

STATE V. FOX

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**STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
CHIP FOX,
Defendant-Appellant.**

No. A-1-CA-33798

COURT OF APPEALS OF NEW MEXICO

December 26, 2018

APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY, Stephen K. Quinn,
District Judge

COUNSEL

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JUDGES

MICHAEL E. VIGIL, Judge. WE CONCUR: LINDA M. VANZI, Chief Judge, J. MILES HANISEE, Judge

AUTHOR: MICHAEL E. VIGIL

MEMORANDUM OPINION

VIGIL, Judge.

{1} This case returns to us after the Supreme Court granted certiorari, quashed certiorari, and remanded the case to us for consideration in light of its disposition in *State v. Radosevich*, 2018-NMSC-028, 419 P.3d 176.

{2} In *Radosevich*, our Supreme Court held, in pertinent part, that when the evidence is sufficient to support a jury conviction for tampering with evidence under NMSA 1978, Section 30-22-5 (2003), but makes no finding beyond a reasonable doubt of the level of the underlying crime, the district court must file a conviction and sentence for a petty misdemeanor pursuant to Subsection (B)(3) of Section 30-22-5. *Radosevich*, 2018-NMSC-028, ¶¶ 2, 30.

{3} In this case, the jury instructions did not require the jury to make a finding beyond a reasonable doubt of the level of the underlying crime in finding Defendant guilty of solicitation to commit tampering with evidence, in violation of Section 30-22-5(B). *State v. Fox*, 2017-NMCA-029, ¶¶1, 16, *cert. granted*, 2017-NMCERT-___ (No. 33,798, Dec. 20, 2017). At first blush, it appears that under *Radosevich*, an amended judgment and sentence for a misdemeanor pursuant to Section 30-22-5(B)(3) must be entered. However, this does not account for the fact that, unlike the defendant in *Radosevich*, Defendant was convicted of *solicitation* to commit tampering with evidence. *Fox*, 2017-NMCA-029, ¶ 6.

{4} Solicitation is a stand alone crime under NMSA 1978, Section 30-28-3 (1979). Under Section 30-28-3 (E):

(1) if the highest crime solicited is a capital or first degree felony, the person soliciting such felony is guilty of a second degree felony;

(2) if the highest crime solicited is a second degree felony, the person soliciting such a felony is guilty of a third degree felony; and

(3) if the highest crime solicited is a third degree felony or a fourth degree felony, the person soliciting such felony is guilty of a fourth degree felony.

Thus, there is no criminal solicitation if the highest crime solicited is a misdemeanor or a petty misdemeanor. Because *Radosevich* mandates that the tampering with evidence committed in this case is a petty misdemeanor, it follows that Defendant's conviction for solicitation to commit tampering with evidence must be vacated.

{5} The case is remanded to the district court to vacate Defendant's conviction for solicitation to commit tampering with evidence. In all other respects, the judgment, sentence, and order determining habitual offender status is affirmed.

{6} IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

LINDA M. VANZI, Chief Judge

J. MILES HANISEE, Judge