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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico
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Mark Reynolds

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v. **No. A-1-CA-42294**

JAMES SHEELE,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SIERRA COUNTY
Mercedes Murphy, District Court Judge

Raúl Torrez, Attorney General
Teresa Ryan, Assistant Solicitor General
Santa Fe, NM

for Appellee

Bennett J. Baur, Chief Public Defender
Maria A. Pomorski, Assistant Appellate Defender
Santa Fe, NM

for Appellant

MEMORANDUM OPINION

HANISEE, Judge.

{1} Defendant James Sheele appeals his conviction, following a jury trial, for one count of extortion contrary to NMSA 1978, Section 30-16-9 (1963). Defendant argues that (1) the extortion instruction was fundamentally erroneous and requires reversal for a new trial; (2) his trial counsel was ineffective; and (3) the errors at trial

compounded one another such that their cumulative impact requires reversal. We affirm.

BACKGROUND

{2} Defendant was employed as a paralegal by the Gibson Law Office, working under the supervision of Victim, who at the time was a contract public defender with the state of New Mexico. Defendant's employment was terminated in 2021. Soon thereafter, Defendant sent a series of emails to several people detailing his termination and disparaging Victim, as well as a single email entitled, "Termination Settlement" to Victim. The email to Victim directly led to Defendant being charged with one count of extortion. Defendant was convicted following a jury trial, and now appeals.[1] We affirm.

DISCUSSION

{3} On appeal, Defendant argues for the first time that the element instruction provided to the jury by the district court regarding the crime of extortion—which excluded the term "wrongfully" set forth in the extortion statute—was erroneous. He further contends that the error was fundamental in nature, therefore warranting reversal of his conviction along with a new trial. He additionally argues his trial

[1] Because this is a memorandum opinion, we omit a detailed factual background and instead supply facts as necessary to our analysis.

counsel was constitutionally ineffective. We first address Defendant's jury instruction arguments and then that which relates to his trial counsel's performance.

I. Fundamental Error Review

{4} "The standard of review we apply to jury instructions depends on whether the issue has been preserved. If the error has been preserved we review the instructions for reversible error. If not, we review for fundamental error." *State v. Benally*, 2001-NMSC-033, ¶ 12, 131 N.M. 258, 34 P.3d 1134 (citation omitted). Defendant acknowledges that he did not object to the extortion instruction at trial, so we therefore review for fundamental error. In this context, our "fundamental error analysis follows two steps." *State v. Sivils*, 2023-NMCA-080, ¶ 10, 538 P.3d 126. "[W]e [first] determine whether error occurred[,] . . . [applying] our analysis for reversible error." *Id.* If so, we next determine "whether that error was fundamental." *Id.* ¶ 11.

{5} We begin our analysis of the propriety of a given instruction by asking "whether a reasonable juror would have been confused or misdirected by the jury instruction." *State v. Lucero*, 2017-NMSC-008, ¶ 27, 389 P.3d 1039 (internal quotation marks and citation omitted). A juror may become confused not only when the jury instructions are "facially contradictory or ambiguous" but also when the instructions "through omission or misstatement, fail to provide the juror with an accurate rendition of the relevant law." *Benally*, 2001-NMSC-033, ¶ 12. When such

is the case, we turn to the second, fundamental error query, which entails "review [of] the entire record, placing the jury instructions in the context of the individual facts and circumstances of the case, to determine whether the defendant's conviction was the result of a plain miscarriage of justice." *Lucero*, 2017-NMSC-008, ¶ 27 (alteration, internal quotation marks, and citation omitted).

{6} Although the "general rule is that fundamental error occurs when the trial court fails to instruct the jury on an essential element," *id.* ¶ 27, not every failure to instruct on an essential element amounts to fundamental error. There are two exceptions: first, failure to instruct on an essential element is not fundamental error when the jury implicitly finds that the state has proven the omitted element. *State v. Barber*, 2004-NMSC-019, ¶ 29, 135 N.M. 621, 92 P.3d 633 ("Error is not fundamental when the jury could not have reached its verdict without also finding the element omitted from the instructions."). This happens when the jury makes a specific finding, given the circumstances of the case and context of the facts, that necessarily includes or elicits a finding of the omitted element. *See State v. Orosco*, 1992-NMSC-006, ¶ 17, 113 N.M. 780, 833 P.2d 1146. The second exception occurs when the omitted element is "undisputed" and "indisputable," such that any rational jury would have found the element to be true beyond a reasonable doubt had the element not been omitted. *State v. Padilla*, 1997-NMSC-022, ¶ 8, 123 N.M. 216,

937 P.2d 492. As discussed below, our analysis in this case involves the second exception.

II. The Instruction Was Erroneous

{7} Section 30-16-9 defines extortion as "the communication or transmission of any threat to another by any means whatsoever with intent thereby to wrongfully obtain anything of value or to wrongfully . . . compel the person threatened to do or refrain from doing any act against [their] will." (alteration omitted). At trial, the jury was given, in pertinent part, the following instruction:

> For you to find [D]efendant guilty of extortion as charged in Count 1, the [S]tate must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. [Defendant] threatened to expose or imply the existence of a disgrace of [Victim], intending to obtain anything of value from [Victim];
>
> . . . .
>
> OR IN THE ALTERNATIVE:
>
> 1. [Defendant] threatened to expose or imply the existence of a disgrace of [Victim], intending to compel [Victim] to do something she would not have done;
>
> . . . .
>
> OR IN THE ALTERNATIVE:
>
> 1. [Defendant] threatened to expose or imply the existence of a disgrace of [Victim], intending to compel [Victim] to refrain from doing something she would have done.

See UJI 14-1642 NMRA. The instruction given at trial did not give an accurate rendition of the elements of the crime, excluding the required finding that Defendant's behavior be wrongful. The committee commentary to UJI 14-1642 mentions that the instruction was amended to add the term "wrongfully" after its enactment, following a line of cases with facts similar to this one. *See* UJI 14-1642 comm. cmt. Stated differently, without the requisite verbiage, guilt could be deduced even for innocent conduct.

{8} As Defendant points out, omission of the word "wrongfully" from the extortion instruction in this case allowed it to be read to criminalize innocent conduct, and thereby relieved the State of its burden to prove wrongful intent. *See State v. Green*, 1993-NMSC-056, ¶¶ 6-18, 116 N.M. 273, 861 P.2d 954 (holding in pertinent part that "fraudulent intent" is an essential element of the crime of embezzlement, and that the omission of those words from the instruction could be read to criminalize noncriminal behavior, or in other words, allow a defendant to be convicted for "innocent conduct"); *State v. Osborne*, 1991-NMSC-032, ¶¶ 20, 33, 111 N.M. 654, 808 P.2d 624 (holding in pertinent part that the word "unlawfully" was an essential element of the offense, and that the absence of the word left the jury unable to determine whether the defendant's conduct could be deemed innocent or inappropriate); *State v. Parish*, 1994-NMSC-073, ¶¶ 8, 23, 118 N.M. 39, 878 P.2d 988 (holding in pertinent part that the omission of the word "unlawfulness" created

ambiguity, and the jury may have not understood that that "the claim of self-defense supersedes the element of provocation"). As such, the instruction given to the jury was erroneous.

III. The Error Was Not Fundamental

{9} Because we have concluded that the instruction was erroneous, we next must ask if this error was fundamental. *See Sivils*, 2023-NMCA-080, ¶ 11; *see also State v. Swick*, 2012-NMSC-018, ¶ 46, 279 P.3d 747 ("[F]undamental error occurs when, because an erroneous instruction was given, a court has no way of knowing whether the conviction was or was not based on the lack of the essential element.").

{10} At trial, the State presented evidence supporting the notion that Defendant intended to *wrongfully* obtain something of value or *wrongfully* compel Victim to do or refrain from doing any act against her will. The State presented the emails Defendant sent three days after his termination from the Gibson Law Office to members of the local legal community, including private attorneys, prosecutors, court staff, and judges, describing Victim as absent and dishonest, stating that he was instructed by Victim to be untruthful and that he had "over the years seen and been a party to many untruths advanced to the courts and parties involved about the business of the Gibson Law Office."

{11} Roughly an hour after Defendant sent that email, he sent another email to the same group stating that Victim "lacks ethics, morals, and principles[. S]he has spread

many lies to the court." Defendant went on to say that Victim failed to represent clients effectively, coerced clients to make false statements, and stole money from the taxpayers of New Mexico by inadequately representing indigent defendants.

{12} Later that same day, Defendant sent an email to Victim to "propose the following terms to bring a[n] end to the current situation." In that email, which we quote verbatim, Defendant proposed the following terms:

> 1. A check in the amount of two months of my pre-tax salary.
>
> 2. A NDA singed [sic] by the owner of the Gibson Law office to never discuss any personal or private information learned about me during my employment.
>
> 3. No attempt to block my unemployment request to the State, not that it's needed the email I received rendered any attempt to block my unemployment mute.

At the end of this email, which we again quote verbatim, Defendant wrote:

> Once this agreement has been signed and payment has been made I will stop immediately with anymore email's to anyway include the New Mexico State Bar.

In order to prove that Defendant intended to obtain or compel Victim to do or refrain from doing an act against her, the State had to show that Defendant did so wrongfully. As we stated above, the question we must answer is whether the facts before us fit into the second exception as defined in *Padilla*, which hinges on the omitted element being "undisputed (i.e., by concession it is not at issue)" and "indisputable (i.e., the jury undoubtedly would have so found)," such that any

rational jury would have found the element to be true beyond a reasonable doubt had the element not been omitted. *See* 1997-NMSC-022, ¶ 8.

{13} First, and critically, our review of the record reveals the wrongfulness element of the crime of extortion was undisputed at trial by Defendant. At trial, Defendant's theory of defense was not that he was within his rights to send the email to Victim nor did he contend that which he demanded from Victim was rightly owed to him. While defense counsel asked Victim at trial whether Defendant's email amounted to an effort to "negotiate a severance package," a suggestion with which Victim disagreed, Defendant did not present a defense that there existed any debt he was owed by Victim or that the emails were otherwise sent in an innocent manner. Indeed, defense counsel answered "I know" when being told by Victim that the email was in fact threatening. And, rather than arguing that the admitted threats were not wrongful, during closing argument defense counsel argued that the threats "aren't even really meaningful" and that Victim was neither damaged nor disgraced, and suffered no monetary loss. Such a defense fails to challenge the wrongfulness of the communications, fails to contend that Defendant intended to innocently communicate a request for a severance package, or that the threat was otherwise acceptable. Such is not sufficient to dispute the wrongfulness of Defendant's actions.

{14} Second, the wrongfulness element was indisputable. An argument that this conduct was not wrongful (i.e., intended to place Victim in fear and motivate her to

give him the severance package) would have been unreasonable on these facts. *See Orosco*, 1992-NMSC-006, ¶ 10 (explaining that in the event that the element is undisputed or unchallenged at trial, the question becomes "whether there was any evidence or suggestion in the facts, however slight, that could have put the element . . . in issue"). Defendant asserts on appeal that his email to Victim "bears hallmarks of a legitimate attempt to negotiate the resolution of the dispute." However, we are unconvinced. The emails criticized her and disparaged her character and work ethic. In Defendant's last email to Victim, he demanded things of her and stated that should she meet his requests, only then would he stop sending emails to her colleagues and others. We therefore agree with the State that under the facts of this case, the jury could not have found that Defendant's demands of Victim were untethered from his threats to continue his email campaign, and as a result were anything but wrongful.

{15} In sum, considering the elements of extortion and the facts presented at trial, including the requirement that Victim meet Defendant's demands lest the slanderous emails continue, we conclude that the wrongfulness element was undisputed and indisputable. As a result, a jury could not have found Defendant's actions toward Victim as anything but wrongful. *See Orosco*, 1992-NMSC-006, ¶ 20 ("The record as to unlawfulness in these cases was undisputed and indisputable, and no rational jury could have concluded that [the] defendants had committed the acts without also determining that the acts were performed in the manner proscribed by law. The error

in the jury instructions, therefore, was not fundamental and does not require reversing [the] defendants' convictions."). Accordingly, there was no fundamental error through this instructional omission, and we affirm Defendant's conviction.

IV. Defendant Has Not Established a Prima Facie Case of Ineffective Assistance of Counsel

{16} Defendant's next claim is that his trial counsel was ineffective, and he asks this Court to remand to the district court for an evidentiary hearing on this claim. A claim of ineffective assistance of counsel presents a mixed question of law and fact, which we review de novo. *See State v. Barnett*, 1998-NMCA-105, ¶ 13, 125 N.M. 739, 965 P.2d 323. "Trial counsel is generally presumed to have provided adequate assistance." *State v. Bernal*, 2006-NMSC-050, ¶ 32, 140 N.M. 644, 146 P.3d 289. "For this Court to remand to the trial court on [the] issue [of ineffective assistance of counsel], the defendant must present a prima facie case of ineffective assistance of counsel." *State v. Arrendondo*, 2012-NMSC-013, ¶ 38, 278 P.3d 517.

{17} "To establish a prima facie case of ineffective assistance of counsel, [the d]efendant must show that (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness; and (2) that [the d]efendant suffered prejudice in that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Aker*, 2005-NMCA-063, ¶ 34, 137 N.M. 561, 113 P.3d 384 (internal quotation marks and citation omitted). "A prima facie case is made if [the d]efendant produces

enough evidence to allow the fact-trier to infer the fact at issue and rule in [the d]efendant's favor." *State v. Crocco*, 2014-NMSC-016, ¶ 14, 327 P.3d 1068 (alteration, internal quotation marks, and citation omitted).

{18} "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, we need not consider whether counsel's performance was deficient." *State v. Martinez*, 2007-NMCA-160, ¶ 19, 143 N.M. 96, 173 P.3d 18. "To show actual prejudice, there must have been a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Lukens v. Franco*, 2019-NMSC-002, ¶ 17, 433 P.3d 288 (internal quotation marks and citation omitted).

{19} Defendant maintains that if not for his counsel's errors, there is a reasonable probability that the outcome of his trial would have been different. Specifically, Defendant asserts that if his counsel had not misunderstood the crime, his counsel would have objected to the jury instruction and "may" have advanced a meritorious defense on Defendant's behalf. Defendant complains that his counsel was "operating throughout trial under the mistaken impression that damages is an element of extortion under New Mexico law, and made the absence of damages central to [Defendant's] defense." Regardless, Defendant's argument that in the absence of this misunderstanding, his attorney "may" have advanced a meritorious defense falls short of establishing a prejudice. Likewise, because of the conclusion we have

already reached regarding the jury instruction, we are not convinced that there is a significant probability that counsel's misunderstanding of the elements of the offense affected the jury's verdict.

{20} Defendant also points to his counsel's decision—to ask Victim to "opine" as to how Defendant's conduct constituted extortion—also constituted ineffective assistance of counsel. However, we will not question that decision. *See State v. Jensen*, 2005-NMCA-113, ¶ 14, 138 N.M. 254, 118 P.3d 762 ("Rarely will we engage on appeal in Monday-morning quarterbacking of trial counsel's tactics and strategy, and remand for a hearing on the issue of ineffective assistance of counsel, even when it appears the decisions may have been improvident."). While Defendant has every right to question his counsel's tactics and strategy, such alone does not necessarily amount to ineffective assistance of counsel. We remain unconvinced that Defendant was prejudiced to the extent that the outcome of his trial would have been different.

{21} Based on the foregoing, Defendant has not shown a reasonable probability that but for Defendant's counsel's alleged errors, the outcome of the trial would have been different. We therefore reject Defendant's ineffective assistance of counsel claim for failure to make a prima facie showing on direct appeal, *see State v. Swavola*, 1992-NMCA-089, ¶ 3, 114 N.M. 472, 840 P.2d 1238 (limiting remand in ineffective assistance cases to those "in which the record on appeal establishes a

prima facie case of ineffective assistance"), though our doing so does not prevent Defendant from pursuing his claim in the form of a habeas corpus petition. *See Crocco*, 2014-NMSC-016, ¶ 24 ("If facts beyond those in the record on appeal could establish a legitimate claim of ineffective assistance of counsel, [the d]efendant may assert it in a habeas corpus proceeding where an adequate factual record can be developed for a court to make a reasoned determination of the issues.").

{22} Because we have concluded that there was no fundamental error and reject Defendant's ineffective assistance of counsel claim, we do not address his claim regarding cumulative error. *See State v. Aragon*, 1999-NMCA-060, ¶ 19, 127 N.M. 393, 981 P.2d 1211 (concluding that when there is no error, "there is no cumulative error").

CONCLUSION

{23} For the foregoing reasons, we affirm.

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

J. MILES HANISEE, Judge

WE CONCUR:

MEGAN P. DUFFY, Judge

KRISTOPHER N. HOUGHTON, Judge