STATE V. YBARRA

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
TRINIDAD YBARRA,
Defendant-Appellant.

NO. A-1-CA-36157

COURT OF APPEALS OF NEW MEXICO

December 19, 2017

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Christina P. Argyres, District Judge

COUNSEL

Hector H. Balderas, Attorney General, Santa Fe, NM, for Appellee

Bowles Law Firm, Robert Jason Bowles, Albuquerque, NM, for Appellant

JUDGES

TIMOTHY L. GARCIA, Judge. WE CONCUR: JULIE J. VARGAS, Judge, STEPHEN G. FRENCH, Judge

AUTHOR: TIMOTHY L. GARCIA

MEMORANDUM OPINION

GARCIA, Judge.

{1} Defendant-Appellant Trinidad Ybarra (Defendant) appeals his convictions for criminal sexual penetration of a minor (CSPM), criminal sexual contact of a minor (CSCM) and intimidation of a witness. We previously issued a notice of proposed summary disposition in which we proposed to affirm. Defendant has filed a

memorandum in opposition, which we have duly considered. Because we remain unpersuaded, we uphold the convictions.

{2} In the notice of proposed summary disposition, we set forth the relevant background information, as well as our analysis of the issues. We will avoid undue reiteration here. Instead, we will focus on the content of the memorandum in opposition.

{3} First, Defendant renews his argument that the district court erred in denying his motion to bar retrial following the declaration of a mistrial for manifest necessity. [MIO 15-22] Defendant contends that the prosecutor's failure to instruct one of its witnesses to avoid any reference to Defendant's prior sexual relationship with the victim's mother, which resulted in the birth of a child (Joseph), together with the prosecutor's failure to ensure that the defense had full discovery of all of the victim's medical records prior to trial, should be regarded as misconduct in willful disregard of the resulting mistrial. [MIO 16-20] We remain unpersuaded.

{4} The record reflects that the State had no information about the doctor's visit with which the records are associated until the victim mentioned them on the stand at trial. [RP 120, 168] Upon that revelation, the State immediately obtained those records and provided them to the defense. [RP 120] Defendant contends that the State should have been more diligent in ferreting out those records and providing them to the defense. [MIO 17] Be that as it may, the trial court reviewed the records, determined that the information was not exculpatory, found no prejudice to the defense, and determined that the opportunity for review prior to recommencement of the trial proceedings constituted an adequate cure. [RP 121, 168] In light of these unchallenged findings, the district court's handling of the situation cannot be regarded as an abuse of discretion. *See State v. Ortega*, 2014-NMSC-017, ¶¶ 43 , 49-50, 327 P.3d 1076 (observing that materiality, prejudice, and susceptibility to cure are relevant considerations when evidence is disclosed for the first time during trial, and holding that a mistrial was properly denied where the defendant failed to demonstrate prejudice, and where the late disclosure was adequately cured); *and see generally State v. McDaniel*, 2004-NMCA-022, ¶ 6, 135 N.M. 84, 84 P.3d 701 (indicating that rulings on late discovery are reviewed for abuse of discretion, and "[i]n order to find an abuse of discretion, we must conclude that the decision below was against logic and not justified by reason").

{5} The record similarly reflects that neither the parties nor the district court considered the admissibility of evidence of the prior sexual relationship between Defendant and the victim's mother until the trial was well underway. [RP 120-21] The matter appears to have been formally raised on the morning of the second day of trial, at which time the district court ruled that no mention of that relationship should be made. [RP 121] A witness for the State who was called later that morning was advised not to mention the relationship between Defendant and Joseph (the child who was born of Defendant's sexual relationship with the victim's mother). [RP 121] However, on the stand, the witness answered a question in an unanticipated fashion, alluding in an abortive fashion to "a one-time sexual relationship" before the prosecutor interrupted. [RP 122] The district court found that the prosecutor's handling of the situation did not

evince a deliberate intention to provoke a mistrial or willful disregard. [RP 168] Once again, we perceive no abuse of discretion.

{6} Defendant faults the prosecutor for failing to instruct the witness in advance that he should not refer to the sexual relationship between Defendant and the victim's mother. [MIO 17] However, given that this issue was not raised until the thirteenth hour, the prosecutor had little or no opportunity for prior instruction. Defendant also faults the prosecutor for failing to clearly describe the prohibited subject matter. [MIO 17-18] Although the prosecutor's statement was imprecise, given the relationships involved, the prosecutor could reasonably have believed that he had conveyed the essential information to the witness. In light of that advisement, as well as the unexpected nature of the witness's response to the precipitating question and the State's prompt objection when the relationship was mentioned, [RP 122] we conclude that the district court acted well within its discretion in determining that the ensuing mistrial was not ascribable to the sort of prosecutorial misconduct which bars retrial. *See generally State v. Gutierrez*, 2014-NMSC-031, ¶ 21, 333 P.3d 247 (indicating that "manifest mistrial rulings are reviewed for abuse of discretion"); *State v. McClaugherty,* 2008-NMSC-044, ¶ 25, 144 N.M. 483, 188 P.3d 1234 (observing that the bar of double jeopardy is an exceedingly uncommon remedy which applies only in cases of the most severe prosecutorial transgressions). We therefore reject Defendant's first assertion of error.

{7} Next, Defendant renews his challenge to the sufficiency of the evidence to support his convictions. [MIO 22-25] As we previously described at greater length in the notice of proposed summary disposition, the State presented evidence in support of each of the elements of the offense. [CN 5-8] Defendant does not dispute this, apart from contending that one of the counts of digital penetration was unsupported by any evidence that Defendant compelled the victim to perform the act. [MIO 22-23] Although that may have been the basis for one of the counts as originally charged in the indictment, [RP 1] it was not the basis for either of the counts for which Defendant was ultimately convicted. [RP 206-07] *See generally State v. Arrendondo*, 2012-NMSC-013, ¶ 18, 278 P.3d 517 *(*"[J]ury instructions become the law of the case against which the sufficiency of the evidence is to be measured." (internal quotation marks and citations omitted)). We therefore remain unpersuaded.

{8} We understand Defendant to further contend that the evidence was too vague and conflicting to establish the dates upon which the various offenses occurred. [MIO 23] However, the verdict clearly reflects that the jury found the evidence to be sufficient, notwithstanding any inconsistencies or lack of specificity in the victim's testimony. *See generally State v. Sena*, 2008-NMSC-053, ¶ 11, 144 N.M. 821, 192 P.3d 1198 ("When parts of a witness's testimony are conflicting and ambiguous[,] . . . [i]t is the exclusive province of the jury to resolve [the] factual inconsistencies in [that] testimony." (alterations in original) (internal quotation marks and citation omitted)).

{9} In connection with his challenge to the sufficiency of the evidence, Defendant contends that the State should have been required to narrow the charging period. [MIO 23-25] However, in light of Defendant's failure to raise this issue below, [MIO 24] we

decline to consider this unpreserved argument. *See State v. Huerta-Castro*, 2017-NMCA-026, ¶ 15, 390 P.3d 185 (indicating that a defendant must move for a bill of particulars in order to preserve a *Baldonado* issue for appeal); *State v. Altgilbers*, 1989-NMCA-106, ¶ 46, 109 N.M. 453, 786 P.2d 680 (holding that a defendant who does not raise lack of notice by requesting a statement of facts before trial has waived any such claim). Defendant also contends that one of the two counts of CSPM based on digital penetration should be vacated because the jury instructions do not contain differentiating characteristics. [MIO 24-25] However, to the extent that the victim testified that this occurred on more than one occasion (and Defendant does not dispute our presumption in this regard), [DS 5;CN 6] the evidence is sufficient to support two convictions. *See, e.g.*, *State v. Tapia*, 2015-NMCA-048, ¶ 18, 347 P.3d 738 (upholding two convictions for CSCM, under identically worded jury instructions, where the testimony indicated that the defendant had committed the same act on two occasions). Accordingly, we reject Defendant's argument.

{10} Third and finally, Defendant renews his claim of ineffective assistance of counsel. [MIO 25-27] He continues to assert that trial counsel's failure to file witness lists, file motions, conduct witness interviews, call potential defense witnesses, vigorously cross-examine the victim regarding prior inconsistent statements, raise speedy trial concerns, or generally "properly object, motion, or defend" the case "detrimentally affected the outcome[.]" [MIO 26-27] However, the record before us is insufficient to establish that trial counsel's conduct was unreasonable, lacked a strategic or tactical basis, or prejudiced the defense in the sense required. *See generally State v. Reyes*, 2002-NMSC-024, ¶ 48, 132 N.M. 576, 52 P.3d 948 (observing that the defendant must demonstrate that his counsel's errors prejudiced his defense such that there is "a reasonable probability that the outcome of the trial would have been different"), *abrogated on other grounds by Allen v. McMaster*, 2012-NMSC-001, 267 P.3d 806; *State v. Roybal*, 2002-NMSC-027, ¶ 21, 132 N.M. 657, 54 P.3d 61 (stating that an appellate court presumes that counsel's performance fell within the wide range of reasonable professional assistance); *Lytle v. Jordan*, 2001-NMSC-016, ¶ 26, 130 N.M. 198, 22 P.3d 666 (indicating that if there is a plausible, rational strategy or tactic to explain counsel's conduct, a prima facie case for ineffective assistance is not made). Although we conclude that Defendant has not established a prima facie case of ineffective assistance of counsel, we do so without prejudice to Defendant's ability to pursue habeas proceedings. *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").

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

{12} IT IS SO ORDERED.

TIMOTHY L. GARCIA, Judge

WE CONCUR:

JULIE J. VARGAS, Judge

STEPHEN G. FRENCH, Judge