STATE V. VEGA

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
ENRIQUE GUMORO VEGA,
Defendant-Appellant.

No. 32,835

COURT OF APPEALS OF NEW MEXICO

December 30, 2015

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY, Douglas R. Driggers, District Judge

COUNSEL

Hector H. Balderas, Attorney General, Margaret E. McLean, Assistant Attorney General, Joel K. Jacobsen, Assistant Attorney General Santa Fe, NM, for Appellee

Jorge A. Alvarado, Chief Public Defender, Kimberly Chavez Cook, Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

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

AUTHOR: RODERICK T. KENNEDY

MEMORANDUM OPINION

KENNEDY, Judge.

{1} Defendant appeals his convictions for tampering with evidence and possession of a firearm by a felon. He claims that insufficient evidence supported his convictions and that the jury instruction on tampering with evidence was improper. We affirm.

BACKGROUND

{2} The parties do not dispute the relevant facts. Two social gatherings were taking place on a residential street in Anthony, New Mexico, when a fight broke out between various people in attendance. Witness Oscar Lopez saw Defendant pull out a gun, and various witnesses heard several shots. Someone called the police, who arrived on the scene and investigated but, finding no suspects or victims, soon left. Witness Perla Soto hid in a bathroom when she heard shots, and soon after, Defendant came in and placed a gun in the toilet tank, saying, "I think I killed somebody." Soto heard police outside and, sometime later, Defendant retrieved the gun from the toilet tank. Ultimately, several people sustained gunshot wounds.

{3} Defendant was charged with three counts of aggravated battery (deadly weapon), one count of shooting at or from an inhabited dwelling (no great bodily harm), one count of tampering with evidence, and one count of possession of a firearm by a felon. Following a trial on all but one of the aggravated battery counts, the jury convicted Defendant of tampering with evidence and felon in possession of a firearm and deadlocked on the remaining counts. This appeal followed.

DISCUSSION

Sufficiency of Evidence of Felon in Possession of a Firearm

{4} Relying on *State v. Franklin*, 1967-NMSC-151, 78 N.M. 127, 428 P.2d 982, and *State v. Boyer*, 1985-NMCA-029, 103 N.M. 655, 712 P.2d 1, Defendant argues that there was insufficient evidence to support his conviction as a felon in possession of a firearm. In order to convict Defendant of this crime, the jury was instructed to find beyond a reasonable doubt that: (1) Defendant possessed a firearm; (2) Defendant, "in the preceding ten years, was convicted and sentenced to one or more years imprisonment by a court of the United States or by a court of any state"; and (3) this happened in New Mexico on July 19, 2008.

{5} "The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Duran*, 2006-NMSC-035, ¶ 5, 140 N.M. 94, 140 P.3d 515 (internal quotation marks and citation omitted). We review the evidence in the "light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *State v. Garcia*, 2011-NMSC-003, ¶ 5, 149 N.M. 185, 246 P.3d 1057 (internal quotation marks and citation omitted).

{6} Defendant specifically maintains that no physical evidence corroborated eyewitness testimony that Defendant was ever in possession of a gun and that the testimony of one of the eyewitnesses was unreliable. Defendant cites no authority, and we are aware of none, for the proposition that eyewitness testimony must be corroborated with physical evidence. Both Perla Soto and Oscar Lopez testified that they saw Defendant with a gun. In addition, the State introduced evidence establishing that Defendant had been convicted of a felony in 2007. Thus, the evidence supported the jury's verdict. We do not "invade the jury's province as fact-finder by second-guessing the jury's decision concerning the credibility of witnesses, reweighing the evidence, or substituting [our] judgment for that of the jury." *Id*. (alterations, internal quotation marks, and citation omitted). Therefore, Defendant's conviction for felon in possession of a firearm was supported by substantial evidence.

A. Alleged Instruction Error on Tampering With Evidence

{7} Defendant argues that the jury instruction given on tampering with evidence ran afoul of the Sixth Amendment to the United States Constitution because it did not require the jury to find beyond a reasonable doubt that the gun was physical evidence of a particular crime. Apparently acknowledging that he failed to preserve this alleged error, Defendant argues that failure to instruct the jury in this fashion constituted fundamental error. "The rule of fundamental error applies only if there has been a miscarriage of justice, if the question of guilt is so doubtful that it would shock the conscience to permit the conviction to stand, or if substantial justice has not been done." *State v. Orosco*, 1992-NMSC-006, ¶ 12, 113 N.M. 780, 833 P.2d 1146.

{8} Case law establishes that, because Subsection (B) of NMSA 1978, Section 30-22-15 (2003) (tampering statute) ties levels of punishment to the degree of crime for which the tampering is committed, the degree of the crime is an element of tampering and must be proved to the fact finder beyond a reasonable doubt. *State v. Alvarado*, 2012-NMCA-089, ¶ 16, ___ P.3d ___. Defendant here wants to take *Alvarado*'s holding a step further and require the State to prove not only the degree of the crime related to the tampering offense but also which specific crime is related to the tampering offense. In other words, as we understand Defendant's argument, in order to convict Defendant of tampering with evidence, the jury had to be instructed to find that the gun in question was evidence of one of the specific crimes charged—either one of the shooting crimes or the crime of felon in possession of a firearm.

{9} We are not persuaded. Our Supreme Court in *State v. Jackson* expressly held that, in order to obtain a conviction under the tampering statute, the State does not have to allege or prove that the accused "tampered with evidence of an identifiable, underlying crime." 2010-NMSC-032, ¶ 9, 148 N.M. 452, 237 P.3d 754. Defendant here attempts to distinguish *Jackson* by focusing on the statute's element of "destroying, changing, hiding, placing or fabricating any *physical evidence*" with the requisite intent. Section 30-22-5(A) (emphasis added). Defendant maintains that hiding an object that is not evidence cannot be tampering; therefore, he contends, the Legislature must have intended the State to prove what crime the object is evidence *of*.

{10} We see nothing in the tampering statute that would give rise to the strained construction urged by Defendant. And, as the State aptly notes, the tampering with evidence uniform jury instruction (UJI), and the jury instruction given in the present case already ask the jury to find that the object tampered with is evidence by asking the jury to find that the accused acted with the intent to "prevent the apprehension, prosecution, or conviction" of someone. UJI 14-2241 NMRA (2011). We agree with the State that "[a]n accused who acts with the specific intent to prevent arrest, prosecution[,] or conviction self-evidently acts on the belief that the physical object in question constitutes evidence that the police and prosecution could otherwise use for one or all of those purposes."

{11} In summary, we conclude there was no error in the jury instruction due to a failure to require the jury to find that the gun related to a specific crime. There being no error, there was no fundamental error.

B. Sufficiency of Evidence of Tampering

{12} Defendant advances three grounds for his contention that his conviction for tampering with evidence was not supported by substantial evidence. First, he claims that there was insufficient evidence of any overt act of tampering because he placed the gun in the toilet tank only temporarily. Second, he argues that the State failed to present evidence connecting the gun to the shooting crimes charged. Third, Defendant maintains that the jury's failure to find that the gun was evidence of a felony violated his rights under the Sixth Amendment to the United States Constitution. We address each argument in turn.

1. Temporary Hiding of Gun

{13} Defendant contends that, after he briefly placed the gun in the toilet tank, he then "took the gun with him, just like the defendants" in three New Mexico cases where appellate courts held that there was insufficient evidence of tampering. As a result, he claims that his conviction, like the convictions in the other three cases, should be reversed. We disagree. This case bears no resemblance to the three cases relied on.

{14} In each of the three cases mentioned, the state did not introduce any evidence suggesting that the defendant had done anything affirmative that would give rise to the inference that he had the intent "to prevent the apprehension, prosecution or conviction of any person" as required by the tampering statute. Section 30-22-5(A). In *State v. Silva*, the state introduced evidence that the defendant had a gun at the scene of the murder and the gun was never recovered. 2008-NMSC-051, ¶ 17, 144 N.M. 815, 192 P.3d 1192. Our Supreme Court affirmed this Court's reversal of the defendant's conviction for tampering because the state failed to introduce "any evidence, circumstantial or otherwise, of an overt act on [the d]efendant's part from which the jury could infer [the specific] intent" necessary to support the conviction. *Id.* ¶ 19. Similarly, in *State v. Guerra*, the defendant was accused of tampering with a knife used in a stabbing. 2012-NMSC-027, ¶ 9, 284 P.3d 1076. The defendant was seen with a knife

before the stabbing occurred, but police never found the knife used in the killing. *Id.* ¶¶ 3, 7. Our Supreme Court reversed the defendant's conviction for tampering based on the "bedrock principle" that "[t]he [s]tate cannot convict [a d]efendant of tampering with evidence simply because evidence that must have once existed cannot now be found." *Id.* ¶ 16. Finally, in *State v. Arrendondo*, our Supreme Court reversed the defendant's tampering conviction because the state "offered no evidence that [the defendant] actively hid or disposed of" the gun he admittedly used in a shooting he claimed was in self defense. 2012-NMSC-013, ¶¶ 1, 33, 278 P.3d 517.

{15} The facts in the present case are in contrast to those in *Silva*, *Guerra*, and *Arrendondo*. Here, the State introduced eyewitness testimony that Defendant placed a gun in a toilet tank after the shooting occurred and during the time police were investigating the shooting, while stating that he thought he might have killed someone. Thus, there was evidence of an overt act from which the jury could infer, without speculating, that Defendant had the requisite intent. To the extent Defendant claims that an overt act that is "fleeting" or "temporary" is somehow insufficient to support a tampering conviction, he cites no authority supporting this implausible theory, and we therefore decline to consider it. *See In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 (explaining that an appellate court need not consider an issue if no authority is cited in support of the issue, as absent cited authority to support an argument, the court assumes no such authority exists).

2. Evidence Connecting the Gun to the Shooting Crimes

{16} Defendant next contends that because the gun hidden in the toilet tank was never connected to the shootings, there was insufficient evidence that the gun was evidence. This appears to be a variation of Defendant's argument regarding the jury instruction that we discussed above. We are equally unpersuaded by this variation.

{17} Defendant acknowledges that our Supreme Court in *Jackson* held that an object need not be evidence of an actual crime in order to support a conviction for tampering with evidence. *See* 2010-NMSC-032, ¶ 14 (declining to limit tampering to evidence of "a separate, identifiable crime"). But Defendant claims that *Jackson* implicitly requires that the evidence tampered with be "*relevan[t]* to the criminal justice system" because *Jackson* focused on the purpose of the tampering statute, which "is to protect the integrity of the criminal justice system." *Id.* ¶ 10. Defendant claims that it follows from this focus that the tampering statute's element of "destroying, changing, hiding, placing or fabricating any physical evidence" cannot be proved unless the evidence destroyed, changed, hidden, placed, or fabricated is related to a specific crime. Section 30-22-5(A).

{18} We decline to employ Defendant's strained reading of the tampering statute and *Jackson*. The teaching of *Jackson* is clear: "Nothing in Section [30-22-5(A)] *limits* tampering to circumstances where there is a separate identifiable crime." *Jackson*, 2010-NMSC-032, ¶ 14. Indeed, in *Jackson*, the defendant attempted to use a urine specimen other than his own when submitting to a random urinalysis required by the terms of his probation. *Id.* ¶ 3. This conduct was clearly not tampering with evidence of

a crime, but our Supreme Court held that it could constitute tampering because "[t]he crime of tampering with evidence is complete the moment the accused commits the prohibited act with the requisite mental state, regardless of whether any subsequent police investigation does or even could materialize." *Id.* ¶ 9. Defendant's argument is without merit.

3. Sixth Amendment Claims

{19} Defendant's final argument on this issue is hard to follow. He appears to offer another variation of the theme presented in his argument regarding the jury instruction, which we have disposed of above. Defendant claims that the State was required and failed to prove that the gun in question was evidence of a felony. This is because Subsection (B) of the tampering statute ties levels of punishment to the degree of crime for which the tampering is committed. *See Alvarado*, 2012-NMCA-089, ¶ 16. Thus, he reasons, in order to avoid a violation of the Sixth Amendment, the State must prove, and the jury must be asked to find, "a particular tampered-with crime."

{20} We were not persuaded in *Alvarado* by this interpretation of the tampering statute in connection with Defendant's argument regarding the jury instruction, and we are equally unpersuaded here. The State presented evidence of all of the elements of the crime of tampering, and we therefore affirm Defendant's conviction on this basis.

CONCLUSION

{21} For the foregoing reasons, we affirm Defendant's convictions.

{22} IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

CYNTHIA A. FRY, Judge