COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,
Plaintiff-Appellee,

v. No. A-1-CA-41294

ALIKA ARISUMI,
Defendant-Appellant.

Appeal from Twelfth Judicial District Court, County of Otero, Honorable Angie K. Schneider, District Court Judge, Case No. D-1215-CR-2019-00542
(Pilot Project Case)

REPLY BRIEF

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Statement Regarding Compliance With Rule of Appellate Procedure 12-318(F)(3)

Pursuant to Rule of Appellate Procedure 12-318(G), Mr. Arisumi hereby states that this reply brief was prepared using a proportionally-spaced typeface. The brief contains 2388 words, using the word count feature of Google Docs, Version 79.0.

ARGUMENT

1. The State's arguments on Issue #1 fail.

A. The State's preservation arguments fail.

With respect to the question of preservation, the State's arguments miss the mark.

The requirements of Rule 12-321 were met because a ruling by the district court on the issue was fairly invoked. As noted in Mr. Arisumi's brief in chief, the issue came to the trial court's attention when the State filed a motion in limine, seeking to preclude any mention of, introduction of, or questions regarding the contract that Mr. Arisumi contended showed his intent at the time. *See* BC at 15-18, 36-41; R.P. 72-75, 139. In Mr. Arisumi's written response, *see* R.P. 77, he argued that the written agreement reflected his mental state at the time, pointing to specific facts of the interactions between him and Ms. Miller regarding the agreement. *See* R.P. 77, ¶¶ 1-7. *See also* R.P. 78 (additional arguments and facts advanced by Mr. Arisumi against the State's motion in limine). The trial court convened a hearing on the motion, during which the trial court issued an oral ruling granting the State's motion. 12/17/21 at 8:04:41 AM. The trial court also later

issued a written ruling. *See* R.P. 139.

Under these circumstances, a ruling on the issue by the trial court was fairly invoked, and the preservation requirements of Rule 12-321 are met.

The State complains that the arguments appellate counsel has advanced in his brief in chief are not carbon copies of what trial counsel argued. *See* AB at 7 (characterizing trial counsel's arguments as "a far cry" from appellate counsel's arguments). But while this might be an apt contrast of the details of the appellate versus trial arguments, that is not what the preservation rule is designed to do. There is no requirement that appellate arguments be carbon copies of trial arguments; on the contrary it is a commonplace that appellate counsel's arguments will often be more developed than trial counsel's contentions in the trial court. In any event, Rule 12-321's requirement that a ruling by the district court be fairly invoked was met in this case.

B. The State's standard of review arguments fail.

With respect to the standard of review, the State does not dispute, as it cannot, that the trial court's exclusion implicates Mr. Arisumi's right to present a defense, which is a constitutional right.

The State's reliance on *State v. Garcia*, 2013-NMCA-064, ¶ 11, is mistaken. In *Garcia*, the appellant did not claim that the exclusion at issue implicated his right to present a defense. *See id.*, ¶ 11. The *Garcia* decision has no application to Mr. Arisumi's case.

Similarly, the State's reliance on *State v. Bregar*, 2017-NMCA-028, ¶ 28, is mistaken. In *Bregar*, the appellant claimed that introduction of expert testimony constituted an abuse of discretion; she did not claim that it implicated her constitutional right to present a defense. The *Bregar* decision has no application to Mr. Arisumi's case.

Although the appeal in *State v. Sanders*, 1994-NMSC-043, at least involved a right to present a defense, in that case, the Court did not address any claim of a de novo standard applying to review of the district court's rulings. *See id.*, ¶¶ 21, 27. Insofar as the Court did not even address the issue on which the State claims it constitutes precedent, it lacks even persuasive value.

The State provides no on-point authority for its claim that when a constitutional right to present a defense is raised on appeal, the applicable standard of review is de novo due to the fact that the ruling at issue implicated a fundamental constitutional right. Two of the three

cases relied on by the State have nothing to do with this issue. *See Garcia*, 2013-NMCA-064, ¶ 11; *Bregar*, 2017-NMCA-028, ¶ 28. And in the third case, *Sanders*, although an abuse of discretion standard was applied, there was no issue on appeal as to which standard of review applied—de novo or abuse of discretion. *See Sanders*, 1994-NMSC-043, ¶¶ 21, 27.

The State's attempt to brush aside the cases cited by Mr. Arisumi—*State v. Belanger*, 2009-NMSC-025, ¶ 8; *State v. Neal*, 2007-NMSC-043, ¶ 15; and *State v. Martinez*, 2021-NMSC-002, ¶ 25—fails when it concedes, as it must, that each of these cases, like Mr. Arisumi's, involved issues of constitutional dimension.

The State makes no attempt to contest or dispute in any way the fact that the trial court's exclusion of the contract in Mr. Arisumi's case directly implicated his constitutional right to present a defense. Accordingly, as the New Mexico Supreme Court did in *Belanger*, *Neal*, and *Martinez*, this Court should review the issue of the trial court's infringement upon Mr. Arisumi's constitutional right to present a defense de novo.

C. The State's arguments on the merits fail.

The State's answer brief fails to address or even cite *State v. Campbell*, 2007-NMCA-051, ¶ 14. *See* AB at iii (Table of Authorities showing no citation to *Campbell*); AB at 4-12 (argument on issue #1, showing no citation to *Campbell*).

The State mysteriously overlooks Mr. Arisumi's arguments in the Brief in Chief at 36-41, and contends that Mr. Arisumi "is by and large silent on why, in his view, the State was wrong." AB at 11. Mr. Arisumi need not here repeat all of his arguments in the Brief in Chief on this issue, *see* BC at 36-41, but Mr. Arisumi vigorously argued why the district court's ruling erroneously infringed on his right to present a defense. For instance, Mr. Arisumi argued that the written contract showed his intent at the time, BC at 36-37, argued that the district court's ruling precluded him from showing the jury that he did not have the fraudulent intent that the prosecution claimed he had. *See* BC at 38. He contended that his intent was important with respect to essential elements of both counts. *See* BC at 38-39. It went to Essential Elements #1 and #2 of Count 1, and Essential Element #1 of Count 2. *See* BC at 39 (referring to R.P. 272, 273). There is no merit to the

State's contention that in Mr. Arisumi's brief in chief he was largely silent on this issue.

The State fails to address the key case discussed with respect to this issue—*Campbell*. *Compare* BC at 36-41 *with* AB at 4-12. The State's curious omission is critical because this Court made it clear in *Campbell* that it is reversible error where it "may have made a potential avenue of defense unavailable" to the defendant. 2007-NMSC-051, ¶ 14. Mr. Arisumi argued at length in the brief in chief that the trial court's exclusion took a potential avenue defense from him. Yet the State failed to address this argument in its answer brief.

For the reasons set forth in the brief in chief as well as those advanced in this reply brief, the Court should reverse the trial court's exclusion of the written contract because it removed from Mr. Arisumi a potential avenue of defense—*viz.*, that he did not have the intent that the State was required to prove.

2. The State's arguments on Issue #2 fail.

The State fails to show what probative value Ms. Miller's suffering and "extreme hardship" might have had.

The State attempts to minimize the danger of unfair prejudice to Mr. Arisumi by claiming that because the question and answer took 17 seconds, there could not have been prejudice. *See* AB at 13. The State cites no authority from this Court or the New Mexico Supreme Court for the proposition that the measure of prejudice under Rule 403 involves a mathematical percentage calculation, and if the inadmissible evidence took up only a small percentage, it will be ignored on appeal. *See* AB at 12-14. The relevant rules, and cases applying them were cited in Mr. Arisumi's Brief in Chief at Pages 41-45, 51-53. And in none of these rules, cases, or secondary authorities can one find any support for the remarkable proposition that prejudice is mathematically measured by comparing the duration of the offending testimony to the overall length of the entire trial.

Moreover, the State inadvertently undercuts its own argument by characterizing the dubious evidence as being "a

flash." AB at 13. Indeed, like a flash, it stands out from the background, and was no doubt memorable to the jury.

The State ignored all of the authorities cited and discussed by Mr. Arisumi on this issue in his Brief in Chief. *See* BC at 41-45, 51-53 (citing Rule 11-403 NMRA; *State v. Ruiz*, 1995-NMCA-007, ¶ 12, 119 N.M. 515; *State v. Otto*, 2007-NMSC-012, ¶ 15, 141 N.M. 443; Rule 11-401 NMRA; *McNeill v. Burlington Resources Oil & Gas Co.*, 2008-NMSC-022, ¶ 14; *Wright v. Brem*, 1970-NMCA-030, ¶ 19, 81 N.M. 410; *State v. Maxwell*, 2016-NMCA-082, ¶¶ 15-16; *State v. Jordan*, 1993-NMCA-091, ¶ 16; *State v. Stanley*, 2001-NMSC-037, ¶ 17, 131 N.M. 368; Advisory Committee's Note on Fed. R. Evid. 403, 28 U.S.S.C.A.N. 860; 1 Christopher B. Mueller and Laird C. Kirkpatrick, Federal Evidence § 94 (2d ed. 1987). None of these pertinent sources of legal authority were cited or even addressed by the State in its Answer Brief.

The State's omissions in this regard are a tacit omission that the testimony in question had no probative value to any fact in issue in this trial, and that the prejudicial value substantially

outweighed the non-existent or negligible probative value.

For the reasons stated in the Brief in Chief and in this Reply Brief, the testimony was erroneously admitted and this matter should be remanded to the trial court for a new trial.

3. The State's arguments on Issue #3 fail.

The State contends that adding two years to an individual's term of probation is only "a clerical mistake." AB at 16. But the State ignores the fact that when Mr. Arisumi was present in the courtroom, the court stated that the term of probation would be three years. 4/27/23 at 3:59:41 to 4:02:11 PM. In the written judgment, the term of probation is five years. R.P. 292. The addition of two years is much more than a "clerical mistake," because it adds two years to the deprivation of liberty imposed by the court. And the case law is clear that Mr. Arisumi has a right to be present when a five-year term of probation is imposed, if that was the trial court's intent. *See State v. Stejskal*, 2018-NMCA-045, ¶ 14, cited in BC at 54. The right of allocution precludes the court from increasing a sentence without the defendant's presence and opportunity to allocute.

The State also declares that the record is ambiguous as to what the three year statement by the court was referring to, *see* AB at 14, ignoring the well-established rule of lenity under which ambiguities are construed in the defendant's favor. *Cf. State v. Torres*, 2022-NMSC-024, ¶ 15 (under rule of lenity ambiguity of statute prohibiting certain types of conduct is resolved "in favor of the defendant"). Although *Torres* was addressing statutory ambiguity, the rationale of the rule of lenity applies in the sentencing context as well, where if the trial court's pronounced sentence is ambiguous between three years and five years, the ambiguity should be resolved not in the favor of the State, but in Mr. Arisumi's favor. *Cf. Torres*, 2022-NMSC-024, ¶ 15.

Whether there is an ambiguity in the oral pronouncement, or a material increase in the sentence outside Mr. Arisumi's presence, the matter should be remanded to the district court to impose a three-year term of probation.

4. The State's arguments on Issue #4 fail.

The State argues that the imposition of an extra $4125 should be "overlooked" as a trifle, or "an imperfection." AB at 19. As with Issue #3, the State regards imposition of unauthorized punishment as nothing to any consequence. If defies logic that an unauthorized restitution amount—exceeding the amount supported by evidence by more than $4000—would be considered nothing.

Mr. Arisumi acknowledged in the Brief in Chief that fundamental error review applies, but the State nevertheless suggests that Mr. Arisumi is unaware that it was not preserved or that fundamental error review applies. *See* AB at 18 (contending that Mr. Arisumi "without saying as much" contends the error is fundamental error). This ignores Mr. Arisumi's statement of the fundamental error standard of review, *see* BC at 55, and it ignores Mr. Arisumi's express argument that the district court's restitution order was fundamental error. *See* BC at 56-57.

Moreover, the State does not dispute that the evidence did not support a restitution award of $8400. *See* AB at 17-20. The State's tacit concession that the restitution amount was erroneous, together

with the fact that it was approximately double the maximum amount supported by the evidence, and forces Mr. Arisumi to pay in excess of $4000 more than what the evidence would support qualifies as fundamental error.

5. The State's arguments regarding cumulative error fail.

The State's only argument on cumulative error assumes that it has prevailed on its arguments with respect to Issues #1 and #2. *See* AB at 20. But if the Court were to rule that the trial court erred with respect to Issues #1 and #2, but found neither of them standing alone to constitute reversible error, the State has conceded the cumulative error argument. The combined effect of these errors deprived Mr. Arisumi of a fair trial, for the reasons stated in the Brief in Chief, which stand unrebutted by the State's answer brief. *See State v. Martin*, 1984-NMSC-077, ¶ 17; *State v. Vallejos*, 1974-NMCA-009, 86 N.M. 39; *State v. Gomez*, 1965-NMSC-128, ¶ 9, 75 N.M. 545.

Conclusion and Request for Oral Argument

For the reasons stated in this reply brief and in the brief in chief, Mr. Arisumi respectfully requests the Court to reverse the conviction and remand for retrial for the reasons stated in Issues #1, #2 and #5. In

addition, Mr. Arisumi respectfully requests the Court to vacate the sentence of probation for the reasons stated in Issue #3 and to vacate the restitution order for the reasons stated in Issue #4.

Mr. Arisumi also respectfully requests oral argument, where Court and counsel may engage in constructive dialog about any matters not adequately addressed in the parties' briefs.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing reply brief was served on the Criminal Appeals Division, Attorney General's Office, State of New Mexico, through the Odyssey electronic filing system and/or email, on the 18th day of March 2024.

/s/ Scott M. Davidson
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