

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,

v.

No. A-1-CA-43119

ALEXANDER GALLEGOS,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY

Clara Moran, District Court Judge

Raúl Torrez, Attorney General

Santa Fe, NM

Michael T. Thomas, Assistant Solicitor General

Albuquerque, NM

for Appellee

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Santa Fe, NM

for Appellant

MEMORANDUM OPINION

YOHALEM, Judge.

{1} This matter was submitted to the Court on Defendant's brief in chief pursuant
to the Administrative Order for Appeals in Criminal Cases from the Second,
Eleventh, and Twelfth Judicial District Courts in *In re Pilot Project for Criminal
Appeals*, No. 2022-002, effective November 1, 2022. Following consideration of the

1 brief in chief, the Court assigned this matter to Track 2 for additional briefing. Now
2 having considered the brief in chief, answer brief, and reply brief, we affirm for the
3 following reasons.

4 {2} Following a jury trial, Defendant appeals from his conviction of disarming a
5 peace officer. [RP 59, 102] The sole issue raised by Defendant is whether the
6 evidence presented at trial supports Defendant’s claim that a correctional officer
7 applied excessive force to Defendant such that a self-defense instruction should have
8 been given for that charge. [BIC 1, 20, 23] We review the district court’s rejection
9 of a requested jury instruction de novo. *See State v. Jones*, 2020-NMCA-029, ¶ 8,
10 464 P.3d 1079. In conducting this review, we view the evidence in the light most
11 favorable to the giving of the requested instruction. *See id.*

12 {3} “[A] person has only a qualified right to assert self-defense against a [peace]
13 officer” and therefore may assert self-defense only when the officer is using
14 excessive force. *State v. Ellis*, 2008-NMSC-032, ¶¶ 15-16, 144 N.M. 253, 186 P.3d
15 245 (emphasis omitted). “[Peace] officers act with excessive force when they use
16 more force than is necessary to effect an arrest, as viewed objectively from a
17 reasonable officer’s perspective.” *State v. Lymon*, 2021-NMSC-021, ¶ 32, 488 P.3d
18 610 (internal quotation marks and citation omitted). Viewing a reasonable officer’s
19 perspective includes the recognition that “officers are often forced to make split-
20 second judgments—in circumstances that are tense, uncertain, and rapidly

1 evolving—about the amount of force that is necessary in a particular situation.” *Ellis*,
2 2008-NMSC-032, ¶ 26 (internal quotation marks and citation omitted). In
3 considering a requested self-defense jury instruction, the district court must
4 determine whether reasonable minds could differ on whether the officer’s use of
5 force was excessive. *Id.* ¶ 17. If the district court “concludes that reasonable minds
6 could not find that the officer used excessive force, the matter ends there, and the
7 [district] court should not instruct the jury on the elements of self-defense.” *Id.*

8 {4} Reviewing the evidence in the light most favorable to giving the self-defense
9 instruction, we must determine whether reasonable minds could differ regarding
10 whether the officer used excessive force. *See id.* ¶ 35. Having considered
11 Defendant’s arguments, we are unpersuaded that the district court’s decision to deny
12 the instruction was erroneous.

13 {5} Defendant contends that only a Code 25 request—which is for minor
14 incidents—was made and Defendant was not resisting or striking anyone when the
15 officer entered the pod. [BIC 16, 17] It is undisputed, however, that the officer
16 immediately encountered a situation where another officer was engaged in a struggle
17 with Defendant on the second-floor catwalk. [BIC 2, 6, 12; Def. Ex. A 3:17] The
18 struggle continued during the several seconds it took for the officer to ascend the
19 stairs to the catwalk and reach Defendant. [Def. Ex. A 3:17-33] The officer testified
20 that his use of the taser was the appropriate amount of force necessary for the

1 situation, and that he did not use mace because he might have sprayed the other
2 officers. [BIC 7; 9-2-25 CD 3:57:23-43]

3 {6} Defendant argues that the officer failed to give Defendant warnings before
4 tasing him. [BIC 18] Though there was conflicting evidence on whether the officer
5 warned Defendant [BIC 18], Defendant has cited no precedential authority requiring
6 an officer to issue a warning before using force where the defendant is already
7 engaged in a struggle with another officer. *See State v. Wyman*, 2008-NMCA-113,
8 ¶ 6, 144 N.M. 701, 191 P.3d 559 (“Where a party cites no authority to support an
9 argument, we may assume no such authority exists.”); *cf. Jones*, 2020-NMCA-029,
10 ¶¶ 10, 11 (concluding that the defendant was entitled to a defense of another
11 instruction for grabbing an officer’s taser because, among other facts, when the
12 officer “drew and pointed his taser at [the defendant’s son] and advanced on him,
13 [the son] *had not yet resisted or evaded arrest*” and the officer gave the son “mere
14 seconds” to comply (emphasis added)).

15 {7} Defendant argues that the Metropolitan Detention Center (MDC) has a policy
16 that a corrections officer may use force only as a last resort. [BIC 21, 28-29] The
17 officer’s use of force appears, however, to have conformed with MDC policy, as
18 related by another officer’s testimony, that force may be used in the first instance in
19 reaction to active aggression by an inmate. [BIC 10-11; 9-3-25 CD 10:05:06-14,
20 10:06:36-43]

1 {8} Defendant argues that he testified that he initially believed Lieutenant
2 Jaramillo was there to help him, not tase him. [BIC 17] That belief, however, is not
3 evidence of a reasonable officer's perspective of the situation. *See Ellis*, 2008-
4 NMSC-032, ¶ 24 (“[T]he police officer's privilege of using necessary force implies
5 that the necessity of the force should be measured from the perspective of an
6 objectively reasonable officer and not from what an arrestee might think would be
7 reasonable.”). The officer offered direct and relevant testimony regarding a
8 reasonable officer's perspective on whether he used excessive force, and his
9 testimony was that he used the necessary amount of force. [9-2-25 CD 3:57:23-43]

10 {9} Defendant argues that force used was excessive because, after the officer
11 initially tased Defendant twice, the officer drive-stunned Defendant while Defendant
12 was lying face-down on the floor, helpless and surrounded by multiple officers, and
13 only then did Defendant employ self-defense by grabbing the taser. [BIC 25] The
14 trial testimony, however, does not support this contention. The officer testified that
15 he deployed the taser probes twice at Defendant, the probes were ineffective, he then
16 drive-stunned Defendant while Defendant was standing and still actively resisting,
17 Defendant took the taser, and fellow officers took Defendant to the ground. [9-2-25
18 CD 3:53:49-55:31] Another officer testified that Defendant took the taser while
19 officers pulled Defendant to the floor. [9-2-25 CD 3:09:43-50] Defendant testified
20 that, after the officer fired the taser probes at him twice, the officer drive-stunned

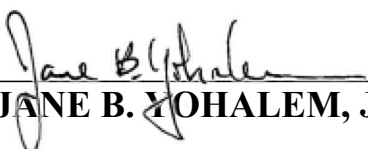
1 him in the left leg while Defendant was still standing, more guards grabbed him, and
2 Defendant was “tased and pulled and pushed and—I don’t know—I was on the floor
3 after that.” [9-3-25 CD 10:18:52-20:25] Though Defendant remembered grabbing
4 the officer’s hand, Defendant did not remember taking the taser, and only after he
5 was on the floor on his stomach did he realize he had the taser. [9-3-25 CD 10:20:33-
6 21:51] All of this testimony showed that the officer drive-stunned Defendant while
7 he was standing, and Defendant took the taser before—or at the same time as—he
8 was pulled to the floor. There was no testimony that the officer drive-stunned
9 Defendant *after* he was face-down and helpless on the floor.

10 {10} Defendant argues that he limited his actions to taking the taser but not firing
11 it. [BIC 18, 20] That distinction, however, is not relevant to whether the officer used
12 excessive force *before* Defendant took the taser.

13 {11} For these reasons, we conclude that reasonable minds could not find that the
14 officer used excessive force when he tased Defendant during the altercation, and
15 thus the district court did not err in denying a jury instruction on self-defense as to
16 disarming a peace officer. *See id.* ¶ 41.

17 {12} Accordingly, we affirm.

18 {13} **IT IS SO ORDERED.**

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JANE B. YOHALEM, Judge

1 **WE CONCUR:**

2 *Jacqueline R. Medina*
3 JACQUELINE R. MEDINA, Chief Judge

4 *Katherine A. Wray*
5 KATHERINE A. WRAY, Judge