

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico
Filed 10/27/2026 7:29 AM


Mark Reynolds

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

No. A-1-CA-43014

REBECCA ILIANA HERRERA,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY

Stephen Ochoa, District Court Judge

Raúl Torrez, Attorney General
Janet Franklin, Assistant Solicitor General
Santa Fe, NM

for Appellee

Gary C. Mitchell, P.C.
Gary C. Mitchell
Ruidoso, NM

for Appellant

MEMORANDUM OPINION

BACA, Judge.

{1} Defendant Rebecca Herrera appeals her conviction of one count of vehicular
homicide (driving while under the influence of intoxicating liquor), contrary to
NMSA 1978, Section 66-8-101(A), (C) (2016). Defendant raises nine claimed errors
on appeal, which distill to the following arguments: (1) the district court erred in
denying her motion to suppress statements made to police; (2) two separate instances

1 of prosecutorial misconduct deprived her of her right to a fair trial; and (3) the jury
2 was erroneously instructed at trial. Unpersuaded, and for the reasons set forth below,
3 we affirm.

4 **BACKGROUND**

5 {2} Because this is a memorandum opinion and the parties are familiar with the
6 facts and procedural history of this case, we set forth here only a brief overview of
7 the facts of this case. We discuss additional facts as necessary for our analysis.

8 {3} Defendant was driving southbound in the northbound lanes of U.S.
9 Highway 54 near the New Mexico-Texas border when she struck Victim's vehicle
10 head-on. Victim was pronounced dead at the scene, and Defendant was transported
11 to a nearby hospital in El Paso, Texas. Police officers spoke with Defendant at the
12 hospital a few hours later. Based on observations of the police officer who responded
13 to the crash scene, and statements Defendant made to police, Defendant was
14 subsequently charged with vehicular homicide (driving while under the influence of
15 intoxicating liquor), contrary to Section 66-8-101(A), (C). Following her conviction
16 by a jury, Defendant appeals.

17 **DISCUSSION**

18 **I. The District Court Did Not Err in Denying Defendant's Motion to** 19 **Suppress**

20 {4} Prior to trial, Defendant moved to suppress the statements she made to police
21 while she was being treated at the hospital, contending that the statements should be

1 suppressed because she was subjected to a custodial interrogation without first being
2 advised of her rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966).
3 Following a hearing, the district court granted in part, and denied in part, the motion.
4 Concerning the motion to suppress her statements to police while she was being
5 treated at the hospital, the district court denied the motion after concluding that
6 Defendant was not in custody when she made the incriminating statements, and
7 therefore police were not required to inform Defendant of her *Miranda* rights.
8 Defendant maintains on appeal that the district court erred in concluding that she
9 was not in custody while she was speaking to police and therefore *Miranda* warnings
10 were not required. We disagree.

11 **A. Standard of Review**

12 {5} “Appellate review of a district court’s decision regarding a motion to suppress
13 evidence involves mixed questions of fact and law.” *State v. Widmer*, 2020-NMSC-
14 007, ¶ 11, 461 P.3d 881 (internal quotation marks and citation omitted). “In
15 reviewing a [district] court’s denial of a motion to suppress, we observe the
16 distinction between factual determinations which are subject to a substantial
17 evidence standard of review and application of law to the facts, which is subject to
18 de novo review. Determining whether or not a police interview constitutes a
19 custodial interrogation requires the application of law to the facts. We therefore

1 apply de novo review.” *State v. Nieto*, 2000-NMSC-031, ¶ 19, 129 N.M. 688, 12
2 P.3d 442 (internal quotation marks and citations omitted).

3 **B. Defendant Was Not in Custody**

4 {6} A suspect’s *Miranda* rights attach only when “(1) the suspect is in custody,
5 and (2) any questioning meets the legal definition of interrogation.” *Widmer*, 2020-
6 NMSC-007, ¶ 13 (text only) (citation omitted). “Thus, an officer’s obligation to
7 administer *Miranda* warnings arises only when there has been such a restriction on
8 a person’s freedom as to render [them] in custody.” *Nieto*, 2000-NMSC-031, ¶ 20.
9 In *State v. LaCouture*, this Court evaluated for the first time whether the
10 interrogation of a hospital patient constitutes a custodial interrogation. 2009-
11 NMCA-071, ¶ 16, 146 N.M. 649, 213 P.3d 799. After examining how other states
12 analyzed the issue, this Court concluded, in the context where law enforcement is
13 interrogating a suspect who is also a hospital patient, “the determination that a
14 defendant was subjected to custodial interrogation most often turns on the distinction
15 between circumstantial restraints and direct police-imposed limitations on a
16 defendant’s freedom.” *Id.*

17 {7} Here, like the defendant in *LaCouture*, Defendant sustained serious physical
18 injuries during the accident, and was unable to leave the hospital room because she
19 was confined to the bed as a result of her injuries. *See id.* ¶ 18 (summarily rejecting
20 the defendant’s argument “that despite the absence of any police-imposed restraint

1 on his freedom, he was still subjected to a custodial interrogation because his injuries
2 confined him to the bed and rendered him unfree to leave”). As in *LaCouture*, based
3 on the record before us, there is little evidence to suggest that law enforcement
4 imposed any restraints on Defendant’s freedom such that she “was subjected to a
5 custodial interrogation.”¹ See *id.* ¶ 17. Therefore, we affirm the district court’s order
6 partially denying Defendant’s motion to suppress.

7 **II. Reversal for Prosecutorial Misconduct Is Not Warranted**

8 {8} Defendant argues that she was deprived of a fair trial due to two instances of
9 prosecutorial misconduct. First, Defendant alleges that the prosecutor impermissibly
10 commented on her right to remain silent, and that the district court erred in denying
11 her motion for mistrial. Second, Defendant alleges that the prosecutor elicited
12 testimony regarding Defendant’s blood alcohol levels in violation of a court order
13 excluding that evidence.

¹Defendant, both in her motion to suppress and brief in chief, alleges that law enforcement instructed her father to leave the hospital room before continuing to interrogate Defendant. However, the evidentiary record does not appear to support this contention. Although Officer Saenz’s body camera footage was introduced as an exhibit at trial, the portions of the body camera footage that would corroborate Defendant’s allegations were presumably redacted from the footage. And while the district court appears to have received a version of the body camera footage that allegedly shows Officer Saenz directing Defendant’s father to leave the hospital room, it is unclear whether that version of the footage was similarly redacted. Without evidentiary support, the allegation that officers instructed Defendant’s father to leave the room to continue their interrogation is, in essence, an argument by counsel, which is “not evidence and cannot be used to prove a fact.” See *State v. Wacey C.*, 2004-NMCA-029, ¶ 13, 135 N.M. 186, 86 P.3d 611.

A. The Prosecution’s Comment on Defendant’s Right to Counsel

{9} During redirect examination, the prosecutor asked Officer Saenz whether he remembered if Defendant asked to speak with her lawyer. Defendant promptly objected and moved for a mistrial, which the district court denied. Defendant contends that the prosecutor’s question was an impermissible comment on her right to remain silent, and that the district court erred in denying her motion for mistrial.

{10} At the outset, we note that the right to silence and the right to an attorney are distinct, however, it is generally improper for prosecutors to comment on a defendant’s exercise of either right. *See State v. McDowell*, 2018-NMSC-008, ¶¶ 4-5, 411 P.3d 337. Where a defendant has made a proper objection at trial, such as here, we determine whether the prosecution commented on the defendant’s protected constitutional right, and if so, reverse the conviction unless the state can demonstrate that the error was harmless beyond a reasonable doubt. *Cf. State v. DeGraff*, 2006-NMSC-011, ¶ 22, 139 N.M. 211, 131 P.3d 61 (stating that, “[w]here a defendant has made a proper objection at trial, the appellate court determines whether the prosecution commented on the defendant’s protected silence, and if so, reverses the conviction unless the State can demonstrate that the error was harmless beyond a reasonable doubt.” (internal quotation marks and citation omitted)).

{11} The State maintains that its comment on Defendant’s exercise of her right to counsel is harmless beyond a reasonable doubt. In support of that argument, the State

1 points to the fact that the jury did not hear an answer to the prosecutor's question
2 because Defendant promptly objected to the question before Officer Saenz could
3 answer. The State further points out that the improper question was subsequently
4 withdrawn in the presence of the jury, and that the prosecutor drew no further
5 attention to Defendant's exercise of her right to counsel during the remainder of trial.
6 At Defendant's request, no curative instruction was given; however, the jury had
7 been instructed that questions are not evidence and they should not speculate as to
8 the answer of unanswered questions.

9 {12} Under the circumstances of this case, we perceive no reasonable possibility
10 that the prosecutor's comment on Defendant's right to counsel affected the jury's
11 verdict. We therefore conclude that the prosecutor's improper comment is harmless
12 beyond a reasonable doubt.

13 **B. The Prosecutor's Question About Defendant's Blood Sample**

14 {13} Defendant also argues that the prosecutor willfully disobeyed a court order
15 and referenced inadmissible evidence during trial. We have reviewed the record and
16 we cannot conclude that the prosecutor violated the district court's order.²

17 {14} Defendant correctly asserts that, prior to trial, the district court concluded that
18 Defendant had a doctor/patient privilege between her and the hospitals/medical

²Given these circumstances, we decline to address Defendant's purported argument that, under the standard articulated in *State v. Breit*, 1996-NMSC-067, 122 N.M. 655, 930 P.2d 792, double jeopardy prohibits retrial in this case.

1 facilities that treated her, and therefore the State could not use evidence pertaining
2 to her treatment at the hospital, including medical records, medical tests, and lab
3 results during trial. During trial however, Defendant testified that she drank two
4 beers about four or five hours before the accident, but that she did not feel intoxicated
5 at the time of the accident. Based on Defendant's testimony, the State asked the
6 district court to modify its ruling and allow the State to impeach Defendant by
7 referencing the information contained in the previously excluded medical records.
8 The district court ruled that the State would be permitted to cross-examine Defendant
9 as to whether she had alcohol in her system while at the hospital, but the State would
10 not be permitted to elicit testimony as to the blood alcohol content percentage. The
11 State then asked Defendant during cross examination, "Isn't it true that a blood draw
12 taken from you in the hospital showed that you had alcohol in your system at 3
13 a.m.?" Over Defendant's objection, the court ruled that the subject was "fair game,
14 just phrase [the question] differently" to properly lay foundation. The prosecutor
15 rephrased, "At about 3:03 a.m., your blood was drawn, correct?" Defendant
16 answered that she did not know whether her blood was drawn by the hospital staff,
17 and the prosecutor concluded his questioning.

18 {15} Because the prosecutor's question to Defendant was limited to whether
19 Defendant had alcohol in her system at the time she was being treated at the hospital
20 after the accident, and because the prosecutor's question did not mention any value,

1 amount or percentage of alcohol in Defendant’s blood, we do not agree with
2 Defendant’s contention that the State violated the district court’s order. As well,
3 because Defendant does not challenge the district court’s ruling that the State could
4 ask about a blood draw for the limited purpose of impeachment, we reject the claim
5 of prosecutorial misconduct.

6 **III. Jury Instructions**

7 {16} At trial, one of Defendant’s theories of the case was that Victim and the New
8 Mexico Department of Transportation (NMDOT) were negligent actors, and that
9 their negligence contributed to the crash that killed Victim. In support of this theory,
10 Defendant requested several jury instructions related to causation, which the district
11 court denied. Defendant lastly contends that the district court erred in denying
12 Defendant’s proposed jury instructions regarding (a) proximate causation and the
13 alleged negligence of Victim and NMDOT; and (b) the presumption of
14 nonintoxication under the Implied Consent Act (ICA), NMSA 1978, §§ 66-8-105 to
15 -112 (1978, as amended through 2025). Defendant further contends that one of the
16 given jury instructions violated her due process rights.³ We consider each contention
17 in turn after setting out the applicable standard of review.

³Defendant also contends that the district court erred in denying her proposed instruction that “a violation of speeding laws as set forth in the Motor Vehicle Code shall not per se be a basis for violation of the offense of reckless driving.” However, Defendant was only charged with—and the jury was only instructed as to—vehicular homicide (driving while under the influence of intoxicating liquor). Recklessness is

1 **A. Standard of Review**

2 {17} A defendant is “fairly entitled to a jury instruction that accurately describes
3 the essential elements of the crime and what the state would have to prove for a
4 conviction.” *State v. Haagenson*, 2026-NMCA-052, ¶ 11, 587 P.3d 887 (text only)
5 (citation omitted). “The standard of review we apply to jury instructions depends on
6 whether the issue has been preserved.” *State v. Cabezuela*, 2011-NMSC-041, ¶ 21,
7 150 N.M. 654, 265 P.3d 705 (internal quotation marks and citation omitted).
8 Because there is no dispute that the issues were preserved, we review for reversible
9 error. *See State v. Montoya*, 2015-NMSC-010, ¶ 25, 345 P.3d 1056. “Denial of a
10 jury instruction rises to reversible error if the defendant shows they were entitled to
11 the denied instruction or that a reasonable juror could have been confused or
12 misdirected by the omission.” *State v. Stalter*, 2023-NMCA-054, ¶ 22, 534 P.3d 989
13 (text only) (citation omitted). “The propriety of denying a jury instruction is a mixed
14 question of law and fact that we review de novo. . . . Failure to instruct on self-
15 defense when there is a sufficient quantum of proof to warrant it is reversible error.”

not an element of homicide by vehicle (driving while under the influence of intoxicating liquor), and, thus, the district court was not required to instruct the jury on recklessness. *Cf. State v. Stefani*, 2006-NMCA-073, ¶ 24, 139 N.M. 719, 137 P.3d 659 (holding that an instruction on possession was not required to be given alongside an instruction on trafficking by manufacture because possession is not an element of trafficking by manufacture); *State v. Vickery*, 1973-NMCA-091, ¶ 22, 85 N.M. 389, 512 P.2d 962 (holding that the trial court did not need to instruct the jury on criminal intent because criminal intent is not an element of the crime that the defendant was charged). Accordingly, we do not address this claim of error.

1 *State v. Baroz*, 2017-NMSC-030, ¶ 13, 404 P.3d 769 (internal quotation marks and
2 citations omitted).

3 **B. The Proposed Instructions Regarding Causation**

4 {18} Defendant argues that Victim and NMDOT committed negligent acts, and,
5 that those allegedly negligent acts contributed to the crash that killed Victim.
6 Specifically, Defendant argues that (1) Victim was negligently driving in the
7 leftmost lane at the time of the accident; and (2) NMDOT was negligent by failing
8 to install adequate road signage to warn drivers they were entering a divided
9 highway. Defendant argues that these alleged negligent acts were superseding,
10 intervening causes that broke the causal chain between Defendant's acts and
11 Victim's death, and, as a result, the district court erred in denying Defendant's
12 proposed instruction UJI 14-251 NMRA (defining proximate cause) and UJI 14-252
13 NMRA (discussing negligence of deceased or third person).

14 {19} Here, the State was required to prove, in relevant part, that Defendant's
15 driving while impaired from alcohol caused Victim's death. Even assuming without
16 deciding that Victim was negligent in driving in the leftmost lane, or that NMDOT
17 was negligent in maintaining its signage, those facts alone do not allow Defendant
18 to escape criminal liability, because "the conduct of other parties is relevant only if
19 it is a superseding cause that negates the defendant's conduct." *See State v. Simpson*,
20 1993-NMSC-073, ¶ 14, 116 N.M. 768, 867 P.2d 1150; *see also State v. Romero*,

1 1961-NMSC-139, ¶ 10, 69 N.M. 187, 365 P.2d 58 (“[I]f the culpable negligence of
2 the defendant is found to be the cause of the death, [they are] criminally responsible
3 whether the decedent’s failure to use due care contributed to the injury or not.”
4 (internal quotation marks and citation omitted)). Put differently, the claim that a
5 person other than the defendant was negligent is relevant only if that negligence
6 “was the *only* significant cause of death or constitutes an *intervening cause* that
7 breaks the foreseeable chain of events.” UJI 14-252 (emphases added); *see also State*
8 *v. Maddox*, 1983-NMCA-023, ¶ 9, 99 N.M. 490, 660 P.2d 132 (explaining that the
9 claim that an actor other than defendant was negligent “has value only if it
10 establishes that the [actor]’s negligence was the *sole* cause of the
11 accident” (emphasis added)). Based on the facts of this case, we hold that the district
12 court correctly concluded that no reasonable juror could find that either Victim or
13 NMDOT’s allegedly negligent acts were significant or intervening causes that would
14 alleviate Defendant of criminal liability. Accordingly, we affirm the district court’s
15 denial of the proposed jury instructions regarding causation.

16 **C. The Proposed Instruction Regarding the Presumptions Under the ICA**

17 {20} At trial, the parties stipulated that a blood sample was taken from Defendant
18 at 9:56 a.m.—approximately (nine hours) after the accident had occurred—and that,
19 at the time the blood sample was taken, Defendant had 0.00 g/100 mL ethanol in her
20 bloodstream.

1 {21} Based on the results of the blood test, Defendant requested a jury instruction
2 modeled after Section 66-8-110(B)(1) of the ICA. The jury instruction stated, in
3 relevant part, “When the blood or breath of a person tested contains an alcohol
4 concentration of less than four one hundredths, it shall be presumed that the person
5 was not under the influence of intoxicating liquor.” Defendant argues that because
6 the only test of her blood showed a blood alcohol concentration of 0.00 g/100 mL,
7 the district court erred in failing to instruct the jury that Defendant was entitled to
8 the presumption that she was not under the influence of intoxicating liquor at the
9 time of the accident.

10 {22} Initially, we note that the parties appear to assume that the presumptions
11 outlined in Section 66-8-110 are applicable in this matter. Accordingly, rather than
12 addressing whether this assumption is correct, we instead frame our analysis within
13 the confines of the parties’ assumptions on appeal. *See State v. Isaac M.*, 2001-
14 NMCA-088, ¶ 3, 131 N.M. 235, 34 P.3d 624 (stating that where both parties assume
15 the applicability of certain statutes and concepts, “[w]e [may] assume, without
16 deciding, that the parties are correct”).

17 {23} As Defendant points out, Section 66-8-110(E) provides that, if a chemical test
18 “is administered more than three hours after the person was driving a vehicle, the
19 test result may be introduced as evidence of the alcohol concentration in the person’s
20 blood or breath at the time of the test and the trier of fact shall determine what weight

1 to give the test result for the purpose of determining” whether the person was driving
2 a vehicle in violation of Section 66-8-102.

3 {24} Here, the district court denied the proposed instruction after finding that
4 Defendant’s blood was taken approximately nine hours after the accident occurred,
5 and thus was not entitled to the presumption under Section 66-8-110(B). In other
6 words, it appears that the district court concluded that the facts of the case more
7 closely aligned with Section 66-8-110(E) than Section 66-8-110(B) and, as a result,
8 that the proposed instruction was not consistent with the ICA.

9 {25} Defendant does not challenge the district court’s reasoning in denying the
10 instruction, nor does Defendant argue that the jury was confused or misdirected
11 without the proposed instruction. *See State v. Laney*, 2003-NMCA-144, ¶ 38, 134
12 N.M. 648, 81 P.3d 591 (“Juror confusion or misdirection may stem not only from
13 instructions that are facially contradictory or ambiguous, but from instructions
14 which, through omission or misstatement, fail to provide the juror with an accurate
15 rendition of the relevant law.” (text only) (citation omitted)). And while Defendant
16 asserts that “[w]here chemical tests are introduced in evidence, an instruction to the
17 jury on presumptions is mandatory and the failure to do so is reversible error,” after
18 reviewing the authorities upon which Defendant relies for this assertion, we
19 conclude that they do not support the proposition that Defendant was entitled to her

1 proposed instruction. Therefore, we find no error in the district court’s decision to
2 deny Defendant’s proposed jury instruction.

3 **D. Jury Instruction No. 6**

4 {26} The district court instructed the jury, in accord with UJI 14-243 NMRA, that
5 “[a] person is under the influence of intoxicating liquor when as a result of drinking
6 such liquor the person is less able, to the slightest degree, either mentally or
7 physically, or both, to exercise the clear judgement and steady hand necessary to
8 handle a vehicle with safety to the person and the public.” “We presume that our
9 uniform jury instructions correctly reflect the law.” *State v. Benavidez*, 2026-NMSC-
10 007, ¶ 58, 593 P.3d 560. Defendant does not seek to rebut this presumption, but
11 instead contends that the “slightest degree standard provides insufficient guidance
12 to juries about what constitutes criminal impairment” because there is no objective
13 scientific measure for defining “impairment to the slightest degree.” Defendant
14 further contends that without a scientific quantification of impairment to the slightest
15 degree, “convictions rest on subjective interpretations of normal human behavior
16 variations.”

17 {27} Defendant’s argument on this point is substantially similar to the argument
18 made in *State v. Neal*, 2008-NMCA-008, 143 N.M. 341, 176 P.3d 330, where this
19 Court explicitly rejected the argument that the slightest degree interpretation of
20 Section 66-8-102(A) allows a conviction on less evidence than proof beyond a

1 reasonable doubt. *See Neal*, 2008-NMCA-008, ¶¶ 23-28 (discussing the legislative
2 intent behind Section 66-8-102(A) and historical precedent addressing the impaired-
3 to-the-slightest-degree standard). We find *Neal* instructive and controlling as to
4 Defendant's challenges to the impaired-to-the-slightest-degree standard.
5 Accordingly, we conclude that the district court did not err in giving this instruction.

6 **CONCLUSION**

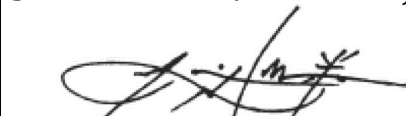
7 {28} For the foregoing reasons, we affirm Defendant's conviction.

8 {29} **IT IS SO ORDERED.**

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

11 **WE CONCUR:**

12 
13 **JENNIFER L. ATTREP, Judge**

14 
15 **KRISTOPHER N. HOUGHTON, Judge**