


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

Court of Appeals of New Mexico
Filed 2/6/2023 1:37 PM

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,

4 v.



Mark Reynolds

No. A-1-CA-39768

5 **RICHARD LEE PAUL CHAVEZ,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY**

8 **Mary L. Marlowe Sommer, District Court Judge**

9 Raúl Torrez, Attorney General

10 Santa Fe, NM

11 Van Snow, Assistant Attorney General

12 Albuquerque, NM

13 for Appellee

14 Bennett J. Baur, Chief Public Defender

15 Santa Fe, NM

16 Steven J. Forsberg, Assistant Appellate Defender

17 Albuquerque, NM

18 for Appellant

19 **MEMORANDUM OPINION**

20 **HANISEE, Judge.**

21 {1} Defendant Richard Chavez appeals from the district court's judgment and

22 sentence convicting him of first degree kidnapping, contrary to NMSA 1978, Section

23 30-4-1(A) (2003); unlawful taking of a motor vehicle, contrary to NMSA 1978,

24 Section 30-16D-1(A)(1) (2009); and aggravated battery against a household

1 member, contrary to NMSA 1978, Section 30-3-16(B) (2018). The underlying
2 charges arose from an altercation between Defendant and his girlfriend (Victim).
3 Defendant argues that the jury instructions regarding kidnapping were erroneous,
4 the district court abused its discretion in admitting telephone recordings without
5 proper authentication, and the alleged kidnapping was merely incidental to the
6 aggravated battery. For the reasons that follow, we affirm.

7 **DISCUSSION**

8 **I. Jury Instructions**

9 {2} Defendant argues the provided jury instructions for first and second degree
10 kidnapping constituted fundamental error because a variation between the two
11 instructions confused the jury to the extent it could only reasonably find Defendant
12 guilty of first, rather than second, degree kidnapping. This issue was not preserved
13 below, and we thus review it for fundamental error. *See State v. Benally*, 2001-
14 NMSC-033, ¶ 12, 131 N.M. 258, 34 P.3d 1134 (“The standard of review we apply
15 to jury instructions depends on whether the issue has been preserved. If the error has
16 been preserved we review the instructions for reversible error. If not, we review for
17 fundamental error.” (citation omitted)). The latter such inquiry entails determination
18 of “whether a reasonable juror would have been confused or misdirected by the
19 instruction.” *Id.* (internal quotation marks omitted). We apply the fundamental error
20 exception to the preservation rule “only under extraordinary circumstances to

1 prevent the miscarriage of justice.” *State v. Silva*, 2008-NMSC-051, ¶ 13, 144 N.M.
2 815, 192 P.3d 1192 (internal quotation marks and citation omitted), *holding modified*
3 *by State v. Guerra*, 2012-NMSC-027, ¶¶ 14-15, 284 P.3d 1076. We discern no
4 miscarriage of justice because no “mistake in the process” rendered the “conviction
5 fundamentally unfair notwithstanding the apparent guilt of the accused.” *State v.*
6 *Barber*, 2004-NMSC-019, ¶ 17, 135 N.M. 621, 92 P.3d 633.

7 {3} Here, the jury was instructed that a first degree kidnapping conviction
8 required proof beyond a reasonable doubt of the following elements:

- 9 1. [D]efendant took or restrained or confined or transported
10 [Victim] by force or *deception* by keeping [Victim] in a car
11 against her will;
- 12 2. [D]efendant’s acts was unlawful;
- 13 3. [D]efendant intended to inflict death or physical injury on
14 [Victim];
- 15 4. The taking or restraint or confinement or transportation of
16 [Victim] was not slight, inconsequential, or merely incidental to
17 the commission of another crime;
- 18 5. [D]efendant inflicted physical injury upon [Victim] during the
19 course of the kidnapping or [D]efendant did not voluntarily free
20 [Victim] in a safe place.

21 (Emphasis added.) By contrast, the jury was instructed that a second degree
22 kidnapping conviction required proof beyond a reasonable doubt of the following
23 elements:

- 1 1. [D]efendant took or restrained or confined or transported
2 [Victim] by force or *intimidation* by keeping [Victim] in a car
3 against her will;
- 4 2. [D]efendant’s act was unlawful;
- 5 3. [D]efendant intended to inflict death or physical injury on
6 [Victim];
- 7 4. The taking or restraint or confinement or transportation of
8 [Victim] was not slight, inconsequential, or merely incidental to
9 the commission of another crime.

10 (Emphasis added.)

11 {4} Defendant contends that a variance between the two instructions—that being
12 the distinction between first degree kidnapping requiring a finding of force or
13 *deception*, and second degree kidnapping requiring a finding of force or
14 *intimidation*—“created a situation where the jury may have thought it could not find
15 [D]efendant guilty of second[]degree kidnap[ping], and could only find him guilty
16 of first[]degree kidnap[ping].” Assuming, without deciding, that the asserted
17 variance between the instructions was error, we conclude that such error does not
18 constitute fundamental error, and our review of the record does not support a
19 conclusion that Defendant’s “conviction was the result of a plain miscarriage of
20 justice.” *See State v. Ancira*, 2022-NMCA-053, ¶ 25, 517 P.3d 292 (internal
21 quotation marks and citation omitted). In addition to the elements quoted above, the
22 jury was also instructed that it could not reach a verdict on second degree kidnapping
23 unless the jury first unanimously agreed that Defendant was not guilty of first degree

1 kidnapping. Because the jury found the State proved all of the elements of first
2 degree kidnapping—and Defendant does not challenge the accuracy of such
3 instruction—there was no risk that the jury was confused by any variance between
4 the two instructions. Defendant has therefore failed to demonstrate fundamental
5 error.

6 {5} Further, to the extent Defendant attempts to prove that the jury was confused
7 about the first and second degree kidnapping instructions based on markings found
8 on the instruction forms, no evidence in the record supports a finding that the jury
9 made such markings, or that the markings carry any specific meaning, and we will
10 ascribe no such meaning thereon. *See State v. Cordova*, 2014-NMCA-081, ¶ 10, 331
11 P.3d 980 (“[A]rgument of counsel is not evidence.” (internal quotation marks and
12 citation omitted)); *see also State v. Hall*, 2013-NMSC-001, ¶ 28, 294 P.3d 1235 (“It
13 is not our practice to rely on assertions of counsel unaccompanied by support in the
14 record. The mere assertions and arguments of counsel are not evidence.”). We
15 therefore conclude that Defendant has failed to prove fundamental error requiring
16 reversal in order to prevent the miscarriage of justice. *See Silva*, 2008-NMSC-051,
17 ¶ 13.

18 **II. Authentication of Telephone Recordings**

19 {6} Defendant argues that the district court erred in admitting recordings of jail
20 telephone calls between Defendant and Victim because the State failed to properly

1 authenticate the recordings. Defendant specifically contends that while the testimony
2 of a district attorney’s investigator identified Defendant as the caller, such
3 identification is premised on “assumed” versus personal knowledge by the
4 investigator. We review the district court’s evidentiary ruling for an abuse of
5 discretion. *State v. Romero*, 2019-NMSC-007, ¶ 40, 435 P.3d 1231. “An abuse of
6 discretion occurs when the ruling is clearly against the logic and effect of the facts
7 and circumstances of the case.” *Id.* (internal quotation marks and citation omitted).

8 {7} “To satisfy the requirement of authenticating or identifying an item of
9 evidence, the proponent must produce evidence sufficient to support a finding that
10 the item is what the proponent claims it is.” Rule 11-901(A) NMRA. “A witness’s
11 identification of a voice requires only a *minimal* showing that the voice belongs to
12 the person the witness purports that it . . . belongs to and sets a low threshold for
13 admissibility.” *Romero*, 2019-NMSC-007, ¶ 41 (internal quotation marks and
14 citation omitted). “The identity of a party making a telephone call may be established
15 by either direct or circumstantial evidence.” *Id.* (internal quotation marks and
16 citation omitted).

17 {8} Here, the investigator testified outside of the presence of the jury that he
18 recognized Defendant’s voice, pulled and verified records for hundreds of calls to
19 Victim’s phone number, heard Defendant’s and Victim’s names on the calls, and
20 identified Defendant’s pin number used during the calls. While Defendant argues

1 that the investigator’s testimony in this regard was insufficient to establish
2 Defendant’s identity—and therefore insufficient to authenticate the call
3 recordings—our Supreme Court has clarified that the proponent of evidence “need
4 not demonstrate authorship of the evidence conclusively; arguments contesting
5 authorship go to the weight of the evidence, not its admissibility.” *State v. Jesenya*
6 *O.*, 2022-NMSC-014, ¶ 18, 514 P.3d 445. “The jury is left to decide the weight given
7 to the evidence.” *Romero*, 2019-NMSC-007, ¶ 41; *see also State v. Salas*, 1999-
8 NMCA-099, ¶ 13, 127 N.M. 686, 986 P.2d 482 (recognizing that it is for the fact-
9 finder to resolve any conflict in the testimony of the witnesses and to determine
10 where the weight and credibility lie). Further, we decline to entertain Defendant’s
11 speculation that someone other than Defendant could have been the caller, given that
12 Defendant fails to cite to any portion of the record that could support such an
13 assertion. *See Cordova*, 2014-NMCA-081, ¶ 10; *Hall*, 2013-NMSC-001, ¶ 28. We
14 therefore discern no abuse of discretion by the district court in admitting the call
15 recordings.

16 **III. Kidnapping Conviction**

17 {9} Defendant argues that the facts of his case do not support a kidnapping
18 conviction, asserting that any alleged kidnapping was merely incidental to the
19 aggravated battery and therefore cannot constitute a separate charged crime.
20 Defendant “need not have preserved this argument because it rests on whether the

1 evidence was sufficient to convict him of kidnapping.” *State v. Sotelo*, 2013-NMCA-
2 028, ¶ 30, 296 P.3d 1232. “Under this standard, an appellate court reviews the
3 evidence in the light most favorable to the guilty verdict, indulging all reasonable
4 inferences and resolving all conflicts in the evidence in favor of the verdict.” *Id.*
5 (internal quotation marks and citation omitted).

6 {10} We have yet to adopt a specific test to determine whether the conduct
7 underlying a conviction for kidnapping is merely incidental to the conduct
8 underlying a conviction for aggravated battery. *See State v. Trujillo*, 2012-NMCA-
9 112, ¶¶ 22, 32, 39, 289 P.3d 238 (discussing three possible tests for determining
10 whether the alleged kidnapping was incidental to battery, but finding it unnecessary
11 to adopt a specific test because the facts did not present a “close call” in relation to
12 the available tests); *see also Sotelo*, 2013-NMCA-028, ¶ 30 (declining to adopt a
13 specific test because there existed sufficient evidence for the jury to conclude that
14 the defendant’s conduct was not merely incidental to battery). However, we have
15 clearly established that kidnapping may occur—wholly separate from aggravated
16 battery—“once the victim’s physical association with the defendant is no longer
17 voluntary” *Id.* (alterations, internal quotation marks, and citations omitted).

18 {11} Here, the jury heard evidence that after Defendant stopped and exited the
19 vehicle, Victim locked the doors and tried to get help from nearby strangers. The
20 jury further heard that Defendant forced his way back into the vehicle after being

1 locked out, continued to both drive and beat Victim, and that Victim believed she
2 was being “taken [by Defendant] to be killed.” Such evidence is sufficient to
3 establish that (1) Victim’s physical association with Defendant was no longer
4 voluntary once Defendant forced his way back into the vehicle and continued to
5 transport Victim, and (2) Victim’s restraint in the car was not merely to further the
6 subsequent beating but had “significance of its own.” *Sotelo*, 2013-NMCA-028, ¶ 30
7 (internal quotation marks and citation omitted). Thus, we conclude that the conduct
8 underlying the kidnapping was not merely incidental to the aggravated battery.

9 **CONCLUSION**

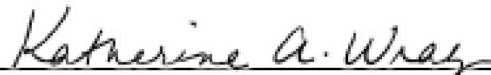
10 {12} For the above reasons, we affirm.

11 {13} **IT IS SO ORDERED.**

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13 _____
J. MILES HANISEE, Judge

14 **WE CONCUR:**

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16 _____
ZACHARY A. IVES, Judge

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18 _____
KATHERINE A. WRAY, Judge