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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 Opinion Number: _____

Court of Appeals of New Mexico
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4 **NO. A-1-CA-38218**



Mark Reynolds

5 **STATE OF NEW MEXICO,**

6 Plaintiff-Appellee,

7 v.

8 **SHANNON DWANE JACKSON,**

9 Defendant-Appellant.

10 **APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY**

11 **Fred T. Van Soelen, District Judge**

12 Hector H. Balderas, Attorney General
13 Maris Veidemanis, Assistant Attorney General
14 Santa Fe, NM

15 for Appellee

16 Bennett J. Baur, Chief Public Defender
17 Caitlin C.M. Smith, Assistant Appellate Defender
18 Santa Fe, NM

19 for Appellant

1 **OPINION**

2 **DUFFY, Judge.**

3 {1} The memorandum opinion filed on August 9, 2021, is hereby withdrawn and
4 replaced with this opinion.

5 {2} Defendant Shannon Dwane Jackson appeals his convictions for trafficking of
6 a controlled substance, contrary to NMSA 1978, Section 30-31-20 (2006); tampering
7 with evidence, contrary to NMSA 1978, Section 30-22-5 (2003); resisting, evading,
8 or obstructing an officer, contrary to NMSA 1978, Section 30-22-1(B) (1981); and
9 possession of drug paraphernalia, contrary to NMSA 1978, Section 30-31-25.1(A)
10 (2001, amended 2019). Defendant argues that (1) the State presented insufficient
11 evidence to prove he tampered with evidence; (2) the district court erred in admitting
12 evidence that Defendant owned a gun; (3) the district court erred in denying
13 Defendant’s motion for a mistrial based on a previously undisclosed supplemental
14 police report that was discovered midtrial; and (4) the evidence found during the
15 search of his person should have been suppressed as it was outside the scope of the
16 search warrant. We reverse Defendant’s conviction for tampering with evidence, but
17 otherwise affirm.

18 **BACKGROUND**

19 {3} Police obtained a warrant to search Defendant’s residence for narcotics.
20 Officer Rafael Aguilar and Sergeant Waylon Rains of the Clovis Police Department

1 arrived at Defendant's home to execute the warrant, but due to safety concerns, they
2 chose to wait until Defendant exited his home. A short time later, the officers
3 observed Defendant leave the house and get into the passenger side of a vehicle with
4 a female driver.

5 {4} Officer Aguilar and Sergeant Rains followed the vehicle and observed it stop
6 at another house that was known to be involved in narcotic dealings. Defendant went
7 inside for approximately five minutes and then returned to the vehicle, whereupon it
8 drove off. A short time later, Officer Aguilar and Sergeant Rains stopped the vehicle.
9 Officer Aguilar approached the passenger side of the car and observed Defendant
10 with a large amount of money on his lap. He asked Defendant to get out of the car
11 and, as he did, Officer Aguilar observed a large baggie with smaller baggies in
12 Defendant's pocket. Officer Aguilar attempted to restrain Defendant after he got out
13 of the car. Defendant began to resist arrest and a struggle ensued. At this point,
14 Defendant pulled the large baggie from the right pocket of his shorts and threw it to
15 the female driver. After Defendant was restrained, Sergeant James Gurule, also with
16 the Clovis Police Department, conducted a search of Defendant. He located two zip-
17 lock bags containing \$2,230 in cash. The officers also confiscated the bag Defendant
18 had thrown into the car, which contained many smaller baggies of crack cocaine—
19 sixty-three in total.

1 {5} After conducting the traffic stop, the officers proceeded to Defendant's
2 residence to execute the search warrant. Officers discovered the following items in
3 Defendant's home: a .380 caliber semi-automatic pistol, several small zip-lock
4 baggies, several digital scales, and a brown bag with small zip-lock baggies inside.
5 Following a jury trial, Defendant was convicted on all charges. He appeals.

6 **DISCUSSION**

7 **I. Defendant's Conviction for Tampering With Evidence**

8 {6} Defendant first argues that there was insufficient evidence to support his
9 conviction for tampering with evidence. Under the instruction given, the State had
10 to prove that Defendant "threw baggies of crack[]cocaine into a vehicle" and
11 "intended to prevent, apprehension, prosecution, or conviction of himself for the
12 crime of [t]rafficking of a [c]ontrolled [s]ubstance." Defendant claims that his act of
13 throwing baggies of crack cocaine in plain view of multiple police officers does not
14 constitute any of the prohibited acts listed in Section 30-22-5. The State concedes
15 that there is insufficient evidence to sustain the tampering conviction. While we are
16 not bound by the State's concession, we accept it here. *See State v. Montoya*, 2015-
17 NMSC-010, ¶ 58, 345 P.3d 1056.

18 {7} The New Mexico Supreme Court has stated that the "tampering with evidence
19 criminal statute, . . . [Section] 30-22-5 . . . , makes it a crime to hide or alter evidence
20 of a crime." *State v. Radosevich*, 2018-NMSC-028, ¶ 1, 419 P.3d 176. The statute

1 provides that “[t]ampering with evidence consists of destroying, changing, hiding,
2 placing or fabricating any physical evidence with intent to prevent the apprehension,
3 prosecution or conviction of any person or to throw suspicion of the commission of
4 a crime upon another.” Section 30-22-5(A). As such, “[t]he tampering statute
5 punishes those who try to frustrate the criminal justice system by obstructing access
6 to evidence of a crime.” *Radosevich*, 2018-NMSC-028, ¶ 10.

7 {8} Our courts have drawn a distinction between acts occurring in the presence of
8 an officer and those that attempted to conceal evidence outside of the view of an
9 officer. *Compare State v. Roybal*, 1992-NMCA-114, ¶¶ 7, 29, 115 N.M. 27, 846 P.2d
10 333 (holding that the evidence was insufficient to support the defendant’s conviction
11 for tampering where the defendant dropped some items from his hand to the ground
12 as officers approached), *with State v. Delgado*, 2009-NMCA-061, ¶ 24, 146 N.M.
13 402, 210 P.3d 828 (holding that there was sufficient evidence to support a conviction
14 for tampering where the police observed the defendant making suspicious
15 movements, but could not directly see what the defendant was doing and later
16 discovered evidence in the area), *overruled on other grounds by State v. Aragon*,
17 2010-NMSC-008, ¶ 19, 147 N.M. 474, 225 P.3d 1280; *and State v. Graham*, 2003-
18 NMCA-127, ¶ 13, 134 N.M. 613, 81 P.3d 556 (holding that there was sufficient
19 evidence to support the defendant’s conviction for tampering where the defendant

1 dropped evidence behind the seat in his truck so as to conceal it from the police),
2 *rev'd on other grounds*, 2005-NMSC-004, 137 N.M. 197, 109 P.3d 285.

3 {9} Here, Defendant's actions plainly occurred in the presence of the police. The
4 officers saw Defendant throw the baggie and were able to immediately recover it.
5 The evidence was never concealed from the officers, and we therefore agree with
6 the parties that Defendant's conviction for tampering with evidence is not supported
7 by sufficient evidence.

8 **II. Admission of Evidence That Defendant Owned a Gun**

9 {10} Defendant argues that the district court abused its discretion in admitting
10 evidence of the gun found inside the residence, over Defendant's objection.
11 Defendant claims that the gun evidence's "probative value was substantially
12 outweighed by the risk of prejudice[.]" arguing that he was not armed at the time of
13 his arrest and the State presented no evidence that the presence of a single handgun
14 in the home made it more likely that Defendant was trafficking drugs. *See* Rule 11-
15 403 NMRA. The State responds that Defendant's "ownership of a gun was relevant
16 to establishing that he was a drug dealer." At trial, Sergeant Rains testified that it is
17 "common" for anyone involved in the drug trade to have a gun and Officer Aguilar
18 testified that firearms and sales of narcotics "go hand in hand."

19 {11} Assuming without deciding that the district court abused its discretion in
20 admitting evidence of the gun, we conclude that any error was harmless. "When an

1 error is preserved, we review for harmless error[.]” *State v. Astorga*, 2015-NMSC-
2 007, ¶ 42, 343 P.3d 1245. “Absent a constitutional violation, we look to whether
3 there is a reasonable probability that the error affected the verdict.” *Id.* ¶ 43. “[The
4 d]efendant bears the initial burden of demonstrating that he was prejudiced by the
5 error.” *Id.* “To put the error in context, we often look at the other, non-objectionable
6 evidence of guilt, not for a sufficiency-of-the-evidence analysis, but to evaluate what
7 role the error played at trial.” *State v. Leyba*, 2012-NMSC-037, ¶ 24, 289 P.3d 1215.

8 {12} Defendant argues that the gun evidence created the impression that Defendant
9 was dangerous and that, in turn, encouraged the jury to convict him of trafficking a
10 controlled substance rather than simple possession. The distinction between the two
11 offenses turned on whether the jury found that Defendant intended to transfer the
12 crack cocaine to another. The State presented evidence that Defendant was
13 apprehended with sixty-three baggies of crack cocaine and more than \$2,200 in cash
14 on his person. The State also presented evidence that the quantity of crack cocaine
15 found on Defendant and the way it was individually packaged indicated that the
16 drugs were intended for sale to individuals. In addition, police found several digital
17 scales and empty small baggies at Defendant’s residence. In light of this and other
18 evidence presented by the State at trial, we are doubtful that the admission of the
19 gun evidence had any probable impact on the jury’s deliberations regarding

1 trafficking versus possession. Therefore, even if the district court erred in admitting
2 the gun evidence, we hold that any error was harmless.

3 **III. Defendant’s Motion for a Mistrial**

4 {13} Defendant contends that the district court abused its discretion in denying his
5 motion for a mistrial after learning, during trial, that the State had failed to disclose
6 a supplemental police report. We review the district court’s denial of a motion for
7 mistrial for an abuse of discretion. *State v. Hernandez*, 2017-NMCA-020, ¶ 14, 388
8 P.3d 1016. “The district court abuses its discretion in ruling on a motion for mistrial
9 if it acts in an obviously erroneous, arbitrary, or unwarranted manner, or when the
10 decision is clearly against the logic and effect of the facts and circumstances before
11 the court.” *Id.* (internal quotation marks and citations omitted).

12 {14} During cross-examination on the first day of trial, Sergeant Gurule testified
13 that he had written a supplemental police report documenting Defendant’s arrest.
14 The report was not given to Defendant prior to trial, and he moved for a mistrial
15 based on the omission. The State explained to the court that it, too, had not received
16 Sergeant Gurule’s report before trial and did not know that the report existed. The
17 State obtained the report and provided a copy of it to Defendant later that day. Before
18 trial resumed the following day, the district court admonished the prosecution for
19 failing to produce the supplemental police report. However, the district court found
20 there was no prejudice to Defendant because there was nothing in the supplemental

1 report that was exculpatory and the report was consistent with Sergeant Gurule's
2 trial testimony. The district court stated that Defendant would be allowed to recall
3 Sergeant Gurule and Sergeant Rains for further cross-examination.

4 {15} Defendant argues that because more than four years had passed since the date
5 of the incident and the trial, and because the State had repeatedly declared it was
6 ready for trial, the "State should have known, and had the responsibility to know,
7 that [Sergeant] Gurule's report existed and had never been turned over to the
8 defense." Although Defendant concedes that there is a "lack of apparent prejudice"
9 from the State's discovery violation, he argues that a mistrial would have been a way
10 to enforce the State's discovery obligations. "When the [s]tate discovers additional
11 evidence, Rule 5-505(A) [NMRA] requires prompt written notice be provided to a
12 defendant." *State v. Smith*, 2016-NMSC-007, ¶ 25, 367 P.3d 420. "To enforce Rule
13 5-505(A) the trial court has a number of remedies at its disposal including granting
14 a continuance, prohibiting a party from introducing the undisclosed material
15 evidence, or entering any other order deemed appropriate." *Smith*, 2016-NMSC-007,
16 ¶ 25. The rule gives a court broad discretion to fashion a remedy that it deems proper
17 under the circumstances. *See* Rule 5-505(B).

18 {16} In this case, the district court dealt with the failure to disclose by admonishing
19 the prosecution and allowing Defendant to recall the officers for cross-examination.
20 Defendant makes no argument as to why the district court's remedy was insufficient

1 under the circumstances. Given that the supplemental report was merely cumulative
2 and Defendant conceded that he was not prejudiced, we see no basis to conclude that
3 the district court abused its discretion. *See State v. Harper*, 2011-NMSC-044, ¶ 16,
4 150 N.M. 745, 266 P.3d 25 (stating that “the mere showing of violation of a
5 discovery order, without a showing of prejudice, is not grounds for sanctioning a
6 party”).

7 **IV. Defendant’s Motion to Suppress**

8 {17} Finally, Defendant argues that the district court should have suppressed the
9 evidence found during the traffic stop because the warrant authorized only a search
10 of his residence. He maintains that because the warrant did not include his name or
11 description, the police had no justification to stop the vehicle.

12 {18} Defendant moved to suppress the evidence obtained after the traffic stop on
13 that basis. In response, the State argued that the traffic stop was supported by
14 reasonable suspicion, citing *State v. Alderete*, 2011-NMCA-055, 149 N.M. 799, 255
15 P.3d 377. The district court found that there was reasonable suspicion for the stop
16 based on the fact that the officers had a search warrant for Defendant’s residence
17 and their observations while conducting surveillance on Defendant’s residence, and
18 therefore denied Defendant’s motion to suppress.

19 {19} On review of a motion to suppress evidence, “[w]e review factual questions
20 under a deferential substantial evidence standard, and we review the application of

1 the law to the facts de novo.” *Id.* ¶ 9. “In doing so, we review the facts in the light
2 most favorable to the district court’s factual findings so long as substantial evidence
3 exists to support those findings.” *Id.* (omission, internal quotation marks, and
4 citation omitted).

5 {20} As the State noted below, this case is substantially similar to *Alderete*. There,
6 officers had received a tip from a confidential informant that a house was being used
7 as a stash house for large amounts of marijuana. *Id.* ¶ 2. The officers had previously
8 received reliable information from the informant. *Id.* The officers conducted
9 surveillance of the house throughout the week, and approximately four days in, they
10 observed two men moving large boxes from the back of a pickup truck into the
11 house. *Id.* The officers obtained a search warrant for the house. *Id.* Later that day,
12 officers observed the defendant driving from the subject house and stopped the
13 vehicle. *Id.* ¶ 4. During a subsequent inventory search of the vehicle, the officer
14 observed two large cardboard boxes containing “small brick-like shaped items,”
15 which were later confirmed to be over one hundred bundles of marijuana. *Id.* ¶ 6.

16 {21} The defendant moved to suppress the drug evidence found in her car, arguing
17 that the stop was pretextual and the real reason for the stop was to investigate her
18 involvement in drug activity. *Id.* ¶ 1. This Court held that the officers had reasonable
19 suspicion for the stop, noting that “the detectives in the present case who were
20 observing the subject house had specific factual information regarding the residents’

1 possible involvement in drug trafficking and therefore had reasonable suspicion to
2 conduct an investigatory stop of [the d]efendant’s vehicle to confirm or dispel their
3 suspicions.” *Id.* ¶ 18. As well, officers had a reliable tip from an informant, which
4 was consistent with officers’ own observations, the officers obtained a search
5 warrant for the residence, and they witnessed the defendant leave the house in the
6 car they later stopped. *Id.* ¶¶ 18-19. We stated that the detectives “could reasonably
7 suspect that a large amount of drugs had been in the house that [the d]efendant had
8 just left and that [the d]efendant could be transporting those drugs to an alternate
9 location.” *Id.* ¶ 19. And although “the detectives did not have any information
10 regarding [the d]efendant herself, they had reasonable suspicion that the driver of
11 the vehicle that left the garage, whoever that may have been, was involved in the
12 drug activity they had observed throughout the course of their investigation, and they
13 were permitted to make an investigatory stop to confirm or dispel their suspicions.”
14 *Id.* ¶ 20. Based on all of these considerations, we held that a stop for the purpose of
15 investigating drug activity was supported by reasonable suspicion. *Id.*

16 {22} The same considerations are present in this case. The officers had obtained a
17 search warrant to search Defendant’s residence for narcotics. The affidavit attached
18 to the search warrant detailed how an informant had relayed information for the past
19 several weeks regarding drug trafficking at Defendant’s house. The affidavit noted
20 that “[t]his informant has established their credibility and reliability by making not

1 less than three controlled purchases of controlled substances” at the house.
2 According to the affidavit, the informant had seen Defendant selling cocaine from
3 the residence and had stated that Defendant conceals the cocaine on his person.


4 {23} Prior to executing the search warrant, the officers conducted surveillance of
5 the residence for approximately thirty to forty-five minutes. They watched as
6 Defendant left the house with a woman, got into a car, and drove away. As they
7 attempted to catch up with the vehicle, the officers testified that it stopped at another
8 house known to be involved in narcotic dealings. Defendant entered this house and
9 was inside for less than five minutes before returning to the vehicle. A short time
10 later, the officers conducted the traffic stop.

11 {24} Based on the totality of the circumstances, specific and articulable facts
12 supported the officers’ suspicion that Defendant was engaged in illegal activity. We
13 affirm the district court’s conclusion that the traffic stop was supported by
14 reasonable suspicion.

15 **CONCLUSION**

16 {25} For the foregoing reasons, we reverse Defendant’s conviction for tampering
17 with evidence, but otherwise affirm.

18 {26} **IT IS SO ORDERED.**

19
20 
MEGAN P. DUFFY, Judge

