STATE V. RUIZ

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JESUS RUIZ,
Defendant-Appellant.

NO. A-1-CA-35726

COURT OF APPEALS OF NEW MEXICO

December 26, 2018

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY, Marci E. Beyer, District Judge

COUNSEL

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

Bennett J. Baur, Chief Public Defender, Kathleen T. Baldridge, Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

HENRY M. BOHNHOFF, Judge. WE CONCUR: DANIEL J. GALLEGOS, Judge, JENNIFER L. ATTREP, Judge

AUTHOR: HENRY M. BOHNHOFF

MEMORANDUM OPINION

BOHNHOFF, Judge

{1} Defendant Jesus Ruiz was convicted of possession of drug paraphernalia and a controlled substance (methamphetamine), contrary to NMSA 1978, Section 30-31-

25.1(A) (2001) and NMSA 1978, Section 30-31-23(E) (2011), respectively. On appeal, Defendant argues that during trial the prosecutor impermissibly commented on his silence, amounting to fundamental or plain error. Defendant also contends that there is insufficient evidence to support his conviction for possession of the methamphetamine. Unpersuaded, we affirm.[1]

BACKGROUND

{2} Deputy José Pacheco pulled Defendant over for having a suspended license and then learned that there was a warrant out for Defendant's arrest. Deputy Pacheco placed Defendant under arrest, handcuffed him, and conducted a search incident to arrest. Deputy Pacheco asked Defendant if he had anything in his pocket that could harm him during the search. Defendant stated that he had one or two pipes used to smoke methamphetamine in his pocket. Deputy Pacheco then asked Defendant if he had any methamphetamine on him or if there was any in his vehicle. Defendant responded in the negative to these inquiries. After searching Defendant's clothing and finding a single pipe, Deputy Pacheco placed Defendant in the back of his patrol vehicle. Upon searching Defendant's vehicle, Deputy Pacheco discovered two bags of methamphetamine in the pocket of the driver's side door within arm's reach of where Defendant had been seated. The State subsequently charged Defendant with possession of drug paraphernalia and possession of a controlled substance.

{3} At trial, there was no testimony as to whether Deputy Pacheco or any of the other officers who had participated in Defendant's arrest had read Defendant his *Miranda* rights. The district court did admit into evidence the dashboard video from the arresting officer's patrol vehicle, which showed that Deputy Pacheco did not advise Defendant of his *Miranda* rights prior to placing him in the back of the patrol vehicle. However, for reasons that were not explained, subsequently during the course of the arrest the video was muted and continued to run for approximately twenty-five minutes before the sound resumed; thus, we do not know whether Defendant was advised of his *Miranda* rights while the video was muted. Defendant never moved to suppress or otherwise objected to any of the statements he had made to Deputy Pacheco on the basis of a *Miranda* violation.

{4} During opening statements, Defendant's counsel indicated to the jury that Defendant would testify that other people had driven his vehicle prior to his arrest, providing an alternative explanation why the vehicle contained methamphetamine. When Defendant took the stand, he testified that several of his friends and family members had used the vehicle, including on the day of Defendant's arrest. However, Defendant admitted that the pipe was his and that he had used it to smoke methamphetamine. There was additional testimony from one of the officers who participated in the arrest that the pipe contained methamphetamine residue.

{5} During the prosecutor's cross-examination of Defendant, the following exchange occurred:

Q: Mr. Ruiz, isn't it true that when you were pulled over a year ago, you were the occupant of your vehicle?

A: Correct.

Q: Isn't it true that you admitted to the officer that that's your car?

A: Yes.

Q: Okay. Mr. Ruiz, you've been sitting here throughout the entire trial, haven't you?

A: Yes.

Q: So you've heard the testimony of all the other officers and the scientist, correct?

A: Correct.

Q: So won't you agree with me that none of the police officers testified that you told them that other people had been in your car?

A: Can you repeat that question?

Q: That was a confusing way to ask that question, I'll agree with you on that. Wouldn't you agree with me that *none of the officers that testified said that you told them other people had been in your car*?

A: They never asked.

Q: But *you never told them, did you*?

A: *No*.

Q: Wouldn't you agree with me that that might have been helpful if you would have told them that story?

A: They never asked that nothing at all.

Q: But *you didn't think it was important to tell the officers that other people have been in your car*?

A: *No, sir*.

. . .

Q: Isn't it true that the methamphetamine that was found in your car was found in the driver's side door pocket?

A: I don't know, sir.

Q: So if the officers testified that it was found there, you couldn't say whether or not that's the truth?

A: No, sir.

Q: So isn't it true that actually today is the first time you've told the story about your kids and your kids' friend and your sister having access to your vehicle, wouldn't you agree with me?

A: No.

Q: That's not the first time that you've told that story to law enforcement?

A: Correct.

Q: You told it to law enforcement previously?

A: I talked to my attorney about it.

Q: Okay. No, I'm sorry. I'm not talking about what you may have told your attorney. *Isn't it true that you never told law enforcement that other people had access to your vehicle*?

A: No.

Q: Isn't it true that none of those people are here today?

A: No.

Q: That is true or it is not true?

A: It's not true. *I never tell anybody. Never say nothing about being other people in my car.*

Q: Thank you. That's what I wanted to get to. Isn't it true that none of those people are here today?

A: No, not here.

(Emphasis added.) Defendant did not object during this questioning.

{6} In a portion of State's closing argument, the prosecutor stated:

> Now, *yesterday you heard the story for the first time* that, oh, I loaned my car out to everyone. He blamed his teenage children, maybe, for having methamphetamine. Maybe it was one of their friends or his sister. It could have been my sister's meth. *The first time he told that story to law enforcement*, well, while law enforcement was present. Remember, Undersheriff Elston was here. *I asked the defendant, isn't that something you would want to tell police? But you didn't, did you?* None of those people were here yesterday. None of those people are here today.

(Emphasis added.) Defendant did not object to the prosecutor's closing remarks either.

{7} At the conclusion of the trial, the jury returned a guilty verdict on both possession of drug paraphernalia and possession of a controlled substance (methamphetamine).

DISCUSSION

I. Comment on Defendant's Silence

{8} On appeal, Defendant does not assert any violation of his rights based on the fact that Deputy Pacheco questioned him following his arrest without first advising him of his *Miranda* rights. *See Miranda v. Arizona*, 384 U.S. 436, 444, 467 (1966) (holding that prosecution may not use statements stemming from custodial interrogation of the defendant unless it demonstrates the use of "procedural safeguards effective to secure the privilege against self-incrimination[,]" and that a person is subject to custodial interrogation when law enforcement initiates questioning after a person has been taken into custody or otherwise deprived of his or her freedom of action in any way). Instead, Defendant argues that the prosecutor's cross-examination of him and closing argument statement quoted above impermissibly commented on his silence immediately following his arrest and between that time and his trial.

{9} Whether a prosecutor improperly commented on a defendant's postarrest silence is a legal question that we review de novo. *See State v. Foster*, 1998-NMCA-163, ¶ 8, 126 N.M. 177, 967 P.2d 852. However, as stated above, Defendant never objected at trial to any of the prosecutor's cross-examination and argument that he now challenges. "To preserve an issue for review, it must appear that a ruling or decision by the [district] court was fairly invoked." Rule 12-321(A) NMRA. "When a defendant fails to object at trial to comments made by the prosecution about his or her silence, we review only for fundamental error[.]" *State v. DeGraff*, 2006-NMSC-011, ¶ 21, 139 N.M. 211, 131 P.3d 61. Fundamental error analysis involves two steps. "We first determine whether any error occurred, i.e., whether the prosecutor commented on the defendant's protected silence. If such an error occurred, we then determine whether the error was fundamental." *Id.*

A. Law Regarding Comment on a Defendant's Silence

{10} Although the standard *Miranda* warning does not indicate that remaining silent will carry no penalty, it is implied. *See Doyle v. Ohio*, 426 U.S. 610, 618 (1976). Consequently, "New Mexico courts have long held that a prosecutor is prohibited from commenting on a defendant's right to remain silent[.]" *State v. McDowell*, 2018-NMSC-008, ¶ 4, 411 P.3d 337. *See also Foster*, 1998-NMCA-163, ¶ 9 (noting "the general rule forbidding a prosecutor from commenting on a defendant's silence or introducing evidence of silence"); *State v. Garcia*, 1994-NMCA-147, ¶ 12, 118 N.M. 773, 887 P.2d 767 (stating that "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial" (internal quotation marks and citation omitted)). The prohibition on commenting on an accused's silence extends to drawing attention to his or her *delay* in giving a statement. *See, e.g.*, *DeGraff*, 2006-NMSC-011, ¶¶ 4-5, 17, 20 (stating a defendant charged with murder claimed self-defense; prosecutor impermissibly commented about the defendant's silence, both in the immediate aftermath of the attack and during the three-week interval before he gave a statement to police).

{11} Even where the defendant has not been advised of his *Miranda* rights, in this State "[e]vidence of a defendant's postarrest silence is generally inadmissible because the probative value of the silence is substantially outweighed by the potential for unfair prejudice." *Garcia*, 1994-NMCA-147, ¶ 7 (citing Rule 11-403 NMRA and *State v. Baca*, 1976-NMSC-015, ¶ 4, 89 N.M. 204, 549 P.2d 282). *See also DeGraff*, 2006-NMSC-011, ¶ 15 ("New Mexico evidentiary rules limited comment on a defendant's silence prior to the [United States] Supreme Court's decision in *Doyle*. . . . Because silence is often too ambiguous to have great probative force and may be given improper weight by a jury, evidence of a defendant's silence generally is not admissible as proof of guilt.").

{12} As stated, the dashboard video shows that Deputy Pacheco did not read Defendant his *Miranda* rights either before or at the time of the arrest, but it is possible that they were read to Defendant later that evening, after he had been placed in the patrol vehicle and during the muted portion of the video. Where the record is unclear whether and, if so, when law enforcement gave *Miranda* warnings to a defendant, for purposes of evaluating any comment on the defendant's silence we presume the advice was given. *See DeGraff*, 2006-NMSC-011, ¶ 13; *State v. Gutierrez*, 2003-NMCA-077, ¶ 10, 133 N.M. 797, 70 P.3d 787. Therefore, for purposes of evaluating the impropriety of the prosecutor's cross-examination of Defendant and closing argument, we assume that Defendant was Mirandized subsequent to his statements to Deputy Pacheco.

{13} Even if a defendant does not invoke his right to remain silent immediately following arrest, the waiver is not permanent and he may stop speaking to the police at any time. Consequently, the prohibition against commenting on a defendant's silence extends to a defendant's failure to correct an initial statement. *See State v. Hennessy*, 1992-NMCA-069, ¶¶ 16-17, 114 N.M. 283, 837 P.2d 1366 ("[A] defendant may exercise the right to remain silent even if that right is not initially asserted."), *overruled on other grounds by State v. Lucero*, 1993-NMSC-064, ¶ 13, 116 N.M. 450, 863 P.2d 1071; *see also State v. Martin*, 1984-NMSC-077, ¶¶ 12-15, 101 N.M. 595, 686 P.2d 937 (declining

to limit protection of right to remain silent to custodial interrogation only, and extending it to cover post-arrest, pretrial silence as well).

{14} While the prosecution cannot comment on a defendant's failure to return to law enforcement between his arrest and trial to correct a misstatement or incomplete statement made during interrogation at or near the time of arrest, the prosecution permissibly may cross-examine the defendant, and comment, on *inconsistencies* between the earlier statement and his trial testimony. *See Hennessy*, 1992-NMCA-069, ¶¶ 18-19. There is no bar to cross-examination that calls into question a defendant's credibility by highlighting his or her failure to tell law enforcement the same story that is later told to the jury, and the jury also is permitted to infer that a defendant's testimony at trial is recently fabricated. *See Martin*, 1984-NMSC-077, ¶ 9 ("When a defendant waives [the] right to remain silent and takes the stand in [their] own defense, [the defendant is subject] to cross-examination on the credibility of [the defendant's] testimony."); *State v. Loera*, 1996-NMSC-074, ¶¶ 7-9, 122 N.M. 641, 930 P.2d 176 (holding that the court did not err in permitting the detective to testify that the defendant's statements to the detective during interrogation were inconsistent with his trial testimony).

{15} Finally, we note that the prosecution permissibly may focus on the *incompleteness* of a defendant's previous statement as a form of inconsistency. *See State v. Johnson*, 1984-NMCA-094, ¶ 11, 102 N.M. 110, 692 P.2d 35 ("The fact that a defendant omits details in his statement is certainly not the kind of silence which is constitutionally protected as the defendant does not remain silent with respect to the subject matter of his statement."), *overruled on other grounds as recognized by State v. Maestas*, 2007-NMSC-001, ¶ 20, 140 N.M. 836, 149 P.3d 933. Such an omission amounts to an inconsistent statement, and it is not a violation of due process for the prosecutor to point out this inconsistency. *See Anderson v. Charles*, 447 U.S. 404, 409 (1980) ("The questions were not designed to draw meaning from silence, but to elicit an explanation for a prior inconsistent statement."). The Supreme Court of the United States noted in *Anderson* that "[e]ach of two inconsistent descriptions of events may be said to involve silence insofar as it omits facts included in the other version." *Id.* at 409 (internal quotation marks omitted). However, the *Anderson* Court chose not to adopt a "formalistic understanding" of silence and concluded that asking a defendant about omitted details in a story already given to law enforcement is not a comment on the right to remain silent. *Id*.

{16} *Foster* is a case in point. Following his arrest for the murder of his father's girlfriend, the defendant waived his right to remain silent and gave a statement to law enforcement. 1998-NMCA-163, ¶¶ 2-3. He admitted that he had shot his father's girlfriend, but did not mention crucial information about his father's earlier threats to kill him, information about which he testified at trial and which formed the basis for his claim of self-defense. *Id.* ¶¶ 2-5. At trial, the prosecutor highlighted the omission during direct examination of the police detective who took the defendant's post-arrest statement and during cross-examination of the defendant. *Id.* ¶¶ 6-7. We rejected the defendant's argument that this amounted to impermissible comment on his silence. *Id.* ¶¶ 13-19.

"*Miranda* warnings do not imply that the arrestee's half-truths will carry no penalty." *Id.* ¶ 14.

B. Whether the Prosecutor Improperly Commented on Defendant's Silence

{17} In determining whether a prosecutor improperly comments on a defendant's silence, we "consider whether the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on the accused's exercise of his or her right to remain silent." *DeGraff*, 2006-NMSC-011, ¶ 8 (internal quotation marks and citation omitted). "We evaluate the statement in context to determine the manifest intention that prompted the remarks, as well as the natural and necessary impact on the jury." *Id.* (internal quotation marks and citation omitted). "Where comments by the prosecutor are ambiguous, we consider what inference the jury was asked to draw from the defendant's silence and the propriety of that inference." *Id.* ¶ 9.

{18} The prosecutor initially had focused his questions on Defendant's interactions with Deputy Pacheco and the other officers that assisted Deputy Pacheco on the night of the arrest and who had testified during the trial: "Mr. Ruiz, you've been sitting here through the entire trial, haven't you?" "So you've heard the testimony of all the other officers and the scientist, correct?" The prosecutor then asked Defendant whether he would agree that "none of the officers that testified said that you told them other people had been in your car." Up to that point, given the context, the jury "naturally and necessarily" would understand the cross-examination to be calling into question why the account Defendant gave the officers did not match what he testified to at trial, namely, that other people had access to his vehicle.

{19} But the questioning that followed was not so temporally confined, that is, clearly focused on the inconsistencies between the two accounts as opposed to commenting on his failure to return to law enforcement at a subsequent date and give a more complete statement. The prosecutor asked Defendant to admit that "actually today is the first time you've told the story about your kids and your kids' friend and your sister having access to your vehicle." The prosecutor persisted: "Isn't it true that you *never* told law enforcement that other people had access to your vehicle?" And when Defendant gave an unconfined answer—"I never tell anybody. Never say nothing about being other people in my car."—the prosecutor ended that line of questioning: "Thank you. That's what I wanted to get to." Similarly, the prosecutor's closing argument was not limited to commenting on Defendant's failure to provide his exculpatory information to the officers who were present during the night of his arrest: "The first time he told that story to law enforcement, well, while law enforcement was present. Remember, Undersheriff Elston was here. I asked the defendant, isn't that something you would want to tell police?"

{20} We conclude that the latter portion of the prosecutor's cross-examination and his closing argument "was of such a character that the jury would naturally and necessarily take it to be" not just a comment on Defendant's failure to tell the arresting officers on

the night of his arrest that other persons had access to his vehicle and were in a position to leave the two baggies of methamphetamine in the driver's side door pocket, but also a comment on Defendant's failure to bring that information to the attention of law enforcement during the period of time between his arrest and trial. Such comment amounted to impermissible comment on Defendant's silence. *DeGraff*, 2006-NMSC-011, ¶ 20.

{21} Even assuming the prosecutor's cross-examination and closing argument amounted only to a comment on Defendant's failure to disclose his exculpatory information to law enforcement at the time of his arrest, we still conclude that it amounted to impermissible comment about Defendant's silence. When the subject of the comment is an omission—a failure to say something—there can be a fine line between permissibly commenting on the inconsistency arising from a defendant's failure to include a detail in a statement about the events and circumstances surrounding the charged crime as opposed to impermissibly commenting on the delay in providing additional exculpatory information. That is particularly the case where, as here, the defendant was responding to specific questions. Deputy Pacheco had asked Defendant only whether he had any drugs on his person or in his vehicle. Deputy Pacheco had not asked Defendant *why* he had drugs in his vehicle, for the obvious reason that at the time the methamphetamine had not yet been discovered in the driver's side door pocket. For this reason, the facts of this case are distinguishable from cases in which the prosecution properly commented on discrepancies between the details of the accounts that the defendant gave at or near the time of his arrest and those to which the defendant testifies at trial. *See, e.g.*, *Anderson*, 447 U.S. at 404-05 (holding that prosecutor permissibly commented on the defendant's inconsistent descriptions of where he stole an automobile in his post-arrest interview versus his trial testimony); *Foster*, 1998-NMCA-163, ¶¶ 6-7 (holding that prosecutor permissibly commented on discrepancy in details of the defendant's account of events leading up to killing of victim given in post-arrest interview versus trial testimony); *Johnson*, 1984-NMCA-094, ¶¶ 8, 11 (holding that prosecutor permissibly commented on inconsistency between the defendant's post-arrest statement regarding the timing of his location during the night in question versus other evidence). Instead, the situation here is more analogous to *DeGraff*, where our Supreme Court concluded that the prosecutor impermissibly commented on the defendant's failure to provide exculpatory information at an earlier date. 2006-NMSC-011, ¶ 20. The key distinction is that, at the time that Defendant was answering Deputy Pacheco's questions, he was not providing a comprehensive statement to law enforcement about the events in question, and instead he was responding to a question that called for a yes or no answer. Thus, it is not accurate to characterize Defendant's failure to provide additional information about who else might have had access to his vehicle as a "half-truth." *Foster*, 1998-NMCA-163, ¶ 14.

{22} The difference in time between Deputy Pacheco's questioning and the discovery of the methamphetamine is troubling as well. One would not necessarily expect Defendant to volunteer, at least at the point in the arrest sequence when he was questioned by Pacheco, that if there were any drugs in the vehicle, their presence would be explained by the fact that other persons had used the vehicle earlier that day: that

explanation likely would be prompted only by the discovery of the drugs. Further, it is unclear from the record whether Defendant had already been placed and restrained in the patrol car when the officers found the methamphetamine in the driver's side door pocket and, indeed, whether Defendant even saw the methamphetamine being removed from his vehicle or otherwise became aware or learned of that development. Again, only at that point might one expect Defendant to provide the exculpatory information, yet we do not know what interaction Defendant had with the officers after that point. Yet the point of the prosecutor's cross-examination of Defendant and then closing argument was to criticize him for not telling Deputy Pacheco or the other officers who participated in his arrest that other persons had access to his vehicle and could have left the methamphetamine in the driver's side door pocket: the prosecutor's manifest intent was to suggest to the jury that, if Defendant was innocent, he would have disclosed that information at the time the methamphetamine was discovered, and that his failure to do so is evidence that his trial testimony was a post hoc fabrication. This disconnect between the time when Defendant made his supposed incomplete statement and the time at which he logically might be expected to have provided the additional information supports the conclusion that the probative value of the cross-examination (including subsequent closing argument) about Defendant's silence was outweighed by its potential for unfair prejudice.

{23} For all of these reasons, we hold that the prosecutor's cross-examination and closing argument at issue crossed the line and impermissibly commented on Defendant's silence.

C. Whether the Prosecutor's Comment on Defendant's Silence Amounted to Fundamental Error

{24} An error is fundamental "if there is a reasonable probability that the error was a significant factor in the jury's deliberations in relation to the rest of the evidence before them." DeGraff, 2006-NMSC-011, ¶ 21. (internal quotation marks and citation omitted). However, our Supreme Court has stressed that this standard establishes a high bar. "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. The Court "employ[s] the fundamental error exception very guardedly, and applies it only under extraordinary circumstances to prevent the miscarriage of justice." *State v. Marquez*, 2016-NMSC-025, ¶ 46, 376 P.3d 815 (internal quotation marks and citation omitted). The defendant bears the burden of demonstrating fundamental error, and he must demonstrate error that "goes to the foundation of the case or takes away a right that was essential to the defense and which no court could or ought to permit him to waive." *State v. Astorga*, 2016-NMCA-015, ¶¶ 4, 5, 365 P.3d 53 (internal quotation marks and citation omitted).

{25} In *DeGraff*, after determining that the prosecution's comments regarding the Defendant's silence were error, our Supreme Court concluded that they nevertheless did not amount to fundamental error. 2006-NMSC-011, ¶ 23. The Court noted that

"more direct prosecutorial comments on a defendant's invocation of the right to remain silent are more likely to be fundamental error[,]" and that no fundamental error will be found "where the prejudicial effect of the prosecutor's comments [is] minimal and the evidence presented by the prosecution [is] overwhelming." *Id.* ¶ 21. As stated above, the ultimate question is whether the defendant can demonstrate "that there is a reasonable probability that the error was a significant factor in the jury deliberations in relation to the [rest of] the evidence before them." *Id.* ¶ 22.

{26} Using this analytical framework, the *DeGraff* Court considered first that "[t]here is a reasonable argument that the [prosecutor's] comments did not directly call on the jury to infer guilt from [the d]efendant's silence." *Id.* ¶ 23. Instead, the comments suggested that the defendant's three-week delay in giving his account of self-defense provided an opportunity for fabrication, "not that the failure to give a statement was in itself proof of guilt" *Id*. The Court then reviewed the considerable evidence that had been presented at trial that was inconsistent with the defendant's theory of self-defense. *Id*. In light of that evidence, the Court "conclude[d] that the prosecutor's comments were not a significant factor in deliberations and d[id] not rise to the level of fundamental error. In light of the minimal prejudicial effect of the prosecutor's comments, and the overwhelming evidence presented by the prosecution, [the defendant had] not shown fundamental error." *Id*.

{27} For similar reasons, we conclude that Defendant has not demonstrated that the prosecutor's comments about his silence during cross-examination and in closing argument amounted to fundamental error. First, we do not view the prosecutor as suggesting directly that Defendant was guilty simply because he did not tell Deputy Pacheco or the other officers who participated in his arrest, or any other law enforcement personnel after that date, that other persons had used his vehicle earlier during the day of the arrest. Rather, the questions suggested that Defendant's exculpatory statement was a recent fabrication.

{28} Second, as is discussed in more detail below in connection with Defendant's challenge to the sufficiency of the evidence that supports his conviction, there was ample evidence that he constructively possessed the methamphetamine found in his vehicle: he admitted that he had a meth pipe and that he had used it; Defendant owned the vehicle; the methamphetamine was within an arm's reach of where Defendant was sitting; and other than Defendant's testimony, there was no additional evidence that other persons had access to and used his vehicle and possessed the drug. The jury also could consider the plausibility of Defendant's suggestion that family members or other persons would have left methamphetamine in the driver's side pocket after they finished driving the vehicle.

{29} In view of the compelling evidence of his own guilt, Defendant has not persuaded us that there was a reasonable probability that the prosecutor's comments during cross-examination and closing were a significant factor in the jury's decision to convict him of constructive possession of methamphetamine. We do not condone the prosecutor's improper comment on Defendant's silence. We reiterate that "prosecutors who inject impermissible comments on silence into trials will risk reversal by the court of

convictions secured through such tactics[.]" *Hennessy*, 1992-NMCA-069, ¶ 23. However, under the facts of this case the misconduct did not rise to the level of a miscarriage of justice, the question of guilt is not so doubtful that permitting the conviction to stand shocks the conscience, and we are not convinced that substantial justice was not accomplished. *See Orosco*, 1992-NMSC-006, ¶ 12.[2]

II. Sufficiency of the Evidence

{30} "The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction." *Montoya*, 2015-NMSC-010, ¶ 52 (internal quotation marks and citation omitted). Substantial evidence consists of relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *See State v. Salgado*, 1999-NMSC-008, ¶ 25, 126 N.M. 691, 974 P.2d 661. This Court views the evidence in a light most favorable to the verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict. *See State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. We will disregard all evidence and inferences that support a different result. *See State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829.

{31} "Proof of possession in controlled substances cases may be established by evidence of the conduct and actions of a defendant, and by circumstantial evidence connecting defendant with the crime." *State v. Barber*, 2004-NMSC-019, ¶ 27, 135 N.M. 621, 92 P.3d 633. Possession can be either actual or constructive. *See State v. Brietag*, 1989-NMCA-019, ¶ 10, 108 N.M. 368, 772 P.2d 898.

{32} The State was required to prove constructive possession because the arresting officer found the methamphetamine in Defendant's vehicle rather than on his person. *See State v. Garcia*, 2005-NMSC-017, ¶ 13, 138 N.M. 1, 116 P.3d 72 (analyzing a conviction of a defendant being a felon in possession of a firearm). For constructive possession, the State must prove both that Defendant had knowledge of the presence of the methamphetamine and control over it. *See Brietag*, 1989-NMCA-019, ¶ 10. Defendant's mere proximity to the methamphetamine does not constitute knowledge and control. *See Garcia*, 2005-NMSC-017, ¶ 13. To affirm, we must be able to articulate a reasonable analysis that the jury might have used to determine knowledge and control over the methamphetamine. *Id*.

{33} Defendant argues that he did not have exclusive control over the vehicle and there is not enough circumstantial evidence to convict him of possession of the methamphetamine. "When the accused does not have exclusive control over the premises where the drugs are found, the mere presence of the contraband is not enough to support an inference of constructive possession." *State v. Phillips*, 2000-NMCA-028, ¶ 8, 128 N.M. 777, 999 P.2d 421; *see also State v. Maes*, 2007-NMCA-089, ¶ 17, 142 N.M. 276, 164 P.3d 975 ("In non-exclusive access cases, the problem the [s]tate faces is the alternative inference that some other individual with access to the premises is responsible for the presence of the contraband."). If Defendant did not have

exclusive control over the vehicle additional facts are necessary to establish possession. *See Brietag*, 1989-NMCA-019, ¶¶ 12, 17.

{34} This case is similar to *State v. Lopez*, where a defendant was also convicted of, among other crimes, possession of a controlled substance. 2009-NMCA-127, ¶ 1, 147 N.M. 364, 223 P.3d 361. In *Lopez*, the defendant was towing a trailer that was missing a required tail light as well as a license plate. *Id*. ¶ 2. Law enforcement pulled over the defendant and the officer discovered that the defendant had a revoked license. *Id*. The officer placed the defendant under arrest and conducted an inventory search of his vehicle. *Id*. ¶ 3. The officers found a glass pipe containing meth residue in the center console. *Id*. The defendant challenged his conviction of possession of a controlled substance stemming from this incident based on the sufficiency of the evidence to support the conviction. *Id*. ¶ 31. On appeal, the defendant made a similar argument that other people had access to the vehicle and it was not within his exclusive control. *Id*. ¶ 35. This Court held that the record indicated that the defendant did have exclusive control over the vehicle, because he was the registered owner as well as the only occupant. *Id*.; *cf. State v. Howl*, 2016-NMCA-084, ¶¶ 5, 31, 381 P.3d 684 (upholding inference of control of glass pipe inside center console of vehicle when defendant was owner even though passenger was in vehicle at the time); *State v. Morales*, 2002-NMCA-052, ¶ 32, 132 N.M. 146, 45 P.3d 406 (concluding that defendant was in control of vehicle in part because there was no evidence that he "had just become the driver"), *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, ¶ 35 n.6, 275 P.3d 110.

{35} Likewise, Defendant was the owner and the only occupant of the vehicle where the arresting officer found the methamphetamine. *Lopez* indicates it was reasonable to draw the inference that Defendant had exclusive control over the vehicle at the time law enforcement found the methamphetamine and thus the methamphetamine was not merely proximate to Defendant. Granted, there is a distinction here from *Lopez* in that there is evidence in the record that other people could have used Defendant's vehicle. However, Defendant was the only one who testified to this fact and the jury was free to ignore his testimony that this was the case. *See State v. Garcia*, 2011-NMSC-003, ¶ 5, 149 N.M. 185, 246 P.3d 1057 ("New Mexico appellate courts will 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 its judgment for that of the jury." (alterations, internal quotation marks, and citation omitted)).

{36} Regardless of whether Defendant had exclusive control over the location of where the methamphetamine was found, there was ample evidence available to the jury to support a conviction for possession other than just the mere proximity to Defendant. The relevant evidence at trial apprised the jury that Defendant had a pipe in his pocket that contained methamphetamine residue and Defendant had previously used the pipe to smoke methamphetamine. The arresting officer also found the methamphetamine in a vehicle solely owned and driven by Defendant. Coupled with the methamphetamine's location of being within arm's reach of the driver's seat, there was substantial evidence to support the jury's conclusion beyond a reasonable doubt that Defendant had

knowledge and control over the methamphetamine. Therefore, we conclude there was sufficient evidence to convict Defendant on the possession of a controlled substance charge.

III. CONCLUSION

{37} We affirm Defendant's convictions.

{38} IT IS SO ORDERED.

HENRY M. BOHNHOFF, Judge

WE CONCUR:

DANIEL J. GALLEGOS, Judge

JENNIFER L. ATTREP, Judge

1Although Defendant cites to both New Mexico and United States constitutional provisions in support of his arguments, he does not claim there is any difference in the application of the state and federal constitutional provisions to this case. We, therefore, do not distinguish between them in our analysis. *See State v. Ben*, 2015-NMCA-118, ¶ 7, 362 P.3d 180.

2 For the same reasons that lead us to conclude that the prosecutor's comments on Defendant's silence did not rise to the level of fundamental error, we also reject his argument that the prosecutor's cross-examination constituted plain error. "The plain-error rule . . . applies only if the alleged error affected the substantial rights of the accused." *State v. Montoya*, 2015-NMSC-010, ¶ 46, 345 P.3d 1056 (internal quotation marks and citation omitted). "To find plain error, the Court must be convinced that admission of the testimony constituted an injustice that created grave doubts concerning the validity of the verdict." *Id.* (internal quotation marks and citation omitted).