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

Court of Appeals of New Mexico  
Filed 5/30/2024 10:02 AM

2 **STATE OF NEW MEXICO,**



Ramon J. Maestas  
Chief Clerk

3 Plaintiff-Appellee,

4 v.

**No. A-1-CA-40836**

5 **DOMINIC JAMES MARTINEZ,**

6 Defendant-Appellant.

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

8 **Britt Marie Baca-Miller, District Court Judge**

9 Raúl Torrez, Attorney General

10 Santa Fe, NM

11 Charles J. Gutierrez, Assistant Solicitor General

12 Albuquerque, NM

13 for Appellee

14 The Law Office of Scott M. Davidson, Ph.D.

15 Scott M. Davidson

16 Albuquerque, NM

17 for Appellant

18 **MEMORANDUM OPINION**

19 **IVES, Judge.**

20 {1} This matter was submitted to this 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, this 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} On appeal, Defendant challenges the district court’s designation of his  
5 conviction for third degree vehicular homicide (reckless driving) as a serious violent  
6 offense for the purposes of the Earned Meritorious Deductions Act (the EMDA),  
7 NMSA 1978, § 33-2-34 (2015). [BIC 6] Specifically, Defendant asserts that the  
8 district court abused its discretion when it premised its serious violent offense  
9 determination on the specific speed that he was driving at the time of the collision  
10 because there was insufficient evidence in the record proper to support that  
11 determination. [BIC 28-33]

12 {3} “We review the [district] court’s ruling for an abuse of discretion.” *State v.*  
13 *Lavone*, 2011-NMCA-084, ¶ 5, 150 N.M. 473, 261 P.3d 1105. “A court abuses its  
14 discretion if it acts contrary to law or when its decision is not supported by  
15 substantial evidence.” *Id.* “In conducting our review for abuse of discretion, we  
16 consider whether the court’s serious violent offense designation is supported by  
17 sufficient evidence, free of legal error, and reflects a reasonable choice among  
18 alternatives.” *Id.*

19 {4} In the present case, after a fatal collision, Defendant was charged with two  
20 counts of homicide by vehicle (reckless driving), contrary to NMSA 1978, Section

1 66-8-101(A) (2016), and two counts of great bodily harm by vehicle (reckless  
2 driving), contrary to Section 66-8-101(B). [BIC 9; AB 2] Defendant was driving at  
3 a high rate of speed at approximately 10:00 p.m. when he hit another car making a  
4 left-hand turn, killing both occupants. [BIC 10; AB 2] The two passengers in  
5 Defendant’s vehicle were also seriously injured. [BIC 10; AB 2] Defendant  
6 ultimately entered into a plea and disposition agreement, in which he pled no contest  
7 to all four counts. [BIC 15; AB 3] The plea agreement specified that each offense is  
8 “an optional serious violent offense.” [BIC 15; AB 4; RP 125-26] In addition, the  
9 plea agreement stated that “[i]f . . . [D]efendant is incarcerated on a ‘[s]erious  
10 [v]iolent [o]ffense’ pursuant to [Section] 33-2-34 . . . , as amended, then the  
11 provisions of the statute as to earned meritorious deductions will apply.” [RP 126]

12 {5} Before the sentencing hearing, each party presented a sentencing  
13 memorandum to the district court. [RP 138-44, 145-51] At the hearing, the district  
14 court indicated that it had reviewed the sentencing memorandums and the  
15 presentence report, which included at least one police report. [6/22/22 CD 9:05:35-  
16 05:55] Ultimately, the district court found that only Count 1—homicide by vehicle  
17 (reckless driving)—was a serious violent offense. [BIC 22; AB 7; 6/22/22 CD  
18 12:11:10-12:30] Defendant appeals the district court’s decision regarding the serious  
19 violent offense.

1 {6} Under Section 33-2-34, a prisoner may earn meritorious deductions under  
2 certain circumstances. If the offense is a nonviolent offense, the defendant may earn  
3 up to thirty days per month of time served. *See* § 33-2-34(A)(2). If, however, the  
4 offense is designated as a serious violent offense, the sentence reduction is limited  
5 to no more than four days per month of time served. *See* § 33-2-34(A)(1). “Under  
6 the EMDA, some offenses are per se serious violent offenses, while other listed  
7 offenses may, in the court’s discretion, be found to be so.” *Lavone*, 2011-NMCA-  
8 084, ¶ 4. Section 33-2-34(L)(4)(o) lists several “specific crimes that may be  
9 considered serious violent offenses when the nature of the offense and the resulting  
10 harm are such that the court judges the crime to be a serious violent offense.” *State*  
11 *v. Solano*, 2009-NMCA-098, ¶ 9, 146 N.M. 831, 215 P.3d 769 (internal quotation  
12 marks and citation omitted). Included among these discretionary serious violent  
13 offenses, are “third degree homicide by vehicle or great bodily harm by vehicle.”  
14 Section 33-2-34(L)(4)(o). “In order to designate the conduct of a particular  
15 defendant as a serious violent offense under the discretionary category, the district  
16 court must determine that the crime was committed in a physically violent manner  
17 either with an intent to do serious harm or with recklessness in the face of knowledge  
18 that one’s acts are reasonably likely to result in serious harm.” *Solano*, 2009-NMCA-  
19 098, ¶ 10 (internal quotation marks and citation omitted). “This factual basis for

1 designation of a serious violent offense must be reflected in findings made by the  
2 district court.” *Id.*

3 {7} Defendant argues that in order to designate a crime as a serious violent offense  
4 “[t]he district court’s finding must be grounded in adequate evidentiary facts” and  
5 that, in this case, the State failed to present sufficient facts to support the district  
6 court’s determination. [BIC 29-31] Specifically, Defendant contends that “[t]he  
7 State never presented any testimony or documentary evidence to support the claim  
8 that [Defendant] was going 111 mph, or 97 mph at the time of the collision.”  
9 [BIC 31] Defendant claims that the State had “listed several witnesses in its pre-trial  
10 witness lists, [but] failed to present any testimony from any of these witnesses at  
11 sentencing to support its unfounded claim [regarding his speed].” [BIC 31]

12 {8} In response, the State argues that Defendant failed to raise this issue before  
13 the district court. Specifically, the State argues that Defendant’s argument “is  
14 unpreserved because he never objected to the State’s reliance on his speeds, never  
15 submitted contrary evidence, and never challenged the district court’s reliance on  
16 the speeds.” [AB 10] Based on our review of the record proper, we agree with the  
17 State.

18 {9} A similar issue was raised in *State v. Smith*, 1990-NMCA-082, ¶¶ 1, 9, 110  
19 N.M. 534, 797 P.2d 984, where the defendant argued that the State did not present  
20 evidence on which the district court could have concluded that the victim was over

1 the age of sixty. This Court explained that the defendant “never called the [district]  
2 court’s attention to a need for formal evidence on the issue of whether [the]  
3 defendant’s sentence should be enhanced.” *Id.* ¶ 10. As such, this Court held that, on  
4 the facts of the case, “the matter of a lack of formal evidence was not called to the  
5 trial court’s attention and we will not decide the question under these  
6 circumstances.” *Id.*

7 {10} We believe that the case before us is analogous to *Smith*. The State’s  
8 sentencing memorandum expressly stated that “[t]he airbag control model (ACM)  
9 was retrieved from [Defendant’s vehicle],” and it “showed [Defendant’s vehicle]  
10 going 111 mph 5 seconds prior to the collision, and 97 mph a half second prior to  
11 the collision. The speed limit on the portion of Irving is 35 mph.” [RP 145] In  
12 addition, during the sentencing hearing, the State, in its opening, stated that  
13 Defendant was driving “at a very high speed and the [ACM] indicated 111 mph 5  
14 seconds prior to impact when he struck the vehicle.” [6/22/22 CD 9:04:10-04:34]  
15 Although this statement regarding Defendant’s speed at the time of the collision had  
16 been brought up by the State two separate times, Defendant did not directly or  
17 implicitly object to it. Rather, Defendant, at the sentencing hearing, merely argued  
18 that he did “not believe the State has brought forth the evidence necessary to  
19 designate these charges as serious violent offenses.” [6/22/22 CD 11:44:18-44:32]  
20 Beyond this statement, Defendant did not object to or contradict any facts asserted

1 by the State. As such, Defendant did not call the district court’s attention to a need  
2 for formal evidence to support the statement regarding his speed. *See Smith*, 1990-  
3 NMCA-082, ¶ 10; *State v. Montoya*, 2015-NMSC-010, ¶ 45, 345 P.3d 1056 (“In  
4 order to preserve an issue for appeal, a defendant must make a timely objection that  
5 specifically apprises the trial court of the nature of the claimed error and invokes an  
6 intelligent ruling thereon.” (internal quotation marks and citation omitted)).  
7 Accordingly, we conclude that the district court did not abuse its discretion. *See*  
8 *Smith*, 1990-NMCA-082, ¶ 10; *State v. Nash*, 2007-NMCA-141, ¶¶ 6, 9, 142 N.M.  
9 754, 170 P.3d 533 (concluding that the district court did not abuse its discretion when  
10 it considered the defense counsel’s statement regarding the validity of the  
11 defendant’s prior DWI conviction because the state failed to raise the issue before  
12 the district court).

13 {11} Moreover, the record proper indicates that the district court considered  
14 multiple factors, not just Defendant’s speed, when making its determination that  
15 Count 1—homicide by vehicle (reckless driving)—was a serious violent offense.  
16 *See Lavone*, 2011-NMCA-084, ¶ 5; *id.* ¶ 8 (explaining that “[t]he determination [that  
17 an offense is a serious violent offense] is highly dependent on the ‘particular factual  
18 context’ of the case” (citation omitted)). “In the sentencing context, generally, a  
19 district court must consider many factors when it makes a sentencing determination,

1 and the court is given broad discretion to fashion a sentence appropriate to the  
2 offense and the offender.” *Id.* ¶ 9 (internal quotation marks and citation omitted).

3 {12} Here, the district court took into consideration the sentencing memoranda  
4 from both the State and Defendant as well as the statements from the victims’  
5 families. [6/22/22 CD 9:05:35-05:55] In his sentencing memorandum, the Defendant  
6 acknowledged that “he made a terrible and reckless decision to drive at high speed”  
7 and that his “decision to speed on a neighborhood street was the proximate cause of  
8 the[] deaths and injuries[.]” [RP 138-39] In making its determination that  
9 Defendant’s offense was a serious violent one, the district court explained:

10 [D]efendant committed [C]ount 1 in a physically violent manner, and  
11 with recklessness with knowledge that his acts were reasonably likely  
12 to result in serious harm for the following reasons. Defendant struck the  
13 passenger side of a vehicle occupied by [the victim] violently colliding  
14 into that side of the vehicle. Defendant was driving 111 mph in a 35  
15 mph zone, through an intersection in a residential neighborhood. There  
16 were businesses in the area, and it was around 10:00 [p].[m]., after dark  
17 and occurred the Wednesday before the Thanksgiving Holiday, a time  
18 and date that other motorists were likely to be on the roadways.  
19 Defendant had alcohol and [m]arijuana in his system. Defendant had  
20 two prior speeding tickets.

21 [RP 159] Taking into consideration the factual context of this case, we conclude that  
22 the district court appropriately acted within its discretion in determining that  
23 Defendant’s offense was a serious violent offense. *See id.* ¶ 8. Defendant’s conduct  
24 of driving at a high speed, at night, in a residential neighborhood the night before  
25 Thanksgiving constituted “recklessness in the face of knowledge that one’s acts are



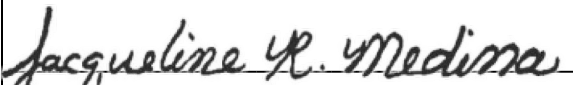
1 reasonably likely to result in serious harm.” *Solano*, 2009-NMCA-098, ¶ 10 (internal  
2 quotation marks and citation omitted).

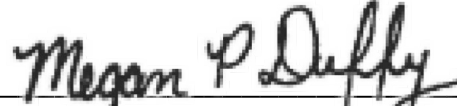
3 {13} For the foregoing reasons, we affirm the district court’s designation of  
4 Defendant’s crime for homicide by vehicle as a serious violent offense.

5 {14} **IT IS SO ORDERED.**

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7 \_\_\_\_\_  
8 **ZACHARY A. IVES, Judge**

8 **WE CONCUR:**

9   
10 \_\_\_\_\_  
11 **JACQUELINE R. MEDINA, Judge**

11   
12 \_\_\_\_\_  
13 **MEGAN P. DUFFY, Judge**