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

2 **CITY OF ROSWELL,**

3 Plaintiff-Appellee,

4 v.

NO. A-1-CA-35914

5
6 **EDWARD KAFKA,**

7 Defendant-Appellant.

8 **APPEAL FROM THE DISTRICT COURT OF CHAVEZ COUNTY**

9 **James M. Hudson, District Judge**

10 City of Roswell

11 Paul V. Sanchez

12 El Prado, NM

13 for Appellee

14 Edward Kafka

15 Roswell, NM

16 Pro se Appellant

17 **MEMORANDUM OPINION**

18 **GARCIA, Judge.**

19 {1} Defendant appeals his convictions for failure to yield and failure to provide

20 immediate notice of an accident. We issued a notice of proposed disposition proposing

1 to dismiss in part and affirm in part. After obtaining several extensions of time from
2 this Court, Defendant has responded with a memorandum in opposition. We have
3 carefully considered the arguments raised in that memorandum, but continue to
4 believe that the proposed disposition is correct. Therefore, for the reasons set out
5 below and in our notice of proposed summary disposition, we dismiss in part and
6 affirm in part.

7 {2} In our notice, we pointed out that Defendant had not filed a timely appeal from
8 the judgment and sentence and that his appeal would be limited to the denial of his
9 “omnibus” motion for reconsideration, which we construed as a motion filed under
10 Rule 5-803 NMRA. Defendant has not responded to the proposal to dismiss the appeal
11 insofar as it concerns the judgment and sentence, and we therefore dismiss that portion
12 of his appeal.

13 {3} With respect to the proposal to affirm the district court’s rejection of
14 Defendant’s motion for reconsideration, Defendant presents evidence and argument
15 intended to establish that his convictions were not supported by substantial evidence.
16 In particular, he points out that the only witness who was on the scene at the time of
17 the accident testified that he did not actually see the accident happen. [MIO 4-5]
18 Instead, the witness testified that he saw the positions of the vehicles after the accident
19 and heard the other driver yelling that Defendant had run the stop sign; this statement

1 was apparently admitted into evidence as an exception to the hearsay rule, the “excited
2 utterance” exception. [Id.] In addition, Defendant maintains there was no evidence that
3 the amount of damage to either vehicle was “to the apparent extent of \$500 or more”
4 as the city ordinance apparently requires. [Id. 3, 5-6]

5 {4} The problem with both of Defendant’s arguments is that they attack the
6 sufficiency of the evidence supporting his convictions. However, in New Mexico and
7 elsewhere, a claimed lack of sufficient evidence is not an argument cognizable in a
8 post-conviction proceeding. *See, e.g., Faulkner v. State*, 1972-NMCA-061, ¶ 6, 83
9 N.M. 742, 497 P.2d 744; *State v. Bonney*, 1971-NMCA-041, ¶ 4, 82 N.M. 508, 484
10 P.2d 350; *accord Clay v. Kelley*, 528 S.W.3d 836, 838 (“Claims of actual innocence,
11 which are effectively challenges to the sufficiency of the evidence, are due-process
12 claims that are not cognizable in habeas proceedings.”); *In re Richards*, 371 P.3d 195,
13 209 (Cal. 2016) (noting that a sufficiency-of-the-evidence claim is a type of claim not
14 cognizable on a petition for writ of habeas corpus). A motion filed under Rule 5-803,
15 or construed as filed under that rule, is unequivocally a motion requesting post-
16 conviction relief. Rule 5-803(A) (describing such a motion as a “petition to set aside
17 a judgment and sentence”). Therefore, the sufficiency-of-the-evidence arguments
18 being raised by Defendant were simply not cognizable by the district court or by this
19 Court on appeal. We therefore decline to address the arguments Defendant has raised

1 concerning the sufficiency of the evidence supporting his convictions.

2 {5} Based on the foregoing, as well as the discussion contained in the notice of
3 proposed summary disposition, we affirm Defendant's convictions.

4 {6} **IT IS SO ORDERED.**

5

6

TIMOTHY L. GARCIA, Judge

7 **WE CONCUR:**

8

LINDA M. VANZI, Chief Judge

10

STEPHEN G. FRENCH, Judge