

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

Court of Appeals of New Mexico
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2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,



Mark Reynolds

4 v.

No. A-1-CA-40416

5 **MONIQUE MARTINEZ,**

6 Defendant-Appellant.

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

8 **Steven Blankinship, District Court Judge**

9 Raúl Torrez, Attorney General

10 Santa Fe, NM

11 Michael J. Thomas, Assistant Attorney General

12 Albuquerque, NM

13 for Appellee

14 Bennett J. Baur, Chief Public Defender

15 MJ Edge, Assistant Appellate Defender

16 Santa Fe, NM

17 for Appellant

18 **MEMORANDUM OPINION**

19 **DUFFY, Judge.**

20 {1} This matter was submitted to the Court on Defendant's brief in chief pursuant

21 to the Administrative Order for Appeals in Criminal Cases from the Second,

22 Eleventh, and Twelfth Judicial District Courts in *In re Pilot Project for Criminal*

23 *Appeals*, No. 2022-002, effective November 1, 2022. Following consideration of the

1 brief in chief, the Court assigned this matter to Track 2 for additional briefing. Now
2 having considered the brief in chief, answer brief, and reply brief, we affirm for the
3 following reasons.

4 {2} Defendant appeals the district court’s judgment and sentence, convicting her
5 of felon in possession of a firearm. Defendant contends that the statute criminalizing
6 the possession of a firearm by a felon is unconstitutional as applied to her under the
7 United States and New Mexico Constitutions because her prior convictions were for
8 nonviolent offenses. [BIC 1, 4-26] Defendant admits that all the constitutional
9 arguments she raises on appeal were not preserved. [BIC 4] She asks that we address
10 them for the first time on appeal on grounds that addressing the right to possess a
11 firearm constitutes a matter of “general public interest” pursuant to the discretionary
12 exception to the preservation rule. [BIC 4-5] *See* Rule 12-321(B)(2)(a) NMRA
13 (providing that an appellate court may, in its discretion, consider unpreserved issues
14 involving “general public interest”).

15 {3} Defendant’s failure to preserve the novel constitutional arguments she raises
16 on appeal is not a mere technical oversight that we may overlook in the greater public
17 interest. There are specific preservation requirements where an appellant asserts the
18 violation of a state constitutional right that has not been interpreted differently than
19 its federal analog. *State v. Gomez*, 1997-NMSC-006, ¶¶ 22-23, 122 N.M. 777, 932
20 P.2d 1. All preservation requirements are designed to require the development of

1 facts in the trial court, allow the trial court to correct any mistake, and to give the
2 opposing party a fair opportunity to respond. *Id.* ¶ 29. These requirements are
3 particularly important to assist in our development of constitutional law and to
4 ensure that we are deciding novel constitutional questions that are actually presented
5 by the facts. *See Allen v. LeMaster*, 2012-NMSC-001, ¶ 28, 267 P.3d 806 (observing
6 that “courts exercise judicial restraint by deciding cases on the narrowest possible
7 grounds and avoid reaching unnecessary constitutional issues”); *Kilgore v. Fuji*
8 *Heavy Indus. Ltd.*, 2009-NMCA-078, ¶ 50, 146 N.M. 698, 213 P.3d 1127 (setting
9 forth the primary purposes of preservation, including the creation of “a record
10 sufficient to allow this Court to make an informed decision regarding the contested
11 issue”).

12 {4} In the current case, Defendant’s failure to preserve her constitutional
13 arguments undermines all the purposes of preservation. Notably, the lack of
14 preservation of this matter in district court resulted in a record that lacks factual
15 support for Defendant’s representation that she is not a dangerous or violent felon.
16 *See State v. Jim*, 1988-NMCA-092, ¶ 3, 107 N.M. 779, 765 P.2d 195 (“It is [the
17 appellant’s] burden to bring up a record sufficient for review of the issues [raised]
18 on appeal.”). Thus, Defendant’s premise that she is a not a violent or dangerous felon
19 and can challenge the constitutionality of the statute as applied to her is not grounded
20 in facts established in the record. And, “[m]atters outside the record present no issue

1 for review.” *State v. Harrison*, 2010-NMSC-038, ¶ 10, 148 N.M. 500, 238 P.3d 869
2 (internal quotation marks and citation omitted). Even in cases with issues that may
3 be raised at any time or for the first time on appeal, our appellate courts will only
4 address the merits where the record supports the issues raised. *See, e.g., State v.*
5 *Lewis*, 2017-NMCA-056, ¶ 13, 399 P.3d 954 (observing that although a double
6 jeopardy challenge need not be preserved and may be raised at any time, there must
7 be a factual basis in the record to support the claim); *State v. Roybal*, 2002-NMSC-
8 027, ¶ 19, 132 N.M. 657, 54 P.3d 61 (explaining that a claim that counsel was
9 ineffective may be raised for the first time on appeal, but it must be shown on the
10 record).

11 {5} In the current case, the State has not stipulated that Defendant is not a
12 dangerous or violent felon; rather, the State disputes the need for a victim of a violent
13 offense in order to criminalize possession of firearm by a felon and points out that
14 Defendant’s prior felony conviction was for commercial burglary, as shown only by
15 the supplemental criminal information in the record. [AB 3 n.2; 1 RP 239] New
16 Mexico case law expressly considers burglary to be an “inherently dangerous
17 crime.” *See State v. Vandenberg*, 2003-NMSC-030, ¶ 22, 134 N.M. 566, 81 P.3d 19;
18 *State v. Barragan*, 2001-NMCA-086, ¶ 13, 131 N.M. 281, 34 P.3d 1157 (“[B]urglary
19 [is] an inherently dangerous crime for which officers may assume that a suspect is

1 likely to be armed.”); *State v. Cobbs*, 1985-NMCA-105, ¶ 35, 103 N.M. 623, 711
2 P.2d 900.

3 {6} We will not assume that Defendant’s burglary was not a violent or dangerous
4 act on the basis of Defendant’s assertion, because to do so would be unfair to the
5 State and we do not assume facts that do not appear in the record. *See State ex rel.*
6 *Hum. Servs. Dep’t v. Rawls*, 2012-NMCA-052, ¶ 13, 279 P.3d 766 (refusing to
7 assume certain reasons for the district court’s ruling that were not supported by the
8 record, quoting *State v. Thayer*, 1969-NMCA-086, ¶ 15, 80 N.M. 579, 458 P.2d 831,
9 for the proposition that “[w]e will not assume facts unsupported by the record”);
10 *State v. Sandoval*, 1966-NMSC-143, ¶ 5, 76 N.M. 570, 417 P.2d 56 (refusing to
11 assume facts that do not appear in the record in order to address an allegation of error
12 on appeal). It is particularly inappropriate for this Court to assume that Defendant is
13 not a dangerous or violent felon in order to reach out to the unpreserved, novel
14 constitutional issues presented in this case. *See Allen*, 2012-NMSC-001, ¶ 28 (“It is
15 an enduring principle of constitutional jurisprudence that courts will avoid deciding
16 constitutional questions unless required to do so.”).

17 {7} For these reasons, we do not exercise our discretion to address the unpreserved
18 issues Defendant has brought before us. *Cf. State v. McDuffie*, 1987-NMCA-077,
19 ¶¶ 3, 13-14, 106 N.M. 120, 739 P.2d 989 (addressing the defendant’s unpreserved
20 constitutional argument that the statute prohibiting him from carrying a concealed

1 weapon violates the equal protection rights of those without a home or vehicle and
2 observing that the defendant was “homeless” and a “street person” who received
3 mail at a shelter, showing the existence of facts establishing that the defendant was
4 among the people he sought to protect). Because we do not resolve the constitutional
5 issues and Defendant does not present any allegations of district court error, we
6 affirm the district court’s judgment and sentence.

7 {8} **IT IS SO ORDERED.**

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MEGAN P. DUFFY, Judge

10 **WE CONCUR:**

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12 _____
ZACHARY A. IVES, Judge

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14 _____
JANE B. VOHALEM, Judge