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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,

4 v.

NO. 34,418 Consolidated with 34,553

5 **SCOTT ALLEN FOSTER,**

6 Defendant-Appellant,

7 **APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY**

8 **Drew D. Tatum, District Judge**

9 Hector H. Balderas, Attorney General

10 Santa Fe, NM

11 M. Anne Kelly, Assistant Attorney General

12 Albuquerque, NM

13 for Appellee

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15 Sergio Viscoli, Appellate Defender

16 B. Douglas Wood III, Assistant Appellate Defender

17 Santa Fe, NM

18 for Appellant

19 **MEMORANDUM OPINION**

20 **HANISEE, Judge.**

1 {1} Defendant Scott Allen Foster appeals from his convictions after a jury trial for
2 one count of trafficking controlled substances by distribution, and one count of
3 conspiracy to commit trafficking controlled substances by distribution. In this Court's
4 first calendar notice, we proposed to affirm in part and reverse in part. The State and
5 Defendant each filed a memorandum in opposition. After considering the memoranda,
6 we issued a second calendar notice in which we proposed to affirm. In response,
7 Defendant filed a second memorandum in opposition, which we have duly considered.
8 We are not persuaded by Defendant's arguments, and therefore affirm.

9 {2} **Issues 1–4:** In our second calendar notice, with respect to the first issue, we
10 proposed to hold that the facts presented by Defendant were insufficient to establish
11 that his right to a speedy trial was violated and we stated that we were not persuaded
12 that the district court's failure to dismiss this case on a speedy trial grounds was
13 fundamental error. [2 CN 2–4] With respect to the second issue, we suggested that we
14 were not persuaded that the State's late disclosure of a witness (Michael Robinson),
15 and the late interview of another witness (Kandi Garcia), prejudiced Defendant and
16 warrants reversal for a new trial. [2 CN 4–5] With respect to the third issue, we
17 suggested that Defendant had not demonstrated that the district court committed
18 fundamental error by permitting video evidence to be played before the jury without
19 accompanying audio. [2 CN 5–7] With respect to the fourth issue, we proposed to

1 hold that Defendant failed to demonstrate that the district court abused its discretion
2 in admitting Robinson’s testimony or in excluding evidence regarding Garcia’s
3 alleged misconduct. [2 CN 7–9] In response, Defendant does not point to any error in
4 fact or law with the second proposed disposition. [2 Def. MIO 1] *See Hennessy v.*
5 *Duryea*, 1998-NMCA-036, ¶ 24, 124 N.M. 754, 955 P.2d 683 (“Our courts have
6 repeatedly held that, in summary calendar cases, the burden is on the party opposing
7 the proposed disposition to clearly point out errors in fact or law.”). Instead, he simply
8 asserts that he stands on his previous arguments. [2 Def. MIO 1] Therefore, for the
9 reasons detailed in our second calendar notice, we affirm as to Issues 1 through 4.

10 {3} **Additional Issues:** In our first calendar notice, we noted two additional issues
11 that were not raised by Defendant—double jeopardy and an illegal sentence, both of
12 which may be raised for the first time on appeal, sua sponte by this Court. [1 CN 5–7;
13 *see also* 2 CN 9] *See State v. May*, 2010-NMCA-071, ¶ 6, 148 N.M. 854, 242 P.3d
14 421 (providing that this Court may consider double jeopardy violations and illegal
15 sentences for the first time on appeal).

16 {4} **Double Jeopardy:** Based on the information that we had at the time, we
17 proposed to reverse Defendant’s conviction for conspiracy on double jeopardy
18 grounds in our first calendar notice. [1 CN 5] *See State v. Silvas*, 2015-NMSC-006,
19 ¶¶ 1, 8-29, 343 P.3d 616 (holding that double jeopardy precludes trafficking and

1 conspiracy to commit trafficking convictions for a single act). After considering the
2 additional facts provided in the State’s memorandum in opposition, we proposed to
3 hold that there was not a double jeopardy violation in this case, and we proposed to
4 affirm Defendant’s convictions for trafficking and conspiracy to commit trafficking.
5 [2 CN 9–11] In response to this Court’s second calendar notice, Defendant asserts that
6 he stands on his previous arguments. [2 Def. MIO 1] He does not point to any error
7 in fact or law with the second proposed disposition as to this issue. *See Hennessy*,
8 1998-NMCA-036, ¶ 24. Thus, for the reasons detailed in our second calendar notice,
9 we affirm Defendant’s convictions for trafficking and conspiracy to commit
10 trafficking.

11 {5} **Sentencing:** In our first notice of proposed disposition, we noted that it
12 appeared that Defendant may be raising an issue regarding a potential illegal sentence;
13 however, it was unclear what error Defendant was claiming. [1 CN 5–7; *see also DS*
14 6] Because an illegal sentence is a jurisdictional issue, we asked the parties to address
15 the sentencing issue if they filed a memorandum in opposition to the calendar notice.
16 [1 CN 7] *See State v. Trujillo*, 2007-NMSC-017, ¶ 8, 141 N.M. 451, 157 P.3d 16
17 (stating that the “trial court does not have subject-matter jurisdiction to impose a
18 sentence that is illegal”).

1 {6} In Defendant’s first memorandum in opposition, he asserted that his sentence
2 is illegal because the State failed to prove the conviction-crime sequence required
3 under *State v. Linam*, 1979-NMSC-004, 93 N.M. 307, 600 P.2d 253, for purposes of
4 the habitual offender enhancement statute. [1 Def. MIO 16-17; *see also* State MIO 15-
5 16] We considered the arguments presented by both Defendant and the State and, for
6 the reasons detailed in our second calendar notice, we proposed to affirm the district
7 court’s enhancement of Defendant’s sentence. [2 CN 15; *see also* 2 CN 11–15] We
8 further suggested that if Defendant wishes to pursue an argument regarding the
9 enhanced sentence, he may file a petition for habeas corpus pursuant to Rule 5-802
10 NMRA. [2 CN 15]

11 {7} In response to this proposed disposition, Defendant continues to argue that his
12 sentence is illegal because the State failed to prove the conviction-crime sequence
13 required under *Linam*. [2 Def. MIO 4–6] Defendant also argues that, to the extent any
14 uncertainty remains as to the facts in this case, this Court should place this matter on
15 the general calendar. [2 Def. MIO 6–7] In support of this argument, Defendant
16 reminds this Court that trial counsel is deceased and appellate counsel has had to rely
17 on either Defendant’s recollections or “the limited information in the record proper.”
18 [2 Def. MIO 7] We are not persuaded by these arguments. Additionally, we note that

1 Defendant has not pointed to any error in fact or law with this Court's proposed
2 disposition as to this issue. *See Hennessy*, 1998-NMCA-036, ¶ 24.

3 {8} For the reasons discussed in detail in our second calendar notice, and consistent
4 with our reasoning and holding in *State v. Graham*, 2003-NMCA-127, 134 N.M. 613,
5 81 P.3d 556, *rev'd on other grounds by* 2005-NMSC-004, 137 N.M. 197, 109 P.3d
6 285, we affirm the district court's enhancement of Defendant's sentence. If Defendant
7 wishes to pursue an argument regarding the enhanced sentence, he may file a petition
8 for habeas corpus pursuant to Rule 5-802.

9 {9} Accordingly, for the reasons stated above, in the first notice of proposed
10 summary disposition, and in the second notice of proposed disposition, we affirm.

11 {10} **IT IS SO ORDERED.**

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 J. MILES HANISEE, Judge

14 **WE CONCUR:**

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 JAMES J. WECHSLER, Judge

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 TIMOTHY L. GARCIA, Judge