STATE V. THOMPSON

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
THOMAS THOMPSON,
Defendant-Appellant.

No. 33,321

COURT OF APPEALS OF NEW MEXICO

December 3, 2014

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Stan Whitaker, District Judge

COUNSEL

Gary K. King, Attorney General, Santa Fe, NM, Jane A. Bernstein, Assistant Attorney General, Albuquerque, NM, for Appellee

Law Offices of the Public Defender, Jorge A. Alvarado, Chief Public Defender, J.K. Theodosia Johnson, Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

JONATHAN B. SUTIN, Judge. WE CONCUR: CYNTHIA A. FRY, Judge, LINDA M. VANZI, Judge

AUTHOR: JONATHAN B. SUTIN

MEMORANDUM OPINION

SUTIN, Judge.

{1} Defendant appeals from the district court's judgment, partially suspended sentence and commitment, convicting Defendant of aggravated battery (deadly

weapon) and aggravated battery (great bodily harm). [RP 109] In the initial docketing statement, Defendant raised one issue on appeal, contending that the district court erred in not allowing Defendant to present his testimony regarding his entire prior experience of protecting a friend. [DS 4] Our calendar notice proposed to affirm the district court on this issue. [CN 1-2] We also proposed to reverse in part because, in the judgment, the district court merged the sentences to remedy the double jeopardy violation posed by the two convictions rather than vacating one of the convictions. [RP 109-10; CN 6-7]

{2} The State has filed a response, stating that it will not be filing a memorandum in opposition to proposed partial summary reversal on the double jeopardy violation. [Ct. App. File] Defendant has filed a memorandum in opposition and a motion to amend the docketing statement. [MIO] Defendant requests this Court's consideration of two new issues. [MIO 1] Upon due consideration, we deny Defendant's motion to amend, and we affirm in part and reverse in part.

DISCUSSION

Motion to Amend the Docketing Statement

{3} In the motion to amend the docketing statement, Defendant proposed to add two new issues, contending (A) that the jury was improperly instructed using the jury instruction for defense of another, deadly force, UJI 14-5184 NMRA, rather than defense of another, nondeadly force, UJI 14-5182 NMRA; and (B) Defendant received ineffective assistance of counsel. [MIO 1, 3-6] We deny the motion to amend, because these issues are not viable. *See State v. Moore*, 1989-NMCA-073, ¶¶ 42-44, 109 N.M. 119, 782 P.2d 91 (explaining that issues sought to be presented must be viable), *superseded by statute on other grounds as stated in State v. Salgado*, 1991-NMCA-044, ¶ 2, 112 N.M. 537, 817 P.2d 730. Thus, we deny the motion.

{4} "In order to obtain an instruction on a lesser included offense, there must be some view of the evidence pursuant to which the lesser offense is the highest degree of crime committed[] and that view must be reasonable." *State v. Brown*, 1998-NMSC-037, ¶ 12, 126 N.M. 338, 969 P.2d 313 (alteration, internal quotation marks, and citation omitted). In this case, however, the jury was properly instructed on deadly force where the evidence showed that Defendant alleged that he perceived his friend being strangled or choked by the bar manager near a long flight of stairs, and in turn, Defendant used deadly force against the manager by smashing a glass into his face, causing injury in and around his eye. [RP 84-88; MIO 2] "Deadly weapon" was defined for the jury such that it would include a glass smashed into someone's face causing cuts to the eyes [RP 87], and "[d]eadly force" was defined for the jury include "serious disfigurement." [RP 88] Accordingly, no error occurred in the instructions to the jury. Since there was no error in the jury instructions, we cannot say that Defendant received ineffective assistance of counsel on this basis. *See State v. Martinez*, 1996-NMCA-109, ¶ 25, 122 N.M. 476, 927 P.2d 31 (stating that "[t]his Court has expressed its preference for habeas corpus proceedings over remand when the record on appeal does not

establish a prima facie case of ineffective assistance of counsel"); *see also State v. Baca*, 1997-NMSC-059, ¶ 25, 124 N.M. 333, 950 P.2d 776 ("A record on appeal that provides a basis for remanding to the trial court for an evidentiary hearing on ineffective assistance of counsel is rare. Ordinarily, such claims are heard on petition for writ of habeas corpus[.]").

{5} Accordingly, we deny Defendant's motion to amend the docketing statement.

Original Issue on Appeal

{6} Defendant contends that the district court erred in not allowing him to present the entire story of his previous mentally and physically traumatic experience where Defendant had sacrificed his own safety to protect a friend. [DS 3-4] Defendant continues to make this argument in his memorandum in opposition, relying on *State v. Franklin*, 1967-NMSC-151, ¶ 9, 78 N.M. 127, 428 P.2d 982, and *State v. Boyer*, 1985-NMCA-029, ¶ 17, 103 N.M. 655, 712 P.2d 1. [MIO 6] We affirm the district court on this issue.

{7} As we discussed in the calendar notice, "[t]he admission or exclusion of evidence is within the discretion of the trial court. On appeal, the trial court's decision is reviewed for abuse of discretion." *State v. Hughey*, 2007-NMSC-036, ¶ 9, 142 N.M. 83, 163 P.3d 470. "An abuse of discretion arises when the evidentiary ruling is clearly contrary to logic and the facts and circumstances of the case." *State v. Armendariz*, 2006-NMSC-036, ¶ 6, 140 N.M. 182, 141 P.3d 526, *overruled on other grounds by State v. Swick*, 2012-NMSC-018, 279 P.3d 747.

{8} On the evening at issue, Defendant and a group of friends were at a bar/restaurant when one of them, Tyler Tarango, became intoxicated. [DS 2-3] The manager, Jamie VanRiper (the manager), attempted to throw the group out of the bar due to Tarango's inebriated conduct. [RP 47] Defendant believed that the manager was using excessive force against Tarango near a long staircase and that the manager's conduct posed an immediate threat to Tarango's safety, which required Defendant to act to protect Tarango from great bodily injury. [DS 3] Defendant smashed a water glass into the manager hitting him in the face, causing injury around and in his eye. [DS 3] Defendant was charged with aggravated battery (deadly weapon) and, in the alternative, aggravated battery (great bodily harm). [RP 2]

{9} At trial, Defendant presented evidence that his conduct was justified because he acted in defense of another, and the district court instructed the jury on the elements of that defense. [RP 84; UJI 14-5184 NMRA] The jury was instructed that:

> Evidence has been presented that the defendant acted while defending another person.
>
> The defendant acted in defense of another if:

1. There was an appearance of immediate danger of death or great bodily harm to . . . Tarango as a result of [the manager's] act of putting his hands around his throat and squeezing; and

2. The defendant believed that . . . Tarango was in immediate danger of death or great bodily harm from [the manager] and hit him with a glass to prevent the death or great bodily harm; and

3. The apparent danger to . . . Tarango would have caused a reasonable person in the same circumstances to act as the defendant did.

The burden is on the state to prove beyond a reasonable doubt that the defendant did not act in defense of . . . Tarango. If you have a reasonable doubt as to the defendant's guilt, you must find the defendant not guilty.

[RP 84] Moreover, for the charges of aggravated battery (deadly weapon) and aggravated battery (great bodily harm), the jury was instructed that in addition to the elements of those crimes, the jury must find to its satisfaction beyond a reasonable doubt that "[t]he defendant did not act in defense of . . . Tarango[.]" [RP 85 (¶ 3), 86 (¶ 4)]

{10} Defendant contends, however, that in addition to these jury instructions, he should have been allowed to present to the jury the entire story of a previous experience, where he defended another, was shot, and gravely injured. [DS 3-4] Defendant wished to testify as to the mental trauma and its aftermath that resulted from the previous incident. [DS 4] The district court limited the evidence of the previous incident to its physical consequences, which, according to Defendant, denied him a complete defense and a fair trial. [Id.] We affirm for the following reasons.

{11} First, Defendant did not seek to have a mental health expert testify as to how the previous experience affected Defendant's behavior in this case, and Defendant is not qualified to do so himself. To the extent Defendant had been told by a mental health provider or Defendant had told others that he was mentally traumatized by the prior experience, such testimony is inadmissible hearsay for which an exception does not apply. *See* Rule 11-801 NMRA; Rule 11-802 NMRA; Rule 11-803 NMRA; Rule 11-804 NMRA. Second, Defendant's testimony about his own psychological state as a result of the previous experience is collateral to and therefore somewhat irrelevant or lacking probative value as to whether he acted in defense of another under the particular circumstances of this case. *See* Rule 11-401 NMRA; Rule 11-402 NMRA. Moreover, the district court could consider that the probative value of this testimony was substantially outweighed by the danger of confusing the issue of defense of another. *See* Rule 11-403 NMRA. Third, Defendant was attempting to use his own testimony about the alleged residual mental effects of the previous experience to explain why he overreacted or reacted in an unreasonable manner, when, in fact, an element of the defense of another defense is that Defendant acted reasonably under the circumstances. Fourth, the facts surrounding Defendant's injury during the previous

incident are in dispute. The State characterized the previous incident as one "in which Defendant was shot in the abdomen when assailants tried to rob him while he was allegedly dealing drugs in a McDonald's parking lot." [RP 60] Defendant's version of the previous incident was that he was shot and gravely injured because he was protecting a friend, and therefore "[t]he subjective element of actual fear felt by the defendant is based on his experiences and circumstances . . . the fear he felt in the defense of Tarango are both dependent upon [Defendant's] unique past and condition." [RP 65] As such, these discrepancies would also potentially confuse the issue and mislead the jury from its primary mission of determining what happened in this case. Rule 11-403.

{12} Finally, as discussed earlier, the district court did allow testimony about the previous incident's physical trauma and residual effects to Defendant [DS 4], and the record proper indicates that the district court fully and properly instructed the jury on the elements of the defense of another defense. Defendant was allowed to present the essence of his defense, and in convicting Defendant of aggravated battery, the jury rejected it. *See, e.g.*, *State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829 (stating that the jury is free to reject the defendant's version of the facts).

{13} Under the circumstances, we cannot say that the district court abused its discretion in not allowing Defendant to testify as to the detail of his prior experience and to explain residual mental trauma from the previous experience. Accordingly, we affirm the district court on this issue.

Double Jeopardy

{14} As we discussed in the calendar notice, Defendant was charged in the alternative for aggravated battery (great bodily harm) and aggravated battery (deadly weapon). [RP 2] The jury was instructed on both crimes and convicted Defendant of both crimes. [RP 85, 86, 75, 76] In the judgment, the district court set out that Defendant was convicted of both crimes [RP 109] and then merged the sentences to remedy the double jeopardy violation. [RP 110] Our case law instructs us, however, that the proper course is for the district court to vacate the lesser of the two convictions. *See Montoya v. Driggers*, 2014-NMSC-009, ¶ 8, 320 P.3d 987 ("Vacating a conviction is the judicially created remedy to avoid multiple punishments in violation of the constitutional proscription against double jeopardy."); *State v. Santillanes*, 2001-NMSC-018, ¶ 28, 130 N.M. 464, 27 P.3d 456 ("[T]he general rule requires that the lesser offense be vacated in the event of impermissible multiple punishments." (internal quotation marks and citation omitted)); *see also State v. Sisneros*, 2013-NMSC-049, ¶ 38, 314 P.3d 665 ("To satisfy double jeopardy protections, the district court judge must explicitly vacate one of the convictions."). In this case, where both convictions carry the same punishment [RP 109], the judgment must be amended to vacate one of them.

{15} The State has filed a response to the calendar notice, indicating that it does not oppose partial summary reversal and remand on this basis. [Ct. App. File] Accordingly, we reverse and remand so that the judgment can be amended to vacate one of the convictions.

CONCLUSION

{16} For the foregoing reasons we affirm in part and reverse in part.

{17} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

CYNTHIA A. FRY, Judge

LINDA M. VANZI, Judge