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

Court of Appeals of New Mexico
Filed 10/15/2024 11:44 AM

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,



Ramon J. Maestas
Chief Clerk

4 v.

No. A-1-CA-41053

5 **PERLA CRYSTAL GONZALEZ**
6 **BOTELLO,**

7 Defendant-Appellant.

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

9 **Angie K. Schneider, District Court Judge**

10 Raúl Torrez, Attorney General
11 Lee Green, Assistant Solicitor General
12 Santa Fe, NM

13 for Appellee

14 Bennett J. Baur, Chief Public Defender
15 Tania Shahani, Assistant Appellate Defender
16 Santa Fe, NM

17 for Appellant

18 **MEMORANDUM OPINION**

19 **HENDERSON, 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} Defendant appeals her convictions for possession with intent to distribute
5 methamphetamine, possession of cocaine, and possession of drug paraphernalia,
6 asserting instructional error as to all three convictions. [BIC 1, 5] Because Defendant
7 acknowledges that the error she alleges on appeal was not preserved [BIC 6], our
8 review is for fundamental error. *See State v. Notah*, 2022-NMCA-005, ¶ 23, 503
9 P.3d 418 (noting that where instructional error is unpreserved, we review for
10 fundamental error).

11 {3} The instruction at issue in this case provided the definition of “possession” as
12 follows:

13 A person is in possession [of] methamphetamine and/or cocaine
14 and/or paraphernalia when she knows it is on her person or is in her
15 presence, and she exercises control over it.

16 Even if the substance and/or paraphernalia is not in her physical
17 presence, she is in possession if she knows where it is, and she exercises
18 control over it.

19 Two or more people can have possession of a substance and/or
20 paraphernalia at the same time.

21 A person’s presence in the vicinity of the substance and/or
22 paraphernalia or her knowledge of the existence or the location of the
23 substance and/or paraphernalia, is not, by itself, possession.

24 [BIC 9; AB 5; 1 RP 211] *See* UJI 14-3130 NMRA.

1 {4} Defendant asserts that this “instruction did not require the jury to find that
2 [Defendant] intended to exercise control over the contraband in question; instead, it
3 allowed convictions on mere findings that [Defendant] knew that the contraband was
4 accessible to her and could control it.” [BIC 9-10] This assertion relies on federal
5 cases defining constructive possession to include the intent to control an object. [BIC
6 8-10] *See United States v. Little*, 829 F.3d 1177, 1182 (10th Cir. 2016) (holding that
7 “constructive possession exists when a person not in actual possession knowingly
8 has the power and intent at a given time to exercise dominion or control over an
9 object”). However, Defendant does not dispute that the district court instructed the
10 jury consistent with New Mexico’s uniform jury instruction, which is presumed to
11 be an accurate rendition of the relevant law. [BIC 9] *See State v. Mares*, 2024-
12 NMSC-002, ¶ 43, 543 P.3d 1198 (“Our [Supreme Court’s] approval of a uniform
13 jury instruction indicates that [it has] considered that instruction and determined that
14 it appears to accurately state the law.”); *State v. Wilson*, 1994-NMSC-009, ¶ 5, 116
15 N.M. 793, 867 P.2d 1175 (explaining that our Supreme Court’s adoption of uniform
16 instructions “establishes a presumption that the instructions are correct statements
17 of law”); *see also State v. Caldwell*, 2008-NMCA-049, ¶ 24, 143 N.M. 792, 182 P.3d
18 775 (“For fundamental error to exist, the instruction given must differ materially
19 from the uniform jury instruction.”).

1 {5} Federal law involving different federal jury instructions notwithstanding,
2 Defendant provides us with no New Mexico authority concluding that “intent to
3 exercise control” must be added to the existing instruction defining “possession,”
4 which required the jury in this case to find both that Defendant knew contraband was
5 in her presence and that she exercised control over it. [1 RP 211] *See* UJI 14-3130.
6 Further, the general intent instruction that the jury received required the jury to find
7 that Defendant intentionally exercised control over the substance and/or
8 paraphernalia. [1 RP 212] UJI 14-141 NMRA requires a finding that Defendant
9 acted intentionally when she committed the crime of possession—a crime, again,
10 defined by UJI 14-3130 as possession of the substance and/or paraphernalia when
11 the defendant “knows it is on [her] person or in [her] presence and [s]he exercises of
12 control over it.” [1 RP 211] UJI 14-3130. This is in contrast to the federal precedent
13 cited by Defendant, in which the jury was instructed that the government had to
14 prove that the defendant “ha[d] the power at a given time to exercise dominion or
15 control over an object.” *See Little*, 829 F.3d at 1183. A general intent instruction
16 together with the federal possession instruction would establish only that the
17 defendant intentionally “had the power” to exercise control, *see id.*, while the general
18 intent instruction in UJI 14-141 together with the language of UJI 14-3130 required
19 the jury to find, in part, that Defendant intentionally exercised control over the
20 substance and/or paraphernalia. Finally, even the complete failure to give a

1 definitional instruction generally does not rise to the level of fundamental error. *See*
2 *State v. Barber*, 2004-NMSC-019, ¶¶ 20, 26, 135 N.M. 621, 92 P.3d 633 (holding
3 that a failure to instruct the jury regarding the definition of “possession” did not rise
4 to the level of fundamental error).

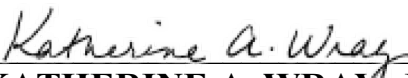
5 {6} Based on the foregoing, we affirm.

6 {7} **IT IS SO ORDERED.**

7
8 
SHAMMARA H. HENDERSON, Judge

9 **WE CONCUR:**

10 
11 JENNIFER L. ATTREP, Chief Judge

12 
13 KATHERINE A. WRAY, Judge