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.

REPLY BRIEF

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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I. The district court erred by refusing to instruct the jury on the doctrine of imperfect self-defense.

The State's primary argument is that Mr. Kindred was not entitled to an instruction on imperfect self-defense because the instruction deviates from the law of self-defense. Answer Br. at 9. According to the State, Mr. Kindred's proposed instruction attempted "to redefine voluntary manslaughter" by "creat[ing] a circumstance in which the defendant's reaction to the fear of death or great bodily harm is both unreasonable and also the result of sufficient provocation." *Id.* at 9-10. But that is the doctrine of imperfect self-defense, which states that while a person may have acted unreasonably in fearing for their life, that unreasonable fear may nevertheless be the result of sufficient provocation. *See State v. Chavez,* 2022-NMCA-077, ¶ 25, 504 P.3d 541 (explaining that "imperfect self-defense" occurs when "the accused's reaction to the fear of death or great bodily harm, though unreasonable, [is the] result of sufficient provocation"). That is not redefining voluntary manslaughter. It would instead be an application of a long-recognized New Mexico legal doctrine. *See, e.g., State v. Jernigan*, 2006-NMSC-003, ¶ 34, 139 N.M. 1, 127 P.3d 537 (Mizner, J. concurring)

(calling for, in the context of an imperfect self-defense case, an "instruction 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"). That is why a great number of states have adopted imperfect self-defense instructions. *See* BIC at 30-33.

Next, the State asserts that the involuntary manslaughter instruction is sufficient for a jury to apply the doctrine of imperfect self-defense. Answer Br. at 11. But as Justice Mizner recognized, imperfect self-defense does not align with the voluntary manslaughter instruction without changes being made to fit the circumstances of the imperfect self-defense. *Jernigan*, 2006-NMSC-003, ¶ 34. Explaining the interplay between imperfect self-defense and sufficient provocation is therefore necessary for the jury to properly apply the involuntary manslaughter instruction.

Finally, the State argues that there is not sufficient reason to clarify previous cases such as *State v. Herrera*, 2014-NMCA-007, ¶ 26, 315 P.3d 343. Answer Br. at 11. This argument is premised on the false position that a jury instruction can only be valid if based on a statute.

Id. See also id. at 12 ("It is for the New Mexico Legislature alone to define crimes and defenses in this jurisdiction, not other states' legislatures and courts."). But the Court clarifies and defines the elements of crimes and defenses all the time.

For example, this Court's felony murder jurisprudence has evolved significantly over time without any material change to the felony murder statute. *See, e.g., State v. Harrison,* 1977-NMSC-038, ¶ 9, 90 N.M. 439, 564 P.2d 1321 (adding the collateral-felony doctrine to the felony murder analysis); *State v. Marquez*, 2016-NMSC-025, ¶ 22, 376 P.3d 815 (adding the independent felonious purpose test to the felony murder analysis). In other words, jurisprudence evolves. And here, this Court's mandatory instructions on the self-defense doctrine have expanded to such a degree that it merits revisiting its jurisprudence on imperfect self-defense.

* * *

Mr. Kindred was entitled to have the jury instructed on the imperfect self-defense doctrine. The district court's failure to do so was reversible error. Mr. Kindred's conviction must be vacated and

remanded for a new trial during which the jury is properly instructed on the relevant law of imperfect self-defense.

II. The rap lyrics and Facebook Live video were not admissible at trial.

A. The State's relevancy arguments are unavailing.

The State's primary argument that the rap lyrics were admissible is that they were relevant to show that the killing of Lavon King was premeditated. Answer Br. at 18. This argument, however, is disconnected from the actual evidence in this case. For example, there is no evidence that Mr. Kindred knew that King had stolen the bike before he saw King with it and announced a plan to kill King through these lyrics. In contrast, at trial, the State contended that republication of the rap after the shooting was relevant in determining Mr. Kindred's intent. But, as explained in the Brief-in-Chief, that argument is flawed because the facts of this case do not match the lyrics. The admission therefore was not only inadmissible, but as explained in the Brief-in-Chief, was unfairly prejudicial.

B. Admitting audio using the N-word is inflammatory no matter the context.

The State also argues that admission of the audio from the Facebook Live video was admissible because the district court could not redact the use of the N-word without interfering with the jury's understanding of the statement. *See* Answer Br. at 20. But this argument makes no sense. For example, the State asserts that the N-word was used by Mr. Kindred to refer to himself and to others. It does not follow that using one word to refer to multiple people provides more assistance to the jury than redacting the word.

The State also contends that the district court correctly concluded that the N-word was not prejudicial at trial because it was not used as hate speech. Answer. Br. at 20. But whether the N-word was used as a racial slur or used as a slang, there is no disputing that it is "the most noxious racial epithet in the contemporary American lexicon." *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1034 (9th Cir. 1998). Allowing it to be played to the jury, even when spoken by Mr. Kindred and even when used as slang, is so prejudicial as to infect the trial and the jury. Its admission was therefore an abuse of discretion.

C. Admission of this evidence was not harmless.

The State contends that Mr. Kindred's evidentiary arguments must be rejected because he has the burden to show that any error was not harmless. *See* Answer Br. at 15 (arguing that "reversal would not be called for unless Defendant demonstrated that the error was not harmless"); 16 ("Despite that Defendant has the initial burden to make this showing, he does nothing to that end."). That is incorrect.

It is well-settled that "the State bears the burden of proving that [an] error is harmless. *See State v. Tollardo*, 2012-NMSC-008, ¶ 25, 275 P.3d 110. *See also State v. Smile*, 2009-NMCA-064, ¶ 35, 146 N.M. 525, 212 P.3d 413 (citing *State v. Walters*, 2007-NMSC-050, ¶ 25, 142 N.M. 644, 168 P.3d 1068) (quotations omitted) (""An error is harmless if the State can establish . . . beyond a reasonable doubt that there is no reasonable probability that the objectionable evidence might have contributed to the defendant's conviction."). Yet the State makes no attempt show that admission of the rap lyrics and the N-word were harmless to the outcome of the trial.

Even so, the State's evidentiary arguments collapse on themselves. For example, the State argues that the rap lyrics and

Facebook Live video were evidence of premeditation. But whether the shooting was premeditated or in self-defense was the only issue at the trial. It is impossible that the jury concluded that the shooting was a first-degree murder rather than self-defense without relying on the lyrics or Facebook live video. The State therefore cannot show that the admission of this evidence was harmless.

III. The district court abused its discretion by failing to declare a mistrial following jury selection.

Finally, the State does not disagree that *State v. Montoya*'s, 2016-NMCA-098, 384 P.3d 1114, requirement that parties not analogize the beyond a reasonable doubt standard to everyday activities should apply to jury selection. Nor does the State contend that comparing the beyond a reasonable doubt standard to the best practices in building a campfire runs afoul of *Montoya*. Rather, the State only argues that the district court did not abuse its discretion in refusing a mistrial after jury selection because "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 reasonable." Answer Br. at 22. That can't be.

Criminal trials are not about negligence or some other reasonableness standard. Rather, the discussion of reasonableness in criminal trials is connected only to reasonable doubt. And there is no doubt that the prosecutor was asking about reasonable doubt when making his campfire analogy in this case because his questions were intertwined with discussions of the standard and because he even told a juror in response to one of his campfire questions that the law does not seek to quantify reasonable doubt. Doing so during jury selection clearly ran afoul of *Montoya*.

Even so, the State asserts that the district court did not err because "any confusion the questions created would be rectified by the jury instruction defining the beyond a reasonable doubt standard." Answer Br. at 22. But the beyond a reasonable doubt standard is too important allow any deviation from the Uniform Jury Instruction definition. *See, e.g., State v. Garcia*, 2005-NMSC-017, ¶ 10, 138 N.M. 1, 116 P.3d 72 ("UJI 14-5060 adequately expresses that definition and is to be used in all jury trials, unadorned by any added, illustrative language from this or any other opinion."). Any deviation from this

benchmark definition cannot be remedied because the damage has already been done.

Once a jury has been infected by improper definitions of the beyond a reasonable doubt standard, that propriety of any future verdict is lost. The district court should have declared a mistrial after jury selection. The failure to do so was an abuse of discretion.

Conclusion

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

Respectfully submitted,

/s/ Nicholas T. Hart

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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 1,632 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

CERTIFICATE OF SERVICE

I certify that, on January 21, 2025, I electronically filed this Reply 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
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