

STATE V. GARCIA

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**STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
LORENZO GARCIA,
Defendant-Appellant.**

NO. A-1-CA-37018

COURT OF APPEALS OF NEW MEXICO

September 17, 2018

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Michael
Martinez, District Judge

COUNSEL

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

Bennett J. Baur, Chief Public Defender, J.K. Theodosia Johnson, Assistant Public
Defender, Santa Fe, NM, for Appellant

JUDGES

LINDA M. VANZI, Chief Judge. WE CONCUR: STEPHEN G. FRENCH, Judge, EMIL J.
KIEHNE, Judge

AUTHOR: LINDA M. VANZI

MEMORANDUM OPINION

VANZI, Chief Judge.

{1} Defendant Lorenzo Garcia appeals from the district court's order revoking probation. This Court's calendar notice proposed to summarily affirm. Defendant filed a

memorandum in opposition to the proposed disposition. Not persuaded by Defendant's arguments, we affirm.

{2} The calendar notice proposed to conclude that the State's circumstantial evidence proved Defendant was the driver of the Thunderbird on the date in question with reasonable certainty, on the basis that proof of a probation violation need not be established beyond a reasonable doubt. See *State v. Galaz*, 2003-NMCA-076, ¶ 8, 133 N.M. 794, 70 P.3d 784. [CN 3] Defendant does not point to any error with regard to this proposal, but argues that the calendar notice did not address the evidence regarding possession of a firearm. [MIO 2] See *State v. Mondragon*, 1988-NMCA-027, ¶ 10, 107 N.M. 421, 759 P.2d 1003 (stating a party responding to a summary calendar notice must come forward and specifically point out errors of law and fact), *superseded by statute as stated in State v. Harris*, 2013-NMCA-031, ¶ 3, 297 P.3d 374. Defendant argues that there was insufficient evidence to support the finding that he violated his probation by possessing a firearm because there was a passenger in his car and he therefore did not have exclusive control over the car. [MIO 3] We affirm the district court's order on the basis that there was sufficient evidence to support the single violation prohibiting Defendant from violating state laws. See *State v. Leon*, 2013-NMCA-011, ¶ 37, 292 P.3d 493 (“[A]lthough Defendant challenges the sufficiency of the evidence supporting each of his probation violations, if there is sufficient evidence to support just one violation, we will find the district court's order was proper.”).

{3} Defendant continues to argue that the district court impermissibly shifted the burden of proof from the State by considering his failure to rebut the evidence against him. [MIO 4] The calendar notice proposed to affirm on the basis that “[t]he burden of proving a violation with reasonable certainty lies with the State,” *State v. Green*, 2015-NMCA-007, ¶ 22, 341 P.3d 10, and it is only after the State meets its burden of proving the breach of a material condition that Defendant must present evidence to excuse non-compliance. See *Leon*, 2013-NMCA-011, ¶ 36. Defendant does not point to any error in fact or law with the proposed disposition, but continues to maintain that the district court impermissibly shifted the burden to him to rebut the State's evidence. [MIO 4] See *Mondragon*, 1988-NMCA-027, ¶ 10 (stating that the repetition of earlier arguments does not fulfill the requirement of a defendant to respond to a proposed disposition). We disagree.

{4} The State must first meet its burden of proving the violation of a material condition of probation before a defendant is given an opportunity to present evidence excusing non-compliance. See *State v. Martinez*, 1989-NMCA-036, ¶ 8, 108 N.M. 604, 775 P.2d 1321 (“Once the state offers proof of a breach of a material condition of probation, the defendant must come forward with evidence to excuse non-compliance.”). “[D]efendant is entitled to present evidence and witnesses . . . in an effort to convince the trial court that his failure to comply with conditions was through no fault of his own.” *Id.* (citations omitted). We conclude that allowing Defendant such an opportunity only after the State has met its initial burden of proof is not an impermissible shifting of burdens.

{5} For all of these reasons, and those stated in the calendar notice, we affirm.

{6} **IT IS SO ORDERED.**

LINDA M. VANZI, Chief Judge

WE CONCUR:

STEPHEN G. FRENCH, Judge

EMIL J. KIEHNE, Judge