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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,



Ramon J. Maestas  
Chief Clerk

4 v.

**No. A-1-CA-41986**

5 **KASSIDY ESPANA,**

6 Defendant-Appellant.

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

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

9 Raúl Torrez, Attorney General

10 Santa Fe, NM

11 for Appellee

12 Bennett J. Baur, Chief Public Defender

13 Anne Amicarella, Assistant Appellate Defender

14 Santa Fe, NM

15 for Appellant

16 **MEMORANDUM OPINION**

17 **ATTREP, Chief Judge.**

18 {1} This Court issued an opinion on September 12, 2024, which is hereby

19 withdrawn and replaced with this opinion, following the denial of Defendant

20 Kassidy Espana's motion for rehearing. This matter was submitted to this Court on

21 the brief in chief pursuant to the Administrative Order for Appeals in Criminal Cases

22 from the Second, Eleventh, and Twelfth Judicial District Courts in *In re Pilot Project*

1 *for Criminal Appeals*, No. 2022-002, effective November 1, 2022. Having  
2 considered the brief in chief, concluding the briefing submitted to this Court  
3 provides no possibility for reversal, and determining that this case is appropriate for  
4 resolution on Track 1 as defined in that order, we affirm for the following reasons.

5 {2} This appeal arises from the State’s third petition for revocation and an  
6 adjudicatory hearing in which the district court revoked Defendant’s probation and  
7 reinstated Defendant’s probation for a five-year term, equal to her original probation  
8 sentence. [2 RP 339-41, 338; BIC 1] The State’s petition was premised upon  
9 allegations that Defendant “consumed, bought, sold, distributed or possessed a  
10 controlled substance which was not legally prescribed to her.” [2 RP 313] At the  
11 adjudicatory hearing, Defendant’s probation officer testified that Defendant  
12 admitted use of methamphetamine, tested positive for methamphetamine on a saliva  
13 test, and signed a written admission form regarding her use, although the form was  
14 not attached to the probation report. [BIC 11] Defendant appeals from the district  
15 court’s order revoking probation and reinstating probation, arguing that (1) the  
16 testimony detailing the saliva test results lacked foundation and violated Defendant’s  
17 confrontation rights; and (2) the evidence supporting revocation was insufficient. [2  
18 RP 339-41, 344; BIC 14-23, 29-31]

19 {3} Regarding Defendant’s first argument, Defendant acknowledges that she did  
20 not object to the admission of the probation officer’s testimony about the drug test

1 results, and the issue is therefore unpreserved. [BIC 14] Defendant, however, urges  
2 this Court to review the issue for fundamental error. [BIC 14] By alleging  
3 fundamental error, Defendant “must demonstrate the existence of circumstances that  
4 shock the conscience or implicate a fundamental unfairness within the system that  
5 would undermine judicial integrity if left unchecked.” *State v. Salas*, 2017-NMCA-  
6 057, ¶ 11, 400 P.3d 251 (internal quotation marks and citation omitted). We do not  
7 discern any such circumstances and therefore conclude that no fundamental error  
8 occurred as a result of the district court’s admission of the probation officer’s  
9 testimony as to the drug test results.

10 {4} Defendant contends that the admission of the relevant testimony implicated  
11 her confrontation rights because it lacked the proper foundation to establish either  
12 how the drug test was administered or how the test’s results were interpreted. [BIC  
13 21] Relying on *State v. Sanchez*, 2001-NMCA-060, ¶¶ 17-18, 130 N.M. 602, 28 P.3d  
14 1143, [BIC 19] Defendant asserts that “there is no indication . . . that any of the  
15 foundational procedures required of the [S]tate were met or that the evidence was  
16 demonstrated to be reliable.” [BIC 21-22] In *Sanchez*, this Court addressed whether  
17 the admission, over the defendant’s objection, of a defendant’s positive laboratory  
18 test results for drugs violated the defendant’s confrontation rights. 2001-NMCA-  
19 060, ¶¶ 13-14, 17-18. This Court concluded that a defendant is entitled to minimum  
20 due process rights in a probation violation hearing, including some right to

1 confrontation. *See id.* ¶ 13. To protect such rights, *Sanchez* adopted certain  
2 requirements that must be met before laboratory test results may be admitted at a  
3 probation violation hearing. *See id.* ¶¶ 17-18. Relying on the *Sanchez* requirements,  
4 Defendant contends the admission of the probation officer’s testimony about the  
5 saliva test violated due process. [BIC 21-22]

6 {5} Even if we assume this is true, Defendant fails to persuade us that any such  
7 error was fundamental. *See State v. Astorga*, 2016-NMCA-015, ¶ 5, 365 P.3d 53  
8 (“The burden of demonstrating fundamental error is on the party alleging it, and the  
9 standard of review for reversal for fundamental error is an ‘exacting’ one.” (citations  
10 omitted)); *see also State v. Cunningham*, 2000-NMSC-009, 128 N.M. 711, 998 P.2d  
11 176 (“[T]he analysis under a reversible error standard is decidedly different than the  
12 analysis under a fundamental error standard. The main analytical distinction between  
13 a fundamental error analysis and a reversible error analysis is the level of scrutiny  
14 afforded to claims of error.”). To support her claim of fundamental error, Defendant  
15 argues that the saliva test result made up half of the State’s proof and contends that  
16 “[b]ecause the test result was not excluded and the court also did not indicate it was  
17 excluding consideration of it, [her] fundamental rights were violated.” [BIC 22-23]  
18 Such an argument does not convince us that Defendant’s “guilt is so questionable  
19 that upholding a conviction would shock the conscience” or that “a fundamental  
20 unfairness within the system has undermined judicial integrity,” as is required to

1 meet the fundamental error standard. *See Campos v. Bravo*, 2007-NMSC-021, ¶ 18,  
2 141 N.M. 801, 161 P.3d 846; *see also State v. Trujillo*, 2002-NMSC-005, ¶ 60, 131  
3 N.M. 709, 42 P.3d 814 (“Because we find substantial evidence in the record to  
4 support [the d]efendant’s convictions, and because [the d]efendant failed to  
5 demonstrate circumstances that ‘shock the conscience’ or show a fundamental  
6 unfairness, we find no fundamental error.”). We accordingly conclude that no  
7 fundamental error has occurred.

8 {6} Regarding Defendant’s second argument, she contends that the evidence  
9 supporting her probation revocation was insufficient. [BIC 23, 29-31] Proof of a  
10 probation violation must be established with a reasonable certainty, such that a  
11 reasonable and impartial mind would believe that the defendant violated the terms  
12 of probation. *Sanchez*, 2001-NMCA-060, ¶ 13. On appeal we must examine the  
13 evidence in the light most favorable to the district court’s ruling. *State v. Trevor M.*,  
14 2015-NMCA-009, ¶ 14, 341 P.3d 25. We cannot reweigh the evidence or substitute  
15 our judgment for that of the fact-finder. *State v. Ware*, 1994-NMCA-132, ¶ 6, 118  
16 N.M. 703, 884 P.2d 1182.

17 {7} At the adjudicatory hearing, the probation officer provided testimony that  
18 Defendant violated the terms of her probation based on her admitted use of  
19 methamphetamine, the positive drug test results, and Defendant’s signed written  
20 admission form. [BIC 11] This evidence amply supports the district court’s

1 determination that Defendant violated the terms and conditions of her probation. *See*  
2 *State v. Leyba*, 2009-NMCA-030, ¶¶ 16-18, 145 N.M. 712, 204 P.3d 37 (holding  
3 that the defendant’s admission was sufficient to establish a probation violation);  
4 *State v. Leon*, 2013-NMCA-011, ¶¶ 37-39, 41, 292 P.3d 493 (holding that a  
5 probation officer’s testimony was sufficient to establish a violation and to support  
6 revocation of probation). “Once the state offers proof of a breach of a material  
7 condition of probation, the defendant must come forward with evidence to excuse  
8 non-compliance.” *Leon*, 2013-NMCA-011, ¶ 36 (internal quotation marks and  
9 citation omitted). To the extent Defendant contends that her cross-examination of  
10 the probation officer—given she did or could not testify because of her constitutional  
11 right against self-incrimination—should suffice to meet the standard set out in *Leon*,  
12 [BIC 24-28] we disagree based on our review of the record. We accordingly  
13 conclude that sufficient evidence supports Defendant’s probation revocation.

14 {8} Based on the foregoing, we affirm.

15 {9} **IT IS SO ORDERED.**

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\_\_\_\_\_  
JENNIFER L. ATTREP, Chief Judge

1 **WE CONCUR:**

2 *Jacqueline R. Medina*  
3 \_\_\_\_\_  
3 **JACQUELINE R. MEDINA, Judge**

4 *Gerald E. Baca*  
5 \_\_\_\_\_  
5 **GERALD E. BACA, Judge**