

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico

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STATE OF NEW MEXICO,

Plaintiff-Appellee,


Mark Reynolds

v.

No. A-1-CA-40688

LARRY K. FITZGERALD,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF ROOSEVELT COUNTY

Donna J. Mowrer, District Court Judge

Raúl Torrez, Attorney General

Santa Fe, NM

Henry Chynoweth, Honors Attorney

Albuquerque, NM

for Appellee

Bennett J. Baur, Chief Public Defender

Bianca Ybarra, Assistant Appellate Defender

Santa Fe, NM

for Appellant

MEMORANDUM OPINION

ATTREP, Judge.

{1} Defendant Larry Fitzgerald appeals his conviction for receiving stolen
property over \$20,000 (NMSA 1978, § 30-16-11 (2006)), following a jury trial.
Defendant argues that (1) the district court erred by limiting Defendant's cross-

1 examination of a State's witness, and (2) Defendant's conviction is not supported by
2 substantial evidence. We affirm.

3 **BACKGROUND**

4 {2} Defendant and his coworker, Lorenzo Cabral, were working at Bovina Dairy
5 the day a 9,000-gallon diesel fuel tank trailer with an air compressor was stolen from
6 that location. That same night, Defendant, with another unidentified individual, went
7 to his stepdaughter's home hauling a diesel fuel tank trailer with an air compressor
8 and tried to sell her and her husband diesel fuel. The next day, Defendant's
9 stepdaughter learned of the stolen trailer and contacted the Roosevelt County
10 Sheriff's Office. Later that day, a sheriff's deputy, with the assistance of Defendant's
11 stepdaughter, followed Defendant to the stolen trailer. Defendant was arrested and
12 charged with receiving the stolen trailer. According to the criminal complaint,
13 Cabral, who had been with the trailer when the deputy arrived, was arrested on an
14 outstanding arrest warrant.

15 {3} At trial, defense counsel asked Defendant's stepdaughter on cross-
16 examination whether she had spoken with Cabral since he was arrested, and where
17 he had called her from, "expecting to elicit the response 'from jail.'" The State
18 objected, arguing that this was irrelevant and prejudicial. Defense counsel argued
19 that the fact Cabral was calling from jail was relevant because she believed "Cabral
20 was arrested for this charge, . . . and that would make him an alternate suspect." The

1 district court sustained the State’s objection on relevancy grounds, but allowed
2 Defendant to ask who Defendant was working with on the day the trailer was stolen.
3 Defendant ultimately was convicted and this appeal followed.

4 **DISCUSSION**

5 **I. The District Court’s Evidentiary Ruling**

6 {4} Defendant first challenges the district court’s exclusion of evidence that
7 Cabral was calling from jail at the time Defendant’s stepdaughter spoke with him.
8 Defendant argues that the court’s ruling “infringed on defense counsel’s opportunity
9 to fully present an alternate suspect defense to the jury.” In support, Defendant
10 argues that “[d]efense counsel sought to prove . . . Cabral was the guilty party by
11 eliciting testimony regarding where [he] called from with follow-up questions about
12 [his] prior theft convictions.” At trial, however, defense counsel did not attempt to
13 elicit, nor did the district court restrict, any testimony regarding Cabral’s prior theft
14 convictions. Instead, defense counsel only sought to elicit that Cabral was calling
15 from jail and that Cabral was working with Defendant on the day the trailer was
16 stolen—the latter of which the district court permitted. Additionally, Defendant has
17 not directed us to anywhere in the record where defense counsel otherwise pursued,
18 or the district court otherwise restricted, the theory that Cabral was an alternate
19 suspect in this case. *See Crutchfield v. N.M. Dep’t of Tax’n & Revenue*, 2005-
20 NMCA-022, ¶ 14, 137 N.M. 26, 106 P.3d 1273 (“Absent . . . citation to the record

1 [where the party invoked the court’s ruling on an issue] or any obvious preservation,
2 we will not consider the issue.”). We therefore agree with the State that Defendant
3 only preserved the issue about Cabral’s location during the conversation with
4 Defendant’s stepdaughter. *See* Rule 12-321(A) NMRA (“To preserve an issue for
5 review, it must appear that a ruling or decision by the trial court was fairly
6 invoked.”); *see also* Rule 11-103(A) NMRA (providing that “[a] party may claim
7 error in a ruling to admit or exclude evidence only if the error affects a substantial
8 right of the party and . . . if the ruling excludes evidence, the party informs the court
9 of its substance by an offer of proof, unless the substance was apparent from the
10 context”).

11 {5} Because Defendant does not raise plain error with respect to his claims of error
12 pertaining to Cabral’s criminal history or his alternate suspect theory, we limit our
13 review to his preserved claim only. *See State v. Druktenis*, 2004-NMCA-032, ¶ 122,
14 135 N.M. 223, 86 P.3d 1050 (“[G]enerally, [we] will [not] address issues not
15 preserved below and raised for the first time on appeal.”); *State v. Gutierrez*, 2003-
16 NMCA-077, ¶ 9, 133 N.M. 797, 70 P.3d 787 (stating that courts normally do not
17 review for fundamental or plain error when not requested by the appellant). We
18 review preserved challenges to a district court’s evidentiary rulings for an abuse of
19 discretion. *See State v. Salazar*, 2023-NMCA-026, ¶ 8, 527 P.3d 693. “A district
20 court abuses its discretion if its ruling is based on a misapprehension of the law, or

1 is clearly untenable or not justified by reason.” *Id.* (internal quotation marks and
2 citations omitted). As a general rule, “[r]elevant evidence is admissible,” and
3 “[i]rrelevant evidence is not admissible.” Rule 11-402 NMRA; *see also State v.*
4 *Balderama*, 2004-NMSC-008, ¶ 23, 135 N.M. 329, 88 P.3d 845 (same). “Evidence
5 is relevant if it tends to make a fact more or less probable than it would be without
6 the evidence, and the fact is of consequence in determining the action.” *State v.*
7 *Arvizo*, 2021-NMCA-055, ¶ 30, 499 P.3d 1221 (text only) (citation omitted); *see*
8 *also* Rule 11-401 NMRA (defining “relevant evidence”).

9 {6} The State argues that the district court did not err in excluding the evidence
10 about Cabral’s location when Defendant’s stepdaughter spoke with him as
11 irrelevant, that the admission of such evidence would have violated Rules 11-403
12 and 11-404(B) NMRA, and that, in the alternative, any error in excluding such
13 evidence was harmless. Because we agree with the State’s first argument, we do not
14 address the State’s remaining contentions. At trial, defense counsel argued that
15 Cabral’s location was relevant because counsel believed Cabral was arrested and
16 incarcerated for the crime at issue in this case. The record, however, does not reflect
17 this assertion. Instead, it appears Cabral had been arrested on a separate, outstanding
18 warrant. We therefore agree with the State that whether Cabral was in jail for an
19 unrelated crime does not make Defendant’s guilt “more or less probable than it
20 would be without the evidence,” and Cabral’s location at the time of his call with

1 Defendant's stepdaughter was thus not "of consequence in determining"
2 Defendant's guilt. *See* Rule 11-401. However, even if Cabral had been arrested for
3 possessing the stolen trailer, the jury in this case was instructed that "[t]wo or more
4 people can have possession of an object at the same time." *See* UJI 14-130 NMRA.
5 Given this, we are not convinced that Cabral's possible guilt in this case would make
6 Defendant's guilt "more or less probable than it would be without the evidence." *See*
7 Rule 11-401.

8 {7} For these reasons, the district court did not abuse its discretion in excluding
9 the evidence about Cabral's location in jail during a call with Defendant's
10 stepdaughter as irrelevant.

11 **II. Defendant's Substantial Evidence Challenge**

12 {8} Defendant next argues that "the evidence was insufficient to establish that he
13 was the guilty party" because "[t]he majority of the evidence presented was
14 sufficient to prove that . . . Cabral was the one who had acquired possession of the
15 stolen trailer." When reviewing for substantial evidence, however, "[w]e do not
16 evaluate the evidence to determine whether some hypothesis could be designed
17 which is consistent with a finding of innocence." *State v. Montoya*, 2015-NMSC-
18 010, ¶ 52, 345 P.3d 1056 (internal quotation marks and citation omitted). Instead,
19 our task is to determine "whether substantial evidence of either a direct or
20 circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt

1 with respect to every element essential to a conviction.” *Id.* (internal quotation marks
2 and citation omitted). During this review, “we resolve all disputed facts in favor of
3 the [s]tate, indulge all reasonable inferences in support of the verdict, and disregard
4 all evidence and inferences to the contrary.” *State v. Rojo*, 1999-NMSC-001, ¶ 19,
5 126 N.M. 438, 971 P.2d 829.

6 {9} Defendant fails to present an argument, under the above standard, explaining
7 why the evidence presented at trial is insufficient to support his conviction. Further,
8 even assuming *arguendo* that the evidence could have supported Cabral’s conviction
9 for possessing the stolen trailer, as Defendant contends, Defendant does not explain
10 why this renders the evidence insufficient to support his own conviction—
11 particularly given that more than one person can possess the same stolen property,
12 *see* UJI 14-130. *See State v. Fuentes*, 2010-NMCA-027, ¶ 29, 147 N.M. 761, 228
13 P.3d 1181 (noting that we will “not review unclear or undeveloped arguments [that]
14 require us to guess at what [a] part[y’s] arguments might be”). In short, because
15 Defendant does not advance a sufficiency challenge in compliance with our standard
16 of review, we do not further consider it. *See, e.g.*, Rule 12-318(A)(3) NMRA
17 (providing that “[a] contention that a verdict, judgment, or finding of fact is not
18 supported by substantial evidence shall be deemed waived unless the summary of
19 proceedings includes the substance of the evidence bearing on the proposition”).

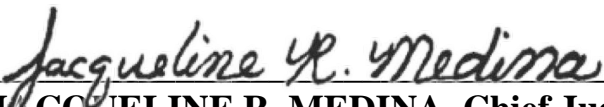
1 **CONCLUSION**

2 {10} For the foregoing reasons, we affirm.

3 {11} **IT IS SO ORDERED.**

4 
5 **JENNIFER L. ATTREP, Judge**

6 **WE CONCUR:**

7 
8 **JACQUELINE R. MEDINA, Chief Judge**

9 
10 **GERALD E. BACA, Judge**