

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Court of Appeals of New Mexico
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Plaintiff-Appellee,

v.

No. A-1-CA-41716


Mark Reynolds

OSCAR FROYLAN HUERTA,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY

Mark Sanchez, District Court Judge

Raúl Torrez, Attorney General

Santa Fe, NM

Henry Chynoweth, Honors Attorney/Assistant Solicitor General

Albuquerque, NM

for Appellee

Bennett J. Baur, Chief Public Defender

Mallory E. Harwood, Assistant Appellate Defender

Santa Fe, NM

for Appellant

MEMORANDUM OPINION

MEDINA, Chief Judge.

{1} Defendant Oscar Huerta appeals his convictions of false imprisonment, contrary to NMSA 1978, Section 30-4-3 (1963); criminal damage to the property of a household member under \$1,000, contrary to NMSA 1978, Section 30-3-18 (2009); and battery against a household member, contrary to NMSA 1978, Section

1 30-3-15 (2008). Defendant argues (1) there was insufficient evidence to support his
2 conviction for criminal damage to the property of a household member; (2) it was
3 plain error for a police officer to testify to Defendant's credibility, and (3) there was
4 prosecutorial misconduct. For the following reasons, we vacate the criminal damage
5 to the property of a household member conviction and affirm Defendant's remaining
6 convictions.

7 **BACKGROUND**

8 {2} The following facts were presented to a jury. In March 2020, an officer
9 responded to a residence in reference to a domestic dispute in Jal, New Mexico.
10 Upon his arrival at the residence, the officer first spoke with Defendant who was
11 standing outside. When the officer asked Defendant what happened earlier that
12 evening, Defendant responded that nothing at all had happened. Defendant had an
13 odor of alcohol on his person and, when asked, stated that he had been drinking.
14 Defendant's knuckles were red, and he had scratches on his neck. The officer asked
15 Defendant where the scratches came from, and Defendant stated he had gotten into
16 an argument.

17 {3} The officer then entered the residence and spoke with Defendant's wife
18 (Victim). According to the officer, Victim was extremely distraught; it looked like
19 she had been crying, and the inside of the residence was in disarray with broken
20 items. The officer documented injuries he saw on Victim with his lapel camera.

1 Victim had a black eye, bumps on the back of her head, and bruises that, according
2 to Victim, she sustained after being struck by Defendant. The officer observed a
3 broken television and Victim's broken eyeglasses. Victim told the officer that she
4 had scratched Defendant on his neck while trying to defend herself. After speaking
5 with Defendant and Victim, the officer placed Defendant under arrest.

6 {4} At trial, Victim testified that Defendant punched her and broke her glasses,
7 which cost two to three hundred dollars. She also testified that Defendant punched
8 and broke the television. The State referred to the broken glasses and television
9 during closing argument as evidence of the criminal damage to property.

10 {5} Pertinent to the vouching issue raised by Defendant on appeal, Defendant
11 highlights various portions of the officer's testimony. While testifying about his
12 observations leading up to Defendant's arrest, the officer testified, "I believe[d] that
13 [Defendant was] not telling the whole truth." The officer also testified that the
14 injuries he observed on Victim and Defendant were consistent with what Victim told
15 him and "not consistent" with what Defendant told him. Given his observations and
16 conversations with Victim and Defendant, the officer testified, "I determined that
17 [Defendant] was a primary aggressor in an event of domestic violence."

18 {6} Further, Defendant highlights that the officer's decision-making process—
19 and his "primary aggressor" determination—were testified to again on redirect
20 examination. Defendant also notes some statements by the officer elicited during

1 defense counsel's cross-examination relating to Victim possibly returning to her
2 mother's place in Arizona as a "safe haven."

3 {7} Finally, Defendant highlights that, during closing argument, the State stated:

4 You were also going to get to hear from the officer who heard both of
5 these stories and then went in and looked around and made his own
6 determinations. You heard all of that. You got to see for yourself
7 [Victim]'s injuries the night of from the point of view of [the officer].

8 {8} The jury convicted Defendant of false imprisonment, criminal damage to the
9 property of a household member under \$1,000, and battery against a household
10 member. This appeal followed.

11 **DISCUSSION**

12 **I. The Evidence Was Insufficient to Convict Defendant of Criminal Damage** 13 **to Property of a Household Member**

14 {9} Defendant argues that the evidence is insufficient to support his criminal
15 damage to property conviction. Specifically, Defendant asserts that—in order to
16 convict him of criminal damage to property—the jury was instructed that it had to
17 find that he intentionally damaged "real property" and the only evidence of damage
18 to property the State presented was that of damage to personal property. The State
19 concedes that the jury was only instructed on a theory of criminal damage to real
20 property but, nonetheless, contends that the elements of the crime are not limited to
21 real property.

1 {10} Directing this Court to the jury instruction for criminal damage to property of
2 a household member, UJI 14-318 NMRA, the State contends that the four different
3 types of bracketed property identified in the jury instruction—real, personal,
4 community and jointly owned—“are not each themselves essential elements” but
5 rather “alternative ways by which the same essential elements may be satisfied.” The
6 State next contends that the apparent erroneous selection of the “real property”
7 alternative, instead of the “personal property” alternative, in the instruction given to
8 the jury is analogous to the jury being instructed on “an additional nonessential
9 element.” Building on this contention, the State argues that we should test the
10 sufficiency of the evidence against the elements of the statute and not against the
11 jury instructions actually given—essentially that we should ignore that the jury
12 instructions were limited to the “real property” alternative. The State, however, cites
13 no authority for the idea that where, as here, there was an apparent clerical error in
14 the instructions, the sufficiency of the evidence is nevertheless tested against the jury
15 instructions that *should* have been given, without the clerical error. *See, e.g., State*
16 *v. Vigil-Giron*, 2014-NMCA-069, ¶ 60, 327 P.3d 1129 (providing that “appellate
17 courts will not consider an issue if no authority is cited in support of the issue and
18 that, given no cited authority, we assume no such authority exists”). Further, we have
19 case law providing that the sufficiency of the evidence is tested against the jury
20 instructions actually given at trial. *See State v. Garcia*, 2021-NMSC-019, ¶¶ 22-24,

1 488 P.3d 585 (providing that appellate courts “review[ing] for sufficiency of the
2 evidence consider[] all of the evidence in support of conviction under the alleged
3 erroneous jury instruction” and “do not evaluate the sufficiency of the evidence for
4 instructions that were not given to the jury”; and concluding that insufficient
5 evidence supported the conviction under purportedly erroneous jury instructions
6 without deciding whether there was instructional error (internal quotation marks and
7 citations omitted)). We accordingly do not find the State’s argument persuasive in
8 this case.

9 {11} “[W]e apply a substantial evidence standard to review the sufficiency of the
10 evidence.” *State v. Chavez*, 2009-NMSC-035, ¶ 11, 146 N.M. 434, 211 P.3d 891.
11 “The relevant question is whether, after viewing the evidence in the light most
12 favorable to the prosecution, any rational trier of fact could have found the essential
13 elements of the crime beyond a reasonable doubt.” *Id.* (alteration, internal quotation
14 marks, and citation omitted). This review is highly deferential to the jury’s verdict,
15 but it is “the independent responsibility of the courts to ensure that the jury’s
16 decisions are supportable by evidence in the record, rather than mere guess or
17 conjecture.” *State v. Slade*, 2014-NMCA-088, ¶ 14, 331 P.3d 930 (internal quotation
18 marks and citation omitted).

19 {12} Under our Rules of Criminal Procedure, the district court is required to
20 instruct the jury on “all questions of law essential for a conviction of any crime

1 submitted to the jury.” Rule 5-608(A) NMRA. The State’s theory of criminal
2 damage to property was that Defendant damaged personal property of Victim, a
3 household member. As noted above, UJI 14-318 identifies four different types of
4 property in brackets. In addition, the directive in use note 4 of the instruction states
5 to “[u]se only the applicable bracketed element established by the evidence.” The
6 State presented evidence that Defendant damaged personal property belonging to the
7 Victim, but the jury was instructed on damage to real property not personal property.
8 {13} The State presented the jury with evidence of damage to eyeglasses and a
9 television, neither of which are real property¹. Moreover, the State concedes that it
10 did not present evidence of criminal damage to real property. Assessing the evidence
11 in light of the jury instructions given, *see Garcia*, 2021-NMSC-019, ¶ 22, we
12 conclude that Defendant’s conviction for criminal damage to property of a
13 household member under \$1,000 is not supported by substantial evidence.

¹“Real property” is defined as “[l]and and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land,” *Real Property, Black’s Law Dictionary* (12th ed. 2024), whereas “personal property” is defined as “[a]ny movable or intangible thing that is subject to ownership and not classified as real property.” *Personal property, Black’s Law Dictionary* (12th ed. 2024).

II. The Officer's Testimony Did Not Amount to Plain Error

{14} Defendant contends the officer repeatedly commented on his credibility and guilt, and that this testimony was prejudicial.² The State responds that (1) the officer did not directly comment on another witness's testimony, but instead testified that he did not think Defendant had provided the "whole" truth; and (2) the State did not encourage or elaborate on an answer relating to whether the officer thought Defendant was a credible witness. Both parties agree, as do we, that this issue was not preserved by a timely objection, so we review only for plain error.

{15} The doctrine of plain error, arising from our Rules of Evidence, applies specifically to evidentiary matters and permits a court to "take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved." Rule 11-103(E) NMRA. We will reverse for plain error only where we find that there is "(1) error, that is (2) plain, and (3) that affects substantial rights." *State v. Hill*, 2008-NMCA-117, ¶ 21, 144 N.M. 775, 192 P.3d 770 (internal quotation marks and citation omitted). To find plain error, the Court "must be convinced that admission of the testimony constituted an injustice that created grave doubts concerning the validity of the verdict." *State v. Montoya*, 2015-NMSC-010, ¶ 46, 345 P.3d 1056 (internal quotation marks and citation omitted). "Further, in determining whether

²Defendant additionally argued that the officer commented on the ultimate issue of the case but appears to abandon this argument in his reply brief and as a result, we do not address it.

1 there has been plain error, we must examine the alleged errors in the context of the
2 testimony as a whole.” *Id.* (text only) (citation omitted).

3 {16} Our plain error review requires us first to determine whether there was error
4 in admitting the testimony. *See Hill*, 2008-NMCA-117, ¶ 21. Testimony that
5 comments directly on the credibility of witnesses where credibility is pivotal
6 amounts to plain error in some circumstances. *See State v. Lucero*, 1993-NMSC-
7 064, ¶¶ 15-17, 22, 116 N.M. 450, 863 P.2d 1071 (Where “credibility was a pivotal
8 issue,” admission of a doctor’s testimony that commented directly upon the
9 credibility of the complainant, named the perpetrator in a way that “was tantamount
10 to saying the complainant was telling the truth,” and testified that the cause of the
11 complainant’s symptoms “was in fact sexual molestation” amounted to plain error);
12 *State v. Alberico*, 1993-NMSC-047, ¶ 85, 116 N.M. 156, 861 P.2d 192 (“[D]irect
13 testimony regarding the credibility or truthfulness of the alleged victim of sexual
14 abuse” is “expressly prohibit[ed].”); *State v. Garcia*, 2019-NMCA-056, ¶¶ 12, 16,
15 450 P.3d 418 (determining that it was plain error to admit credibility testimony when
16 credibility was “a pivotal issue in [the] case” and a witness “repeatedly commented,
17 both directly and indirectly, upon [the v]ictim’s truthfulness, identified [the
18 d]efendant as [the v]ictim’s molester numerous times based solely on [the v]ictim’s
19 statement of events, and repeated in detail [the v]ictim’s statements regarding the

sexual abuse”). Assuming without deciding that the officer’s testimony was error, we hold that this testimony did not amount to plain error.

{17} Despite the officer’s testimony that he determined Defendant was the “primary aggressor” and that he did not believe Defendant was telling the whole truth, the jury had other evidence to make its determination as to Defendant’s guilt on the charges, such as Victim’s testimony, the officer’s lapel recording, and photographs of Victim’s injuries. Further, the officer did not comment directly on the credibility of Victim or intrude upon the jury’s function as arbiter of the witnesses’ credibility. *See State v. Smith*, 2024-NMCA-068, ¶¶ 8, 9, 556 P.3d 988 (examining the nature of the challenged credibility testimony, in light of the evidence as a whole, in undertaking a plain error review). The jury’s function to be the arbiter of the witnesses’ credibility here remained intact by way of Defendant’s testimony, Victim’s testimony, lapel camera footage, and other photographic evidence.

{18} In light of the testimony of the witnesses and the various forms of physical evidence corroborating Victim’s testimony and calling into question the veracity of Defendant’s testimony, we are not convinced that admission of the officer’s statements constituted an injustice that created grave doubts concerning the validity of the verdict. *See Montoya*, 2015-NMSC-010, ¶ 46 (“[I]n determining whether there

has been plain error, we must examine the alleged errors in the context of the testimony as a whole.” *Id.* (text only) (citation omitted).

III. The State’s Conduct Was Not Fundamental Error

{19} Defendant asserts that “the [State] committed misconduct by eliciting and focusing on testimony that indicated guilt was already determined by [the officer].” The State responds that the officer’s testimony regarding the determinations he made while investigating the domestic dispute did not rise to the level of fundamental error. Both parties agree, as do we, that this issue was not preserved by a timely objection.

{20} When an issue of prosecutorial misconduct has not been properly preserved by a timely objection at trial, we have discretion to review the claim on appeal for fundamental error. *State v. Trujillo*, 2002-NMSC-005, ¶ 52, 131 N.M. 709, 42 P.3d 814. “Prosecutorial misconduct rises to the level of fundamental error when it is so egregious and had such a persuasive and prejudicial effect on the jury’s verdict that the defendant was deprived of a fair trial.” *State v. Allen*, 2000-NMSC-002, ¶ 95, 128 N.M. 482, 994 P.2d 728 (internal quotation marks and citation omitted).

{21} With regard to closing arguments, the State highlighted evidence that was persuasive as to Defendant’s guilt. The State also emphasized that the jury should make its own determination in the final moments of closing argument. We conclude that the State’s articulation of the officer’s testimony does not rise to the level of

1 fundamental error by having such a persuasive and prejudicial effect on the jury's
2 verdict as to deprive Defendant of a fair trial.

3 **CONCLUSION**

4 {22} For these reasons, we reverse the criminal damage to the property of a
5 household member conviction and affirm on all other grounds.

6 {23} **IT IS SO ORDERED.**

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

9 **WE CONCUR:**


10 
11 **JENNIFER L. ATTREP, Judge**

12 
13 **ZACHARY A. IVES, Judge**

1 **IVES, J. (concurring, writing separately).**

2 {24} I concur fully in the opinion of the Court. I write separately only to spotlight
3 again, as this Court did in *State v. Sivils*, 2023-NMCA-080, ¶¶ 28-31, 538 P.3d 126,
4 the apparent tension between binding precedents on the question of whether the
5 sufficiency of the evidence should be measured against the actual essential elements
6 of the offense charged or instead against the incorrect instructions given to the jury.
7 Because this is “a question of constitutional magnitude that arises often on appeal,”
8 *id.* ¶ 32, it seems to me that New Mexicans deserve an answer. But the answer they
9 deserve is one based on careful consideration of briefs that grapple with the relevant
10 precedents. Such briefs were not filed in this case, and, based on the briefs we have
11 here, I believe this Court’s handling of this appeal is an appropriate one. I hope that
12 soon a different appeal will present a good opportunity to answer the question.

13
14 
ZACHARY A. IVES, Judge

15 
16 A. TREP, J., concurs.