



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. S-1-SC-41012

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

LIONEL BERKELEY FISKE,

Defendant-Respondent.

STATE OF NEW MEXICO'S REPLY BRIEF

On Certiorari from the New Mexico Court of Appeals

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ARGUMENT

I. The State Invoked a Ruling on Whether Defendant Had a Possessory Interest in the GoPro.

Defendant argues that the State failed to preserve both standing or abandonment. **[AB 12-17]** But Defendant failed to rebut the State's argument that both claims were preserved.

To begin with, *Defendant* bore the burden of showing that he had standing to challenge the seizure in order to invoke the exclusionary rule at all. *See Rakas v. Illinois*, 439 U.S. 128, 132 n.1 (1978) (stating that a defendant “has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure.”); *U.S. v. Russell*, 26 F.4th 371, 375 (6th Cir. 2022) (stating that the burden continues on appeal); *State v. Van Dang*, 2005-NMSC-033, ¶ 7, 138 N.M. 408 (“To establish standing, Defendant must demonstrate . . .”). In order to have standing to challenge a seizure, a defendant must demonstrate that he or she had a possessory interest in the property. *See U.S. v. Jacobsen*, 466 U.S. 109, 113 (1984). So, Defendant cannot complain that he was not on notice that he had to establish that he had a possessory interest in the GoPro in order to challenge the seizure. **[See AB 24, 32, 36 (describing notice to the defendant as a critical consideration)]**

And because standing is either a threshold consideration or a “necessary element” of a search and seizure claim, *Van Dang*, 2005-NMSC-033, ¶ 7, the district court should have known that it had to resolve the issue before granting relief.

Moreover, the State’s written response squarely invoked a ruling on whether Defendant had a possessory interest in the GoPro or if he abandoned that interest. In its response, the State argued that Defendant “has no possessory interest in the GoPro or computer” because, among other facts, Defendant damaged the GoPro with the intent to avoid prosecution. **[RP 63]** It argued that “Defendant disregarded his possessory interest” in the camera by never seeking its return, “meaning he *abandoned any standing to challenge* searches of the item.” **[Id. 65 (emphasis added)]** It further argued that his decision to damage the camera “demonstrate[ed] a prominent disregard for his possessory interest in that item.” **[Id.]** The lack of password protection for the GoPro meant “that *any* possessory interest Defendant *assumed* he *might have* had was unfounded and unrealistic.” **[Id. (emphasis added)]** For those reasons as well as the fact that the GoPro contained contraband, “Defendant’s possessory interest was undercut[.]” **[Id.]** Even

Defendant admits that the State's response argued that his possessory interest in the GoPro was "possibly 'zero'" **[AB 33]**

So, by expressly arguing that 1) Defendant did not have a possessory interest in the GoPro, and 2) that Defendant abandoned any possessory interest he might have had, the State invoked a ruling from the district court on whether, in light of Defendant's actions, he had any possessory interest in the GoPro at all. This preserved the State's claim. *See* Rule 12-312(A) NMRA ("To preserve an issue for review, it must appear that a ruling or decision by the trial court was fairly invoked."). *See also State v. Leyba*, 1997-NMCA-023, ¶¶ 4, 6-7, 123 N.M. 159 ("We hold that the State's reliance on the timely and specific arguments made in its written opposition was sufficient to preserve the claimed error regarding Defendant's standing.").

Defendant, relying on *State v. Janzen*, 2007-NMCA-134, 142 N.M. 638 and *U.S. v. Golson*, 743 F.3d 44 (3d. Cir. 2014) argues that the State had to be more specific below. But neither case applies here. In *Janzen*, two co-defendants, Janzen and Marquez, filed a motion to suppress. 2007-NMCA-134, ¶ 5. In its response in district court, the State argued that Janzen gave valid consent to search a property and that,

accordingly, Marquez did not have standing. *Id.* ¶ 9. On appeal, the State changed tack and argued that Janzen did not have standing either. *Id.* ¶ 13. The Court of Appeals held that the State’s standing argument as to Janzen was not preserved because its arguments below did not “fairly apprise[] the district court of a possible waiver or standing argument as to Defendant Janzen.” *Id.* ¶ 13. Here, in contrast, the State expressly invoked rulings on whether Defendant had a possessory interest at all.

Golson is even more clearly distinguishable. The Third Circuit did not discuss the government’s position in district court at all, but noted that the government raised standing “for the first time on appeal.” *Golson*, 743 F.3d at 55 n.9; *see id.* 50, 55-56 (not describing the government’s position on the issue below). So, *Golson* bears only on whether the government can raise standing for the first time on appeal. Neither *Janzen* nor *Golson* creates a heightened standard for preservation.

Certainly, the State could have made the issue clearer by explicitly stating that because Defendant did not have a possessory interest, he also did not have standing. But the response specifically alerted the district court to the question of Defendant’s possessory interest in the

GoPro (it ruled on the issue, **[see RP 86-89]**), Defendant had a full and fair opportunity to respond to the State’s arguments (**[see 12-10-24 CD 4:40:53-4:43:45 (arguing that Defendant had a possessory interest in the GoPro)]**), and created a clear record of the issue (the parties largely agree on the facts but disagree about the inferences to be drawn therefrom). *See Gonzales v. Shaw*, 2018-NMCA-059, ¶ 14 (discussing purposes of the preservation rule). Because whether Defendant had standing turned solely on whether he had a possessory interest in the GoPro, the State’s specific and timely attacks on Defendant’s possessory interest served to preserve its claims.

Nor did the State abandon its arguments at the suppression hearing. True, the State mainly spoke of Defendant’s “diminished” possessory interest rather than stating he had no possessory interest at all. But defendant overreads the significance of this word choice. The parties disputed how *State v. Padilla*, 2024-NMCA-073 applied to Defendant’s case, and that decision repeatedly discussed a defendant’s “diminished possessory interest” in a tablet computer. *See id.* ¶¶ 1, 13-14, 22 (using the terms “diminish” and “diminished” to describe the property interest). The best interpretation of the prosecutor’s word choice

is not that she intended to entirely depart from the State's written response by admitting a possessory interest but instead that she used the terminology found in the leading case.

As the State acknowledged in its Brief in Chief, the prosecutor said of the GoPro—in rebuttal, and shortly before the court closed its doors— "We're not stating that he either abandoned it or that he was trying to avoid prosecution, but that rather that because it was a broken device that he has reduced interest in that property." [*Id* 5:00:55-5:03:40] The State, relying on *State v. Sosa*, 2009-NMSC-056, ¶ 24, 147 N.M. 351 for the proposition that "closing argument, and rebuttal argument in particular, is necessarily responsive and extemporaneous, not always capable of the precision that goes into prepared remarks," argued that this was a time-pressured misstatement rather than an intentional concession of an issue raised in the written response.

Defendant responds that the prosecutor did not face a "particular timeframe before a jury about to deliberate." [AB 17] But the prosecutor faced a particular timeframe before the court closed its doors. He also argues that the State could have moved for an extension of the hearing or filed additional written pleadings. [*Id.*] But the State's written

submission already mentioned abandonment. Moreover, the court understood that the State argued that Defendant's efforts to damage the GoPro "showed that Defendant did not want to own the item and intended on destroying the item, which diminishes his possessory interest." [RP 77]

The State preserved the issue of whether Defendant had standing to challenge the seizure of the GoPro.

II. Alternatively, This Court Should Hold That Standing May Be Raised on Appeal.

Because the State preserved its standing challenge below, this Court does not have to address whether the State may raise the issue for the first time on appeal. If it does, however, this Court should hold that appellate courts may consider unpreserved standing challenges for the first time on appeal on a discretionary basis.

There is a broad split in authority about whether the government may raise standing for the first time on appeal. The government may certainly waive standing by affirmative action. In *Steagald v. United States*, 451 U.S. 204 (1981), the Supreme Court declined to consider the government's argument that a defendant did not have standing to contest the search of a house. There, the government had not raised that

challenge in district court or on appeal. *Id.* at 208. Moreover, “during both the trial and the appeal in this case the Government argued successfully that petitioner's connection with the searched home was sufficient to establish his constructive possession of the cocaine found in a suitcase in the closet of the house.” *Id.* at 209. Even in its response to the defendant’s petition for writ of certiorari, the government “expressly represented that the searched home was petitioner’s residence.” *Id.* at 210. It was only in its substantive briefing before the Court that the government argued that the defendant might not have a reasonable expectation of privacy in the house. *Id.* at 208-09. In light of the government’s “assertions, concessions, and acquiescence,” the Court ruled that the government “lost its right to challenge petitioner's assertion that he possessed a legitimate expectation of privacy in the searched home.” *Id.* at 209.

But this is not an *Steagald* case: there, the government profited from arguing that the house belonged to the defendant, then suddenly changed course at the very last moment (a response brief before the Supreme Court of the United States) to argue that the defendant might not have a privacy interest in the house. Here, the State attacked

Defendant's possessory interest in the GoPro below and on appeal. Accordingly, if the Court concludes that the State failed to preserve its arguments, this would fall into the more ordinary run of cases where the government does not raise standing below.

Defendant defends the hard waiver rule in *State v. Porras-Fuerte*, 1994-NMCA-141, 119 N.M. 180 and *Leyba*, 1997-NMCA-023. But Defendant failed to respond to the State's argument against those cases. Both *Porras-Fuerte* and *Leyba* relied heavily on the notion that standing "is a fact-based issue . . . [t]he defendant must be alerted to the issue and given the opportunity to present evidence thereon at the trial court level." *Porras-Fuerte*, 1994-NMCA-141, ¶ 10; *see also Leyba*, 1997-NMCA-023, ¶ 6 ("[S]tanding is a fact-based issue on which Defendant must be given the opportunity to present evidence to the trial court."). This is a good rule for ordinary evidentiary claims, but not for standing, which a defendant always bears the burden of establishing. True, if the State raised an exotic standing argument for the first time on appeal, a defendant might need the opportunity to be able to develop more evidence. But in cases like this one, defendants are on ample notice about the nature of the State's standing challenge. A flexible rule giving

appellate courts discretion to handle these different circumstances makes far more sense than the hard rule from those two cases.

Defendant acknowledges a split in authority in the federal circuits on the issue. **[See AB 25-29]** From his count, there are three approaches: a majority rule, a minority rule, and a hybrid approach. **[Id.]** But even this categorization hides the full extent of the split. Defendant lumps the Third Circuit in with the Fifth and Tenth Circuits as majority rule circuits. But these three circuits take meaningfully different approaches.

The Third Circuit apparently embraces a hard waiver rule: the government may not raise standing for the first time on appeal at all. *See Golson*, 743 F.3d at 55 n.9 (“However, these cases cannot overcome or conflict with our precedent that the government may not raise a Fourth Amendment standing argument for the first time on appeal.”). Although the Fifth Circuit follows that general rule, it expressly recognizes an exception: the government may raise standing for the first time on appeal when “no facts are adduced [by the defendant] at the hearing from which the government could reasonably have inferred the existence of the defendant's standing.” *U.S. v. Gonzales*, 79 F.3d 413, 419 (5th Cir. 1996). The Tenth Circuit recognizes a different exception: the government may

raise standing on appeal if there was “an impediment” to doing so below. *U.S. v. Dewitt*, 946 F.2d 1497, 1499 (10th Cir. 1991).

The hard waiver rule, under which a simple failure to raise standing bars the government from ever raising it on appeal, is flawed. As the Sixth Circuit recognized in *U.S. v. Noble*, this approach ignores the difference between waiver and forfeiture. *See* 762 F.3d 509, 528 (6th Cir. 2014) (explaining the difference). A simple failure to timely raise an issue normally constitutes a forfeiture, which may still be reviewed for plain error. Moreover, most hard waiver cases turn on the distinction between Fourth Amendment standing and Article III standing, which is a jurisdictional issue federal courts are required to resolve. *See, e.g., Golson*, 743 F.3d at 55 n.9 (“Fourth Amendment standing is one element of a Fourth Amendment claim, and does not implicate federal jurisdiction. Consequently, standing can be conceded by the government, and it is also subject to the ordinary rule that an argument not raised in the district court is waived on appeal.”). However, New Mexico courts are not subject to Article III, and general standing accordingly functions differently. *See ACLU of N.M. v. City of Albuquerque*, 2008-NMSC-045,

¶ 9, 144 N.M. 471; *Deutsche Bank Nat. Trust Co. v. Johnson*, 2016-NMSC-013, ¶ 16.

Allowing for discretionary review of standing under Rule 12-321(B)(2) NMRA would allow New Mexico appellate courts to avoid the “strange position of having to hold that [a d]efendant’s search and seizure rights were violated when the search and seizure did not implicate the defendant’s rights at all.” **[BIC 22-23]**

III. Defendant Did Not Have a Possessory Interest in the GoPro.

The State argued that Defendant only pointed to two facts to establish an interest in the GoPro: he was the legal owner of the camera and he used the GoPro to record in his house. **[BIC 24]** Although Defendant claims that this assertion was “belied by the record,” **[AB 35]**, it appears that the parties agree on this issue. Defendant notes that everybody seemed to agree that Defendant had legal ownership of the GoPro. **[See *id.* 35-36 (discussing multiple instances of parties and the court referring to the GoPro as belonging to Defendant)]** And Defendant notes that his counsel argued that he used the GoPro as a security camera. **[See *id.* 35-36]** So it is unclear how “the State [wa]s incorrect about the content of the defense argument.” **[AB 36]**

As the State explained in its Brief in Chief, neither Defendant’s legal ownership nor his use of it (before he put it in the shower) as a security camera established much if any possessory interest in the GoPro. The State argued:

Although legal ownership of property may give rise to a possessory interest, it is not determinative: “[w]hile property ownership is clearly a factor to be considered in determining whether an individual’s Fourth Amendment rights have been violated, property rights are neither the beginning nor the end of this Court’s inquiry.” *U.S. v. Salvucci*, 448 U.S. 83, 91 (1980) (internal citation omitted).

[BIC 24] Defendant relied on *Salvucci* for a different purpose, but he apparently did not respond to this argument.

The State also argued that Defendant’s use of the GoPro for a time as a security camera only—as his counsel expressly argued—demonstrated a privacy interest in the camera, not a property interest.

[BIC 24-25] Defendant claims that he “did not rely on a privacy argument.” **[AB 37]** But he did. **[See 12-10-24 CD 4:35:02-37, 4:43:20-45, 4:35:02-37 (discussing Defendant’s privacy interest)]** That the camera functioned for a time as a security camera was significant only because it might have captured “scenes . . . from [Defendant’s] life.” **[Id. 4:41:51-4:42:31]** A defendant might have an expectation of privacy in a

footage taken from inside his home, but not necessarily a possessory interest in the camera used to capture them.

Defendant asserts that “[p]ossessory interests and privacy interest often merge as issues in the suppression context, including the context of this case.” **[AB 37]** But the cited case provides no support for this proposition. In the cited portion of *Salvucci*, 448 U.S. at 92-93, the Supreme Court overruled a prior case which had established that possession of an object automatically confers standing to challenge a search when the defendant is charged with possessing contraband. Although the Court did disclaim “blind adherence” to unsound rules, it said nothing about the firmly-settled distinction between privacy and possessory interests. *See id.* So, Defendant only provided general dicta about the Fourth Amendment to support his claim.

Defendant unsuccessfully attempts to distinguish *U.S. v. Miller*, 799 F.3d 1097 (D.C. Cir. 2015), which states that a privacy interest does not establish standing to contest a seizure. He notes factual differences between that case and his. **[See AB 37]** But the State did not cite to *Miller* as a dead-ringer: it cited to *Miller* to establish that a challenge to a seizure that “sounds exclusively in the *privacy* interest” in property is

“flawed at its foundation.” 799 F.3d at 1101. Defendant failed to rebut this, so the privacy interests trial counsel pointed to do not establish that Defendant had a possessory interest in the GoPro sufficient to challenge the seizure.

So, even though Defendant bore the burden of establishing a possessory interest in the GoPro, he failed to do so. And this slim-to-nonexistent interest was substantially undermined by other facts that the district court found: 1) Defendant stored contraband child sexual abuse materials on the GoPro, 2) he gave the camera to Jessica who in turn handed it to the police, and 3) he made no effort to reclaim the camera during the approximately three years the police had it.

Defendant claims that the Court cannot consider whether he stored contraband on the GoPro when weighing his possessory interest in it. But it is well-settled that a defendant does not have a possessory interest in contraband. *See State v. Bomboy*, 2008-NMSC-029, ¶ 10, 144 N.M. 151. And the Eleventh Circuit in *U.S. v. Mitchell*, 565 F.3d 1347, 1349, 1351 (11th Cir. 2009) recognized that the presence of child sexual abuse material on an electronic device reduces an individual’s property interest in a computer.

Although this Court defers to the factual findings of the district court, it reviews standing de novo. *See State v. Silvas*, 2013-NMCA-093, ¶ 9, *aff'd on other grounds*, *State v. Silvas*, 2015-NMSC-006, ¶ 9; *Van Dang*, 2005-NMSC-033, ¶ 7 (describing standing as a “threshold question”); *State v. Attaway*, 1994-NMSC-011, ¶¶ 8, 10, 117 N.M. 141 (stating that “threshold constitutional issues” such as “the validity of search warrants” or whether exigent circumstances justified a warrantless search or seizure, are reviewed de novo). So this Court is not bound by the district court’s conclusion that Defendant had some possessory interest in the GoPro, especially when it failed to consider the damage Defendant caused to the camera. This Court should conclude that Defendant did not have a possessory interest in the GoPro.

IV. Defendant Abandoned His Possessory Interest in the GoPro by Damaging it to Evade Prosecution.

Defendant apparently does not quarrel with the State’s position that an intentional attempt to destroy property to evade prosecution constitutes an abandonment of any possessory interest in that property; he argues only that the State failed to prove that Defendant did so in this case. **[See AB 40-44]** Even if this Court agrees, it should, at very least, adopt the State’s rule for future cases.

To be clear, the State is not arguing that a grand jury indictment for tampering alone proves abandonment. **[See AB 40]** The State merely argued that the evidence proving abandonment “matches the grand jury’s view of the evidence[.]” **[BIC 33]** So Defendant’s arguments that legal authority does not prove that “the prosecution can carry its burden simply by charging tampering” are aimed at a strawman. **[AB 42]** So Defendant’s arguments that legal authority does not prove “the prosecution can carry its burden simply by charging tampering” are aimed at a strawman. The real question is what evidence was before the district court, which the State discussed in its Brief in Chief. **[BIC 33-34]**

Defendant claims that the State does not know whether any person besides Defendant was in the house during the relevant time period. But the evidence established that, of three ordinary residents of the home, only Defendant remained there when the GoPro was damaged. As Defendant argued below: he “was the sole resident of the house” after Jessica and her daughter moved out. **[12-10-24 CD 4:38:04-14]** This fact, together with Defendant having an obvious motive to destroy the GoPro, amply supports the inference that Defendant was the one who broke the

camera. This is not upending the burden of proof, [**see AB 42-43**]*—*it is making reasonable inferences from admitted testimony.

Similarly, it is possible that Defendant did not know that his stepdaughter had regularly-scheduled therapy appointments. [**Id. 43**] Jessica, however, did. [**See 4:03:43-4:04:01**] And regardless of whether he knew about the appointments, he had to know that, when his wife and stepdaughter moved out of the house after discovering he had recorded his underage stepdaughter naked, there was at least a substantial risk that one of them would report him.

Defendant argues that the cases the State cited were much clearer factually. [**AB 43-44**] But, as the State pointed out in its Brief in Chief, there remained areas of doubt about the identity of the individual involved and their intent even in those very clear cases. [**See BIC 34-35**] This shows that, although abandonment has a heavy standard, it is not so demanding that the State must prove abandonment beyond any possible doubt.

This Court, reviewing the ultimate issue *de novo*, should hold that Defendant abandoned his possessory interest in the GoPro.

V. The District Court's Suppression Order Was Flawed.

Certainly, if a person damages property with the intent to destroy it, that action has some bearing on his or her interest in possessing the property. Although the district court considered all of the State's other arguments about Defendant's reduced possessory interest in the GoPro, it conspicuously did not consider the State's claim that Defendant attempted to destroy it. The order does not reflect whether the court believed or disbelieved the argument; it simply noted the argument but did not engage with it.

This Court, however, reviews the ultimate conclusion de novo, as discussed above. So although the district court did not consider the State's argument, this Court can and should conclude that the district court erred when it balanced the private and governmental interest. Defendant's only argument to the contrary is to claim that there was no evidence that he damaged the GoPro and that the State's argument was not evidence. **[AB 47]** But as discussed in the State's Brief in Chief, there certainly was evidence from which the court could have inferred that Defendant was the one who broke the camera.

CONCLUSION

For all of the reasons articulated above and in the State's Brief in Chief, the State respectfully requests that this Court adopt the question posed on certiorari and reverse the district court.

Respectfully submitted,

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STATEMENT OF COMPLIANCE

The body of this brief complies with the limitations of Rule 12-318(F)(3) NMRA because it contains 3,916 words as calculated by Microsoft Word 365.

CERTIFICATE OF SERVICE

I certify that, on March 10, 2025, I filed a true and correct copy of the foregoing Rely electronically through the Odyssey E-File & Serve System, which caused opposing counsel to be served by electronic means.

/s/ Van Snow
Deputy Solicitor General