IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v. **No. A-1-CA-41972**

RONALD BARELA,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SAN MIGUEL COUNTY
Abigail Aragon, District Court Judge

Raúl Torrez, Attorney General
Felicity Strachan, Assistant Solicitor General
Santa Fe, NM

for Appellee

Bennett J. Baur, Chief Public Defender
Joelle N. Gonzales, Assistant Appellate Defender
Santa Fe, NM

for Appellant

MEMORANDUM OPINION

ATTREP, Judge.

{1} This matter was submitted to the Court on the brief in chief in the above-entitled cause, pursuant to this Court's notice of assignment to the general calendar with modified briefing. Following consideration of the brief in chief, the Court assigned this matter to Track 2 for additional briefing, pursuant to the Administrative Order in *In re Pilot Project for Criminal Appeals*, No. 2022-002, effective

November 1, 2022. Now having considered the brief in chief, answer brief, and reply brief, we reverse for the following reasons.

{2} Defendant appeals from his convictions, following a jury trial, for drug trafficking and two counts of possession of a controlled substance. [BIC 1-10; RP 219-20] Defendant argues the district court erred in admitting a jail phone call between Defendant and his uncle (Uncle) [BIC 5-14] and that the State committed prosecutorial misconduct in its closing argument. [BIC 15-20] We reverse due to the district court's admission of the jail phone call and, therefore, need not address Defendant's prosecutorial misconduct argument.[1]

BACKGROUND

{3} In the jail phone call, Defendant converses with Uncle about his potential sentence. In particular, they discuss the State's ability to enhance any drug trafficking conviction, seemingly based on Defendant's potential status as a habitual offender or due to his prior conviction for drug trafficking. [BIC 4; RP 131, 91]

> Uncle: This is how I read it. It's cuz they are giving you enhanced charges already. Give nine years for fucking, uhh you didn't kill nobody, you sold drugs. So how can they give you an enhancement charge already? It's an enhanced charge itself.

[1]In some cases, prosecutorial misconduct is so severe that a court may bar a retrial against a defendant. *State v. Breit*, 1996-NMSC-067, ¶ 32, 122 N.M. 655, 930 P.2d 792 (establishing a two-part test for determining when misconduct might rise to the level that a retrial should be barred). Defendant, however, has not argued that retrial should be barred, so we do not discuss this issue.

> Defendant: So, so, I'm getting an enhanced though on the trafficking? I'm already being enhanced.

[RP 131; BIC 4]

{4} Prior to trial, the State moved for admission of the jail phone call, arguing that it "reflects [D]efendant's state of mind as to what consequences [he] faces," and that the phone call was admissible as a party-opponent adoptive statement because Defendant did not refute Uncle's statement that he sold drugs and responded with reference to the trafficking charge. [RP 131] At the hearing on the State's motion, Defendant objected to the relevance of the jail phone call. [BIC 12; Audio 4/15/24, 4:14:43-4:16:50] Defense counsel additionally asserted that Defendant's failure to refute Uncle's statement that Defendant sold drugs was not admissible as a party-opponent admission, arguing "[t]here's no authority that says if somebody alleges something during a jail call and you don't refute that allegation . . . that you somehow adopt it and that becomes an admission." [BIC 7; Audio 4/15/24, 4:14:43-4:16:50] Defendant did not otherwise contend that Uncle's statement was inadmissible hearsay.

{5} The district court admitted the jail phone call without specifying its reasoning. The district court stated only that Defendant's arguments go "to its weight, not its admissibility." [BIC 12; Audio 4/15/24, 4:16:50-56]

STANDARD OF REVIEW

{6} We review preserved evidentiary rulings for an abuse of discretion. *State v. Hughey*, 2007-NMSC-036, ¶ 9, 142 N.M. 83, 163 P.3d 470. "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the [district] court abused its discretion by its ruling unless we can characterize the ruling as clearly untenable or not justified by reason." *State v. Rojo*, 1999-NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829 (internal quotation marks and citation omitted). In the context of evidentiary errors, reversal is only justified if an error is harmful. *State v. Tollardo*, 2012-NMSC-008, ¶ 25, 275 P.3d 110. An error, such as the wrongful admission of evidence, is harmless "when there is no reasonable *probability* the error affected the verdict." *Id.* ¶ 36 (internal quotation marks and citation omitted).

DISCUSSION

{7} On appeal, Defendant maintains that the jail call is not relevant, with the exception of Uncle's statement that Defendant sold drugs. [BIC 8-11] Defendant also argues that Uncle's statement constituted inadmissible hearsay [BIC 8-9], and Defendant did not adopt that statement by failing to refute it. [BIC 8-11]

{8} In response, the State argues that the jail phone call was relevant to establish that Defendant knew what the substances in his possession were and that they were illegal, and that Defendant possessed the cocaine with the intent to transfer it. [AB

4-5] The State also argues that Defendant's failure to refute Uncle's statement that Defendant sold drugs was relevant to establish Defendant's consciousness of guilt. [AB 6-7] The State does not respond to Defendant's hearsay arguments. [AB 1-18]

{9} We note that the record is silent regarding the district court's reasoning in admitting the jail phone call and the parties do not necessarily agree on the basis for the district court's ruling. [AB 4, 8-9; RB 2] Absent such grounds, we analyze the district court's decision based on the two arguments advanced by the State in the motion in limine and at the hearing on the motion: that the call is (1) relevant; and (2) that the call is admissible as an adoptive admission of Defendant. [RP 131]

{10} We look first to the relevance of the jail phone call. *See State v. Chavez*, 2024-NMSC-023, ¶ 20, 562 P.3d 521 (noting that relevance is the threshold question of admissibility). We understand both parties to agree that the only relevant statement said out loud by either party during the conversation was Uncle's statement to Defendant: "you sold drugs." [BIC 8; AB 5-6] We agree.

{11} The majority of Uncle's statement is irrelevant insofar as Uncle discusses his understanding of the State's intent to enhance Defendant's sentence. *See* Rule 11-401 NMRA (defining relevant evidence as that which tends to make a material fact "more or less probable than it would be without the evidence"). And we do not glean any relevance from Defendant's response insofar as it relates to the enhancement of his sentence. *See id.* (stating that relevant evidence is probative); *see also State v.*

Brown, 1997-NMSC-029, ¶ 12, 123 N.M. 413, 941 P.2d 494 ("Information regarding the consequences of a verdict is . . . irrelevant to the jury's task." (internal quotation marks and citation omitted)).

{12} To the extent that the State argues that what Defendant *said* in the phone call is relevant to his state of mind, knowledge, intent, or consciousness of guilt, we disagree. [RP 131; AB 4-6] Instead, we agree with Defendant that the circumstances of the call indicate that Defendant and Uncle were conversationally discussing Defendant's possible sentence, and that Defendant was responding to Uncle's question asking how Defendant's trafficking charge—an already self-enhancing charge, *see* NMSA 1978, § 30-31-20(B) (2006)—might be additionally enhanced. [BIC 4, 10] Defendant's words do not evince any belief as to the inevitability of his conviction. [RP 131; BIC 4] *Cf. Chavez*, 2024-NMSC-023, ¶¶ 33-34 (holding that a defendant's statement to his son that "[d]addy's going to prison" was potentially relevant to indicate consciousness of guilt "because it reasonably could be construed as an acknowledgment that [the d]efendant committed a criminally culpable act for which he would be sentenced"). Rather, Defendant states only that he is "getting . . . enhanced" on the trafficking charge, an apparent statement of recent fact,[2]

[2]The State filed a supplemental criminal information regarding Defendant's prior trafficking conviction on March 26, 2024 [RP 91-95], and Defendant was arraigned on the supplemental criminal information on April 5, 2024 [RP 127-29], five days prior to the at-issue conversation [RP 131].

regarding the potential consequences faced by Defendant. In this context, it would be unreasonable to view Defendant's statement as tending to make any material fact more probable or otherwise demonstrating Defendant's consciousness of guilt. *See* Rule 11-401; *see also Chavez*, 2024-NMSC-023, ¶ 32 (looking at a defendant's statements in context to determine their relevance).

{13} Accordingly, we conclude that Defendant's jail phone call statements discussing the enhancement of his sentence are not relevant. *See Brown*, 1997-NMSC-029, ¶ 12; *see also Chavez*, 2024-NMSC-023, ¶ 20 (explaining that a jail phone call is "*inadmissible* simply because it was a statement of a party opponent solely—while instead, it must prove something meaningful to the case"); Rule 11-402 NMRA ("Irrelevant evidence is not admissible."). However, we understand the State to argue that the conversation is nonetheless relevant to demonstrate what Defendant did *not* say. [AB 4-6] Specifically, that Defendant did not refute Uncle's statement that Defendant sold drugs. [AB 4-6]

{14} If we were to assume that Defendant's silence[3] in response to Uncle's statement is probative of Defendant's guilt, as was argued by the State in the district court [RP 131], we would agree that it would render the entire jail call relevant. *Cf.*

[3] To the extent Defendant claims that this case involves Defendant's constitutional right to silence [BIC 11, 16], we are not persuaded [*See* AB 13-14]. We refer to Defendant's silence here only to discuss the probative value of any failure to respond to Uncle by Defendant.

State v. Castillo-Sanchez, 1999-NMCA-085, ¶ 23, 127 N.M. 540, 984 P.2d 787 (noting that when a recorded conversation between a defendant and another person constitutes "a reciprocal and integrated utterance between" the two persons, the other party's statements are "necessary to put [the d]efendant's statements in context" (internal quotation marks and citation omitted)). However, "[i]n most circumstances silence is so ambiguous that it is of little probative force." *State v. Martin*, 1984-NMSC-077, ¶ 12, 101 N.M. 595, 686 P.2d 937 (internal quotation marks and citation omitted). As a result, we could only consider Defendant's failure to refute Uncle's statement as relevant, and thus admissible, if it has some independent probative value. *See State v. Doe*, 1977-NMCA-078, ¶ 10, 91 N.M. 92, 570 P.2d 923 ("Silence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation. Failure to contest an assertion, however, is considered evidence of acquiescence only if it would have been natural under the circumstances to object to the assertion in question." (internal quotation marks and citation omitted)); *cf. State v. DeGraff*, 2006-NMSC-011, ¶ 15, 139 N.M. 211, 131 P.3d 61 (noting that we have recognized exceptions to the rule that evidence of a defendant's silence is generally not admissible as proof of guilt when the state can make some additional showing of relevance).

{15} At the district court level, the State argued that the jail phone call was independently probative as essentially a confession to trafficking because Defendant adopted, by failure to refute, Uncle's statement that Defendant sold drugs. [RP 131] Thus, the State claimed that Uncle's statement "you sold drugs" was exempted from the rule against hearsay and admissible for its truth as an adoptive party opponent statement. [RP 131] *See* Rule 11-801(D)(2)(b) NMRA (excluding from the definition of hearsay a third-party statement that is offered against an opposing party and "is one that the party manifested that it adopted or believed to be true"). The State does not appear to raise such an argument in this appeal [AB 9], but we nevertheless must address it because Defendant's failure to rebut Uncle's statement is relevant only if it may be construed as adopting the statement as true. [RB 2; RP 131-135; Audio 4/15/24, 4:14:43-4:16:50] *See* Rule 11-402; Rule 11-801(D)(2)(b); *Doe*, 1977-NMCA-078, ¶ 10. We conclude that it cannot.

{16} As we discussed previously, the conversation between Defendant and Uncle focused on the enhancement of Defendant's sentence rather than the underlying merits of the State's case. During that conversation, Uncle did not accuse Defendant of selling drugs or ask him whether he had sold drugs. [RP 131; BIC 4] Instead, we agree with Defendant that Uncle's reference to Defendant selling drugs was to express Uncle's belief that Defendant's possible sentence exposure for the trafficking charge was high. [RP 131; BIC 4] Thus, the context of the conversation

did not naturally or obviously call for a reply from Defendant to Uncle's statement that "[he] sold drugs," nor did Defendant's response to the operative portion of the discussion—the potential enhancement of his sentence—manifest his agreement with, or belief in the truth of, Uncle's seemingly offhand statement that Defendant sold drugs. *See Doe*, 1977-NMCA-078, ¶¶ 10-14 (noting that an assertion made by another in a defendant's presence is admissible as adoptive party-opponent statement if the defendant, by his actions and responses, unquestionably showed agreement with the assertion or if the defendant failed to rebut the assertion when the circumstances naturally called for such a rebuttal). We therefore are compelled to conclude that the district court abused its discretion to the extent it found that Defendant's failure to refute Uncle's statement manifested his adoption of the statement or his belief in its truth. *See* Rule 11-801(D)(2)(b); *Doe*, 1977-NMCA-078, ¶ 13 (noting that the requirements of Rule 11-801(D)(2)(b) "have not been met if the party does no more than fail to contest an assertion," and instead the Rule "requires more; something not obscure, but obvious"); *see also id.* ¶¶ 11-12 ("[T]here is an admission when the party-opponent manifests his adoption of the statement or manifests his belief in the truth of the statement. The word 'manifest' . . . is defined to include: 'capable of being easily understood or recognized at once by the mind: not obscure: OBVIOUS.'" (citation omitted)).

{17} Because Defendant's failure to refute Uncle was not independently probative as an adoptive confession to trafficking by Defendant, *see* Rule 11-801(D)(2)(b); *Doe*, 1977-NMCA-078, ¶ 13, we are not persuaded by the State's arguments that Defendant's failure to refute Uncle had any probative value [AB 4-7]. In the context of the conversation, the fact that Defendant did not correct Uncle or otherwise protest his innocence does not indicate, and has no bearing on, Defendant's consciousness of guilt, knowledge, or intent [AB 4-7]. *See* Rule 11-401; *see also Chavez*, 2024-NMSC-023, ¶ 28 (noting that "[a] defendant's subsequent statements are only probative of criminal intent if they relate back to the defendant's mens rea prior to the commission of the crime"); *id.* ¶ 32-33 (discussing whether a defendant's statements could reasonably be understood as an expression of guilt for the charged crime). Indeed, we note that the State requested that the jury consider the jail phone call not for any of these purposes, but instead for the truth of the matter asserted: that Defendant, in fact, sold drugs. [Audio 4/16/24 at 3:47:10-3:51:00; 3:53:10-3:53:20] We therefore conclude that the jail phone call was not admissible for purposes of demonstrating what Defendant did not say. *See Doe*, 1977-NMCA-078, ¶¶ 10-13; Rule 11-401; *cf.* 11-801(D)(2)(b).

{18} For the foregoing reasons, we hold that the district court abused its discretion in admitting the jail phone call. Nevertheless, we will not reverse on this basis unless

the error was harmful. *Tollardo*, 2012-NMSC-008, ¶ 25. For the reasons that follow, we conclude that it was.

{19} "[N]on-constitutional error is harmless when there is no reasonable *probability* the error affected the verdict." *Id.* ¶ 36 (internal quotation marks and citation omitted). In determining "the likely effect of the error" under this standard, "courts should evaluate all of the circumstances surrounding the error. This requires an examination of the error itself, which [may] . . . include an examination of the source of the error and the emphasis placed upon the error." *Id.* ¶ 43; *see also State v. Leyba*, 2012-NMSC-037, ¶ 24, 289 P.3d 1215 ("To put the error in context, we often look at the other, non-objectionable evidence of guilt, not for a sufficiency-of-the-evidence analysis, but to evaluate what role the error played at trial.").

{20} Here, related to Defendant's conviction for trafficking cocaine by possession with intent to distribute, the jury was presented with evidence that Defendant was in his car when he was approached by officers and arrested on an outstanding warrant. [BIC 2] His wife was in the passenger seat of the car and was also taken into custody. [BIC 2] During an inventory search of the car, officers found a "white chalk rock substance" in the car's sunglasses compartment [BIC 3], along with four[4] rocks

[4]The State contends that Defendant was found in possession of more than forty rocks of crack cocaine [AB 12, 15-16]. This assertion is not supported by the record and we assume it is a typographical error. We note that, after a defense objection to the prosecutor's statement in closing argument that the amount of cocaine amounted to forty or fifty hits, the prosecutor mistakenly argued that Defendant was found in

individually wrapped in foil that were inside of a flashlight. [BIC 3] The substances tested positive as cocaine. [BIC 3] The cocaine found in the sunglasses compartment weighed 6.9 grams (5.36 grams net). [BIC 3] It is unclear the manner in which the four individually wrapped cocaine rocks were weighed, but the State presented testimony that three of the rocks weighed 0.12, 0.14, and 0.15 grams, respectively. [BIC 3] The total weight of all of the cocaine amounted to 7.1 grams. [BIC 3]

{21} The State was unable to qualify its intended expert witness in drug trafficking. [BIC 4] As a result, the State presented no evidence that the quantity or packaging of the cocaine was indicative of drug trafficking. [BIC 4] The State cited the fact that there were three different controlled substances—cocaine (for the trafficking charge) [RP 153] and methadone and Alprazolam (for the two possession charges) [RP 158-59]—as proof of drug trafficking. [Audio 4/16/24 at 3:39:40-3:40:00; 3:52:27-34] The State's primary argument to support the drug trafficking charge was that Defendant admitted to drug trafficking during the jail phone call when he failed to refute Uncle's statement. [BIC 5; Audio 4/16/24 10:52:45-10:54:20, 3:43:30-3:47:25, 3:48:30-3:53:15, 4:07:25-4:07:48] Indeed, the State argued that Defendant's own words were the best evidence it had. [Audio 4/16/24 3:43:40-52]

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possession of forty to fifty cocaine rocks. [Audio 4/16/25 3:51:30-3:52:13] However, the prosecutor's rebuttal closing argument corrected that error, noting that Defendant was found in possession of four individually packaged rocks, not forty to fifty. [Audio 4/16/25 4:05:45-51]

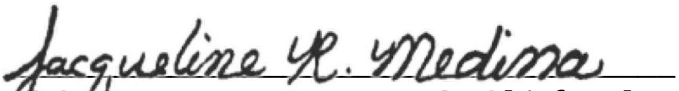
{22} Given the amount of cocaine found in the vehicle, the lack of any testimony that the quantity or packaging of the cocaine was indicative of drug trafficking, and the significant emphasis that was placed on the jail phone call, and in particular, Defendant's adoptive admission of Uncle's statement, we cannot conclude that there is no reasonable probability that the admission of the jail phone call affected the jury's verdict as to the drug trafficking charge. *See Tollardo*, 2012-NMSC-008, ¶ 25; *Leyba*, 2012-NMSC-037, ¶ 24. Further, because the State argued Defendant's failure to defend his innocence was an admission of guilt, and the State lumped all three controlled substances together as proof of drug trafficking, we likewise cannot say that there was no reasonable probability the admission of the jail phone call affected the jury's verdict as to the two drug possession charges. *See Tollardo*, 2012-NMSC-008, ¶ 25; *Leyba*, 2012-NMSC-037, ¶ 24. We thus conclude that the error was not harmless.

{23} Based on the foregoing, we hold that the district court abused its discretion in admitting the jail phone call, and the error was not harmless. We therefore vacate Defendant's convictions and remand this case to the district court for proceedings consistent with this opinion.

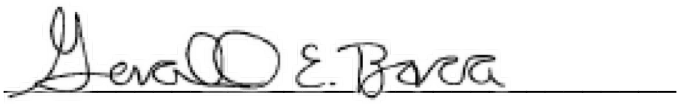
{24} **IT IS SO ORDERED.**

JENNIFER L. ATTREP, Judge

WE CONCUR:



JACQUELINE R. MEDINA, Chief Judge



GERALD E. BACA, Judge