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.

BRIEF-IN-CHIEF

On Appeal from the Second Judicial District Court
Case No. D-202-CR-2022-00383
The Honorable Clara Moran, District Court Judge

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Oral Argument Requested

October 1, 2024

TABLE OF CONTENTS

CERTIFICATE OF COMPLIANCE

I certify, according to Rule 12-328(F), NMRA, that this brief complies with the type-volume, size, and word limitations of the New Mexico Rules of Appellate Procedure because it contains 9,640 words, excluding all text excluded by that rule, and was prepared in size 14 Century Schoolbook font, a proportionally spaced type face, using Microsoft Word as part of Microsoft Office 365.

/s/ Nicholas T. Hart
Nicholas T. Hart

TRANSCRIPT OF PROCEEDING

Citations to the Record Proper are delineated by "R.P." followed by the page number. Citations to the transcripts are delineated by "Audio" followed by the date, the page number, and, if necessary, the time stamp of the transcript.

TABLE OF AUTHORITIES

Cases

Statutes and Court Rules

Other Authorities

Introduction

Breon Kindred and his wife, Davon Pritchett, were riding their scooters to the store when Mr. Kindred saw Lavon King, a man he knew to carry a firearm and to engage in shootouts, riding a bicycle that was stolen from him. Mr. Kindred rode his scooter to King and ask King to return the bicycle. Mr. Kindred was carrying a firearm, so he took it from his waistband and held the firearm at his waist for protection. But Mr. Kindred crashed his scooter when he approached King.

Now exposed to King fearing for his wife's life, and his own, Mr. Kindred felt he had no choice but to approach King with his gun drawn but lowered. Mr. Kindred then walked towards King and asked for his bike. But King did exactly what Mr. Kindred feared would happen: he reached for a gun that was holstered at his waste. Mr. Kindred then fired at King in self-defense. Those gunshots were fatal.

Mr. Kindred was later charged with and tried for an open count of murder. Mr. Kindred conceded that he had shot and killed King but asked the jury to find that it was in self-defense. That trial, however, was fraught with errors.

First, the State sought to introduce lyrics from a rap song written by Mr. Kindred. Those lyrics discuss Mr. Kindred, in his persona as a hip-hop artist, carrying a firearm while riding his scooter and a shooting. But those lyrics were written and published before Mr. Kindred's interaction with King. Even so, the district court found that the lyrics were relevant, were not prejudicial, and allowed them to be read to the jury.

Second, the State sought to introduce a clip of a Facebook Live video, during which Mr. Kindred was talking to his followers as his hip-hop persona. That video included Mr. Kindred using the N-word. And that video included Mr. Kindred stating that somehow had stolen a bike from him and that the person that stole could not have been form his neighborhood because his neighbors are too afraid of him to steal anything. Mr. Kindred vigorously opposed admission of that evidence, arguing that use of the N-word has no place in the courtroom, let alone in the trial of a Black man. The trial court, however, allowed the State to play a portion of the Facebook Live video, which injected the racial epithet into the trial.

Third, during jury selection, the State questioned the jury about the beyond a reasonable doubt standard analogizing reasonable doubt to actions taken to prevent wildfires when camping. For example, the State asked whether it would be reasonable for a person making a campfire to have all the supplies necessary to put out the fire prior to starting one. Of course, the jurors agreed that would be reasonable. The State then asked whether it would be reasonable to require the Albuquerque Fire Department to be present any time someone wished to make a campfire. Of course, the jurors agreed that would be unreasonable. After questioning but before selecting the jury, Mr. Kindred moved for a mistrial because using an improper definition of the beyond a reasonable standard was not only prohibited but was an error that could never be corrected. The trial court denied that motion, finding that Mr. Kindred needed to object as the question was being asked to preserve his ability to challenge the question. And the district court held that, had Mr. Kindred objected while the question was being answered, then a mistrial would not be appropriate because the State was trying to define the term reasonable rather than the beyond a reasonable doubt standard.

And third, Mr. Kindred asked that the trial court instruct the jury on the doctrine of imperfect self-defense. Mr. Kindred, recognizing that a view of the evidence was that he acted unreasonably in response to a reasonable fear of his safety, and expecting that the State would argue that he acted unreasonably, implored the trial court to instruct the jury of this well-settled principle. Mr. Kindred also prepared a proposed jury instruction to be read alongside the other self-defense elements and definitional instructions. The court, however, rejected that request because the Court of Appeals had previously held that a defendant is not entitled to an imperfect self-defense instruction.

Each of these errors requires reversal. A defendant facing an open count of murder should not have to fight against inflammatory and racist evidence that has no probative value to the charges against him. A defendant facing an open count of murder must be tried before a jury that has been properly informed of the beyond a reasonable doubt standard. And a defendant facing an open count of murder should have a jury instructed on the complete law of his defense, included when that law is the doctrine of imperfect self-defense.

Mr. Kindred's conviction must be vacated. And this case must be remanded for a new trial.

Factual Background

One June 27, 2020, Breon Kindred and his wife, Davon Pritchett, were at a stoplight at Pennsylvania Avenue and Central Ave in Albuquerque, New Mexico, when they saw Lavon King riding a custom bicycle that had been stolen from Mr. Kindred. Mr. Kindred recognized King from a previous interaction where he overheard King talking about the shootouts and showing scars he had from being shot. And Mr. Kindred knew King because a friend of his told him that King had his stolen bike, and that King carried a firearm.

Mr. Kindred turned his scooter to approach King and retrieve his bike. Mr. Kindred also grabbed hold of a lawfully possessed firearm because he knew King to be dangerous and to carry a firearm. But when approaching King, Mr. Kindred fell off his scooter.

Believing that King was going to shoot him or his wife, Mr. Kindred walked towards King with his gun drawn. Mr. Kindred asked King to return the bike, but King reached for a holstered firearm. Mr.

Kindred fired to protect himself and his wife. King later died of the gunshot wounds.

Mr. Kindred was charged with one count of first-degree murder arising from the shooting death of Lavon King.[1] R.P. 2. Mr. Kindred was convicted of first-degree murder following a five-day trial. R.P. 93. He was then sentenced to life in the Department of Corrections. R.P. 141. Mr. Kindred timely appealed. R.P. 145.

I. The State Seeks to Admit Racially Inflammatory and Unfairly Prejudicial Lyrics from a Rap Song and a Portion of a Facebook Live Video.

Mr. Kindred moved, before trial, to exclude from evidence a music video and rap lyrics produced by the State during discovery. R.P. 61. In that video, Mr. Kindred rapped about riding a scooter, firearm possession, and "putting someone in a cooler." R.P. 62. The State's theory was that this video was Mr. Kindred recounting the shooting of King. But that video was published for the first time, and those lyrics were written prior to the shooting. R.P. 62. Mr. Kindred argued,

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[1] Mr. Kindred was also charged with armed robbery and conspiracy to commit armed robbery. R.P. 2-3. Those charges were dismissed prior to trial. R.P. 33. And Mr. Kindred was charged with two counts of tampering with evidence. R.P. 3. Those counts were dismissed by a directed verdict.

therefore, that the lyrics were not relevant. *Id.* And Mr. Kindred argued that the video's risk of unfair prejudice outweighed the extremely limited probative value because the video includes misogynistic language, descriptions of sexual acts, profane language, and racial pejoratives. *Id.*

The State also sought to introduce a Facebook Live video during which Mr. Kindred talks about his bike being stolen. During that video, Mr. Kindred is walking around his neighborhood without his shirt on, is acting in his persona as a hip-hop artist, and frequently uses the N-word. Two pretrial hearings were held about this evidence, but a decision was not made before trial.

The court then held several in-trial conferences to discuss the lyrics and social media video. During the first of those conferences, the court concluded that the complete audio and complete visual of the rap song would be excluded as more prejudicial than probative and asked the State to submit which lyrics it would like to have read to the jury. The court also concluded that the video of the Facebook Live was unfairly prejudicial but asked the State to submit any portion of the audio from the video the State wished to play to the jury. *See* Audio,

08/28/2023, 4:48:00 p.m. – 4:50:00 p.m. Even after this initial ruling, Mr. Kindred continued to oppose reading the lyrics or playing a portion of the Facebook Live audio because characterizing him as a rapper, and holding his music persona against him, was inappropriate undertones of race and of a disfavored culture. *Id.*, at 4:50:00 p.m. – 4:51:00 p.m.

The State later submitted a document detailing the portion of the social media video it wished to play:[2]

Portions of video words to be played or restated by the detective.

"Ain't no homeless n[redacted]on my street. No tweakers, no none of that. Bitch I don't give a fuck. Go get a job. N[redacted]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. (Several undecipherable words) I ain't trippin, though because I know a n[redacted] scared to come outside with my shit though. That's the difference. I know a n[redacted]scared to come outside with my shit." P.3-4 of 31. Report 3.

See Court's Exhibit 7. Mr. Kindred again objected, noting that the social media video is unfairly prejudicial because it uses highly inflammatory language, including the use of the N-word. Audio, 08/29/2023, at 10:08:00 a.m. Mr. Kindred argued that the first few sentences held no probative value because the discussion of the homeless and drug users was community commentary with no effect on the case. *Id.* at 10:11:00

[2] The redactions are not because any portion is under seal. The redactions are to remove the portions of the N-word that are used in this document. An unredacted copy can be found at Court's Exhibit 7.

a.m. As for the remainder of the video, Mr. Kindred reiterated that any use of the N-word in the trial of a Black man would lead to unfair prejudice. *Id.* at 10:12:00 am. Finally, Mr. Kindred reiterated that playing the visual portion of the video was unfairly prejudicial because he appeared intoxicated, was walking around without a shirt, and because he was carrying out the persona associated with his music. *Id.* at 10:15:30 a.m. – 10:16:30 a.m.

The State also submitted a portion of the lead detective's report, which included the lyrics of the rap song the State sought to admit and the detective's anticipated testimony of those lyrics:[3]

> Monday July 27, 2020 - I returned to work after a week off. I was advised that Breon Kindred had posted a music video to his open source Facebook page on 7/25/2020. The video was also posted on Youtube on 7/17/2020. The music video depicted Breon performing a rap song with other unidentified male subjects.
>
> Breon describes a Mac style gun
>
> Know that bitch with me, that mac on the scooter.
>
> Breon continues to describe an incident where he shoots someone while on a scooter:
>
> "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. ~~Hate straps ever since I was a juvenile~~, smoke his ass, ~~n~~[redacted] play we gonna shoot 'em." "...he took like five bullets to the chest, switch on the mac say (inaudible)". P. 5.

[3] The redaction is not because any portion is under seal. The redaction is to remove the full spelling of the N-word that was used in this document. An unredacted copy can be found at Court's Exhibit 7.

Id.

The audio clip of the above segment of the Facebook Live video, including the use of the N-word was then played to the jury. And the lyrics, absent use of the N-word, included above were then read to the jury by Detective Allred.

II. The State Tainted the Jury Pool by Improperly Comparing the Beyond a Reasonable Doubt Standard to an Everyday Activity of Camping.

The parties began to choose a jury on the first day of trial. During the State's questioning of the jury, the prosecutor compared the beyond a reasonable doubt standard to best practices when building a campfire:

> Prosecutor: How many people have gone camping? Okay. How many people who went camping have had campfires? . . . We live in New Mexico where there is a high fire risk, risk. Let's talk about – do we need to make a campfire safe. Okay. How do we go about making a campfire safe?
>
> Juror:[4] You start by having the right supplies. Build your fire pit, your rocks, Have your water. Your shovels.
>
> Prosecutor: We have to build it the right way. Have something to put it out, right. . .
>
> Prosecutor: Would you build it under a tree?

[4] Any references to prospective jurors that answered the State's questions are anonymized in this brief by using the generic term "juror."

Juror: Of course not.

Prosecutor: There you go, why not?

Juror: Nah, That's a fire hazard . . . .

Prosecutor: Make sure it's extinguished all the way . . . make sure it's out right. Are those all reasonable steps to make a campfire safe? . . . Do you agree that campfire would be reasonably safe at that point?

Juror: I do.

Prosecutor: Would it be safer if we had Albuquerque Fire Department come out with us to go camping?

Juror: Yes.

Prosecutor: Is that a reasonable step?

Juror: No.

Prosecutor: Why not?

Juror: I don't think the City of Albuquerque has the resources to send the fire department out with everybody who goes camping.

Prosecutor: It's just overkill . . . .

Prosecutor: Sir, would it also be safe if everybody who would go would have to wear fire, flame retardant closing and just hazmat material. I would say that would be an undue burden. It's not reasonable, right?

Juror: No.

Audio, 08/28/2023, at 10:25:00 - 10:27:45 a.m. The State then finished the analogy by explaining that the burden of proof is beyond a reasonable doubt not beyond all doubt.

After questioning, but prior to choosing the jury, Mr. Kindred moved for a mistrial because this analogy was an improper definition of beyond a reasonable doubt. Audio, 08/28/2023, at 11:50:25 a.m. The State opposed, arguing that its questioning was about the definition of the word reasonable, and that it was not seeking to analogize the beyond a reasonable doubt standard to campfires. *Id. at 11*:55:17 a.m. – 11:56:13 a.m. The district court conditionally denied the motion, stating that the objection was not timely. *Id.* at 11:51:45 a.m. – 11:52:55 a.m. The district court also expressed found that the state "did not provide an assessment of what reasonable doubt was" because the question did not seek to "quantify" reasonable doubt. *Id.* at 11:56:28 a.m. – 11:57:18 a.m. The court, however, asked that the parties do some more research and revisit the issue after selecting the jury.

Later that afternoon, the court reconvened argument on the motion for a mistrial. The court stated that it had done its own research during the break and that it had concluded that *State v. Montoya*, 2016-

NMCA-098, 384 P.3d 1114, which state that a party cannot analogize the beyond a reasonable doubt standard during closing argument, was instructive but did not apply to voir dire. *See* Audio, 08/28/2023 (Court Room 402), at 1:50:15 p.m. – 1:51:40 p.m. The district court also agreed that the State was not analogizing, it was just asking jurors what they thought the word reasonable meant. *Id.* And the district court concluded that any issue because of the questioning could be corrected in the final jury instructions by giving the correct definition of the beyond a reasonable doubt standard. *Id.*

August 28, 2023 – court room 402

Mr. Kindred then resumed his argument, contending that an objection to voir dire is only waived if the objection is not made before testimony. *See* Audio, 08/28/2023 (Court Room 402), at 1:52:45 p.m. – 1:52:57 p.m. Mr. Kindred also argued that *Montoya* should be applied to jury selection. *Id.* at 1:53:50 – 1:55:05 p.m. And Mr. Kindred argued that the restriction is not just on quantifying reasonable doubt, it is also on analogizing the beyond a reasonable doubt standard to everyday activities. *Id.*

The district court then formally denied the motion for a mistrial because Mr. Kindred did not make a timely objection, the State only sought to define reasonable not beyond a reasonable doubt, the State did not provide a definition that was contrary to law, and the State was only inquiring about the juror's belief of the definition of reasonable. *See* Audio, 08/28/2023 (Court Room 402), at 1:58:10 p.m. – 1:59:30 p.m.

III. The Evidence at Trial.

The first witness called by the State was Fernando Lazoya. *See* Audio, 08/28/2023, at 3:01:30 p.m. Mr. Lazoya testified that he remembered driving up to the scene of the shooting and seeing King laying on the ground after being shot. *Id.* at 03:08:15 p.m. – 03:11:35 p.m.

The State then called Mr. Kindred's wife, Davon Pritchet. Audio, 08/28/2023, at 3:30:00 p.m. Mr. Pritchet testified that, on the day of the shooting, she was with Mr. Kindred, riding their scooters to the store when they were stopped at the traffic light on Pennsylvania Avenue and Central Avenue in Albuquerque. *Id.* at 3:34:00 p.m. – 3:42:00 p.m. Ms. Pritchet then testified that Mr. Kindred saw King riding Mr. Kindred's bicycle and that Mr. Kindred turned around. *Id.* at 3:42:10 p.m. –

3:43:45 p.m. Ms. Pritchett followed Mr. Kindred, saw that the bicycle King was riding belonged to Mr. Kindred, but was not able to see any of King's actions when approached by Mr. Kindred because Mr. Kindred stood between her and King. *Id. at 3*:44:10 p.m. – 3:53:15 p.m.

Nicholas Munger, an owner of Toyo Automotive, which is near the shooting, testified next. Audio, 08/28/2023, at 4:13:30 p.m. -4:14:10 p.m. Mr. Munger testified that when he arrived at work the day after the shooting, he checked the security cameras for the business and saw that the shooting was captured on video. *Id.* at 4:14:15 p.m. – 4:18:00 p.m. That video showed Mr. Kindred approaching King with his gun drawn. The video then shows that King reached across his body towards his waistband. At that point, Mr. Kindred fired at King. After viewing the video, Mr. Munger called 911 so that law enforcement could collect the video. *Id.* at 4:18:05 p.m. – 4:18:55 p.m.

Officer Ralph Rodriguez of the Albuquerque Police Department was the next witness. Audio, 08/29/2023, at 9:02:30 a.m. Officer Rodriguez testified that he was the first responder to the scene of the shooting. *Id.* at 9:05:40 a.m. – 9:05:45 a.m. When Officer Rodriguez arrived, he found King lying on the floor with gunshot wounds; he was

not sure if King was dead or alive. *Id.* at 9:08:40 a.m. – 09:09:15 a.m. While tending to King, Officer Rodriguez noticed that King had a holstered in a cross-draw position on his waistband. *Id.* at 9:14:00 a.m. – 09:16:15 a.m. A gun holstered in a cross-draw position would require an individual to reach across his body to remove the firearm from the holster. *Id.* at 9:28:10 a.m. – 9:30:00 a.m. Officer Rodriguez inspected the firearm finding that it was loaded and had a bullet in the chamber. *Id.* at 09:16:18 a.m. – 09:18:00 a.m.

The State then called Officer Christopher Duda, who responded to the shooting just after Officer Rodriguez. Audio, 08/29/2023, at 9:47:40 a.m. Officer Duda testified that, while he was tending to King, he saw a large metal clip that he believed to be a holster for a firearm. *Id.* at 09:56:00 a.m. Officer Duda then explained, like Officer Rodriguez, that the holster held the gun in a cross-draw position, which would have required King to reach across his body to unholster the weapon. *Id.* at 9:57:40 a.m. – 9:59:20 a.m.

Dr. Lauren Dvorsack of the University of New Mexico Office of the Medical Investigator testified next. Audio, 08/29/2023, at 1:48:30 p.m. Dr. Dvorsack testified about the entry and exit wounds of the bullets

that killed King. *Id.* at 2:31:02 p.m. – 2:41:05 p.m. Dr. Dvorsack then testified that King's cause of death was gun shot wounds and the manner of death was homicide. *Id.* at 2:49:45 p.m. – 2:50:20 p.m. On cross-examination Dr. Dvorsack testified that she found two projectiles in King's body that were from past shootings and not related to this case. *Id.* at 2:52:20 p.m. – 2:53:15 p.m.

The next witness was the lead case agent, Detective Jason Allred. Audio, 08/29/2023, at 2:57:53 p.m. Detective Allred testified about his investigation. Most critical to this appeal, Detective Allred read the lap lyrics that he believed to be related to the shooting of King and introduced the audio of the portion of the Facebook Live video that was played for the jury.[5] *Id.* at 3:15:15 p.m. – 3:24:00 p.m.

The next day, the State called Jay Stuart, a firearms and ballistics expert with the Albuquerque Police Department. *See* Audio, 08/30/2021, at 8:52:28 a.m. Mr. Stuart testified that four of the cartridge casings

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[5] While Mr. Kindred did restate his objections during Detective Allred's testimony, Mr. Kindred had vigorously objected before the material was disclosed to the jury and Mr. Kindred was asked by the district court whether he had any objection to the form of the evidence "based on the previous ruling," which is sufficient to reincorporate Mr. Kindred's objections in the record. Audio, 08/29/2023, at 3:22:12 p.m.

found at the crime matched a single firearm. *Id.* at 8:58:00 a.m. – 9:02:00 a.m. Mr. Stuart then testified, on cross-examination, that the two older projectiles that Dr. Dvorsack found during King's autopsy conclusively came from a different firearm than the projectiles and cartridge casings for this shooting. *Id.* at 9:10:00 a.m. – 9:11:00 a.m.

Detective Andrea Ortiz next testified. Audio, 08/30/2021, at 9:24:57 a.m. Detective Ortiz collected the evidence from the scene of the shooting and was primarily a foundational witness. But, relevant to this appeal, Detective Ortiz testified that she collected a firearm that King possessed during the incident. The State then rested. Audio, 08/31/2021, at 8:58:32 a.m.

Mr. Kindred later testified in his own defense. Mr. Kindred testified that he received a phone call one day and was told that King had stolen a bike from him and that King was always armed with a firearm. Audio, 08/31/2021, at 9:27:00 a.m. – 9:31:00 a.m. Mr. Kindred also testified about an experience with King. *Id.* During that experience, Mr. Kindred was working as a cameraman at a music video shoot. *Id.* King visit the set to talk with the artist starring in the video. *Id.* While King was there, Mr. Kindred overheard King tell a story of

being shot in the stomach during a shootout, and saw King lift his shirt and show scars from the shooting. *Id.* Mr. Kindred also heard King talk about shooting at the man who shot him. *Id.*

Mr. Kindred then testified about the shooting. Mr. Kindred said that because of the phone call and experience, he knew King was armed and dangerous. Audio, 08/31/2023, at 9:31:04 a.m. – 9:34:00 a.m. Mr. Kindred explained to the jury that he approached King with his gun drawn because he had fallen off his scooter and he was afraid that King would shoot him. *Id.* Mr. Kindred also explained that he saw a gun holstered on King's hip. *Id.* And Mr. Kindred testified that, as he was walking towards King, he saw King reach across his body towards his firearm, so Mr. Kindred fired first so to protect himself and his wife. *Id.*

IV. The Court Rejects Mr. Kindred's Request that the Jury be Instructed on the Imperfect Self-Defense Doctrine.

Before closing arguments, Mr. Kindred requested that the jury be read an instruction of the imperfect self-defense doctrine because a reasonable view of the evidence was that Mr. Kindred reasonably feared for his safety and acted from that reasonable fear, but used excessive force in doing so.. Mr. Kindred proposed the following instruction:

> If you find that the state has proved beyond a reasonable doubt that Mr. Kindred did not act in self-defense, then you must also consider whether Mr. Kindred'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 Mr. Kindred;
>
> 2) Mr. Kindred 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 Mr. Kindred and that Mr. Kindred was in fact put in fear by apparent dangers, but find that Mr. Kindred 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 Mr. Kindred'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.

Court's Exhibit 13.

The district court refused to give the instruction. First, the district court believed that instructing the jury on imperfect self-defense because it would cause juror confusion. *See* Audio, 08/31/2023, at 11:39:10 a.m. – 11:39:35 a.m. The court also concluded that when the

only instruction required when there is a valid claim of imperfect self-defense is the voluntary manslaughter instruction, which the court agreed to give. *Id.* at 12:02:50 p.m. – 12:03:30 p.m.

Following closing argument, Mr. Kindred was convicted of first-degree murder.

V. Mr. Kindred's Attempt to Obtain a New Trial is Rejected.

Mr. Kindred later moved for a new trial. R.P. 121. In that motion, Mr. Kindred renewed his argument that the district court should have instructed the jury on imperfect self-defense. *Id.* The trial court denied that motion, concluding that a manslaughter instruction is sufficient in imperfect self-defense cases because imperfect self-defense is not a true affirmative defense. R.P. 134-135.

Argument

This appeal raises three issues. First, Mr. Kindred asserts that it was reversible error to reject his request to instruct the jury on the law of imperfect self-defense. Second, Mr. Kindred argues that the admission of the rap lyrics and Facebook Live video was an abuse of discretion. And third, Mr. Kindred contends that the district court abused its discretion by denying his request for a mistrial when the

State improperly defined the beyond a reasonable doubt during jury selection.

I. The Jury Should Have Been Instructed on the Complete Law of Self-Defense, Which Includes the Imperfect Self-Defense Doctrine.

The rejection of a proposed jury instruction is reviewed de novo "because [the rejection] is closer to a determination of law than a determination of fact." *State v. Ellis*, 2008-NMSC-032, ¶ 14, 144 N.M. 253, 186 P.3d 245. *See also State v. Gaines*, 2001-NMSC-036, ¶ 4, 131 N.M. 347, 36 P.3d 438 ("The propriety of denying a jury instruction is a mixed question of law and fact that we review de novo."). When properly preserved for an appeal, an improper refusal to give a jury instruction is reversible error. *State v. Benally*, 2001-NMSC-033, ¶ 12, 131 NM. 28, 34 P.3d 1134; *State v. Parish*, 1994-NMSC-073, ¶ 6, 118 N.M. 39, 878 P.2d 988 (explaining that failing to give a self-defense instruction is reversible error). Under this standard, the Court determines "whether a reasonable juror would have been confused or misdirected by the jury instruction." *State v. Cunningham*, 2000-NMSC-009, ¶ 14, 128 N.M. 711, 998 P.2d 176 (internal quotation and citation omitted). This review is done by reviewing "the evidence in the light most favorable to the

giving of the . . . instruction." *Ellis*, 2008-NMC-032, ¶ 2. Here, the failure to instruct the jury on the doctrine of imperfect self-defense was reversible error.

A. Imperfect self-defense is a well-settled legal principle.

"New Mexico has long recognized that the heat of passion includes fear for one's own safety that may result in an unreasonable belief in the need to defend oneself." *State v. Abeyta*, 1995-NMSC-051, ¶ 15, 120 N.M. 233, 901 P.2d 164. This rule, which is called imperfect self-defense, "occurs when an individual uses excessive force while otherwise lawfully engaging in self-defense." *State v. Henley*, 2010-NMSC-039, ¶ 20, 148 N.M. 359, 237 P.3d 103. "To prevail on a claim for imperfect self-defense and reduce the gravity of the offense from second degree murder to voluntary manslaughter, the accused's reaction to the fear of death or great bodily harm, though unreasonable, must be the result of sufficient provocation." *State v. Chavez*, 2022-NMCA-007, ¶ 25, 504 P.3d 541. Provocation includes "any action, conduct or circumstances which arouse anger, rage, fear, sudden resentment, terror or other extreme emotions." UJI 14-222, NMRA. "The provocation must be such as would affect the ability to reason and to cause

temporary loss of self-control in an ordinary person of average disposition." *Id.*

B. The jury should have been instructed on imperfect self-defense.

The issue here, however, is whether an adequate statement of law requires an instruction on imperfect self-defense alongside an instruction for voluntary manslaughter. Justice Minzner, in a concurring opinion, noted that when the "facts [ ] support imperfect self-defense a[nd] justify an instruction on provocation, we at least need an instruction on provocation that fits the circumstances in which, based on the evidence supporting an imperfect self-defense claim, the jury should receive a step-down instruction from . . . second-degree murder to . . . voluntary manslaughter." *State v. Jernigan*, 2006-NMSC-003, ¶ 34, 139 N.M. 1, 127 P.3d 537 (Minzner, J. concurring) (citing Leo M. Romero, *Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice*, 12 N.M. L. Rev. 747, 756 (1982)). Here, those circumstances required a statement explaining that an unreasonable belief in the need to defend oneself is, as a matter of law, sufficient provocation for voluntary manslaughter. Failing to do so was error in four ways.

First, the jury was instructed on self-defense, the initial aggressor doctrine, and the principle that the initial aggressor may transfer between multiple individuals during a single interaction. But the jury was only instructed on the generic definition of sufficient provocation. It was not instructed that, as a matter of law, imperfect self-defense equates to sufficient provocation. Instructing the jury on an incomplete statement of the self-defense law that applied to this case creates jury confusion.

Second, the likelihood of jury confusion was compounded by the State's motion in limine, which the Court granted, to preclude the defense from discussing any law not included in the instructions. In other words, while Mr. Kindred was permitted to, and in fact did argue, that the alleged victim was armed, was known to have engaged in shootouts before, and reached for a holstered handgun was sufficient provocation, Mr. Kindred was prohibited from arguing to the jury that those facts fit within the mitigating doctrine of imperfect self-defense. The failure to instruct, when combined with the motion in limine ruling, compounded jury confusing by prohibition all argument, even absent an instruction, related to imperfect self-defense.

Third, Mr. Kindred was prejudiced because the intended to argue during summation that if the jury believed that Mr. Kindred feared for his life, but that fear was unreasonable, then the jury may decide that the killing stemmed from imperfect self-defense. Mr. Kindred's counsel's prepared summation outline and notes included explicit references to this argument. Yet, Mr. Kindred's counsel, to comply with the Court's motion in limine ruling, had to limit argument to the generic definition of sufficient provocation. The result was significant prejudice to Mr. Kindred.

And fourth, instructing the jury on self-defense, the first aggressor doctrine, and ability for the first aggressor to transfer between the parties, when not instructing the jury on imperfect self-defense left the jury with an incomplete statement of the law. That incomplete statement created jury confusion. The way the jury was instructed, a reasonable juror would conclude that if it did not believe that Mr. Kindred's act met all three prongs of the self-defense analysis, then Mr. Kindred's claim of self-defense failed and he had to be convicted the substantive offense. But that is not completely true because if Mr. Kindred was in fear for is life and acted out of that fear, but did so in an

unreasonable way, then Mr. Kindred may, as a matter of law, be guilty of voluntary manslaughter and not first-degree or second-degree murder.

C. To the extent previous decisions rejecting an imperfect self-defense instruction are controlling, they should be overruled.

The Courts have previously held that a defendant is not entitled to an instruction on imperfect self-defense. *See, e.g., State v. Herrera,* 2014-NMCA-007, ¶ 26, 315 P.3d 343 ("However, in New Mexico, imperfect self-defense is not considered to be a true affirmative defense for which a defendant is entitled to an instruction."); *Abeyta*, 1995-NMSC-051, ¶ 17 n.4 (explaining that a manslaughter instruction is the means of submitting a claim of imperfect self-defense to the jury); . Here, to the extent those decisions apply to this case, then those decisions should be overruled because there are compelling reasons to do so.

'The principle of stare decisis dictates adherence to precedent." *Padilla v. State Farm Mut. Auto. Ins. Co.*, 2003-NMSC-022, ¶ 7, 133 N.M. 661, 68 P.3d 901. But prior decisions may be overruled because of a "compelling reason." *Id.* A compelling reason is identified by

examining: 1) "whether the precedent is so unworkable as to be intolerable;" 2) "whether the parties justifiably relied upon the precedent so that reversing it would create an undue hardship;" 3) "whether the principles of law have developed to such an extent as to leave the old rule no more than remnant of abandoned doctrine;" and 4) "whether the facts have changed in the interval from the old rule to reconsideration so has to have robbed the old rule of justification." *Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 33, 125 N.M. 721, 965 P.2d 305. To overrule a prior decision, there must be convincing reasons that the "past decision [is] wrong" based on at least one of these four factors. *Padilla*, 2003-NMSC-022, ¶ 7. Here, there is a compelling reason because the broad and blanket rules of imperfect self-defense jury instructions are unworkable under the current self-defense instruction framework. And there is a compelling reason because other states now recognize imperfect self-defense as an affirmative defense that must be disproved beyond a reasonable doubt by the State.

i. Prior cases denying an imperfect self-defense instruction must be overruled because they are unworkable in the current framework of self-defense instructions.

The universe of mandatory self-defense instructions has become a complicated web of intertwining legal doctrines. For example, since December 31, 2018, the Uniform Jury Instructions – Criminal require that when there is an issue of the duty to retreat during a self-defense case then the jury must be instructed:

> A person who is [defending against an attack] [defending another from an attack] [or] [defending property] need not retreat. In the exercise of the right of [self defense] [defense of another] [or] [defense of property], a person may stand the person's ground and defend [herself] [himself] [another] [the person's habitation] [or] [property].

UJI 14-5190, NMRA. This instruction traces to *State v. Anderson*, 2016-NMCA-007, ¶ 13, 364 P.3d 30, in which the Court of Appeals concluded that this stand your ground instruction was a required elements instruction. Previously, the instruction was only an optional definitional instruction. *Id.* Similarly, the Uniform Jury Instructions – Criminal require detailed instructions on the first aggressor doctrine, *see* UJI 14-5191, NMRA, and the exceptions to the first aggressor doctrine, *see* UJI 14-5191A, NMRA.

Here, the jury was instructed on the elements of self-defense, the initial aggressor doctrine, and the exceptions to the initial aggressor

doctrine. But the jury was not instructed on imperfect self-defense and how, if it believed Mr. Kindred used excessive force, it may find that there was sufficient provocation warranting voluntary manslaughter. Rather, the jury's provocation instruction was completely disconnected from the self-defense analysis. And that is error.

ii. The Court should overrule its prior decision that imperfect self-defense is not an affirmative defense.

The Court should also revisit the prior decision that imperfect self-defense is not an affirmative defense, *see Herrera*, 2014-NMCA-007, ¶ 26 (citing *Henley*, 2010-NMSC-039, ¶ 20 and *Abeyta*, 1995-NMSC-051, ¶ 17), as the majority to recognize the doctrine allow for a jury instruction or characterize it as an affirmative defense:

- The Utah Legislature has adopted imperfect self-defense as an affirmative defense to murder. *See* Utah Code Ann. § 76-5-203(4)(a) ("It is an affirmative defense to a charge of murder or attempted murder that the defendant caused the death of another individual or attempted to cause the death of another individual under a reasonable belief that the circumstances provided a legal justification or excuse for the conduct although the conduct was not legally justifiable or excusable under the existing circumstances.");

- Kansas, *see* Kan. Stat. Ann. § 21-5405(a)(4) ("Involuntary manslaughter is the killing of a human being committed . . . during the commission of a lawful act in an unlawful manner.");

- California, *see* California Crim. Jury Instr. 571 ("A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because (he/she) acted in (imperfect self-defense/ [or] imperfect defense of another));

- Maryland, *see State v. Falkner*, 483 A.2d 759, 769 (Ct. App. Md. 1984) ("Logically, a defendant who commits a homicide while honestly, though unreasonably, believing that he is threatened with death or serious bodily harm, does not act with malice. Absent malice he cannot be convicted of murder, Nevertheless, because the killing was committed without justification or excuse, the defendant is not entitled to full exoneration. Therefore, as we see it, when evidence is presented showing the defendant's subjective belief that the use of force was necessary to prevent imminent death or serious bodily harm, the defendant is entitled to a proper instruction on imperfect self defense.");

- North Carolina, *see State v. Revels*, 673 S.E.2d 677, 681 (N.C. App. 2009) (explaining that a criminal defendant is entitled to an instruction on imperfect self-defense when the first two elements of perfect self-defense are shown to exist but the evidence also shows that the defendant "either was the aggressor in bringing on the affray or used excessive force");

- Wisconsin, *see* Wisc. Stat. Ann. § 940.01(2)(b) (explaining that the defense of "unnecessary defensive force" is an affirmative defense when the "[d]eath was caused because the actor believed he or she was in imminent danger of death or great bodily harm and that the force used was necessary to defense the endangered person, if either belief was unreasonable");

- Arkansas, *see* Ark. Stat. Ann. § 5-2-614(a) ("When a person believes that the use of physical force is necessary for any purpose justifying that use of physical force under this subchapter but the person is reckless or negligent either in forming that belief or in employing an excessive degree of physical force, the justification afforded by this subchapter is unavailable in a prosecution for an

offense for which recklessness or negligence suffices to establish a culpable mental state.");

- Maine, *see* Maine Rev. Stat. Ann. § 101(3) (requiring an instruction for imperfect self-defense when the defendant proves by a preponderance of the evidence that "a person is justified in using force against another, but the person recklessly injures or creates a risk of injury to 3rd persons");

- Kentucky, *see Bryan v. Commonwealth*, 2017 WL 1102825, at *3 (Ken. Sup. Ct. Mar. 23, 2017) (unpublished) (holding that it was error, albeit harmless, to fail to instruct the jury on imperfect self-defense when "the jury could have [ ] determined that Appellant was objectively mistaken as to the level of force needed to repel the alleged threat");

- New Jersey, *see State v. Pridgen*, 584 A.2d 869, 872 (N.J. App. Div. 1991) ("Accordingly, the trial court improperly failed to charge the impact of imperfect self-defense . . . .");

- Michigan, *see People v. Warthen*, 1996 WL 33362183, at *1 (Mich. Ct. App. July 30, 1996) (explaining that a district court would be "required to instruct the jury on imperfect self-defense if there was evidence to support such an instruction");

- The District of Columbia, *see Swann v. United States*, 648 A.2d 928, 933 (D.C. 1994) (finding that it was error, albeit harmless, to not instruct on imperfect self-defense: "We think that on the facts here, a reasonably jury could have found that appellant had a subjective actual belief that his life was in danger and a like belief that he had to react with the force that he did, even though such beliefs were objectively unreasonable. Accordingly, the request instruction on imperfect self-defense voluntary manslaughter should have been given, and the trial court erred in not doing so.").

- Pennsylvania, *see Commonwealth v. Jones*, 276 A.3d 253 (Table), at *8 (Penn. Sup. Ct. March 24, 2022) (unpublished) (recognizing

that the "defense" of imperfect self-defense "exists where the defendant actually, but unreasonably, believed that deadly force was necessary");

- Alaska, *see Weston v. State*, 682 P.2d 1119, 1122 (Ala. 1984) (explaining the burden shifting involved in the affirmative defense of imperfect self-defense).[6]

It appears that only two states that recognize the doctrine align with New Mexico and conclude that a successful claim of imperfect self-defense only requires a voluntary manslaughter instruction. *See, e.g., State v. Chhith-Berry*, 878 S.E.2d 352 (S.C. Ct. App. 2022); *State v. Forsythe*, 251 S.W.2d 217 (Missouri 1952).

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[6] A minority of states to address this issue do not recognize the defense of imperfect self-defense. *See, e.g., Connell v. Commonwealth*, 542 S.E. 2d 49 (Va. Ct. App. 2001); *Hill v. State*, 979 So.2d 1134, 1135 (Fla. Ct. App. 2008) (holding that imperfect self-defense is not a defense under Florida law); *State v. York*, 2015 WL 1881028, at *3 (Sup. Ct. App. W.V. April 23, 2015) (unpublished) (explaining that West Virginia law does not recognize the doctrine of imperfect self-defense); *Mack v. State*, 428 P.3d 326, 328 (Okla. Ct. Crim. App. 2018) ("If imperfect self-defense was ever recognized as a separate legal doctrine in Oklahoma, our current jurisprudence does not do so. Put simply, this is not a thing. It is not recognized as a separate defense in either Oklahoma statutes or case law."); *State v. Goff*, 2013 WL 139545, at *8 (Ohio Ct. App. Jan. 7, 2013) (explaining that Ohio law does not recognize the imperfect self-defense doctrine).

The overwhelming imbalance in the law in States that recognize the imperfect self-defense doctrine is a compelling reason to revisit this Court's cases on imperfect self-defense.

* * *

As recently as two years ago, the New Mexico Court of Appeals recognized that a defendant may pursue a claim of imperfect self-defense during trial. *See Chavez*, 2022-NMCA-077, ¶ 25 (explaining that "imperfect self-defense mitigates a homicide so that the crime is voluntary manslaughter rather than murder" and that "[t]o prevail on a claim of imperfect self-defense and reduce the gravity of the offense from second degree murder to voluntary manslaughter, the accused's reaction to the fear of death or great bodily harm, through unreasonable, must be a result of sufficient provocation") (quotations and citations omitted). While the issue in *Chavez* was that the district court failed to give a voluntary manslaughter instruction, similar principles are at play here. Mr. Kindred conceded that he shot and killed King in his opening statement. His only defense was self-defense. And to deprive him of the ability to explain to the jury that if they

believed his self-defense was imperfect then there is evidence of sufficient provocation undercut the only mitigating principle available.

Any cases holding otherwise are no longer workable. Self-defense is now a complicated doctrine with shifting responsibility, duties, and entangled principles. A defendant should have the right to a complete recitation of the relevant law to the jury. Those cases holding otherwise must be overruled.

II. The Admission of the Rap Lyrics and Facebook Live Audio was an Abuse of Discretion.

The district court erred in allowing into evidence lyrics from a rap song written by Mr. Kindred that the State alleged was a confession of the shooting in this case and the admission of a social media video during which Mr. Kindred uses the N-word. The Court reviews these rulings "under an abuse of discretion standard." *State v. Gardner*, 1998-NMCA-160, ¶ 5, 126 N.M. 125, 967 P.2d 465 (internal citation omitted). An abuse of discretion occurs when the trial court's discretion is clearly against the logic and effects of the facts before the court. *State v. Alberico*, 1993-NMSC-047, ¶ 63, 116 N.M. 156, 861 P.2d 192. This standard "is not tantamount to rubber-stamping the trial judge's decision," and does "not prevent an appellate court from conducting a

meaningful analysis" of whether the admission of testimony complies with the New Mexico Rules of Evidence. *Id.* Here, the admission of each was an abuse of discretion.

A. The rap lyrics are not relevant and, even if they were, their admission was unfairly prejudicial.

Has a woman's dead body been discovered on the river bank? The jury will have no difficulty convicting Neil Young, who has confessed for all the world to hear: "Down by the river, I shot my baby . . . . Shot her dead." *See* Neil Young with Crazy Horse, *Everyone Knows This is Nowhere* (Reprise Records, 1969) (track 4: "Down by the River"). Or perhaps there is an unsolved murder in Reno, Nevada, who no discernible motive. Check the alibi of an inmate at a California prison. Johnny Cash has admitted, while incarcerated at Folsom, that he "shot a man in Reno, just to watch him die." Johnny Cash, "Folsom Prison Blue" (Sun Records, 1955). Or perhaps a cultural historian is digging into the true story behind the notorious unsolved murder of a young Englishwoman dating to about 1700. Look no further than identifying the balladeer behind "The Oxford Girl," who admitted that after ticking the victim into have sex with him upon a promise of marriage, "I deluded her again into a private place/Then took a stick . . . and struck

her in the face./ . . . And dragged her to the river side and threw her body in." Albert B. Friedman, et al., *The Viking Book of Folk Ballads of the English-Speaking World* 226 (Viking Press 1956).

Would a trial court allow these songs to be played at trial for the jury to decide whether any was an actual confession? Of course not.

But here, the district court allowed a detective to read lyrics of a rap song written by Mr. Kindred as evidence that he intended the murder in this case. This ruling left it to the jury to decide whether the song written in the first person, like all of these historical examples from other cultural traditions, should be taken for the truth of the lyrics, that is, as incriminating admissions by the singer-songwriters. For two related reasons, this decision was incorrect, and Mr. Kindred's conviction must therefore be reversed.

i. The rap lyrics are not relevant because they were written and published before the shooting.

The New Mexico Rules of Evidence require that, to be admitted at trial, evidence be relevant. Rule 11-402, NMRA. Evidence is relevant when "it has any tendency to make a fact more or less probable than it would be without the evidence," and "the fact is of consequent in

determining the action." Rule 11-401(A)-(B), NMRA. Here, the rap lyrics are not relevant because they were written and publicly published before the shooting.

At trial, the State contended that the lyrics about carrying a gun on a scooter, shooting someone five times, and putting something in a cooler was relevant to show Mr. Kindred's intent in shooting King. But, as Detective Allred testified, and as argued before the district court, the lyrics were written and published before the shooting. Despite this, the State's response was that it didn't care. In its view, the lyrics were resembled the shooting so they should be admitted. That is incorrect.

ii. The rap lyrics were unfairly prejudicial.

Even so, the introduction of rap lyrics in evidence at criminal trials has become a recurrent prosecutorial tactic that cannot be squared with principles of equal justice, but which this Court has not yet addressed. As explained some two decades ago by then-Judge Alito:

> 'Gangsta rap' has been described as 'a form of hip hop music that became the genre's dominant style in the 1990s, a reflection and product of the often violent lifestyle of American inner cities afflicted with poverty and the dangers of drug use and drug dealing . . . .' Prominent gangta rap groups are describes as 'present[ing] tales of gangs and violence,' 'offer[ing] hard-hitting depictions of crack-cocaine related crime,' and

> featuring 'a marriage of languid beats and murderous gang mentality.'

Tucker v. Fischbein, 237 F.3d 275, 279 n.1 (3d Cir. 2001).

The complete absence of similar evidence controversies involving confessional or crime-celebrating country music, folk music, opera, Broadway musical, or lounger singers should raise concerns about unconscious racial bias and cultural misunderstanding. Those concerns are borne out by social scientific and other academic literature. *See* Erik Nielsen & Andrea Dennis, *Rap on Trial: Race, Lyrics and Guilty in America* (New Press 2019); Adam Dunbar & Charles E. Kubrin, "Imagining Violent Criminal: An Experimental Investigation of Music Stereotypes and Character Judgments," 14 J. Experimental Crim. 507 (2018); Andrea Dennis, "*Poetic [In]Justice? Rap Music Lyrics as Art, Life and Criminal Evidence*," 31 Colum. J.L. & Arts 25 (2007); Stuart P. Fischoff, "Gangsta' Rap and Murder in Bakersfield," 29 J. Applied Soc. Psych. 795, 803 (1999); Carrie B. Fried, "Who's Afraid of Rap? Differential Reactions to Music Lyrics," 29 J. Applied Soc. Psych. 705 (1999). "Empirical data suggests that the introduction of rap music can have a powerful prejudicial effect on jurors who, despite their efforts, may 'become more disposed to and confident in a guilty verdict what

with the added weight of the negative personally trait associations conjured up by . . . inflammatory lyrics.'" *United States v. Bey*, No. 16-cr-290-WB, 2017 WL 15470006, at *7 n.3 (E.D. Pa. April 28, 2017) (quoting Fischoff, *ante*). *Accord United States v. Gamory*, 635 F.3d 480, 493 (11th Cir. 2011).

Perhaps recognizing that Mr. Kindred's strong objection to this evidence raised questions outside the ordinary ken of a trial court, the district court held several pre-trial hearings and extensive in-trial bench conferences on this issue. But even so, the court allowed highly inflammatory evidence on the assumption it was confessional and thus probative. Probative evidence, however, is not admissible if the probative value is outweighed by the risk of unfair prejudice. *See* Rule 11-403, NMRA.

Here, injecting rap lyrics and the hip hop culture into the trial was highly inflammatory. That culture, which comments on the poverty, drugs, and violence found in communities of color, is often misunderstood and highly polarizing. And because of those feelings, which have been confirmed by the social science research in this area,

reading rap lyrics to the jury was unfairly prejudicial. Admitting those lyrics was an abuse of discretion.

B. Admitting the Facebook Live audio was an abuse of discretion.

The audio from the Facebook Live video was similarly improper. In that audio, Mr. Kindred, in character as his rap persona, commented on community concerns and then discussed that he had a bike stolen. Mr. Kindred then stated that nobody in his neighborhood would have stolen the bike because they are all scared of him. But while this evidence had some minimal probative value because it was discussing a stolen bike, it still should have been excluded because it was unfairly prejudicial.

Courts have routinely recognized that the N-word is among the most inflammatory words in the English language. *See, e.g., Swinton v. Potomac Corp.*, 270 F.3d 794, 817 (9th Cir. 2001) (explaining that the N-word is "perhaps the most offense and inflammatory racial slur in English") (quotations and citation omitted); *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1034 (9th Cir. 1998) (calling the word "the most noxious racial epithet in the contemporary American lexicon"). But the State still argued that Mr. Kindred could not be

prejudiced by introducing the audio because Mr. Kindred used the N-word himself. And the district court determined that there was a reduced risk of prejudice because Mr. Kindred used the word colloquially rather than as a racial epithet. Neither position is correct.

The N-word has no place in the courtroom. It does not matter if it was spoken by a defendant or someone else. When, as here, the word itself is unrelated to any disputed issue in the case, its admission is so unfairly prejudicial in a way that outweighs the probative value. The district court abused its discretion when it allowed the audio of the Facebook Live video to be played to the jury.

III. The District Court Should Have Declared a Mistrial When the State Improperly Defined the Beyond a Reasonable Doubt Standard During Jury Selection.

The denial of a motion for mistrial is reviewed for an abuse of discretion. *State v. Johnson*, 2010-NMSC-016, ¶ 49, 148 N.M. 50, 229 P.3d 523. "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case." *State v. Rojo*, 1999-NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829 (quotations and citation omitted). Here, the district court abused its discretion when it failed to declare a mistrial during jury selection and

before a jury was sworn because the State used gave the jury an improper definition of the beyond a reasonable doubt standard.

A. Mr. Kindred timely objected to the State's questioning of the jury venire.

The district denied Mr. Kindred's motion, at least in part, because it determined that Mr. Kindred did not timely object to the questions during voir dire. While there does not seem to be any New Mexico state case that addresses this issue, the federal courts have held that an objection to jury selection is only waived if it is not made before testimony. *See United States v. Diez*, 736 F.2d 840, 844 (2d Cir. 1984); *United States v. DeFiore*, 720 F.2d 757, 765 (2d Cir. 1983). Here, Mr. Kindred moved for a mistrial after questioning was complete but before a jury was selected and before any testimony was presented. In other words, Mr. Kindred objected to the State's questioning during voir dire. His objection was therefore timely.

B. Analogizing the beyond a reasonable doubt standard to everyday activities is prohibited during jury selection.

"The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course."

Victor v. Nebraska, 511 U.S. 1, 5 (1994). If a definition is provided, however, that definition must be carefully worded, as an erroneous instruction about the state's burden of proof is always prejudicial error. *See Sullivan v. Louisiana*, 508 U.S. 275, 280-82 (1993). In New Mexico, this careful wording in provided in UJI 14-5060, NMRA.

Applying these rules, this Court has held that a district court "did not abuse its discretion in prohibiting defense counsel from discussing before the jury the definition of "reasonable doubt' formulated by 'a couple of people who are smarter than [defense counsel]' and from providing a hypothetical example involving a visit to the doctor." *Montoya*, 2016-NMCA-098, ¶ 16. *See also United States v. Williams*, 526 F.3d 1312, 1320 (11th Cir. 2008) (holding that defense counsel's comparison of reasonable doubt "to a patient's desire to seek a second opinion when told by a doctor 'you know, I'm looking at you and I think you need to have both of your legs amputated'" was both inaccurate and confusing); *People v. Nguyen*, 40 Cal. App. 4th 28, 36 (1995) ("We strongly disapprove of arguments suggesting the reasonable doubt standard is used in daily life to decide such questions as whether to change lanes or marry."); *Evans v. State*, 28 P.3d 498, 514 (Nev. 2001)

("This court has repeatedly cautioned the district courts and attorneys not to attempt to quantify, supplement, or clarify the statutorily prescribed standard for reasonable doubt . . . . [T]he defense bar and prosecutors alike [are] not to explain, elaborate on, or offer analogies or examples based on the statutory definition of reasonable doubt."). While the district court was correct that *Montoya* prohibits use of hypotheticals to discuss reasonable doubt during closing argument, the same principles apply during voir dire.

Voir dire is a critical stage of a criminal trial. *State v. Astorga*, 2016-NMCA-015, ¶ 15, 365 P.3d 53 (identifying jury selection as a critical stage of a jury trial); *State v. Padilla*, 2002-NMSC-016, ¶ 11, 132 N.M. 247, 46 P.3d 1247. It is the jury pool's first interaction with the judge and counsel and benefits greatly from its primacy. And while *Montoya* discusses closing argument, several courts have held that analogizing the beyond a reasonable doubt standard during voir dire was inappropriate. For example, in *State v. Crawford*, 334 P.3d 311, 320-21 (Kan. 2014), the court explained that using the analogy of an envisioning the final product of a jigsaw puzzle even if some pieces are missing to define the beyond a reasonable doubt standard during voir

dire was prosecutorial misconduct. *Id.* This is because "efforts to define reasonable doubt, perhaps inadvertently, lower the State's burden, lead the jurors in a hopeless thicket of redundant phrases and legalese, and obfuscate rather than assist the jury in the discharge of its duty." *Id.* (quotations and citations omitted).

Similarly, in *United States v. Iglesias-Tovar*, the United States Court of Appeals for the Eighth Circuit concluded that a "district court did not abuse its discretion when it rejected defense counsel's use of [an analogy] during voir dire to describe the concept of burden of proof beyond a reasonable doubt." 2022 WL 3349124, at *2 (8th Cir. Aug. 15, 2022) (unpublished). There, the court held, just like in *Montoya*, that the question would be inappropriate because defining the beyond a reasonable doubt standard is properly performed by the court, not the parties. *Id.*

Here, the law clearly establishes that improperly defining the beyond a reasonable doubt standard during jury selection is prohibited because it is the court, and the not the parties, that the law to the jury. The district court therefore abused its discretion when it failed to declare a mistrial after the State improperly analogized the beyond a

reasonable doubt standard to best practices in putting out campfires during jury selection.

Conclusion

Mr. Kindred's conviction for first-degree murder must be reversed, and this case must be remanded for a new trial.

Respectfully submitted,

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Dated: October 1, 2024

STATEMENT ABOUT ORAL ARGUMENT

Mr. Kindred requests oral argument because this appeal includes several detailed evidentiary issues as well as legal issues regarding close review of the factual record. Given that, Mr. Kindred believes that oral argument would help the Court decide this case.

CERTIFICATE OF SERVICE

I certify that, on October 1, 2024, I electronically filed this brief with the State of New Mexico's Tyler/Odyssey E-File & Serve system. All parties are registered as service contacts and were electronically served by that system.

/s/ Nicholas T. Hart
Nicholas T. Hart