


Corrections to this opinion/decision not affecting the outcome, at the Court's discretion, can occur up to the time of publication with NM Compilation Commission. The Court will ensure that the electronic version of this opinion/decision is updated accordingly in Odyssey.

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

Court of Appeals of New Mexico
Filed 6/29/2023 10:35 AM

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,



Mark Reynolds

4 v.

No. A-1-CA-40596

5 **GARY ALLEN MAREZ,**

6 Defendant-Appellant.

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

8 **Matthew E. Chandler, District Court Judge**

9 Raúl Torrez, Attorney General

10 Santa Fe, NM

11 for Appellee

12 Bennett J. Baur, Chief Public Defender

13 Kathleen T. Baldrige, Assistant Attorney General

14 Santa Fe, NM

15 for Appellant

16 **MEMORANDUM OPINION**

17 **BOGARDUS, Judge.**

18 {1} Defendant appeals the district court's judgment and sentence convicting him
19 in part of tampering with evidence, aggravated assault, and larceny. In this Court's
20 notice of proposed disposition, we proposed to summarily affirm. Defendant filed a
21 memorandum in opposition, which we have duly considered. Remaining
22 unpersuaded, we affirm.

1 {2} In his memorandum in opposition, Defendant maintains that the evidence was
2 insufficient to support his conviction for tampering with evidence of aggravated
3 burglary. [MIO 6] Specifically, Defendant asserts that, because the jury acquitted
4 him of aggravated burglary, his conviction for tampering with evidence relating to
5 aggravated burglary must be vacated. [MIO 1, 6] To the extent Defendant's assertion
6 in this regard raises a constitutional issue, we review it de novo. *State v. Alvarado*,
7 2012-NMCA-089, ¶ 5, 495 P.3d 1125. Otherwise, we review the sufficiency of the
8 evidence from a highly deferential standpoint, viewing the evidence "in the light
9 most favorable to the state, and we resolve all conflicts and make all permissible
10 inferences in favor of the jury's verdict." *State v. Slade*, 2014-NMCA-088, ¶ 13, 331
11 P.3d 930 (alterations, internal quotation marks, and citation omitted). We look to the
12 jury instructions to determine what the jury was required to find in order to convict
13 Defendant. *See id.*; *see also State v. Holt*, 2016-NMSC-011, ¶ 20, 368 P.3d 409
14 ("The jury instructions become the law of the case against which the sufficiency of
15 the evidence is to be measured." (alterations, internal quotation marks, and citation
16 omitted)).

17 {3} To convict Defendant of tampering with evidence, the jury had to find that the
18 State proved beyond a reasonable doubt that Defendant hid a 0.45 caliber pistol,
19 intending to prevent the apprehension, prosecution, or conviction of himself for the
20 crime of burglary. [2 RP 271] *See* UJI 14-2241 NMRA (listing elements of

1 tampering with evidence). Because the factors listed in the tampering with evidence
2 statute, NMSA 1978, Section 30-22-5(B) (2003), may increase the legally prescribed
3 punishment, they are also elements of the offense that must be found by the jury. *See*
4 *State v. Herrera*, 2014-NMCA-007, ¶¶ 9, 14, 315 P.3d 343 (“The United States
5 Supreme Court has held that, when a statute provides a general definition of
6 prohibited conduct and then lists a set of stepped sentences that increase based on
7 additional factors, any factor listed in the sentencing section of the statute that
8 increases the prescribed sentence is an element of the offense that must be found by
9 a jury beyond a reasonable doubt.”); *see also* UJI 14-2241 comm. cmt. (“[F]elony
10 liability for tampering may only be accomplished through proper use of UJI 14-6019
11 [NMRA] to ensure express jury findings supporting the felony tampering
12 provisions.”). The jury was, therefore, also required to find beyond a reasonable
13 doubt that Defendant “committed tampering with evidence related to [a]ggravated
14 [b]urglary.” [1 RP 205] *See* UJI 14-6019 (tying tampering with evidence to
15 underlying crime using a special verdict form).

16 {4} In this case, Defendant was seen outside a residence with a handgun and a bag
17 of items taken from the residence, was chased by police on foot, and was seen
18 carrying a handgun during the chase. [1 RP 194; MIO 3] When the officers caught
19 up with Defendant, he no longer had the handgun on his person. [MIO 3] Police
20 searched the area, and found a 0.45 caliber pistol in the yard outside the residence

1 where Defendant was first seen. [*Id.*] The jury found that this evidence was sufficient
2 to prove, beyond a reasonable doubt, that Defendant “committed tampering with
3 evidence related to [a]ggravated [b]urglary.” [1 RP 205] We therefore conclude that
4 the evidence was sufficient to satisfy each element of tampering. *See State v.*
5 *Ramirez*, 2018-NMSC-003, ¶¶ 14-15, 409 P.3d 902 (concluding that, when a gun
6 that fired the casings found at the crime scene was recovered “not far from where
7 police officers first encountered” the defendant, there was sufficient evidence to
8 support tampering with underlying charge of aggravated assault); *State v. Carrillo*,
9 2017-NMSC-023, ¶ 46, 399 P.3d 367 (rejecting the defendant’s sufficiency
10 challenge to tampering, noting that the jury could logically deduce or infer—from
11 testimony that the defendant had a gun in his hand, fled on foot, and did not have a
12 gun when stopped soon thereafter—that the defendant hid or otherwise disposed of
13 a gun to prevent apprehension, prosecution, or conviction).

14 {5} We are mindful that much of our case law rejects tampering sentences where
15 the jury did not make an adequate finding regarding the level of the underlying
16 offense due to some flaw or inadequacy in the jury instructions. *See, e.g., State v.*
17 *Chavez*, 2022-NMCA-007, ¶ 34, 504 P.3d 541 (reversing tampering conviction
18 where jury determination that tampering related to first or second degree murder was
19 based on “incomplete instructions”), *cert. granted* (S-1-SC-39058, Jan. 13, 2022);
20 *State v. Radosevich*, 2018-NMSC-028, ¶ 30, 419 P.3d 176 (reversing conviction for

1 felony tampering because the jury made no finding regarding the level of underlying
2 crime). In fact, UJI 14-2241 and UJI 14-6019, were created to ensure that a
3 conviction for tampering with evidence would be supported by a jury finding relating
4 the tampering to a particular crime. *See Radosevich*, 2018-NMSC-028, ¶¶ 29, 32
5 (holding that Section 30-22-5(B)'s "provision of enhanced felony penalties where a
6 jury cannot or does not find the level of the underlying offense, and thereby the level
7 of the tampering crime[,] cannot be constitutionally imposed" and referring the issue
8 to the Criminal Uniform Jury Instructions Committee to revise the instructions to
9 reflect that holding); UJI 14-6019, comm. cmt. ("Because the permissible
10 punishment range under Section 30-22-5 depends on the highest crime for which
11 tampering with evidence is committed, the jury must clearly identify the crime for
12 which tampering with evidence is alleged to have been committed."). Here, though,
13 the jury was instructed in accordance with UJI 14-2241 and UJI 14-6019, and
14 Defendant has not made any challenge to the adequacy of the instructions. As a
15 result, we conclude that the jury's special verdict, finding that Defendant committed
16 tampering with evidence related to aggravated burglary, is sufficient to ensure
17 Defendant's conviction does not violate due process. *See Radosevich*, 2018-NMSC-
18 028, ¶ 29 (recognizing a constitutional issue "inherent in permitting a defendant to
19 be punished for anything above the lowest level of an offense . . . if the jury does not

1 find the tampering was committed in connection with an offense that would justify
2 an enhanced punishment”).

3 {6} To the extent Defendant asserts that his acquittal on the aggravated burglary
4 charge requires that his conviction for tampering with evidence be vacated, we
5 disagree. “It is clear from the plain language of the statute that a defendant need not
6 be convicted of the underlying crime to be convicted of tampering with evidence of
7 that crime.” *Alvarado*, 2012-NMCA-089, ¶ 8; *see also Radosevich*, 2018-NMSC-
8 028, ¶¶ 28-29 (acknowledging that “the very nature of tampering with evidence may
9 mean that the only evidence with which to prove the nature of the underlying crime
10 has been destroyed” and recognizing the “wisdom of the Legislature’s intent to
11 provide sanctions for situations in which it is clear a defendant tampered with
12 evidence of a crime to such an extent that an underlying crime could not be
13 successfully prosecuted”). Defendant has cited no authority to suggest otherwise, or
14 to support his assertion that acquittal for an underlying offense demands, or even
15 warrants, vacating a tampering conviction. *See State v. Vigil-Giron*, 2014-NMCA-
16 069, ¶ 60, 327 P.3d 1129 (“[A]ppellate courts will not consider an issue if no
17 authority is cited in support of the issue and . . . , given no cited authority, we assume
18 no such authority exists.”). We are therefore unpersuaded by the arguments
19 Defendant raises in his memorandum in opposition as to this issue.

1 {7} As to Defendant’s challenge to the sufficiency of the evidence supporting his
2 convictions for aggravated assault and larceny, Defendant has not asserted any new
3 facts, law, or argument that persuade us that our notice of proposed disposition was
4 erroneous. *See Hennessy v. Duryea*, 1998-NMCA-036, ¶ 24, 124 N.M. 754, 955 P.2d
5 683 (“Our courts have repeatedly held that, in summary calendar cases, the burden
6 is on the party opposing the proposed disposition to clearly point out errors in fact
7 or law.”); *State v. Mondragon*, 1988-NMCA-027, ¶ 10, 107 N.M. 421, 759 P.2d
8 1003 (stating that “[a] party responding to a summary calendar notice must come
9 forward and specifically point out errors of law and fact,” and the repetition of earlier
10 arguments does not fulfill this requirement), *superseded by statute on other grounds*
11 *as stated in State v. Harris*, 2013-NMCA-031, ¶ 3, 297 P.3d 374.

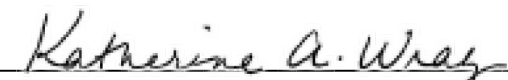
12 {8} Accordingly, for the reasons stated in our notice of proposed disposition and
13 herein, we summarily affirm Defendant’s convictions.

14 {9} **IT IS SO ORDERED.**

15 
16 **KRISTINA BOGARDUS, Judge**

17 **WE CONCUR:**

18 
19 **MEGAN P. DUFFY, Judge**

20 
21 **KATHERINE A. WRAY, Judge**