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

7 **STATE OF NEW MEXICO,**

8 Plaintiff-Appellee,

9 v.

**NO. 27,166**

10 **RUBEN LARA,**

11 Defendant-Appellant.

12 **APPEAL FROM THE DISTRICT COURT OF LEA COUNTY**

13 **Don Maddox, District Judge**

14 Gary K. King, Attorney General

15 Nicole Beder, Assistant Attorney General

16 Santa Fe, NM

17 for Appellee

18 Chief Public Defender

19 Eleanor Brogan, Assistant Appellate Defender

20 Santa Fe, NM

21 for Appellant

22 **MEMORANDUM OPINION**

23 **WECHSLER, Judge.**

1 Defendant appeals his convictions for one count of trafficking a controlled  
2 substance (cocaine) and possession of drug paraphenalia and two counts of possession  
3 of a controlled substance (methamphetamine and marijuana). In a previous  
4 memorandum opinion, we affirmed Defendant's convictions. *State v. Lara*, No.  
5 27,166, slip op. (N.M. Ct. App. May 14, 2009). Our Supreme Court granted a writ of  
6 certiorari to determine whether the district court violated Defendant's confrontation  
7 rights in admitting as evidence the report of a non-testifying Department of Public  
8 Safety Southern Forensic Laboratory (Crime Lab) forensic analyst and by allowing  
9 testimony regarding the report by a forensic analyst not involved in preparing the  
10 report. After deciding *State v. Aragon*, 2010-NMSC-008, 147 N.M. 474, 225 P.3d  
11 1280, our Supreme Court remanded this case to this Court to reconsider our decision  
12 in light of *Aragon*. Because Defendant failed to preserve his confrontation claim and  
13 the admission of the report and testimony did not rise to the level of fundamental  
14 error, we affirm.

## 15 **BACKGROUND**

16 Defendant was convicted of one count of trafficking cocaine and one count each  
17 of possession of drug paraphernalia, methamphetamine, and marijuana.

18 At trial, Eric Young, a forensic analyst at the Crime Lab, testified regarding the  
19 result of a drug analysis performed by another forensic analyst at the Crime Lab,

1 Danielle Elenbaas. Young testified that Elenbaas conducted a drug analysis on the  
2 State's Exhibits 2-7. He testified that Elenbaas concluded that Exhibits 6 and 7 were  
3 cocaine, Exhibits 3, 4, and 5 were methamphetamine, and Exhibit 2 was marijuana.  
4 Although Young testified as to the procedures used by analysts at the Crime Lab, he  
5 testified that he had no personal knowledge of how Elenbaas conducted the analysis  
6 in this case, and he only reviewed her report. Following the testimony, defense  
7 counsel moved to strike the testimony, arguing that Young "does not have sufficient  
8 knowledge necessary to provide the essential elements of the hearsay exception." The  
9 district court overruled the objection, holding that the report and testimony were  
10 admissible under the business records exception.

#### 11 **PRESERVATION AND STANDARD OF REVIEW**

12 While Defendant argues that his general hearsay objection preserved his  
13 confrontation clause argument, in our previous memorandum opinion, we determined  
14 that Defendant asserted for the first time on appeal that Young's testimony violated  
15 his right to confrontation. Indeed, Defendant's general hearsay objection and failure  
16 to invoke a ruling on whether his confrontation rights were violated did not preserve  
17 Defendant's confrontation claim. *See State v. Lucero*, 104 N.M. 587, 591, 725 P.2d  
18 266, 270 (Ct. App. 1986) (holding that a hearsay objection was not sufficiently  
19 specific to alert the district court to preserve a confrontation claim). We therefore

1 review Defendant’s claim for fundamental error. *See State v. Bullcoming*, 2010-  
2 NMSC-007, ¶ 41, 147 N.M. 487, 226 P.3d 1 (holding that “because counsel did not  
3 object under the Confrontation Clause in the trial court, this Court must review the  
4 issue under fundamental error”), *cert. granted, Bullcoming v. New Mexico*, \_\_ U.S. \_\_,  
5 131 S. Ct. 62 (2010).

6 “Fundamental error only applies in exceptional circumstances when guilt is so  
7 doubtful that it would shock the judicial conscience to allow the conviction to stand.”  
8 *Bullcoming*, 2010-NMSC-007, ¶ 41 (internal quotation marks and citation omitted).  
9 Fundamental error also applies when substantial justice has not been served to the  
10 extent that judicial integrity is undermined, regardless of the apparent guilt of the  
11 defendant. *State v. Cunningham*, 2000-NMSC-009, ¶ 21, 128 N.M. 711, 998 P.2d  
12 176.

### 13 **CONFRONTATION CLAUSE**

14 In our previous memorandum opinion, we relied on *State v. Delgado*, 2009-  
15 NMCA-061, 146 N.M. 402, 210 P.3d 828, *overruled by Aragon*, 2010-NMSC-008,  
16 ¶ 19, and held that Elenbaas’ report was admissible under the business records  
17 exception to the hearsay rule. We further held that Young’s testimony, as opposed  
18 to testimony from Elenbaas, did not violate Defendant’s right to confrontation. Our  
19 Supreme Court has since overruled *Delgado* in *Aragon*, 2010-NMSC-008, ¶ 19. In

1 *Aragon*, our Supreme Court held that the admission of a report authored by a non-  
2 testifying forensic analyst and the trial testimony of an analyst who did not prepare  
3 the report violated the defendant’s right to confrontation. *Id.* However, despite the  
4 confrontation clause violation, the Court affirmed the defendant’s conviction for  
5 possession of a controlled substance because the confrontation clause violation was  
6 harmless error. *Id.* ¶ 36.

7       Our present case is indistinguishable from *Aragon*, and the admission of the  
8 Elenbaas’ report without her accompanying testimony violated Defendant’s  
9 confrontation rights. Nevertheless, we hold that the admission of the report and  
10 Young’s testimony did not rise to the level of fundamental error because there was  
11 sufficient evidence, even without Elenbaas’ report and Young’s testimony, for a jury  
12 to find Defendant guilty. *See State v. Rodriguez*, 81 N.M. 503, 505, 469 P.2d 148,  
13 150 (1970) (“If there is substantial evidence . . . to support the verdict of the jury, we  
14 will not resort to fundamental error.”).

15       Officer John Martinez, one of the officers who responded to the scene, testified  
16 that he conducted a field test on either the State’s Exhibit 6 or 7 and that the exhibit  
17 tested positive for cocaine. He further testified that Defendant possessed a crack pipe  
18 and a large amount of currency. After questioning, Defendant admitted to Officer  
19 Martinez that he sold illegal narcotics and that substances found hidden underneath

1 a vehicle belonged to him. Therefore, even without the testimony of Young or  
2 Elenbaas' report, there was sufficient evidence presented to the jury to convict  
3 Defendant of trafficking cocaine and possessing drug paraphernalia and illegal  
4 narcotics. Defendant's guilt was not so doubtful as to shock the conscience of this  
5 Court, and, therefore, there was no fundamental error. *See State v. Johnson*, 2010-  
6 NMSC-016, ¶ 25, 148 N.M. 50, 229 P.3d 523 ("Fundamental error only applies in  
7 exceptional circumstances when guilt is so doubtful that it would shock the judicial  
8 conscience to allow the conviction to stand." (internal quotation marks and citation  
9 omitted)).

10 Moreover, Defendant never challenged the reliability of Elenbaas' report and  
11 the identification of the exhibits as cocaine, methamphetamine, and marijuana. There  
12 cannot be fundamental error when the error only affects an undisputed issue or  
13 element in the case. *Cf. State v. Castro*, 2002-NMCA-093, ¶ 2, 132 N.M. 646, 53 P.3d  
14 413 ("[E]rror in submitting an instruction omitting an essential element is harmless  
15 where a reviewing court concludes beyond a reasonable doubt that the omitted  
16 element was uncontested[.]" (internal quotation marks and citation omitted)). While  
17 Defendant asserts that "[t]here is a high probability that [Defendant's] case would  
18 have turned out differently," Defendant does not provide specifics as to how Elenbaas'  
19 testimony would have affected the verdict. Defendant never argued that the report

1 was unreliable, and his defense theory was never that the substances were not  
2 narcotics. As opposed to challenging the identification of the substances as narcotics,  
3 Defendant’s theory throughout the case was that the substances did not belong to him.  
4 Indeed, defense counsel stated that “[t]here’s not going to be any dispute that there  
5 were some items found, some contraband that were found.”

6 Defendant also argues that because New Mexico courts followed *State v.*  
7 *Dedman*, 2004-NMSC-037, ¶¶ 30, 46, 136 N.M. 561, 102 P.3d 628 (holding that  
8 Scientific Laboratory Division blood alcohol report was non-testimonial and therefore  
9 not subject to a confrontation clause challenge), *overruled by Bullcoming*, 2010-  
10 NMSC-007, ¶ 16, prior to *Aragon* and *Bullcoming*, Defendant’s objection to Young’s  
11 testimony and Elenbaas’ report on confrontation clause grounds would have been  
12 futile. Defendant cites *Commonwealth v. Vasquez*, 923 N.E.2d 524, 528 (Mass. 2010)  
13 (holding that a defendant who failed to preserve confrontation clause argument was  
14 entitled to review as if argument was preserved by proper objection because the law  
15 in effect at the time of the trial would have made objection futile), in arguing that we  
16 should address Defendant’s confrontation clause claim as if it was properly preserved.  
17 If we were to accept Defendant’s argument, we would apply the harmless error  
18 standard instead of fundamental error analysis to the violation of Defendant’s  
19 confrontation rights. *See Aragon*, 2010-NMSC-008, ¶¶ 34-36 (holding that admission

1 of a report by non-testifying forensic analyst and trial testimony by another analyst  
2 violated the defendant's confrontation rights but that the error was harmless).

3       If Defendant properly preserved his confrontation claim, the admission of  
4 Elenbaas' report and Young's testimony was harmless error. "A reviewing court  
5 should only conclude that a constitutional error is harmless when there is no  
6 reasonable possibility it affected the verdict." *Id.* ¶ 35 (alterations, internal quotation  
7 marks, and citation omitted). We consider three non-determinative factors in applying  
8 harmless error analysis: whether (1) absent the improper evidence there is sufficient  
9 evidence to support the convictions, (2) there is a disproportionate volume of  
10 permissible evidence compared to improper evidence, and (3) there is conflicting  
11 evidence to discredit the improper evidence. *Id.* We weigh these factors and uphold  
12 the conviction only if we conclude with the requisite level of certainty that the error  
13 did not contribute to the verdict. *Id.*

14       While there was not a disproportionate volume of permissible evidence that the  
15 substances were narcotics and therefore the second harmless error factor weighs in  
16 Defendant's favor, the first and third factors weigh in favor of the State. As to the  
17 first factor, as we determined in our fundamental error analysis, sufficient evidence  
18 supports Defendant's convictions. Moreover, the third factor weighs heavily in the  
19 State's favor. Defendant did not present conflicting evidence as to whether Exhibits

1 2-7 were narcotics or that Elenbaas' report was unreliable or flawed in any way.  
2 Indeed, Defendant's theory throughout the case was that the substances did not belong  
3 to him. The admission of Elenbaas' report and Young's testimony was therefore  
4 harmless error. *See State v. McDonald*, 2004-NMSC-033, ¶ 12, 136 N.M. 417, 99  
5 P.3d 667 (holding that error was harmless when there was sufficient evidence at trial  
6 that was "essentially uncontested").

7 **CONCLUSION**

8 Because we conclude that the admission of Elenbaas' report into evidence  
9 without her accompanying testimony and Young's testimony regarding Elenbaas'  
10 report was not fundamental error, or alternatively was harmless error, we affirm.

11 **IT IS SO ORDERED.**

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**JAMES J. WECHSLER, Judge**

14 **WE CONCUR:**

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**CELIA FOY CASTILLO, Chief Judge**

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**CYNTHIA A. FRY, Judge**