

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

2 Opinion Number: _____

3 Filing Date: September 17, 2018

4 **STATE OF NEW MEXICO,**

5 Plaintiff-Appellee,

6 v.

NO. A-1-CA-35500

7 **MELISSA RAE FLORES,**

8 Defendant-Appellant.

9 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

10 **Stan Whitaker, District Judge**

11 Hector H. Balderas, Attorney General

12 Santa Fe, NM

13 John Kloss, Assistant Attorney General

14 Albuquerque, NM

15 for Appellee

16 Bennett J. Baur, Chief Public Defender

17 C. David Henderson, Appellate Public Defender

18 Mary Barket, Assistant Appellate Defender

19 Santa Fe, NM

20 for Appellant

1 **OPINION**

2 **VANZI, Chief Judge.**

3 {1} Defendant Melissa Rae Flores appeals her convictions for receiving or
4 transferring a stolen vehicle and possession of burglary tools. She argues that the
5 admission of a codefendant’s indictment and plea, along with inadmissible hearsay
6 testimony, denied her a fair trial. Defendant also raises the issue of an erroneous
7 jury instruction and challenges the sufficiency of the evidence to support each of
8 her convictions. Because we conclude that the State used the codefendant’s plea
9 agreement and indictment solely for the substantive purpose of proving the
10 elements of receiving or transferring a stolen vehicle against Defendant thus
11 violating her right to a fair trial and to due process under the Sixth and Fourteenth
12 Amendments of the United States Constitution, we reverse and remand.

13 **BACKGROUND**

14 **Facts Leading to the Charges Against Defendant and Codefendant Scott**
15 **Veretto**

16 {2} Bernalillo County Sheriff’s Department Detective Jerry Koppman was
17 looking for Scott Veretto in August 2013. Koppman had previously arrested
18 Veretto for stealing motorcycles and confirmed on NCIC that Veretto was a
19 wanted fugitive. When Koppman arrived at Veretto’s last known address, he saw
20 Veretto leave the residence, get into a Mustang, and drive away. Koppman learned
21 the Mustang was registered to Cameron Ezell, so Koppman went to Ezell’s house

1 to speak to him. Ezell told Koppman that he had let Veretto use his car and that
2 Veretto was staying with Defendant, who was Veretto's girlfriend at the time.
3 While at Ezell's residence, Koppman saw a partially disassembled Nissan Murano
4 parked in the backyard. The vehicle identification number (VIN) plate had been
5 removed from the Murano's dashboard, but Koppman found a label with the VIN
6 on the inside of the driver's side door. A National Crime Information Center
7 (NCIC) check established that Defendant's mother owned the vehicle.

8 {3} Koppman then went to Defendant's mother's home, where Defendant also
9 lived, and located Defendant. There, he saw a different and fully assembled Nissan
10 Murano. The VIN plate on the dashboard of the Murano "appeared to have been
11 tampered with." Defendant gave Koppman access to the inside of the Murano by
12 crawling through the back of the car to unlock the car, and an NCIC search of the
13 VIN from the secondary label confirmed that the vehicle was not owned by
14 Defendant or her mother, but had been reported as stolen. Also, when Defendant
15 opened the Murano for Koppman to examine the secondary VIN, he saw "a little
16 computer" in the back of the vehicle. Defendant explained that she used the
17 computer "to reset her key in order to start the car" using written instructions that
18 Veretto had given to her. Defendant's mother thought that she held legal title to the
19 fully assembled Murano as she had purchased a similar one from a dealership a
20 few years earlier for Defendant to drive.

1 {4} Based on these facts, Defendant was charged with receiving or transferring a
2 stolen vehicle, conspiracy to receive or transfer a stolen vehicle, possession of
3 burglary tools, and two counts of harboring a felon. On the same date, the State
4 charged Veretto with receiving or transferring a stolen vehicle, conspiracy to
5 receive or transfer a stolen vehicle, possession of burglary tools, and other crimes
6 related to vehicle theft. Veretto subsequently entered into a plea and disposition
7 agreement in which he agreed to plead guilty to receiving or transferring a stolen
8 2007 white Nissan Murano and conspiracy to commit receiving or transferring a
9 stolen 2007 white Nissan Murano, among other offenses. Defendant's case
10 proceeded to trial.

11 **The State's Motion in Limine**

12 {5} Prior to trial, the State filed a motion in limine requesting, among other
13 things, to introduce Veretto's plea and disposition agreement in order to "prove
14 elements of the crime against . . . Defendant[,] . . . [s]pecifically, . . . to prove
15 knowledge on behalf of . . . Defendant that Scott Veretto had committed a felony
16 or felonies, and that . . . Defendant had reason to believe that the automobile which
17 is the subject of Counts 1 and 2 was stolen." At a hearing on the motion, the State
18 further explained that it was going to call Veretto to testify at trial and that it
19 wanted to present Veretto's plea agreement as evidence for two reasons: First, "to
20 show . . . the amount of motor vehicle thefts that [Veretto] has committed[,]"

1 which “goes to the knowledge element . . . that [Defendant] knew that [Veretto]
2 had committed a felony” on “the harboring of the felon” count; and second, “to
3 show, for the receiving . . . a stolen motor vehicle [count], . . . that she knew it was
4 stolen” because she “presumably. . . got this motor vehicle from Mr. Veretto. . . .
5 And conspiracy to commit. So that all goes to showing that [Veretto] conspired
6 with [Defendant], which is one of the charges [Defendant is] charged with[.]” The
7 State further said that it intended to admit the plea agreement “as substantive
8 evidence . . . to show the knowledge components on [Defendant’s] part.” Defense
9 counsel responded that he was concerned about the way that the State was trying to
10 use Veretto’s guilty plea. Although he acknowledged that the plea agreement could
11 be used to impeach Veretto, defense counsel stated:

12 I’m still a little concerned about the fact that the State is seeming to
13 argue that this is relevant because he was convicted of a crime. It
14 doesn’t show that [Defendant] knew that [Veretto] committed a crime.
15 The crime they’re talking about is receiving or transferring a stolen
16 motor vehicle, and the element that he could have pled to was that
17 [Veretto] should have known it was stolen. That doesn’t do anything
18 to show [Defendant’s] knowledge.

19 The district court said that it had “no idea what the testimony is going to be” but
20 that the plea agreement was “usable for purposes of impeachment by [defense
21 counsel], and [the State] can impeach [Veretto] with it as well, if, in fact, his
22 testimony is contrary to what they intend to present here today.” The court further
23 stated that

1 in terms of whether it'll actually be admitted, I don't know. And
2 whether that's going to be enough to show the state of mind of
3 [Defendant] here remains to be seen. So I guess it's really hard for me
4 to say, it's a little premature to make a firm decision about it, until I
5 know what the foundation is going to be for purposes of trying to get
6 it admitted. . . . So . . . let's hold that in abeyance until we hear some
7 testimony.

8 As a final matter, the district court rejected Defendant's argument that the use of
9 the plea agreement was "more prejudicial than probative."

10 **Use of Veretto's Testimony and Plea Agreement at Trial**

11 {6} During its opening statement, the State told the jury that it would hear that
12 Veretto "pled to being in receipt [or] possession of" the stolen Murano that was
13 parked at Defendant's house, that Veretto "also pled to conspiring to being in
14 receipt of that car[.]" and that "those are the same charges that [Defendant] is now
15 charged with, being in possession of that stolen car[.]" Defense counsel did not
16 object and, in the course of his opening, stated that Veretto "did enter into a plea
17 agreement in his case; and, yes, he did agree to testify for the State and do
18 whatever they asked him to." He then elaborated, telling the jury that

19 a big part of the incentive was the number of charges he was facing,
20 the fact that he was facing additional enhancements as a habitual
21 offender, anywhere up to eight years for each conviction that he has;
22 and the fact that he currently has a probation violation pending, and
23 that that probation violation has not been resolved, but he could end
24 up going to prison as a result of that probation violation. And his
25 testimony here today is happening before that probation violation
26 issue is resolved for him, one way or the other.

1 So you will hear evidence regarding the bias and motivations of
2 . . . Veretto[.]

3 {7} The State called Veretto to testify in its case in chief. Veretto initially
4 refused to testify about anything in his plea agreement which he characterized as
5 “lies.” As a result, the State moved to admit certified copies of Veretto’s
6 indictment and plea agreement into evidence. Defense counsel objected, and the
7 parties held a bench conference outside the presence of the jury. During the bench
8 conference, defense counsel said,

9 I think the only problem we have is, we discussed this in the motion in
10 limine, and there was a more-prejudicial-than-probative argument
11 with regards to the same charges that were against [Defendant]—
12 against [Veretto]. So . . . [w]e don’t want to waive any of the
13 arguments we made in limine on this.

14 The district court responded, “I’m not sure why that would be—why [Veretto’s]
15 testimony, based upon what he pled to in the indictment, is going to be prejudicial
16 to [Defendant] The question is whether it’s more prejudicial than probative,
17 and I’m finding it more probative than prejudicial. . . . They’ll be admitted, over
18 your objection.”

19 {8} At the State’s direction, Veretto read portions of his indictment to the jury:

20 [I]n Bernalillo County, New Mexico, the above named defendant
21 received or transferred possession of a . . . motor vehicle that the
22 defendant knew or had reason to believe had been stolen or
23 unlawfully taken from . . . another person; to wit, a white 2007 Nissan
24 Murano, belonging to [another person], contrary to [NMSA 1978,
25 Section 30-16D-4 (2009)].

1 Veretto confirmed that the name of the defendant on the indictment was his.
2 Veretto then read the following portion of his plea agreement to the jury:
3 “Receiving/transferring a stolen vehicle or motor . . . vehicle, a fourth-degree
4 felony offense occurring on or between May 4, 2013, and October 19, 2013, as
5 charged in Count 4 of [the] indictment[.] . . . [T]he defendant agrees to plead guilty
6 to these crimes.” Veretto further confirmed that the signature on the plea
7 agreement was his. The plea and disposition agreement was admitted into
8 evidence, and the State elicited no further testimony from Veretto.

9 {9} After the State put on its case in chief, defense counsel moved for directed
10 verdict on all of the charges. As to the count of receiving a stolen vehicle, the State
11 argued that sufficient evidence supported the charge because, in pertinent part, “we
12 have the fact that Scott Veretto pled to receiving and transferring this stolen motor
13 vehicle. And [Defendant] had a relationship with Scott Veretto. So a jury, in the
14 light most favorable to the State, can make the inference . . . that because he knew
15 it, she knew it[.]” The district court granted Defendant’s motion for directed
16 verdict on the conspiracy count and one of the harboring a felon counts. It denied
17 the motion as to the three remaining counts of receiving a stolen vehicle,
18 possession of burglary tools, and harboring a felon. With regard to the count of
19 being in possession of a stolen vehicle, the jury was instructed that the State had to
20 prove beyond a reasonable doubt each of the following elements of the crime:

1 1. [D]efendant had possession of a white, 2007
2 Nissan Murano;

3 2. This vehicle had been stolen or unlawfully taken;

4 3. At the time [D]efendant had this vehicle in her
5 possession she knew or had reason to know that this vehicle had been
6 stolen or unlawfully taken;

7 4. This happened in New Mexico on or about the 4th day of
8 May through the 19th day of October, 2013.

9 {10} Thereafter, using Veretto's plea agreement to establish Defendant's
10 knowledge that the vehicle was stolen, the State argued during closing as follows:

11 And then what's the final piece of evidence . . . You have to show that
12 [Defendant] knew it was stolen. . . . [Y]ou have the testimony of Scott
13 Veretto. And you have in evidence his plea, and you have in evidence
14 the indictment that identifies what he pled to. And he pled to receiving
15 a stolen 2007 Nissan Murano.

16

17 [Defendant] was aware, because her boyfriend was, . . . as you'll see
18 in the plea and disposition agreement that will go back to the jury
19 room with you, a car thief, who stole several cars. This was one of
20 them, the 2007 white Murano.

21 {11} Neither the State nor defense counsel asked for—and the district court did
22 not give—a limiting instruction informing the jurors that Veretto's plea agreement
23 could not be used as substantive evidence of Defendant's guilt. The jury acquitted
24 Defendant of the remaining harboring a felon count, but found her guilty of
25 receiving a stolen vehicle and possession of burglary tools. This appeal followed.

1 **DISCUSSION**

2 **Standard of Review**

3 {12} Defendant contends that the State introduced and used Veretto’s indictment
4 and plea agreement at trial solely as substantive evidence to establish her guilt. The
5 State counters that Defendant failed to preserve her claim for review and that she
6 “acquiesced in admission, and even ‘opened the door’ to it.” We agree with
7 Defendant.

8 {13} To the extent that the district court overruled defense counsel’s timely
9 objections, we review those evidentiary rulings under an abuse of discretion
10 standard. *See State v. Duran*, 2015-NMCA-015, ¶ 11, 343 P.3d 207. “But we
11 review de novo a misapprehension of the law upon which a court bases an
12 otherwise discretionary evidentiary ruling.” *Id.* (alterations, internal quotation
13 marks, and citation omitted). And, when a defendant’s federal constitutional rights
14 have been violated, we review those violations under a harmless error standard.
15 *State v. Gutierrez*, 2007-NMSC-033, ¶ 18, 142 N.M. 1, 162 P.3d 156. Error is not
16 harmless “if there is a reasonable possibility that the evidence complained of might
17 have contributed to the conviction.” *Id.* (internal quotation marks and citation
18 omitted); *see also State v. Tollardo*, 2012-NMSC-008, ¶ 36, 275 P.3d 110

1 (explaining that “reviewing courts should only conclude that a constitutional error
2 is harmless when there is no reasonable *possibility* it affected the verdict[.]” as
3 opposed to the “lower standard” of non-constitutional harmless error (alteration,
4 internal quotation marks, and citations omitted)). In determining whether it is
5 reasonably possible that the improper evidence contributed to the conviction, we
6 evaluate “all of the circumstances surrounding the error[.]” which may include
7 examining “the source of the error and the emphasis placed upon the error.”
8 *Tollardo*, 2012-NMSC-008, ¶ 43. Although other evidence of a defendant’s guilt
9 “can never be the singular focus[.]” it “may often be relevant” to help us
10 understand, for example, “what role [the error] may have played in the trial
11 proceedings[.]” *Id.* Thus, we may consider “the importance of the erroneously
12 admitted evidence in the prosecution’s case[.]” *Id.* (alteration, internal quotation
13 marks, and citation omitted). The State has the burden on appeal to “establish[]
14 beyond a reasonable doubt that the jury verdict was not tainted by the
15 constitutional error.” *Gutierrez*, 2007-NMSC-033, ¶ 18; *see also Tollardo*, 2012-
16 NMSC-008, ¶ 36 (“[T]he reasonable possibility standard continues to resemble the
17 reasonable doubt standard[.]” (internal quotation marks and citation omitted)).

18 **Use of a Codefendant’s Guilty Plea**

19 {14} “A codefendant’s guilty plea may not be used as substantive evidence of a
20 defendant’s guilt.” *United States v. Woods*, 764 F.3d 1242, 1246 (10th Cir. 2014)

1 (internal quotation marks and citation omitted); *see also United States v. Halbert*,
2 640 F.2d 1000, 1004 (9th Cir. 1981) (per curiam) (“As a principle of general
3 acceptance, the guilty plea or conviction of a codefendant may not be offered by
4 the government and received over objection as substantive evidence of the guilt of
5 those on trial.”); *Clemmons v. State*, 720 A.2d 1170, 1173 (Md. 1998) (collecting
6 cases from numerous jurisdictions that demonstrate this principle). There are at
7 least two important purposes for this rule: First, “it curbs the jury’s temptation to
8 find guilt by association”; and second, “it helps to ensure the government must
9 prove every element of an offense against the defendant; the government may not
10 borrow proof from another person’s conviction.” *Woods*, 764 F.3d at 1246. “The
11 rule is grounded in notions of fundamental fairness and due process[.]” *Id.*; *see*
12 *also Bisaccia v. Att’y Gen. of the State of N.J.*, 623 F.2d 307, 312-13 (3d Cir. 1980)
13 (explaining that this rule is grounded “on concepts of constitutional fairness” and
14 holding that violation of the rule “amount[s] to a denial of constitutional due
15 process”).

16 {15} Our Supreme Court first recognized this rule a century ago, and our
17 appellate courts have continued to endorse it. *See State v. Martino*, 1918-NMSC-
18 128, ¶ 2, 25 N.M. 47, 176 P. 815 (holding that the criminal information and guilty
19 pleas of four men who unlawfully engaged in gambling upon the defendant’s
20 premises were not admissible to prove that the defendant knowingly permitted

1 gambling on his premises); *see also State v. Jackson*, 1943-NMSC-049, ¶¶ 9, 10,
2 13, 47 N.M. 415, 143 P.2d 875 (holding that a codefendant’s testimony that he
3 pleaded guilty to receiving stolen money—the same charge that the defendant was
4 faced with—was erroneously admitted and “likely . . . was extremely prejudicial”);
5 *State v. Gilbert*, 1982-NMCA-081, ¶ 29, 98 N.M. 77, 644 P.2d 1066 (recognizing
6 that a “co-defendant’s guilty plea may not be admitted . . . when that evidence is
7 offered solely to prove [the] defendant’s guilt”). In *Jackson*, our Supreme Court
8 reasoned that the codefendant’s guilty plea “was sufficient to authorize the court to
9 pronounce sentence upon [the codefendant], but it was not conclusive proof of the
10 *truth* of the charge . . . , and particularly not admissible as to elements of the
11 offense as against a person not a party to [that] proceeding.” 1943-NMSC-049, ¶
12 14 (emphasis added). Recognizing that “[a]ccused persons are sometimes
13 motivated to plead guilty to a charge rather than go to trial in the hope of acquiring
14 leniency or some other advantage,” the Court suggested that the proper way for the
15 prosecution to have used the codefendant as a witness in that case would have been
16 to elicit testimony from the codefendant “that he knew” the money was “stolen
17 when he received it[.]” *Id.*

18 {16} There are no recognized exceptions to the rule that a codefendant’s guilty
19 plea may not be used as *substantive* evidence to prove a defendant’s guilt. *See*
20 *United States v. Torres-Colon*, 790 F.3d 26, 31 (1st Cir. 2015) (“The government

1 cites no case—and we can find none—in which the guilty plea of a codefendant
2 was permissibly used in this substantive way.”); *Woods*, 764 F.3d at 1246 n.1
3 (“Because substantive evidence is evidence offered to help establish a fact in issue,
4 as opposed to evidence directed to impeach or to support a witness’s credibility,
5 allowing plea evidence for any purpose other than credibility would require
6 creating an exception to the general prohibition against using pleas as substantive
7 evidence.” (alteration, internal quotation marks, and citation omitted)). However,
8 in certain narrow instances, a codefendant’s guilty plea evidence may be used non-
9 substantively. *United States v. Paterson*, 780 F.2d 883, 886 (10th Cir. 1986). Most
10 commonly, guilty pleas may be used for the “purpose of aiding the jury in its
11 assessment of the codefendant’s credibility as a witness.” *Woods*, 764 F.3d at 1246
12 (internal quotation marks and citation omitted); *see also Halbert*, 640 F.2d at 1004
13 (“Admissibility of the plea turns on the purpose for which it is offered. When that
14 purpose is to further the jury’s difficult task of evaluating credibility, it is relevant
15 and admissible[.]”); *Tollardo*, 2012-NMSC-008, ¶ 20 (“A co-defendant’s
16 conviction . . . may be admissible when it is introduced to impeach that co-
17 defendant if he or she testifies, rather than as substantive evidence of the
18 defendant’s guilt.”). A guilty plea may also be mentioned at trial “where other co-
19 defendants plead guilty during trial and are conspicuously absent” or “where
20 opposing counsel has left the impression of unfairness which raises the issue or

1 invites comment on the subject.” *Paterson*, 780 F.2d at 886 (internal quotation
2 marks and citation omitted). Anytime a codefendant’s guilty plea is used in one of
3 these permissible ways, it is “critical” that the trial court give the jury “cautionary
4 instructions limiting the jury’s use of the guilty plea . . . as evidence relating to [the
5 witness’s] credibility” and not as proof that the defendant met any of the elements
6 of the offenses with which she is charged. *United States v. Baez*, 703 F.2d 453, 455
7 (10th Cir. 1983).

8 **Use of Codefendant’s Guilty Plea Deprived Defendant of a Fair Trial**

9 {17} In this case, the district court initially declined to “make a firm decision” on
10 whether Veretto’s guilty plea would “actually be admitted,” reserving its ruling for
11 trial when it could “hear some testimony.” Defense counsel acknowledged that
12 evidence of Veretto’s plea agreement could be admissible if it was used for
13 impeachment purposes. However, the record demonstrates that the State did not
14 use Veretto’s plea for impeachment or other permissible reasons, nor does the State
15 make any effort to assert on appeal that it used the plea for any of these proper
16 purposes. From its direct examination of Veretto, to its admission of Veretto’s
17 indictment and guilty plea agreement into evidence, the State used this evidence
18 for the sole purpose of substantively proving the knowledge elements against
19 Defendant. The State’s opening and closing arguments further emphasized to the
20 jury that it should use Veretto’s guilty plea to find that Defendant knew or should

1 have known that the vehicle was stolen. *See Torres-Colon*, 790 F.3d at 31 (stating
2 that they have found no precedent that allows a prosecutor’s “bald introduction of a
3 witness’s guilty plea concerning facts or events similar to that for which the
4 defendant is on trial[,] suggesting to the trier of fact that the defendant should be
5 found guilty merely because of the witness’s guilty plea” (omission, internal
6 quotation marks, and citation omitted)); *United States v. Miranda*, 593 F.2d 590,
7 593 (5th Cir. 1979) (concluding that the prosecutor “deprived the defendant of a
8 fair trial by deliberately urging the jury on two occasions to use [the guilty plea]
9 evidence for a prohibited purpose”). And if the State’s behavior at trial leaves any
10 doubt that it planned to use the guilty plea improperly as substantive evidence, the
11 statements it made during the hearings on its motion in limine (that it intended to
12 use the plea agreement as substantive evidence) and Defendant’s directed verdict
13 motion (“that because [Veretto] knew it, [Defendant] knew it”) make its intentions
14 unmistakably clear. *See Clemmons*, 720 A.2d at 1175 (finding error where it was
15 “unmistakably clear that [the codefendant]’s testimony regarding his conviction
16 was offered, and was likely to be taken by the jury, as substantive evidence against
17 [the defendant],” and concluding “that it was plainly inadmissible for that purpose,
18 and that it was prejudicial”). For these reasons, we conclude that the State’s use
19 and the district court’s admission of Veretto’s guilty plea evidence in this case

1 “amount[ed] to a denial of constitutional due process[,]” *Bisaccia*, 623 F.2d at 313,
2 and “deprived . . . [D]efendant of a fair trial[.]” *Miranda*, 593 F.2d at 593.

3 **The Deprivation of Defendant’s Constitutional Rights Is Not Harmless Error**

4 {18} We next consider whether this deprivation of Defendant’s constitutional
5 rights resulted in harmless error—in other words, whether “there is no reasonable
6 possibility” that the error “affected the verdict.” *Tollardo*, 2012-NMSC-008, ¶ 36
7 (internal quotation marks and citation omitted); *see also Gutierrez*, 2007-NMSC-
8 033, ¶ 18 (emphasizing that “in a proper harmless error analysis, the appellate
9 court defers to the jury verdict *only* when the [s]tate has established beyond a
10 reasonable doubt that the jury verdict was not tainted by the constitutional error.”
11 (internal quotation marks and citation omitted)). We conclude that the error was
12 harmful for several reasons. First, “the source of the error” was not Defendant, but
13 the State who repeatedly emphasized to the jury that Veretto’s guilty plea evidence
14 should be used to prove that Defendant was aware the car was stolen. *See Tollardo*,
15 2012-NMSC-008, ¶ 43. Second, Veretto’s guilty plea was critical to the State’s
16 case because there was no other evidence—other than that she used a computer to
17 start the car at the direction of her boyfriend, and the Murano’s dashboard VIN
18 showed evidence of tampering—to establish Defendant’s knowledge that the
19 vehicle had been stolen or unlawfully taken. *See id.* And third, the State did not
20 meet its burden because it did not provide any analysis in this regard in its answer

1 brief on appeal. *See Gutierrez*, 2007-NMSC-033, ¶ 18 (“The [s]tate has the burden
2 of establishing that the constitutional error was harmless beyond a reasonable
3 doubt.” (internal quotation marks and citation omitted)). Under these
4 circumstances, we cannot say that “there is no reasonable possibility” that the
5 substantive use of Veretto’s guilty plea “affected the verdict.” *Tollardo*, 2012-
6 NMSC-008, ¶ 36 (emphasis, internal quotation marks, and citation omitted). To the
7 contrary, substantive use of the plea in this case appears to have been highly
8 prejudicial and tempted the jury to find Defendant guilty by association. *See*
9 *Woods*, 764 F.3d at 1246 (recognizing that the reason for prohibiting substantive
10 use of a codefendant’s guilty plea is to “curb[] the jury’s temptation to find guilt by
11 association”); *Miranda*, 593 F.2d at 594 (“[A] codefendant’s guilty plea or
12 conviction with respect to similar or identical charges . . . is extremely
13 prejudicial.”); *see also Jackson*, 1943-NMSC-049, ¶ 13 (concluding that the
14 codefendant’s guilty plea evidence was “likely . . . extremely prejudicial”);
15 *Clemmons*, 720 A.2d at 1175 (concluding that “[i]t is unmistakably clear” that
16 substantive use of the codefendant’s guilty plea “was prejudicial”).

17 {19} We are not persuaded by the State’s arguments on appeal that our conclusion
18 should be different. Contrary to the State’s assertions, Defendant preserved her
19 claim and did not “open[] the door” to the State’s use of the plea as substantive
20 evidence. Defense counsel objected to the evidence during the pre-trial hearing on

1 the State’s motion in limine and during trial while Veretto was on the stand,
2 arguing both times that admission of the plea would be prejudicial to Defendant
3 and that Veretto’s plea did not “do anything to show [Defendant’s] knowledge.”
4 Defense counsel’s discussion of the plea in his opening statement came in response
5 to the State’s use of the plea in its opening statement, and defense counsel’s
6 comments were confined to Veretto’s credibility—they did not comment or
7 otherwise open the door to the State’s *substantive* use of Veretto’s plea. *See, e.g.,*
8 *Paterson*, 780 F.2d at 885-86 (noting that where defense counsel did not invite the
9 error and where defense counsel’s objection to the error was overruled, his
10 subsequent failure to object to the admitted evidence may have been the result of
11 tactical considerations). Moreover, any use that defense counsel tried to make of
12 the improper guilty plea evidence during Veretto’s cross-examination after the
13 district court admitted the evidence over his objection does not waive his claim on
14 appeal. *See, e.g., State v. Zamarripa*, 2009-NMSC-001, ¶ 50, 145 N.M. 402, 199
15 P.3d 846 (“There is no waiver where a defense attorney, his or her original
16 objection rejected by the court, determines to ‘make the best of a bad situation’ and
17 argues the improperly admitted evidence in the client’s favor.”).

18 {20} The State next argues that, because the district court decided that Veretto’s
19 guilty plea testimony was more probative than prejudicial under Rule 11-403
20 NMRA, Rule 11-105 NMRA forecloses Defendant’s claim that Veretto’s guilty

1 plea should not have been used because defense counsel did not request a limiting
2 instruction. We disagree. Rule 11-105 states, in pertinent part, “If the court admits
3 evidence that is admissible . . . for a purpose—but not . . . [admissible] for another
4 purpose—the court, on timely request, must restrict the evidence to its proper
5 scope and instruct the jury accordingly.” Under these circumstances, a defendant’s
6 failure to request a limiting instruction “waive[s] any right to complain of the trial
7 court’s alleged error[,]” except in extreme circumstances under the fundamental
8 and plain error doctrines. *DeMatteo v. Simon*, 1991-NMCA-027, ¶ 3, 112 N.M.
9 112, 812 P.2d 361; *see also State v. Allen*, 2000-NMSC-002, ¶ 51, 128 N.M. 482,
10 994 P.2d 728 (reviewing for fundamental and plain error the admission of evidence
11 that had both an admissible and an inadmissible purpose, where the defendant
12 failed to ask for a limiting instruction). Rule 11-105 does not apply in this case
13 because Veretto’s guilty plea evidence was not admitted for an admissible purpose.
14 As demonstrated above, the State’s sole purpose for including this evidence was
15 for the inadmissible purpose of using it as substantive proof for the knowledge
16 element of the crimes that Defendant was accused of committing.

17 {21} Finally, the State contends that the rule against admitting a codefendant’s
18 guilty plea into evidence does not apply where a defendant is able to confront the
19 codefendant at trial and the evidence served a non-hearsay purpose. We are not
20 persuaded. The authorities cited by the State in support of this contention were

1 limited to evidentiary rules against hearsay and a defendant’s constitutional rights
2 under the Confrontation Clause. Here, admission of Veretto’s guilty plea evidence
3 for the sole purpose of using it as substantive proof against Defendant implicated
4 her constitutional rights to due process and a fair trial. None recognize an
5 exception to the rule against the substantive use of guilty plea evidence nor have
6 we found a case that does so. *See Torres-Colon*, 790 F.3d at 31; *Woods*, 764 F.3d
7 at 1246 n.1.

8 **Possession of Burglary Tools**

9 {22} The reversal of Defendant’s conviction for receiving a stolen vehicle
10 necessarily requires that her conviction for possession of burglary tools be reversed
11 as well. The instructions given to the jury for possession of burglary tools required
12 the State to prove beyond a reasonable doubt, among other elements, that
13 Defendant intended to use the automobile computer “for the purpose of committing
14 burglary[.]” Whether Defendant intended to use this computer for the purpose of
15 burglarizing the stolen vehicle depended on whether she knew that the vehicle was
16 stolen. Because the district court improperly admitted Veretto’s guilty plea
17 evidence as substantive proof of Defendant’s knowledge that the vehicle was
18 stolen, there is a reasonable possibility that the improper evidence might have also
19 contributed to the conviction for possession of burglary tools and that this

1 conviction was similarly “tainted by the constitutional error.” *Gutierrez*, 2007-
2 NMSC-033, ¶ 18 (internal quotation marks and citation omitted).

3 **CONCLUSION**

4 {23} We reverse Defendant’s convictions for receiving a stolen vehicle and
5 possession of burglary tools and remand this case for a new trial.

6 {24} **IT IS SO ORDERED.**

7
8

LINDA M. VANZI, Chief Judge

9 **WE CONCUR:**

10
11

M. MONICA ZAMORA, Judge

12
13

JULIE J. VARGAS, Judge