IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v. **No. S-1-SC-40395**

BREON KINDRED,

Defendant-Appellant.

STATE OF NEW MEXICO'S ANSWER BRIEF

Appeal from the Second Judicial District Court
Bernalillo County, New Mexico
Clara Moran, District Judge

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Citations to the record proper are in this form: **[RP (pg.)]**. Where appropriate, a short-form citation is used: **[*Id.* (pg.)]**. References to the digitally recorded audio compact disc of the proceedings are cited, at first occurrence, in a full-form citation indicating the date of recording followed by "CD" and the time of the passage. For example, January 2, 2023, counter 12:34:56 to 12:34:57 is cited as **[1-2-23 CD 12:34:56–57]**.

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Introduction

Defendant Breon Kindred asks this Court to reverse his conviction of willful, deliberate, and premeditated first-degree murder. (NMSA 1978, § 30-2-1(A)(1) (1994)). A video of the murder, which was entered into evidence at trial, showed Defendant, on a moped and with a gun in his hand, approach the victim, who was on bike, from behind. Seconds later, having not been provoked by the victim, Defendant shot him dead. Defendant argued at trial that the victim was reaching for a gun before he fired.

To resolve this appeal, this Court must consider three questions related to Defendant's claims of error.

(1) Should the district court have accepted Defendant's proposed jury instruction, one that would have allowed the jury to find him guilty of voluntary manslaughter under a theory that he acted unreasonably under the circumstances? The answer is no, because the law on voluntary manslaughter directly contradicts this proposition.

(2) Should this Court take up Defendant's contentions that the district court erred in admitting two pieces of evidence—where Defendant does not argue, as would be required for reversal, that the alleged errors had a reasonable probability of affecting the verdict? The answer is no, because

this Court should not supply such an argument for him, and because there is no valid basis for deeming the rulings error in the first place.

(3) Should the district court have granted Defendant's motion for a mistrial on the basis that the prosecutor, using examples, discussed the meaning of "reasonable" with the jury pool? The answer is no, because the court correctly differentiated between (a) exploring the meaning of "reasonable"; and (b) exploring the meaning of "beyond a reasonable doubt," which of the two things is what might be legally objectionable. The answer is no also because the jury was given the uniform instruction defining the legal definition of the "beyond a reasonable doubt" standard.

Background

At around 8:30 p.m. on June 27, 2020, Defendant and his wife were riding their mopeds in their Albuquerque neighborhood. **[St. Ex. 2A; 8-28-23 CD 3:31:34–3:45:12]** They stopped at a traffic light at the intersection of Central Avenue and Pennsylvania Street before making a U-turn and heading back down Pennsylvania. **[*Id.*]**

They turned around because of Lavon King, the victim in this case. **[*Id.*]** What happened next was captured on surveillance video. **[St. Ex. 1]**

King was riding a bicycle down Pennsylvania, with both hands on the handlebar grips, when he apparently heard Defendant approach from behind and to

his right. **[*Id.* 0:01:34–37]** Defendant had his right hand on the moped and in his left, a gun pointed at King. **[*Id.*]** As Defendant closed in on King, his moped started to skid out, and he fell with it onto the asphalt. **[*Id.* 0:01:37–39]** As he went down, and to the extent he could, he kept aiming the gun at King, who was still on the bike and whose hands were still on the handlebar grips, and who watched as Defendant fell. **[*Id.*]**

King stopped the bike as Defendant was popping up from the fall. **[*Id.* 0:01:39–40]** Once up, Defendant moved toward King with his arm outstretched and the gun, still in his left hand, aimed at King. **[*Id.* 0:01:40–41]** By this time, King had taken his right hand off the handlebar and rested his arm at his side, but was otherwise still straddling the bike and looking at Defendant. **[*Id.*]** As Defendant drew closer, King started to dismount the bike from his right side, holding the left handlebar and placing his right hand at his side. **[*Id.* 0:01:41–43]** Defendant aimed the gun straight at King, fired, and struck him. **[*Id.*]** The bike fell

toward Defendant, and King, fatally wounded, fell away from him and onto the curb.[1] **[*Id.* 0:01:43–45]**

From the time King noticed Defendant to the time King fell, about six seconds had elapsed. **[*Id.* 0:01:37–43]**

Defendant then picked up the bike, mounted it, and rode off, leaving his moped in the street. **[*Id.* 0:01:43–53]** He came back on foot a few minutes later, got on the moped, and rode off again. **[*Id.* 0:01:53–0:05:22]**

When police arrived at the scene, King's body was stretched out over the curb, in the same basic position it was in when he fell. **[St. Ex. 127 0:00:30–0:04:35; St. Ex. 126 0:00:10–0:02:57]** His hands were empty. **[*Id.*]** There was a gun holstered to his left hip. **[*Id.*]**

Defendant was charged with first-degree murder, second-degree murder, and voluntary manslaughter. **[RP 2]**

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[1] Defendant gets carried away in his description of the incident on page 1 of his brief in chief: "[Defendant] rode his scooter to King and ask[ed] King to return the bicycle. [Defendant] . . . held the firearm at his waist for protection. . . . Now exposed to King fearing for his wife's life, and his own, [Defendant] felt he had no choice but to approach King with his gun drawn but lowered. [Defendant] then walked towards King and asked for his bike. But King did exactly what [Defendant] feared would happen: he reached for a gun that was holstered at his waste [sic]."

The surveillance video directly contradicts this version of events, as it does Defendant's subsequent statements that "King reached for a holstered firearm" and that "[t]he video . . . shows that King reached across his body towards his waistband." **[BIC 5, 15]** Defendant's characterization of the incident is further belied by the jury's findings that he did not act in self-defense. **[RP 101]**

At trial, Defendant took the stand and said he acted in self-defense: that his custom-made bike had been stolen; that on the evening of the incident, a friend called to say that King, armed, was on the bike; that Defendant approached King and recognized his bike; that he was afraid King would shoot him when he fell off the moped; that after he had gotten up, King "went for it" and "reached, went across his body"; and that, at that point, Defendant fired. **[8-31-23 CD 8:59:56–9:00:17, 9:01:20–28, 9:04:14–25, 9:07:25–9:08:10, 9:26:58–9:32:10]**

Ultimately, the jury was instructed on first-degree murder, second-degree murder, and voluntary manslaughter, along with self-defense. **[8-31-23 CD 2:16:00–2:25:58]** Defendant proposed a fifth option, one of his own creation, that drew on elements of the self-defense and voluntary-manslaughter instructions. **[Ct. Ex. 13]** The court rejected it. **[RP 132 ¶ 2]**

In the end, the jury found Defendant guilty of first-degree murder. **[RP 101]** In his appeal to this Court for a new trial, Defendant contends it was error for the court to refuse his requested instruction. **[BIC 21]** He also alleges error in three other aspects of his trial.

(1) The introduction into evidence of lyrics from a rap song Defendant had performed on a video he posted online around the time of the murder. The detective investigating the crime discovered the post and found it significant to the investigation. **[BIC 35–41] [8-29-23 CD 3:18:14–40, 3:23:05–30]**

(2) The introduction into evidence of a portion of another online post, on Facebook Live, by Defendant, one in which he extemporaneously talked about his stolen bike, and how he knew that whoever stole it was "scared to come outside with [it]." That post preceded the murder. **[BIC 35–36, 41–42] [8-29-23 CD 3:17:04–32, 3:20:40–3:21:13]**

(3) The prosecutor's comments and questions to the jury pool during voir dire, made in the context of a discussion on the beyond-a-reasonable-doubt standard, about which measures for ensuring safety when making a campfire would be reasonable, and which would not. **[BIC 43–47] [8-28-23 CD 10:24:55–10:27:40]**

Argument

Since Defendant preserved the issues he raises, the reversal he seeks would be appropriate only if this Court determines that the district court (1) committed reversible error in refusing to give the jury instruction he proposed, *see State v. Benally*, 2001-NMSC-033, ¶ 12, 131 N.M. 258; (2) abused its discretion in admitting one or both of the online postings, *see State v. Veleta*, 2023-NMSC-024, ¶ 5; or (3) abused its discretion in denying Defendant's motion for a mistrial, *see State v. Lymon*, 2021-NMSC-021, ¶ 12. For those rulings subject to the abuse-of-discretion standard of review, the ruling could be deemed error only if it were "clearly against the logic and effect of the facts and circumstances of the case" and

"clearly untenable or unjustified by reason." *See State v. Martinez*, 2021-NMSC-002, ¶ 93 (internal quotation marks and citations omitted).

No such failing by the district court can be identified.

1. The district court was right to reject the jury instruction Defendant requested.

For there to be reversible error in the district court's refusal to give to the jury Defendant's proposed instruction, the instruction would have to accurately reflect the relevant law. *See State v. Nieto*, 2000-NMSC-031, ¶ 17, 129 N.M. 688. This is because "a defendant has no right to have a legally incorrect jury instruction read to the jury." *Id.*

The court acted properly in refusing the proposed instruction because it was legally incorrect.

In addition to meshing elements of the UJIs for self-defense and voluntary manslaughter with verbiage from a recent Court of Appeals case, the instruction presented novel ideas. It read as follows.

If you find that the state has proved beyond a reasonable doubt that [Defendant] did not act in self-defense, then you must also consider whether [Defendant]'s claim of self-defense was imperfect. As you have already been instructed, to act in self-defense, there must be:

1) An appearance of an immediate danger of death or great bodily harm to [Defendant];

2) [Defendant] was in fact put in fear by the apparent dangers; and

3) A reasonable person in the same circumstances would have reacted similarly.

If you find that there was an appearance of an immediate danger of death or great bodily harm to [Defendant] and that [Defendant] was in fact put in fear by apparent dangers, but find that [Defendant] did not act as a reasonable person in the same circumstances would have reacted, then you may find that there was imperfect self-defense.

Imperfect self-defense occurs if [Defendant]'s reaction to the fear of great death or great bodily harm is unreasonable but was the result of sufficient provocation. If sufficient provocation is present, then there is a claim of imperfect self-defense, which is voluntary manslaughter.

[Ct. Ex. 13]

Not based on any law.

Loosely based on the UJI for self-defense. *See* UJI 14-5171 NMRA.

Loosely based on *State v. Chavez*, 2022-NMCA-007, ¶ 25.

Loosely based on the UJI for voluntary manslaughter. *See* UJI 14-220 NMRA.

There is no law supporting the use of this instruction. Defendant's lack of citation to any such authority underscores that fact. *See, e.g.*, *State v. Ibarra*, 1993-NMCA-040, ¶ 13, 116 N.M. 486 ("We entitled to assume, when arguments are

unsupported by cited authority, that supporting authorities do not exist."). **[BIC 24–27]**

In addition, a close look at the instruction lays bare its deviations from the law as it stands.

The instruction attempts to create a new defense, "imperfect self-defense," defined as existing where (something resembling) the first two elements of self-defense alone are satisfied. *See* UJI 14-5171 ("The killing is in self defense if: 1. There was an appearance of immediate danger of death or great bodily harm to the defendant . . . ; and 2. The defendant was in fact put in fear by the apparent danger of immediate death or great bodily harm and killed [the victim] . . . because of that fear . . . ." (footnotes omitted)). This is a deviation from the law of self-defense, which includes the additional element that "[a] reasonable person in the same circumstances as the defendant would have acted as the defendant did." *Id.*

The instruction also attempts to redefine voluntary manslaughter. It calls imperfect self-defense voluntary manslaughter, and says imperfect self-defense (i.e., voluntary manslaughter) is present if "[the defendant's] reaction to the fear of great death or great bodily harm is unreasonable but was the result of sufficient provocation." This is a deviation from the law of voluntary manslaughter (specifically, the lesser-included offense of second-degree murder), which consists of the following elements:

1. The defendant killed [the victim];
2. The defendant knew that his acts created a strong probability of death or great bodily harm to [the victim] . . . ; [and]
3. The defendant acted as a result of sufficient provocation . . . . [UJI 14-220 (footnotes omitted).]

In a further attempt to redefine voluntary manslaughter, the instruction purports to create a circumstance in which the defendant's "reaction to the fear of great death or great bodily harm" is both unreasonable and also the result of sufficient provocation. That cannot be. Sufficient provocation is defined as something that causes a temporary loss of self control in an ordinary person of average disposition. *See* UJI 14-222 NMRA. An ordinary person of average disposition would, by definition, not react in unreasonable ways. *See State v. Lobato-Rodriguez*, 2024-NMSC-014, ¶ 27, *cert. denied* (S-1-SC-40602, Oct. 17, 2024) (observing that, as a matter of law, sufficient provocation in the voluntary-manslaughter context is present only if the accused's reaction is objectively reasonable—i.e., not simply that he subjectively feared for his life). In trying to forge a new path in which one who takes another's life may be found guilty of voluntary manslaughter for having reacted unreasonably, the instruction goes directly against our law, which holds that sufficient provocation includes an objective component. *See id.*

Lastly, insofar as the instruction was intended to capture the holding in *State v. Chavez*, from which it borrows key phrases, it also does not accord with the law. *See* 2022-NMCA-007, ¶ 25. The Court of Appeals there held that the defendant should have been allowed to present his imperfect self-defense theory "by way of a voluntary manslaughter instruction"—an instruction he was denied. *Id.* ¶ 33. Here, in contrast, the jury was given a voluntary manslaughter instruction. Defendant therefore cannot use *Chavez* as a rational justification for his theory of how the jury should have been instructed.

In a tacit acknowledgement that the law is not on his side, Defendant asks this Court to adjust it accordingly. **[BIC 27–35]** All the while, he gives no cogent reason it should.

On a basic level, Defendant's silence in regard to New Mexico statutes is telling. **[*Id.*]** He cites no legislative enactment supporting his position that a defendant may be convicted of voluntary manslaughter under the circumstances identified in his proposed instruction. **[*Id.*]** Yet for the instruction to be valid, some statute—be it the one defining voluntary manslaughter, or another defining imperfect self-defense—would have to support it. It is the New Mexico Legislature, after all, not another state's legislature or this Court, that alone may define crimes and the defenses, if any, to them. *State v. Lassiter*, 2016-NMCA-078, ¶ 12; *Santillanes v. State*, 1993-NMSC-012, ¶¶ 41–42, 115 N.M. 215.

At the same time, the rationale for this Court to adopt Defendant's position, as articulated by him, is lacking. He argues this Court should be swayed by the fact that other states recognize an imperfect self-defense doctrine along the lines of that which he envisions. **[BIC 28, 30–34]** Again, though, it is for the New Mexico Legislature alone to define crimes and defenses in this jurisdiction, not other states' legislatures and courts.

Defendant otherwise complains that the existing self-defense instructions, UJIs 14-5190, 5191, and 5191A NMRA, are a complicated web of intertwining legal doctrines. **[BIC 29]** Perhaps so, but that is beside the point. Defendant's objection in district court was not regarding any of those instructions—that they were too confusing for the jury to understand—but rather to the rejection of his instruction embodying a novel legal proposition. The "complicated web" argument does not explain why the proposed instruction should have been accepted.

Defendant's only other arguments on this general issue amount to nullities based on their circular reasoning. Namely, he contends that it was error to not instruct the jury that "an unreasonable belief in the need to defend oneself is, as a matter of law, sufficient provocation" (i.e., error to not give the instruction he requested) because (a) "[the jury] was not instructed that, as a matter of law, imperfect self-defense equates to sufficient provocation"; **[BIC 24–25]** (b) [Defendant] was prohibited from arguing any law not included in the instructions;

[BIC 24, 25, 26] and (c) "not instructing the jury on imperfect self-defense left the jury with an incomplete statement of the law." **[BIC 24, 26]**

In a similar vein, Defendant further contends that prior cases denying an imperfect self-defense instruction must be overruled because: (a) they are unworkable, and they are unworkable because "the jury was not instructed on imperfect-self defense and how, if it believed [Defendant] used excessive force, it may find that there was sufficient provocation"; **[BIC 28, 30]** and (b) Defendant was deprived of "the ability to explain to the jury that if they believed his self-defense was imperfect then there is evidence of sufficient provocation[.]" **[BIC 28, 34–35]**

2. Defendant's arguments on the evidentiary issues he raises are deficient and should therefore be dismissed. Even if not summarily dismissed, however, the issues would not justify reversal, because they lack merit.

The next two issues call into question the propriety of two evidentiary rulings, one having to do with song lyrics, and the other, an audio recording of Defendant broadcasting himself on Facebook Live.

A. *Background*

By way of background, the State, before trial, sought the admission of a rap music video showing Defendant performing a song with lyrics that included the following. **[8-28-23 CD]**

> Remember when slim pushed a pack from the scooter. Play with me, put your shit back from the scooter. Won't stop to get out, put your shit in the cooler. . . . smoke his ass, . . . play we gonna shoot 'em. . . . he took like five bullets to the chest, switch on the mac say (inaudible). **[Ct. Ex. 7]**

The State also sought to admit the audio recording of an approximately 27-minute Facebook Live posting. **[Ct. Ex. 6; 8-29-23 CD]** It featured Defendant saying the following.

> Ain't no homeless niggas on my street. No tweakers, no none of that. Bitch I don't give a fuck. Go get a job. Nigga got caught slippin' one night. Left my mother fuckin' bike out there one night and they stole my shit. I shoulda had a chain on it though. . . . I ain't trippin, though because I know a nigga scared to come outside with my shit though. That's the difference. I know a nigga scared to come outside with my shit. **[Ct. Ex. 7]**

The parties debated the admissibility of these pieces of evidence at length. **[8-21-23 CD; 8-28-23 CD 4:47:25–4:58:20; 8-29-23 CD 10:07:26–10:59:45, 1:28:51–1:44:45]**

The court's rulings on the issues ultimately kept most of each item of evidence out of the jury's hearing and viewing: only select portions of each of the recordings were deemed admissible, and the admitted portions were ordered to be conveyed in a restricted format. Specifically, in the case of the music video, only the portion quoted above was allowed in, and it was allowed in not through a replay of the video with sound or of its sound only, but rather by having the text read aloud by the detective. **[8-29-23 CD 10:50:10–10:58:08, 1:28:51–1:29:59, 1:40:32–**

1:44:20] In explaining where the lyrics came from, the court ruled, the detective was allowed to refer to the song as rap. **[8-28-23 CD 4:56:20–4:57:11]**

The detective indeed read the lyrics aloud at trial—but he never stated or affirmed that they were taken from a rap song. **[8-29-23 CD 3:18:08–3:24:00, 4:02:50–4:03:55]**

In the case of the Facebook Live video, the court similarly ruled that only the portion quoted above could come in, and that it could not come in via video replay. **[*Id.* 1:28:51–1:44:45]** However, because the court found that the detective's reading of the text would be more prejudicial than the audio-only replay, the court ruled that the statements could come via audio replay. **[*Id.*]** The State thus played that portion, an approximately 30-second segment, of the recording for the jury. **[*Id.* 3:16:10–3:17:32**; **St. Ex. 128]**

B. *Defendant's arguments are deficient in that they lack harmless-error analyses.*

Defendant now challenges these rulings. **[BIC 35–42]** His challenges, however, are deficient, in that he only attacks the rulings' merits, all the while leaving the question of their effect on the trial unaddressed.

This is problematic because even if this Court were to deem the rulings error, reversal would not be called for unless Defendant demonstrated that the error was not harmless. *See State v. Tollardo*, 2012-NMSC-008, ¶ 25. To do that, he would have to show there was a reasonable probability (versus a possibility) that the

admission of the evidence he takes issue with affected the outcome of his trial. *See id.* ¶ 32. That showing would involve analyzing the at-issue evidence against the backdrop of all the evidence from his five-day trial, including by considering the statements themselves; their source; the emphasis placed on them; the evidence of his guilt separate from the error; the importance of the evidence to the prosecution's case; and whether the evidence introduced new, or merely cumulative, facts. *See id.* ¶ 43.

Despite that Defendant has the initial burden to make this showing, he does nothing to that end. *See State v. Astorga*, 2015-NMSC-007, ¶ 43. **[BIC 35–42]** This leaves a void in the necessary analysis, one that this Court should not fill. *See, e.g.*, *State v. Julg*, 2021-NMCA-058, ¶ 25 (observing that when an appellant does not properly present an argument, the court will not develop the argument for him, or guess at what his argument might be).

C. *Defendant's arguments are also deficient on the merits.*

That said, even if the propriety of the rulings were considered, Defendant still could not prevail on these issues, mainly because such rulings are subject to the highly deferential abuse-of-discretion standard of review.

Neither ruling meets that standard, meaning that neither can be characterized as "clearly against the logic and effect of the facts and circumstances of the case" and "clearly untenable or unjustified by reason." *Martinez*, 2021-NMSC-002, ¶ 93

(internal quotation marks and citations omitted). Defendant's main complaint against the rulings is that they allowed the jury to hear evidence that was irrelevant, unfairly prejudicial, or both. **[BIC 36–42]** He argues these things in reference to Rules 11-401, 402, and 403 NMRA.

The first and second of these rules provide that (1) evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action; and (2) irrelevant evidence is inadmissible.

The third rule provides that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice . . . ." Unfair prejudice is "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Martinez*, 2021-NMSC-002, ¶ 101 (internal quotation marks and citation omitted). Evidence is unfairly prejudicial if it is "best characterized as sensational or shocking, provoking anger, inflaming passions, or arousing overwhelmingly sympathetic reactions, or provoking hostility or revulsion or punitive impulses, or appealing entirely to emotion against reason." *Id.* (internal quotation marks and citation omitted). "Because a determination of unfair prejudice is fact-sensitive, much deference is given to district court judges to fairly weigh probative value against probable dangers." *Id.*

i. *Lyrics*

Beginning with the lyrics, Defendant contends they were inadmissible for their (1) lack of relevance; and (2) character as more prejudicial than probative. In each case, his premise is wrong.

His lack-of-relevance argument is based on the idea that the State was using the lyrics to show that Defendant confessed to killing King. He calls this an impossibility, given that the lyrics were published before the murder. **[BIC 37–38]** In truth, however, the State argued that the lyrics, if published before the murder, would be relevant for their tendency to prove that the murder was premeditated. **[8-21-23 CD 3:01:53–3:08:22, 3:21:41–3:23:08]** This, in turn, would help show Defendant's state of mind in committing the murder, which was a key issue at trial. The court accepted this sound logic, which remains sound. **[8-29-23 CD 10:50:48–10:52:08]**

Also flawed is the premise underlying Defendant's unfairly-prejudicial argument. Here he implies that the introduction of the lyrics, being from a rap song, brought with it unconscious racial bias and cultural misunderstanding and was also highly inflammatory and polarizing. **[BIC 38–41]** He fails to recognize, however, that the detective never ascribed the lyrics to a rap song. **[8-29-23 CD 3:01:53–3:08:33, 3:21:40–3:23:06]** At the end of the detective's testimony, for all the jury knew, the song belonged to the country music, folk music, opera,

Broadway musical, or lounge-singer genre—a genre, that is, that Defendant considers harmless by comparison to rap. **[BIC 39]**

Insofar as Defendant, through his own testimony on the stand about the lyrics' meaning, revealed that they were from a gangsta rap song, he cannot be heard to complain about any taint the revelation had on his trial, since he himself was its source. *Cf. State v. Bonham*, 1998-NMCA-178, ¶ 12, 126 N.M. 382 ("Even if admission of [the at-issue] testimony was error, we will not now hear [the d]efendant complain about the error [because] she invited [it]."), *abrogated on other grounds by State v. Traeger*, 2001-NMSC-022, 130 N.M. 618. **[8-31-23 CD 9:40:40–9:41:43]**

ii. *Facebook Live post*

Moving on to the Facebook Live audio clip, Defendant claims the evidence was inadmissible as unduly prejudicial because it included the word n***a or n***as spoken four times by Defendant. **[BIC 41–42]** His explanation for how the admission was an abuse of discretion is that "the N-word is among the most inflammatory words in the English language" and that "[t]he N-word has no place in the courtroom." **[BIC 35–36, 41–42]**

These statements, however, fail to explain how the court's considered ruling on the issue make it clearly against the logic and effect of the facts and circumstances of the case and clearly untenable or unjustified by reason. **[8-29-23**

CD 1:30:03–1:40:32] The court contemplated ordering that the word be redacted from the clip, but then rejected that option because Defendant had used it to refer to as many as three different people (including himself and the victim); the court reasoned that such a redaction would interfere with the jury's understanding of who was being referred to in each of the separate instances. **[*Id.*]** Defendant neither addresses this aspect of the court's reasoning nor explains why it was illogical.

Similarly, the court considered redacting each use of the word and informing the jury that in those instances of redaction, Defendant was saying "the N word." **[*Id.*]** The court rejected that option, too, though, because it drew a distinction (one supported by out-of-state caselaw) between the word when used colloquially—i.e., when ending in a "soft R"—and the word when used as a racial epithet—i.e., when ending in a "hard R." **[*Id.*]** The court reasoned that the jury would need to know what the actual word was to understand that Defendant was using it colloquially. **[*Id.*]** Relatedly, the court found that because the word was not being used as hate speech, its use carried less potential prejudice. **[*Id.*]** Defendant neither addresses this aspect of the court's reasoning nor explains why it was illogical, either. **[*Id.*]**

Defendant further ignores another, related aspect of the ruling: the court's offer to him that the word be redacted, and the jury be told that the redaction was of the (spelled out) word "n***a(s)." **[*Id.*]** To whatever extent his complaint on

appeal is with the jury's having heard the word spoken aloud, his complaint should not be well taken, considering he had the option to prevent that from happening.

Beyond this lack of argument on how this reasoning by the court was clearly illogical, Defendant's points on this issue also fail to explain how the unredacted playback met the standard for unfair prejudice. How, that is, Defendant's use of the word in reference to himself and unspecified others had an undue tendency to suggest decision on an improper basis—that is, to motivate the jury to find him guilty. Considering its ubiquity (a truth Defendant's own speech and his publication of it help demonstrate), the word, as Defendant used it here, is not fairly characterized as sensational or shocking; as provoking anger; as inflaming passions; as arousing overwhelmingly sympathetic reactions; as provoking hostility or revulsion or punitive impulses; or as appealing entirely to emotion against reason. This was not, say, a case where the defendant was a white man who used the word in addressing his victim, a black man.

3. The district court correctly refused Defendant's request that it declare a mistrial before trial began.

The last main issue in this appeal concerns the prosecutor's questions and comments to the jury pool about what "reasonable" means. **[8-28-23 CD 10:22:05–10:27:53; BIC 10–14, 43–47]** The prosecutor gave the example of making a campfire in a high-risk fire area and asked if a reasonable step for ensuring safety would be to bring firefighters along to the outing and dress in fire

suits and flame-retardant clothing. **[8-28-23 CD 10:22:05–10:27:53]** Based on this, Defendant moved for a mistrial. **[*Id.* 11:50:24–11:57:25, 1:50:04–1:59:48]** The court denied his motion. **[*Id.*]**

Defendant's argument on this issue is amiss. He mistakenly views the prosecutor's words as an attempt to define the reasonable-doubt standard, or to analogize that standard to "best practices in putting out campfires." **[BIC 10, 43, 44, 45, 46, 46–47]** As the court found, the prosecutor was not offering an example of the beyond-a-reasonable-doubt standard and was not providing a definition or example of the standard that misstated the law—but rather was asking the potential jurors what they believed was or was not (simply) reasonable. **[8-28-23 CD 1:50:04–1:59:48]** Defendant's reliance on authority pertaining to analogies and definitions of something more than the simple notion of "reasonable"—namely, the reasonable-doubt standard—is therefore inapt.

In addition, Defendant ignores the fact that, in denying his motion, the court recognized that any confusion the questions created would be rectified by the jury instruction defining the beyond-a-reasonable-doubt standard, UJI 14-5060 NMRA. **[*Id.*]** He makes no effort to undermine this aspect of the court's reasoning. Considering that the jury was given the correct definition of the standard, in writing, just before it was asked to apply it, and in view of the fact that the jury is presumed to follow the instructions it is given, it cannot legitimately be claimed

that the court abused its discretion in not granting the requested mistrial. *See, e.g.*, *State v. Perry*, 2009-NMCA-052, ¶ 45, 146 N.M. 208 ("There is a presumption that the jury follows the instructions they are given." (internal quotation marks and citation omitted)).

Conclusion

The circumstances of this case do not lend themselves to any credible view that reversal is warranted.

A surveillance camera recorded the murder Defendant committed. The recording, played at trial, plainly shows that Defendant was the only aggressor. The jury appropriately rejected Defendant's claim of self-defense and found him guilty of willful, deliberate, and premeditated first-degree murder.

No attempt at manipulating the law through an ad hoc jury instruction can logically change that result.

Defendant's attempts at changing it through his attacks on the district court's evidentiary and mistrial rulings likewise fall flat, considering the obstacles that must be overcome for him to succeed. A look at the full circumstances of the rulings reveals that they sprang from both careful consideration of the circumstances and sound reasoning.

The State thus asks this Court to affirm the conviction.

Respectfully submitted,

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Certificate of Service

I certify that on December 19, 2024, I filed this document through the Odyssey E-File & Serve System, which caused opposing counsel, Nicholas T. Hart, to be served electronically.

/s/ Teresa Ryan
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