IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v. No. S-1-SC-39517

CRISTAL CARDENAS,

Defendant-Appellant.

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
DOÑA ANA COUNTY
HON. JUDGE CONRAD F. PEREA PRESIDING

STATE OF NEW MEXICO'S ANSWER BRIEF

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CITATIONS TO THE RECORD

The body of this brief exceeds the limit of 35 pages set forth in rule 12-318(F)(2) NMRA. Undersigned counsel certifies that this brief is written in Times New Roman, a proportionally spaced font, and that the body of this brief contains fewer than 11,000 words (specifically, 10,934). This word count was obtained using Microsoft Word 2016.

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NATURE OF THE CASE

Defendant appeals her three convictions for first-degree murder, conspiracy, and criminal solicitation. These convictions stem from a total of six criminal charges the State brought against Defendant which included: first degree deliberate murder of Mario Hernandez Cabral, first degree deliberate murder of Vanessa Mora, conspiracy to commit murder of Mr. Cabral, conspiracy to commit murder of Ms. Mora, criminal solicitation to commit murder of Mr. Cabral, and criminal solicitation to commit murder of Ms. Mora.

Defendant was convicted as to the crimes against Mr. Cabral only. Defendant bases this appeal on several alleged errors below. For the reasons set forth herein, the jury verdict should be upheld.

SUMMARY OF FACTS AND PROCEEDINGS

In the early morning of March 25, 2018, Mr. Cabral and Ms. Mora were murdered in Ms. Mora's home ("Carriage Hills Home"). **[03/08/22 CD 4:15:09, 04:19:02-:21:09; RP 1-7]** Ms. Mora's thirteen-year-old daughter was home during the murders. **[*Id.*]** She heard the gunman break into the Carriage Hills Home through the glass sliding door and she heard gunshots, but she remained hidden from the gunman and survived. **[03/08/22 CD 04:19:02-04:23:00]** The next morning, she found the dead bodies of her mother and Mr. Cabral and immediately ran to the neighbor for help. **[03/08/22 CD 04:23:02]**

Prior to the murders, New Mexico State Police had received a tip from the FBI that Defendant and her boyfriend, Luis Flores were alleged to have taken out a "hit" on Mr. Cabral. **[03/08/22 CD 11:44:52-:45:05]** Defendant and Flores were later charged with the murders. **[RP 1-7, 20]**

At trial, the State called fourteen witnesses. Defense called one witness—Defendant herself. For clarity here, the substantial testimonial evidence will be presented chronologically.

Early History

Mr. Cabral and Defendant started dating in 2005. **[03/10/22 CD 01:26:17]** Their daughter Y. Cabral was born in 2007. **[*Id.*]** Mr. Cabral built a home on Doña

Ana Rd. in Las Cruces, New Mexico ("Doña Ana Home"), and deeded that residence to Y. Cabral and Defendant. **[*Id.* 1:36:45-38:55]**

About one year before the murder, Defendant contacted Mr. Cabral's aunt and uncle to get a .45 caliber handgun they were holding for Defendant and Mr. Cabral. **[03/09/22 CD 03:56:35-48, 03:58:14-59:08, 03:31:27-32:26]** Defendant's expressed intent to them was she needed the gun for protection while Mr. Cabral was in jail. **[*Id.*]** Both Mr. Cabral's aunt and uncle testified to Defendant's retrieval of the .45 caliber gun. **[*Id.*]** Both witnesses identified Defendant in the courtroom. **[*Id.*]** Notably, the murders were, in fact, committed with a .45 caliber gun. **[*Id.* 03:15:19]**

December 2017-January 2018

The State's theory for the murder-for-hire plot was that the custody battle between Defendant and Mr. Cabral was beginning to go against Defendant who, to that point, had sole custody of Y. Cabral and who was living in the Doña Ana Home. **[03/08/22 CD 09:21:04, 09:22:51]** A few months before the murders, Mr. Cabral began having supervised custodial visits with Y. Cabral. **[03/09/22 CD 09:22:38-24:46; 03/10/22 CD 01:34:13]** In approximately December 2017, Mr. Cabral had notified the family court, in the form of a *Lis Pendens* filing, of his intention to sell the Doña Ana Home. **[*Id.* 09:22:20]**

In January 2018, Defendant contacted Edward Alonso. Alonso testified that the first time he interacted with Defendant was over a cell phone call during which she had asked him to kill Mr. Cabral. **[03/08/22 CD 01:56:30-58:48]** Alonso agreed to murder Mr. Cabral. **[*Id.* 1:58:55-59:01]** Defendant was to pay Alonso $10,000, payable as $5,000 down and $5,000 after the murder. **[*Id.* 02:06:32]** The day after the phone call, Defendant and Flores met with Alonso, in person. **[*Id.* 02:06:40-07-00]**

Alonso identified Defendant at trial as the same individual he had met. **[*Id.* 02:11:28]** Defendant wanted Mr. Cabral killed because she was in a custody battle with him and she needed him killed within sixty days. **[*Id.* 02:12:27]** Defendant gave Alonso a photo of Mr. Cabral and the GPS coordinates to the Carriage Hills Home. **[*Id.* 02:12:30-15:30]** Despite the deal, Defendant only paid Alonso $3,000 up front, which Alonso believed "broke their arrangement"; so he initially partied and got high off the money. **[*Id.* 02:15:29-16:30]**

February 2018

In February 2018, Ms. Mora's neighbor, Dorothy Garcia, observed a vehicle, which she believed did not belong in the neighborhood ("Carriage Hills Neighborhood") driving in the neighborhood. **[03/08/22 CD 03:12:53]** She kept seeing a Ford Explorer driving slowly so she walked out to confront the driver. **[03/08/22 CD 03:13:00–17:30]** By the time Ms. Garcia approached, the female

driver of the Ford Explorer had parked off the side of the highway under some trees. **[*Id.*]** The woman saw Ms. Garcia approaching and drove off. **[*Id.*]** After the Ford Explorer left, Ms. Garcia saw a man walk out from the trees by where the Ford Explorer had been parked. **[*Id.*]** This man then ran toward the canal near her home. **[*Id.*]**

Ms. Garcia's testimony matched that of Alonso who testified to driving a Ford Explorer in the Carriage Hills Neighborhood. By February 2018, Defendant was pestering Alonso about why he had not murdered Mr. Cabral. **[*Id.* 02:16:56]** To appease her, Alonso agreed to follow Defendant out to the Carriage Hills Home. **[*Id.* 02:17:22-:18:10]** After Defendant had shown Alonso where the home was, he and Defendant split ways. **[*Id.*]** Later in February 2018, Alonso and a woman went back to the Carriage Hills Neighborhood to scope out the house—they were driving a Ford Explorer. **[03/08/22 CD 02:17:04-20, 02:21:26-31]**

As February 2018 continued to pass, Defendant told Alonso that if "he wasn't able to finish the job . . . then [Flores] was gonna take care of it" and asked Alonso to get her an extra magazine for a .45 caliber gun. **[*Id.* 02:24:32-25:10]** Alonso never gave them the requested magazines and was arrested for violation of his federal probation before he could murder Mr. Cabral. **[*Id.* 02:23:36-27:30]** Upon arrest, Alonso sought to use his information regarding the murder for hire to his advantage

in his own sentencing before state and federal authorities. **[*Id.* 02:29:09]** His tip was transferred to the FBI. **[*Id.* 10:12:12]**

Former FBI Agent George Dougherty received and investigated Alonso's tip regarding this murder-for-hire plot. **[*Id.* 10:12:12-20:27]** Agent Dougherty was the State's first witness at trial. **[*Id.* 10:08:28-11:20]** According to Agent Dougherty, Alonso provided information in a piecemeal fashion and never seemed completely forthcoming to the FBI. **[*Id.* 10:34:13-35:02]** Upon getting the initial information from Alonso, Agent Dougherty and the FBI began investigating Alonso's claims. **[*Id.* 10:35:02]** The FBI investigated "the information that Alonso was telling [them], whether it was truthful . . . [because they] didn't know if [] this individual was giving [them] truthful information or not, so [they] were going to follow up." **[*Id.* 10:30:40-56]**

First, Agent Dougherty attempted to verify the phone calls between who he only knew as a woman named "Cristal" and Alonso. **[*Id.* 10:28:09-31:00]** However, Agent Dougherty was unable to do so because Alonso failed to direct the FBI to the phone or phones on which the communications had happened. **[*Id.*]** The phones the FBI was able to obtain, five total, were either ultimately the wrong phone or Alonso could not remember the phone's password. **[*Id.*]** Ultimately, Alonso's tip only led the FBI to the following evidence: "some woman named Cristal," "some target

named Mario," "a custody battle," "a .45 caliber gun," and some directions to a home in Garfield, New Mexico.

Agent Dougherty attempted find the Carriage Hills Home where the target "Mario" was alleged to live. He used the GPS coordinates given to him by Alonso. **[*Id.* 10:31:00-09]** In so doing, Agent Dougherty found Alonso's statement that the GPS coordinates would not lead to the Carriage Hills House to be "100% correct." **[*Id.*]** After not finding the residence using the GPS coordinates, Agent Dougherty used the precise driving instructions provided by Alonso, and Agent Dougherty was able to find the Carriage Hills Home. **[*Id.* 10:31:06-30]** The FBI discovered Alonso's descriptions of the Carriage Hills Home itself, and of the vehicles found there, to have been "pretty good." **[*Id.* 10:31:35-32:50]** The reality of the Carriage Hills Home "matched" Alonso's descriptions. **[*Id.*]** The FBI determined the "story" Alonso gave FBI at their first meeting "had merit to it." **[*Id.* 10:34:25-32]**

Since Alonso remained unwilling to be completely forthcoming, Agent Dougherty had to go outside the information given by Alonso. Agent Dougherty went to the Chief of Police in Hatch, New Mexico and was able to determine a "Mario Cabral" lived at the Carriage Hills Home and this same Mr. Cabral had recorded "police reports [that] showed there was an issue between he and his ex-girlfriend regarding custody." **[*Id.* 10:41:19-42:09]** This ex's name was Cristal

Cardenas—Defendant here. **[*Id.*]** All the information taken together led the FBI to understand this "was the 'Cristal' [they] were looking for." **[*Id.*]**

Once these pieces of information had fallen into place, the FBI was able to verify there was, in fact, a custody battle going on between now-discovered Mr. Cabral and Defendant and, finally, they discovered this matched the information Alonso had given with respect to the party names and the alleged custody battle. **[*Id.* 10:42:30-36]** Once the FBI reached out to local law enforcement and discovered the additional information, they realized the partial bits of information obtained from Alonso "were truthful." **[*Id.*]**

Agent Dougherty testified people in federal custody often try to make deals to get out of trouble. **[*Id.* 10:15:12-16:50]** As a result of this Agent Dougherty said:

> [i]nitially when you get information, you hear all this stuff, and especially because we had such little information that we weren't getting the details that we needed to follow up with this, but through this investigation, and digging into this, we were able to corroborate a lot of what [Alonso] was telling us. And to be honest with you, we couldn't find anything to show that he wasn't being 100% truthful. We just felt like he had more information that we weren't getting at the time.

[*Id.* 10:46:10-38]

March 2018

After discovering Mr. Cabral was the intended target of the murder-for-hire plot, Agent Dougherty met with Mr. Cabral to warn him of the potential threat. **[*Id.***

11:40:00-34] The FBI asked Mr. Cabral if he knew of anyone who would threaten him, and he told FBI agents about his ex, Cristal, and their custody battle. **[*Id.* 11:30:48]** Sometime shortly thereafter, the matter was transferred to state police for further action under New Mexico state law. **[03/08/22 CD 11:44:52-45:05]**

March 25, 2018: Murders

Ms. Mora's daughter testified to the murders. **[03/08/22 CD 04:19:02-23:00]** She was home when the murders occurred. **[*Id.*]** She had been sent to bed by Ms. Mora around 11:45 p.m., but was awoken by the sound of a vehicle driving past her window. **[*Id.* 04:19:02-21:09]** From where she was sleeping in the master bedroom, she later heard glass shattering and gunshots. **[*Id.*]** She heard her mother scream. **[*Id.*]** It then got quiet, and she was so scared she could not move and eventually went back to sleep under the blanket under which she was hiding. **[*Id.*]** The next morning, she woke up and found her mother and Mr. Cabral. **[*Id.* 04:22:07-23:59]** She ran to the neighbor's house for help. **[*Id.*]**

Subsequent Investigation of Carriage Hills Home

At trial, the State called the neighbor to whom Ms. Mora's daughter ran upon finding the dead bodies of her mother and Mr. Cabral. The neighbor took Ms. Mora's daughter in and called the police. **[*Id.* 03:52:23]** Police arrived at the scene.

Four law enforcement officers testified about their various responsibilities at the Carriage Hills Home crime scene and in the investigation of the murders.

[03/09/22 CD 09:49:40-10:12:45, 10:19:17-11:43:47, 03:08:51-22:06; 03/10/22 CD 08:54:43-11:27:43] At the residence, police discovered shoe impressions in the rear of the house which seemed to lead toward and away from the house and, further, seemed to be made by the same person. **[*Id.* 09:56:26-57:45, 10:04:11-12]** Police did not find any shoes, at any searched residence or in any searched vehicle, that matched those shoe impressions. **[03/10/22 CD 10:31:33]**

Police found tire impressions, which they discovered to be separate and different from those used by the residents of the Carriage Hills Home and which seemed to lead toward and away from the residence from a different access point. **[03/09/22 CD 10:23:12]** In addition to the tire impressions found at the residence, police also found tire impressions leaving the canal, which runs behind the Carriage Hills Home and meets up with the road. This second set of identified tire impressions appeared to show tires that had spun out—indicating to police the vehicle was parked there and left quickly. **[03/09/22 CD 10:47:33-48:59]** The case agent testified the tire impressions taken from the Carriage Hills Home and the canal were tested against all of Defendant's vehicles and nothing conclusive was identified. **[03/10/22 CD 10:31:51-59, 10:49:32-50:07]**

Police collected .45 caliber shell casings from the Carriage Hills Home, but no guns. **[*Id.* 10:50:55-54:52, 02:55:53-56:35]** Those shell casings were tested for fingerprints and no fingerprints were conclusively identified. **[03/10/22 CD**

10:51:31-52:12, 10:56:40-59:43] The murder weapon was not found. The caliber bullet used was found—from a .45 caliber gun. **[03/09/22 CD 09:49:40-10:12:45, 10:19:17-11:43:47, 03:08:51-22:06; 03/10/22 CD 08:54:43-11:27:43]** In addition to the numerous shell casings police retrieved from the Carriage Hills Home, they also retrieved white powder, a scale, cash, and Mr. Cabral's wallet from one of the bedrooms. **[03/09/22 03:18:31-19:15; 03/10/22 CD 11:24:41-27:23]**

Subsequent Investigation of Defendant's Doña Ana Home

Police also searched Defendant's Doña Ana Home. Police found ammunition in one of the bedrooms matching the caliber of the ammunition used in the murder, .45 caliber, as well as other sizes. **[03/09/22 CD 10:58:49-11:00:22, 11:30:15-27]** Police did not find a gun at this residence. **[*Id.*]**

Police seized three vehicles from Defendant including a Jeep, a Chevy S-10 truck, and a black Cadillac. In Defendant's black Cadillac, police found fifty-two $100 bills, five $20 bills, and one $50 bill—totaling $5,350. **[03/10/22 CD 10:03:40]** Police also seized four cell phones from the Doña Ana Home and Cadillac. **[*Id.* 09:03:10-05:50]** In one of the three phones found in the Cadillac, police were able to find three photos of the back of the Carriage Hills Home. **[*Id.* 09:18:55-21:33, 09:22:27-58]** On the phone retrieved from among Defendant's property, police found thirty-seven aerial images of the area surrounding the Carriage Hills Home. **[*Id.* 09:22:58-32:10]** Of the individuals residing at the Doña Ana Home, Defendant

testified that she had a phone, Flores had a phone, Defendant's brother had a phone, and Y. Cabral had an emergency phone but she could not say who had pictures on their phone. **[*Id.*]** At the time of the raid on her black Cadillac, Defendant was in possession of Y. Cabral's emergency phone, which was then retrieved at a later raid. **[*Id.* 02:22:55-59]**

Testimony of Defendant's Child Testing Positive for Meth

During direct exam, Defendant testified as to her credibility and that she was telling the truth. **[*Id.* 02:14:12-14]** She testified that when custody started to change she was not mad, she "just wanted everything to go right for [her] daughter." **[*Id.* 01:36:45]** She had always had custody of Y. Cabral and she filed the custody case so that she could have rights for her daughter. **[*Id.* 01:32:50-:33:06]** Defendant said she encouraged Y. Cabral to have visits with her dad and she never coached Y. Cabral with respect to the custody matter, even though Y. Cabral did not want to have timeshare with Mr. Cabral. **[*Id.* 01:54:00-25]** Defendant even put Y. Cabral in counseling. **[*Id.* 01:54:20-24]** However, Defendant said she had to pick up Y. Cabral thirty minutes early from a timeshare she had with Mr. Cabral once they had started. **[*Id.* 01:34:51-35:16]** With respect to the Doña Ana House, she "didn't want the house" it was a "huge thing she had to think about accepting it for her daughter." **[*Id.* 01:37:00-38]** It was a nice house, but "to [her] that didn't matter." **[*Id.* 01:37:24]** The house cost "a lot to maintain and pay bills." **[*Id.* 01:37:42]** Ultimately, she was

not mad about getting no money from the house. **[*Id.* 01:40:37-40]** She testified that she did not want Mr. Cabral dead. **[*Id.* 01:51:24-28]**

Defendant further claimed she did not know anything about guns, she did not have any guns, she had no felony convictions, she had no convictions for a crime of violence, and she had no convictions for domestic violence. **[*Id.* 02:10:30-11:30]** Defendant testified she, herself, was a victim of domestic violence. **[*Id.*]** When asked about the four phones in her possession, she could not identify whose phone was whose. **[*Id.* 02:20:00-23:40]**

During the State's cross-examination of Defendant, Defendant was questioned about her two children—comparing her parenting to that of Mr. Cabral. **[*Id.* 02:58:25-:34]** The following exchange happened:

State:	[Mr. Cabral] didn't care about [Y. Cabral] as much as you did?
D:	I always had [Y. Cabral] since she was born.
State:	And [younger daughter]?
D:	And [younger daughter].
State:	Both of those girls, they are your life right?
D:	Yes they are.
State:	You would do anything to keep them safe.
D:	What do you mean by that?
State:	You would do anything to keep them safe?
D:	Like, danger-wise?
State:	Danger-wise, yes.
D:	Well that is what a parent would do, keep a child safe.
State:	I agree. So why is it that your child tested positive for meth when y'all got arrested?

Defense immediately objected. **[*Id.* 02:58:30-59:13]** At a side-bar on the record, defense expounded on the objection stating that they had received no notice that the State planned to use this evidence and that its use was prejudicial to Defendant. **[*Id.* 02:59:11-03:01:12]** The State responded that Defendant had put her character at issue during direct and she, therefore, opened the door. **[*Id.* 03:01:00-27]** Specifically, Defendant testified that she was a peaceful, law-abiding citizen; she did not want the Doña Ana Home; she just wanted her children to be safe. **[*Id.* 03:01:00-47]**

The State argued Flores had "pled guilty" to the child endangerment charge. **[*Id.* 03:01:46-54]** The State further proffered that Defendant was misleading the jury by insinuating she is a great parent and that "if that was the truth . . . then these children would not be testing positive for methamphetamine." **[*Id.* 03:02:00-20]** The State argued Rule 11-404 NMRA only applies in the State's case-in-chief not "when the Defendant is going to take the stand." **[*Id.* 03:03:28-38]**

The district court decided the question was a Rule 11-404 argument and that it was "not looking at propensity itself." Rather it looked at how the "door was opened" so the district court was "going to allow the question" but instructed the questioning be limited. **[*Id.* 03:06:54-07:06]** The State noted only one question would be asked. **[*Id.* 03:07:07-10]** Defendant asked the State where the disclosure of this fact was made, and the State directed Defendant to a court case, by its case

number, which the State argued it found after Defendant opened the door on direct. **[*Id.* 03:07:22-56]** Back before the jury, the State asked Defendant to confirm that her youngest daughter "tested positive for meth after [Defendant] was arrested," and Defendant confirmed the same. **[*Id.* 03:14:00-10]**

Testimony of Ana Rodriguez

In its case-in-chief, the State called Anna Rodriguez to testify. Ms. Rodriguez was helping Defendant in the ongoing custody case. **[03/09/22 CD 08:48:04]** In addition to testifying on Defendant's behalf in the custody case, Ms. Rodriguez had agreed to help Defendant by taking pictures of where Mr. Cabral was living. **[*Id.* 08:48:05-49:40]** Mr. Cabral had represented to the family court that he was living with his mother when, in fact, he was living with Ms. Mora. **[*Id.*]** Ms. Rodriguez took pictures of the Carriage Hills Home. **[*Id.*]** She testified that she went to the Carriage Hills Home about five or six times. **[*Id.* 08:50:04]** The State showed Ms. Rodriguez some pictures, entered as State's Exhibit 425, and asked Ms. Rodriguez if she took the pictures, to which she responded "I don't recall." **[*Id.* 08:51:30-55]** She further testified that the pictures are not of the vehicle she was looking for. **[*Id.* 08:51:55-52:05]** She also stated that she could not recall taking pictures from the back of the house. **[*Id.* 08:52:50-53]**

During the State's cross-examination of Defendant, the State showed Defendant the pictures that had been taken of the Carriage Hills Neighborhood and

Carriage Hills Home and about which Ms. Rodriguez had earlier testified. **[*Id.* 03:15:45-16:08]** Defendant was not able to confirm whether any of those pictures were on her phone or not. **[*Id.* 03:16:09-25, 03:22:00-18]** Defendant confirmed that she needed the photos, generally, for the custody case to show that Mr. Cabral was lying about where he was living. **[*Id.* 03:16:59-17:20]** Her understanding was that her family lawyer wanted as many photos as possible. **[*Id.* 03:19:45-50]** Defendant could not definitively answer why the photos were on a phone taken from her property, what the photos were meant to show, or whether it was herself, Flores, her brother, or Y. Cabral who had the photos on their phone. **[*Id.*]**

The State pointed out Defendant had been present for the entire trial and had watched all the testimony and then asked whether Defendant was "aware that Anna said that she did not take these photographs." **[*Id.* 03:22:54-23:00]** Defendant responded that Anna "did say that she took photographs." **[*Id.* 03:23:02]** The State then clarified whether Defendant was "aware that [Anna] said she did not take those aerial photographs." **[*Id.* 03:23:03-07]** Defendant responded that she did not recall. **[*Id.* 03:23:08-09]** Continuing with the line of questioning, the State asked Defendant about three more photographs and asked whether they too were for Defendant's custody case. **[*Id.* 03:23:17-24:05]** Defendant confirmed they were. **[*Id.*]** The State asked her who took the photographs and Defendant testified "I believe Anna." **[*Id.*]** The State responded in question with "[e]ven though she sat here and told us that

she did not?" **[*Id.*]** Defendant objected and the State, in front of the jury, stated "[Anna] said she had taken one of them, but not the other two." Ultimately, the district court ruled the facts were in evidence and allowed the State to proceed. **[*Id.* 03:24:20-42]**

Prohibition on Note-Taking in the Courtroom

On the second day of the trial, the State requested a bench conference at which it expressed concern to the district court by stating, "Usually people who are not involved in trial . . . I don't think somebody should record the proceedings or write notes about what is happening. Is that a correct understanding?" **[03/09/22 CD 03:01:01-15]** The district court said, "[t]hat is correct, who is writing notes." **[*Id.* 03:01:17]** The note-taker in question was a woman in the courtroom sitting behind Defendant. **[*Id.* 03:01:42]**

At the time this trial took place, this Court's COVID-19 protocols were still in place and each party was allowed to have one guest in the courtroom—the note-taking woman at issue was Defendant's guest. **[*Id.* 03:05:23-59]** Important to the district court was that this woman was the sister of a local civil law attorney. **[*Id.* 03:01:18-02:16]** The State expressed concern over the note-taking. **[*Id.* 03:02:16-20]** Specifically, the State expressed concern over the possible impact that note-taking could have on Flores (a co-defendant) whose trial was still pending. **[*Id.* 03:04:49]**

Defendant argued, "people can't audio or visual record things, but people are allowed to take notes. It's a public trial. The media is allowed to be in here to take notes and do whatever." **[*Id.* 03:02:39]** After further argument, the district court stated it was "going to ask [note taker] to leave the courtroom." **[*Id.* 03:02:40-03:39]** Defendant clarified "Based on what, judge? People are allowed to take notes." **[*Id.*]** The district court went on to state, "[n]obody who is coming in to visit is taking notes . . . all of a sudden we have a civil attorney's sister coming in here and taking notes." **[*Id.*]** Defendant continued to push the district court and argued that "[p]eople were allowed to take notes." **[*Id.* 03:03:40-04:49]**

The record did not pick up what was apparently a suggestion that the woman turn over her notes rather than asking her to leave. The district court stated that was "a great idea. She can leave the notepad in front . . . Does that satisfy the State?" **[*Id.*]** The State noted its concern there was still "a co-defendant who is pending trial[;] . . . what is the purpose of this happening?" **[*Id.*]**

Having heard the argument, the district court ruled if the woman "hands over the notes to the Court I will be okay with that . . . . Here's the thing I am on the verge of cutting all family members watching this. We have COVID restrictions and we are allowing people to come in . . . and now we have this issue which is arising. Kind of an unheard of issue. If she turns over the notes she'll be allowed to stay." **[*Id.***

03:06:02] The woman turned over her notes and was allowed to stay in the courtroom.

Closing Arguments

The State reiterated its main theory in closing argument. After Alonso did not kill Mr. Cabral for Defendant, Flores did and Defendant aided in the crime. **[03/11/22 08:59:08-10, 09:00:14]** Defendant planned this for months in advance. **[*Id.* 09:13:55-14:01]** Further the State recapped Ms. Rodriguez' testimony that "the only picture she took is from the other side of the home and she was looking for the truck of [Mr. Cabral]. That's the only picture she took. She denied taking any other picture, any google earth photos, all that." **[*Id.* 09:11:53-12:12]** The State then brought up the additional pictures which Ms. Rodriguez testified about, stating that those were "the other pictures that were found on the phone. [Ms. Rodriguez] denies taking these pictures. Flat out denied. 'I never took pictures from this side of the house.'" **[*Id.* 09:12:30-51]**

The State reiterated Alonso's story and the all the aspects of his story and how what he told the FBI seemed to match what actually happened. **[*Id.* 09:14:55-17:00]** Between the facts, the names, the timeline, the custody battle—the State offered that it all panned out. **[*Id.* 09:21:15-30]** The State underscored how Agent Dougherty's testimony corroborated Alonso's testimony. The State said "this is what gives credibility, more credibility to Edward. [Law Enforcement] already kn[e]w about

.45 caliber . . . they already kn[e]w that she wanted to buy extra clips, they already kn[e]w about [Carriage Hill Home], they kn[e]w the custody issues, and they kn[e]w about all this . . . before th[o]se people [were] dead." **[*Id.* 09:29:26-30:29]** In closing, the State questioned Defendant's credibility and her memory, pointing to all the things she could not remember. **[*Id.* 09:28:10-15, 09:39:37-40:19]** Throughout its closing, the State reiterated the crimes were committed by "them," "they," and other plural pronouns in reference to Defendant and Flores.

During Defendant's closing, the defense stated that questions regarding the youngest child testing positive for meth was a "punch below the belt" and that the case had been dismissed. **[*Id.* 10:39:35-40:41]** The State objected stating that the case was not dismissed. **[*Id.*]** Expanding on this the State clarified no evidence had been entered by either party as to the resolution of Flores' case. **[*Id.*]** Defendant reiterated that she had testified on the record it had been dismissed. The district court sustained the State's objection.

Defendant was found guilty of first-degree murder, conspiracy to commit first-degree murder (as to Mr. Cabral), and solicitation to commit first-degree murder (as to Mr. Cabral).

ARGUMENT

I. The District Court's Generally Mistaken Belief Regarding Note-Taking During Trial Has Been Abstracted by Defendant—It Does Not Amount to Partial or Complete Closure of the Trial; There is No Structural Error.

The State acknowledges the district court is generally mistaken as to the permissibility of note-taking in a courtroom. While there is no case law directly on point as to note-taking during court proceedings—the fact is this Court, the 10th Circuit Court, and since the early 2000's, even the Supreme Court of the United States have allowed note-taking. *See Goldschmidt v. Coco*, 413 F. Supp. 2d 949, 953 (N.D. Ill. 2006). Here, the question is not whether the note-taker's rights were violated, but whether the district court's blanket ban closed the courtroom in violation of Defendant's right to a public trial.

A. Standard of review

The press and the general public have a constitutional *right of access* to criminal trials. *Globe Newspaper Co. v. Super. Ct. for Norfolk Cnty.*, 457 U.S. 596, 603 (1982) (emphasis added). The Supreme Court has stated, "public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process." *Id.* at 606. But the Supreme Court has also recognized that, while the "right of access to criminal trials is of constitutional stature, it is not absolute." *Id.* This Court reviews court closure claims *de novo*. *See State v. Turrietta* 2013-NMSC-036 ¶ 14 (deciding "[a]n improper courtroom closure can violate a defendant's constitutional right to a public trial [and] . . . [t]he question of whether a defendant's constitutional rights were violated is a question of law which we review

de novo.).

Criminal trial jurisprudence from early English history to present illustrates that a core aspect of a criminal trial is the openness of the proceedings; the right for people to "hear and be present." *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564-70 (1980) (internal quotation marks and citation omitted). The "presumption of openness may be overcome," however, "by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Waller v. Georgia*, 467 U.S. 39, 45 (1984). Should a court entertain closure, the "overriding interest" must be "articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.*

This Court adopted the "overriding interest" standard from *Waller*. *Turrietta*, 2013-NMSC-036, ¶ 19. Specifically, this Court adopted the following four-pronged *Waller* standard:

> "[1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the [district] court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure."

Id. ¶ 17 (citing *Waller*, 467 U.S. at 48).

However, to reach *de novo* review and the *Waller* analysis, this Court must first decide that the ban on note-taking amounted to a partial or full closure of the

trial, which is a separate, *de novo*, review. Defendant cites no authority to establish that a ban on note-taking effects a partial or full closure of the court—because there is none. Drawing such a parallel would be an improper extrapolation of existing precedent and amount to a slippery slope where otherwise sound jury verdicts could suffer easier challenge and/or reversal.

B. Analysis

The district court's ban on note-taking, while perhaps ill-informed, did not amount to a closure or partial closure of the trial because, saving this Court's COVID protocols, the trial remained fully open. The media was present during the length of the trial. **[03/08/22 CD 09:01:23-02:12]** Additionally, the one individual, although banned from taking notes, was nonetheless allowed to remain in the court for the trial. **[03/09/22 CD 03:06:02]** Had this individual been removed from the trial perhaps—only perhaps—this analysis might take a different posture. But Defendant's trial remained fully open.

In looking at the central tenets of what constitutes an "open trial" through history, and as recorded in precedent, the important aspects of an open trial are physical presence, the ability to hear, and the ability to report on the proceedings. *See Richmond Newspapers*, 448 U.S. at 564-70. In 1565, Sir Thomas Smith wrote that regarding criminal trials, "All the rest is doone openlie in the presence of the Judges, the Justices . . . the prisoner, and so manie as will or can come so neare as to

heare it, and all depositions and witnesses given aloude, that all men may heare from the mouth of the depositors and witnesses what is saide." *See id.* at 566 (misspellings and/or anachronistic spellings in original). This early understanding of what was meant by "open trial" transferred to the United States, where "[o]ther contemporary writings confirm the recognition that part of the very nature of a criminal trial was its *openness* to those who wished to attend." *Id.* at 568 (emphasis added). That "criminal trials both here and in England had long been presumptively open." *Id.* at 569.

Here, this trial remained open. The media was present, Defendant's guest remained present, and all those who wanted to attend and, importantly, were allowed to attend under the COVID protocols were in attendance. They heard. They saw. They were able to report. The constitutional check on governmental power remained fully in place.

Defendant seeks to have this Court extrapolate a new rule that a ban, however misinformed, of one individual from note-taking during the trial meant it was partially closed. There is no court, including those courts cited by Defendant, which has addressed note-taking, or an analogous issue such as sketching, and then gone so far as to conclude a ban on note-taking or sketching amounted to a full or partial closure of the court proceedings. *See Goldschmidt*, 413 F.Supp.2d at 954 (holding that a universal ban on note-taking plausibly violated the First Amendment right of

the note-takers; underlying case unaffected); *see also United States v. Columbia Broadcasting System, Inc.*, 497 F.2d 102, 103 (5th Cir. 1974) (determining that the lower court's prohibitions on in-court sketching and publication of sketches were unconstitutionally overbroad; underlying case unaffected); *see also U.S. v. Cabra*, 622 F.2d 182 (5th Cir. 1980) (determining that the district court's order impounding notes taken during a criminal trial by a paralegal was improper and reversing the order impounding the notes; underlying case unaffected). Defendant provided no authority that prohibiting one person from taking notes – but permitting that person to remain in the courtroom – closes the court. *See In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764 ("We assume where arguments in briefs are unsupported by cited authority, counsel after diligent search, was unable to find any supporting authority."). Reaching further and determining such acts constitute a closure of trial would be a novel approach.

Should this Court determine that reaching the *Waller* analysis is proper, the result would be the same. To conclude that a district court closed a trial, this Court would use the *Waller* test as adopted by the *Turrietta* Court. 2013-NMSC-036, ¶ 17.

The first factor under *Waller* is that the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced. *Id.* Here, the State raised its concern of the note-taking to the district court and sought a ban on note-taking during the trial. The overriding interest presented by the State was potential

prejudice to the co-defendant, Flores, whose trial was still pending. **[03/09/22 CD 03:04:49]** Second, the closure must be no broader than necessary to protect that interest. 2013-NMSC-036, ¶ 17. Here, while the initial reaction by the district court may seem broad, ultimately, the district court's solution was just broad enough to protect the interest presented by the State—prevent this attendee from taking notes which could prejudice the co-defendant's trial. **[*Id.* 03:06:02]** Third, the [district] court must consider reasonable alternatives to closing the proceeding. 2013-NMSC-036, ¶ 17. Here, the district court did consider reasonable alternatives—illustrated by the fact that the district court reversed course from excluding the attendee altogether and instead just removed her notes and placed a ban on future note-taking. **[*Id.* 03:03:09, 03:06:02]** Finally, the district court must make findings adequate to support the closure. 2013-NMSC-036, ¶ 17. Here, there was no closure to make findings about. The State and Defendant consulted with the district court on the record but outside the presence of the jury. In reaching its conclusions, the district court ensured that the conversation was on the record, but ultimately, the district court did not close the trial. Therefore, "findings adequate to support the closure" were never required. To the extent this Court determines they were, the State avers that the record exchange between the State, Defendant, and the district court contain the necessary findings that the Court considered, if by happenstance, the *Waller* test and all prongs were met.

The dangerous, and novel, extrapolation sought by Defendant in this case that the trial should be deemed partially closed because someone was banned from taking notes during the proceedings should be rejected by this Court. However, should this Court proceed to *Waller*, the result is the same. The trial was not closed. There was no violation.

II. There Is No Cumulative Error.

Defendant argues there were three discrete errors in the trial, which Defendant contends should result in reversal of the jury verdict: First, the district court's determination that Rule 11-404(B) NMRA evidence of Defendant's minor child testing positive for methamphetamine was admissible; second, permitting the FBI Agent's testimony that Alonso's story was credible, which Defendant contends amounts to "vouching"; and third that the State mischaracterized evidence as to: (a) the status of a related court case and (b) the testimony of one of the State's fourteen witnesses over the four day trial. On each point, Defendant fails to establish error, except on one point, on which Defendant fails to establish reversible error. It is well settled in New Mexico jurisprudence that several instances of non-error, even if combined with one instance of non-reversible error do no result in cumulative error.

A. Standard of Review

"The doctrine of cumulative error applies when multiple errors, which by themselves do not constitute reversible error, are *so serious* in the aggregate that they

cumulatively deprive the defendant of a fair trial." *State v. Romero*, 2019-NMSC-007, ¶ 45 (emphasis added). But "the doctrine cannot be invoked if no irregularities occurred." *State v. Martin*, 1984-NMSC-077, ¶ 17. Should this Court conclude that "that the district court did not err, there can be no cumulative error." *State v. Veleta*, ___-NMSC-___, ¶ 43 (S-1-SC-38169, Aug. 14, 2023). To the extent this Court believes there was error, any errors would have been "too slight to have the cumulative effect of denying Defendant a fair trial[,]" *State v. Rojo*, 1999-NMSC-001, ¶ 65, 126 N.M. 438, and were otherwise harmless.

Indeed should this Court agree the three issues raised by Defendant amount to error, the error would be non-constitutional. This Court has stated it is "appropriate to review non-constitutional error with a lower standard than that reserved for our most closely held rights." *State v. Tollardo*, 2012-NMSC-008, ¶ 36. A "non-constitutional error is harmless when there is no reasonable probability the error affected the verdict." *Id.*

In its review, this Court looks at all of the circumstances surrounding the error. *Id.* ¶ 43. This could include "looking at the error itself, which depending upon the facts of the particular case could include an examination of the source of the error and the emphasis placed upon the error." *Id.* It could also include "evidence of a defendant's guilt separate from the error . . . since it will provide context for understanding how the error arose and what role it may have played in the trial

proceedings." *Id.* However "such evidence . . . can never be the singular focus of the harmless error analysis." *Id.*

B. The District Court Properly Admitted Rule 11-404(B) Evidence.

First, Defendant alleges the district court's admitting evidence of Defendant's minor child testing positive for methamphetamine was error under Rule 11-404(B) and was otherwise prejudicial and violated Rule 11-403 NMRA. **[BIC 31]** Defendant also argues that the State gave no notice pursuant to the rule.

At the time of trial, Rule 11-404(B)(2) stated:

> B. Crimes, wrongs, or other acts.
> (2) Permitted uses; notice in a criminal case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. In a criminal case, the prosecution must
> (a) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial, and
> (b) do so before trial – or during trial if the court, for good cause, excuses lack of pretrial notice.

Notice

More recently, this Court characterized the notice required under Rule 404(B)(2) as being "reasonable general notice." *State v. Farrington*, 2020-NMSC-022, ¶ 49. On appeal, after citing to Rule 11-404(B)(2), Defendant requests this Court adopt the more restrictive language used by the New Mexico Court of Appeals which requires the State to "give direct notice that it specifically intends to introduce

prior bad acts evidence under Rule 11-404(B)(2) pursuant to an articulated use." **[BIC 32]**, *See State v. Acosta*, 2016-NMCA-003.

Rule 11-404(B)(2) was meant to achieve fairness by preventing unfair surprise while permitting parties the ability to maneuver during the flow of a trial. The rule on its face requires the State provide reasonable notice of a general nature for that evidence the prosecutor "intends" to offer at trial. But this restriction is softened to allow the State to provide the notice even during the trial with the court's approval.

Here, the Rule 11-404 evidence came up during the State's cross-examination of Defendant, in the Defendant's case-in-chief. During the side-bar, defense counsel demonstrated familiarity with the issue raised by the State's Rule 11-404(B) evidence. **[03/10/22 CD 03:04:25-30, 03:05:17-20]** While prosecutor's explanation of Rule 11-404(B) during the side bar was inartful, the mistaken presentation did *not* seem to impact the district court. **[03/10/22 CD 03:03:30-39]** After listening to the State's argument, the district court immediately brought the analysis back to what Rule 11-404 actually stands for stating that "404 is a propensity type rule." **[03/10/22 CD 03:03:30-04:00]** The district court determined Defendant had opened the door to the Rule 11-404(B) evidence.

As the discussion continued, Defendant asked the State to identify where the disclosure of this fact was made, and the State directed Defendant to the court case,

by its case number, which the State argued it found after Defendant opened the door on direct. **[*Id.* 03:07:22-56]** Defense counsel stated he "knew" about the case. **[*Id.*]** The notice element to Rule 11-404 is meant to achieve fairness, provide reasonable general notice, and operate to help prevent surprise. The dialogue before the district court reflects Defendant had such notice.

Admissibility

As to the admissibility of the evidence, this Court reviews "a district court's decision to admit or exclude evidence for abuse of discretion." *State v. Fernandez*, 2023-NMSC-005, ¶ 8. An "abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case." *Id.* With respect to Rule 11-404 evidence, "the trial court need not expressly articulate the reason for admission of evidence, so long as there is probative value . . . . Rule 11-404(B) is a rule of inclusion in New Mexico." *State v. Gaitan*, 2001-NMCA-004, ¶ 25, 130 N.M. 103, aff'd, *State v. Gaitan*, 2002-NMSC-007, ¶ 25, 131 N.M. 758. "A decision of the trial court will be upheld if it is right for any reason." *Id.*

The State argued Defendant had "opened the door" and put her credibility at issue and noted the State was not offering the evidence to demonstrate propensity. **[*Id.* 03:01:00-27]** On direct, Defendant stated she was telling the truth, that when custody started to change she was not mad—she just wanted everything to go right for her daughter; that she encouraged her daughter to visit with her dad even though

she did not know anything about guns; that she put her daughter in therapy; that she had no guns; and that she had no felony or domestic violence convictions. **[*Id.* 02:14:12-14, 01:36:45, 01:54:00-25, 02:10:30-11:30]** The State argued that not only had Defendant opened the door to her credibility, but that she was insinuating to the jury she acts as a good parent and as a peaceful, law-abiding person that "if that was the truth[,] . . . then these children would not be testing positive for methamphetamine." **[*Id.* 03:02:00-20]**

On appeal, Defendant takes issue with the State's articulation of the facts to which the Rule 11-404(B) evidence was directed. In the case cited by Defendant, *State v. Gallegos*, 2007-NMSC-007, 141 N.M. 185, this Court did state "it is incumbent upon the proponent of Rule 11–404(B) evidence to identify and articulate the consequential fact to which the evidence is directed . . . to cogently inform the court . . . the rationale for admitting the evidence to prove something other than propensity." *Id.* ¶ 25. But to the extent Defendant may not agree with the State's proffered articulation, that does not translate to mean the State failed in its obligation under the rule.

Here, the district court performed the proper balance under Rule 11-404(B)(2) and Rule 11-403 finding there was probative value to the Rule 11-404(B) evidence the State sought to admit. The district court decided that the question was a Rule 11-404 argument and with that it was "not looking at propensity itself" rather it looked

at how the "door was opened" and so the district court was "going to allow the question" but instructed that the questioning be limited and the State asked only one question about it and then moved on. **[*Id.* 03:06:54-07:10]** There was no abuse of discretion.

The State reiterates that Defendant opened the door to this evidence. *See State v. Comitz*, 2019-NMSC-011, ¶ 47, when a defendant gives testimony "that 'opens the door' to inadmissible evidence, the doctrine of curative admissibility in some circumstances may permit the State to rebut that claim with otherwise inadmissible evidence." *Tollardo*, 2012-NMSC-008, ¶ 22.

To the extent the district court's decision was erroneous, the error was harmless. *See id.*, ¶ 36 (setting forth the "reasonable probability" standard). Here, the State asked one question to rebut the image Defendant had painted of herself on direct and then moved on. This question did not go to the heart of the State's case or Defendant's defense. There is no reasonable probability that the verdict was impacted by this one question. Any error was harmless.

C. Agent Dougherty's Testimony Did Not Amount to "Vouching."

The next alleged error raised by Defendant deals with Agent Dougherty's testimony on Alonso's tip to the FBI. **[BIC 36]** Defendant did not preserve this error at trial. This Court may "review evidentiary questions although not preserved if the admission of the evidence constitutes plain error." *State v. Montoya*, 2015-NMSC-

010, ¶ 46. "The plain-error rule, however, applies only if the alleged error affected the substantial rights of the accused." *Id.* To find plain error, this Court "must be convinced that admission of the testimony constituted an injustice that created grave doubts concerning the validity of the verdict." *Id.* Finally, "[i]n determining whether there has been plain . . . error, we must examine the alleged errors in the context of the testimony as a whole." *Id.* (omission in original).

The State called Agent Dougherty as its first witness. **[03/08/22 CD 10:08:28-11:20]** As set out more fully above, Agent Dougherty was the FBI Agent who received Alonso's tip, opened the "preliminary inquiry," and investigated Alonso's tip. **[*Id.* 10:12:12-20:27, 10:20:27-25:01]** Agent Dougherty stated Alonso provided information in a piecemeal fashion and never seemed completely forthcoming to the FBI. **[*Id.* 10:34:13-35:02]** As the investigation continued it became apparent that the FBI independently corroborated the information received and thus considered Alonso's descriptions of the Carriage Hills Home itself and of the vehicles found there to be "pretty good"; the reality of the Carriage Hills Home that Agent Dougherty found "matched" Alonso's descriptions. **[*Id.* 10:31:35-32:50]** After investigating the facts, Agent Dougherty independently determined the "story" Alonso gave him at their first meeting "had merit to it." **[*Id.* 10:34:25-32]**

Due to the limited information Alonso gave the FBI (basically two names, an address, and a bad custody battle), Agent Dougherty stated the FBI's investigation

was not just contained within the information obtained from Alonso, but also included their own initiatives, including having local law enforcement help identify the target of the murder-for-hire plot as well as Defendant. **[*Id.* 10:41:19-42:09]** Once the pieces of information had fallen into place based in large part on their own investigative strategy, Agent Dougherty testified the FBI was able to verify other pieces of Alonso's story as well, such as the custody battle going on between Mr. Cabral and Defendant. **[*Id.* 10:42:30-36]** In other words, after engaging in independent investigation, Agent Dougherty was able to verify that the things Alonso was telling the FBI "were truthful." **[*Id.*]** Ultimately, Agent Dougherty testified that,

> especially because we had such little information that we weren't getting the details that we needed to follow up with this, but through this investigation, and digging into this, we were able to corroborate a lot of what [Alonso] was telling us. And to be honest with you, we couldn't find anything to show that he wasn't being 100% truthful. We just felt like he had more information that we weren't getting at the time.

[*Id.* 10:15:12-10:16:50, 10:46:10-38]

The State does not dispute that *Lucero* states what it does about commenting "directly and indirectly" upon a witnesses truthfulness, but the State avers that the context of this particular case—both the macro context and the micro context—shows that Agent Dougherty was not, in fact, vouching for the witness; the context here is everything. *State v. Lucero*, 1993-NMSC-064, ¶ 13, 116 N.M. 450. In

reviewing this alleged error, this Court must examine the testimony as a whole. *Montoya*, 2015-NMSC-010, ¶ 46.

Agent Dougherty's testimony, taken as a whole, illustrates it was the FBI's investigation, not Alonso, that led to the identification of the target of the murder-for-hire plot (Mr. Cabral) and to Defendant. Without the FBI's investigation, this case would just be about a man named "Mario," a woman named "Cristal," a bad custody battle, and a .45 caliber gun with no magazines. The very nature of Agent Dougherty's role in this case was to investigate the legitimacy of Alonso's tip. That investigation allowed for enough of the puzzle to be assembled that the FBI was able to warn Mr. Cabral of the threat on his life and, following the murders, allowed Defendant and Flores to be apprehended and charged. While Agent Dougherty testified that Alonso's tip had merit and seemed truthful, his testimony as a whole demonstrates that the tip merely formed the nascent basis to the FBI's larger investigation and that Alonso was not being completely forthcoming—foreshadowing for the jury a self-interested witness who was not concerned with telling the full-truth even if he told some truth.

Even if this Court concludes that Agent Dougherty did "vouch" for Alonso, Alonso himself testified. The jury saw and heard him subjected to cross-examination where Defendant asked him about his motives, story, memory, drug use, and about

the omissions in his narrative to the FBI. **[03/08/22 CD 02:34:30-03:04:44]** Therefore, the result of this unpreserved error would be harmless.

D. Counsel Are Given Wide Latitude in Closing Arguments—The Evidence Was Otherwise Not Unreasonably Stated.

Defendant contends prosecutors mischaracterized evidence as to: (a) the status of a related court case and (b) the testimony of one of the State's fourteen witnesses over the four day trial. The State concedes the former.

When the issue involving "prosecutorial misconduct is properly preserved . . . we review the trial court's ruling on this issue under the deferential abuse of discretion standard because the trial court is in the best position to evaluate the significance of any alleged prosecutorial errors." *State v. Trujillo*, 2002-NMSC-005, ¶ 49, 131 N.M. 709 (internal quotation marks and citation omitted). Our resolution of this issue "rests on whether the prosecutor's improprieties had such a persuasive and prejudicial effect on the jury's verdict that the defendant was deprived of a fair trial." *Id.*

The question by the prosecutor during Defendant's cross-examination and dealing with the minor child testing positive for methamphetamine, led to a side-bar with the district court during which the prosecutor told the district court that Flores had "pled guilty" to a child endangerment charge arising from another case regarding

the methamphetamine. **[03/10/22 CD 03:01:43-56, 03:07:07-32]** Critically, the jury did not hear this conversation. **[*Id.*]**

The matter came up again in Defendant's closing when the defense sought to tell the jury that the case was "dismissed" and the State, again, reiterated it had not been dismissed. The State concedes the case was dismissed. **[*Id.* 04:06:28-43; *see also* BIC 39, directing this Court, in part, outside the record proper]** Nonetheless, as discussed further below, such error does not justify reversal.

As to Ms. Rodriguez' testimony, the prosecutor's extrapolation that a witness stating they do not recall a fact is a denial is not unreasonable. During the trial, when asked about whether she took certain pictures found within phones seized from Defendant's property, Ms. Rodriguez stated she did not recall. **[*Id.* 08:51:30-55, 08:52:50-53]** She said the pictures were not of the vehicle she would have been photographing. **[*Id.* 08:51:55-52:05]** During Defendant's cross examination, the State told Defendant that Ms. Rodriguez had stated she had not taken the aerial photographs. **[*Id.* 03:23:03-07, 03:23:08-09]** Defendant corrected the State, stating Ms. Rodriguez "did say that she took photographs." **[*Id.* 03:23:02]** The prosecutor also stated Ms. Rodriguez had "told us that she did not [take the photos]." **[*Id.* 03:23:08-09]** Importantly, Ms. Rodriguez never said she *did* take the photos. Moreover, although she did not expressly deny having taken the photos, her responses during her examination *indicated* she was denying having taken them—

especially to the extent she testified the State's proffered pictures did not show those images of which she was sent to take pictures; at the vest least, the State reasonably interpreted the testimony.

The issue also came up again in the State's closing. In closing, the State and Defendant are "allowed wide latitude in closing argument and the trial court has wide discretion in . . . controlling closing argument." *Romero*, 2019-NMSC-007, ¶ 47. Here, since Ms. Rodriguez did not testify that she did take the photos in question, the prosecution's noting that she denied taking them had the same effect as her saying she did not recall. In both scenarios, Ms. Rodriguez avoided admitting that she took the photos and the jury was left with not knowing where the photos came from. There was no error as to this second point.

To the extent this Court disagrees with one or both points here, the question becomes whether any prosecutor improprieties "had such a persuasive and prejudicial effect on the jury's verdict that the defendant was deprived of a fair trial." *Trujillo*, 2002-NMSC-005, ¶ 49. The State contends the answer is no. Both of these instances occurred at the close of the fourth day of a five-day trial. The verdicts demonstrate that the jury carefully weighed the evidence—it convicted Defendant only of the charges dealing with Mr. Cabral, and acquitted her on the remainder. Whether or not Flores' case was dismissed would not have impacted the jury's understanding that Defendant's child had tested positive for methamphetamine.

Whether or not Ms. Rodriguez said she did not recall taking the photos or whether she had flat out denied taking the photos displayed in court does not take away from her testimony that she did, in fact, take photos for Defendant's custody case—albeit not those photos. Ultimately, Defendant had a fair trial.

"The doctrine of cumulative error applies when multiple errors, which by themselves do not constitute reversible error, are so serious in the aggregate that they cumulatively deprive the defendant of a fair trial." *Romero*, 2019-NMSC-007, ¶ 45. To the extent this Court believes there was error, any errors would have been "too slight to have the cumulative effect of denying Defendant a fair trial[,]" *Rojo*, 1999-NMSC-001, ¶ 65, 126 N.M. 438, and were otherwise harmless.

III. The State Presented Sufficient Evidence of First-Degree Murder.

A. Standard of Review

This Court reviews a jury verdict "for sufficiency of the evidence [determining] whether a rational fact-finder could determine beyond a reasonable doubt the essential facts necessary to convict the accused." *State v. Garcia*, 2005-NMSC-017, ¶ 12, 138 N.M. 1. In so making this determination, this Court "views the evidence in a light most favorable to the verdict, considering that the State has the burden of proof beyond a reasonable doubt." *Id.*

A jury may convict based on "reasonable inferences" from the evidence. *See id.* ¶ 15 ("The evidence in the present case was sufficient to give rise to a reasonable

inference that . . ."). "A reasonable inference is a conclusion arrived at by a process of reasoning which is a rational and logical deduction from facts admitted or established by the evidence." *State v. Slade*, 2014-NMCA-088, ¶ 14 (internal citation and quotation marks omitted).

B. Analysis

The State's theory was when Alonso did not murder Mr. Cabral, Flores committed the murders—as planned by Defendant and Flores. The jury had to determine whether Defendant killed Mr. Cabral with a deliberate intention to take away Mr. Cabral's life. **[RP 275]** "Deliberate intention" was defined as:

> the state of mind of the Defendant. A deliberate intention may be inferred from all of the facts and circumstances of the killing. The word deliberate means arrived at or determined upon as a result of careful thought and the weighing of the consideration for and against the proposed course of action[.]

[*Id.*]

Here, there was a great deal of evidence as testified to by fourteen witnesses—fifteen including Defendant. The jury heard from Alonso, who identified Defendant in court as the person he met with in person regarding killing Mr. Cabral. He testified about her custody case and her desire to kill Mr. Cabral within sixty days (a particularly pernicious fact in that the murder ultimately occurred within that timeline). The jury also heard from Mr. Cabral's aunt and uncle who identified Defendant in court and testified that she retrieved a .45 caliber gun from them. The

jury heard from officers who interviewed Defendant regarding the phones in her possession; they related that she would not even recognize her own phone from among only four phones taken from her property. Ms. Rodriguez stated that Defendant had sent Ms. Rodriguez to take pictures of Mr. Cabral and where he was living.

Here, the jury heard about Defendant's motive, Defendant's intent, and Defendant's opportunity. If there was a case where a defendant thoroughly planned a murder and weighed and considered the same, this was it.

The jury did not have to find Defendant at the scene of the murder, standing behind the gun, and/or pulling the trigger. Rather, a reasonable juror could have reviewed all the evidence and found Defendant guilty of first-degree murder for her role in aiding and abetting in the murder. This becomes particularly true where the jury was actually asked to find Defendant guilty of murdering Mr. Cabral and Ms. Mora—but the jury only found Defendant guilty as to the murder of Mr. Cabral—because this was the outcome determined by the evidence. Considering the evidence in the light most favorable to the verdict, there was sufficient evidence here.

IV. Double-Jeopardy

A. Standard of Review

This Court reviews a double jeopardy challenge de novo. *See State v. Begaye*, 2023-NMSC-015, ¶ 11. Here, Defendant raises a double-description challenge.

Double description cases are those "in which a single act results in multiple charges under different criminal statutes." *Id.* ¶ 12.

> In reviewing a double-description challenge, this Court follows
>
> > the two-part test adopted in [*State v.*] *Swafford*, 1991-NMSC-043, ¶ 25, 112 N.M. 3. First, [this Court] assess[es] whether the conduct underlying the offenses is unitary, i.e., whether the same conduct violates both statutes . . . . Second, [this Court] examine[s] the statutes at issue to determine whether the [L]egislature intended to create separately punishable offenses.

Begaye, 2023-NMSC-015, ¶ 13 (internal quotation marks and citation omitted). "Only if the first part of the test is answered in the affirmative, and the second in the negative, will the double jeopardy clause prohibit multiple punishment in the same trial." *Id.*

In applying the first prong of the test, this Court looks to whether the conduct is unitary, i.e. "whether the conduct underlying both convictions is sufficiently distinct as to time, place, or action." *Id.* ¶ 14. In ascertaining the Legislature's intent under the second prong, this Court may look to the legal theory as laid out in the charging documents, the jury instructions, or even in the "testimony, opening arguments, and closing arguments to establish whether the same evidence supported a defendant's convictions under both statutes." *Id.* ¶ 18.

B. Analysis

Here, the conduct is not unitary because it is separated by sufficient indicia of distinctness. *Id.* ¶ 20. Defendant does not contend with the initial portion of the test for sufficient indicia of distinctness, as set forth by this Court, and does not address the separateness of time and/or space. In particular, the testimony clarifies that Defendant met with Alonso in January 2018, solicited him to murder Mr. Cabral, and paid him $3,000 to do so. The evidence established that Alonso was then arrested sometime in mid-February 2018. Flores and Defendant then conspired to kill Mr. Cabral—with the murders happening at the end of March 2018.

There was "sufficient indicia of distinctness" and, therefore, the conduct is not unitary. "Sufficient indicia of distinctness" are present when the illegal acts "are sufficiently separated by either time or space (in the sense of physical distance between the places where the acts occurred)[.]" *State v. Sena*, 2020-NMSC-011, ¶ 46. Here the illegal acts were separated by time and were also arguably separated by space (in that Alonso was in prison when Flores and Defendant were conspiring to commit murder—and then committing the murders). Where there is sufficient indicia of distinctness the analysis ends. *Id.* (holding that if looking to time and space will not "suffice to make the determination" then this Court would look to other considerations). Here time and space suffice to make the determination.

Assuming this Court disagrees, the analysis would turn to the State's theory as ascertained by reviewing the statutes, the jury instructions, and charging documents. *See Begaye*, 2023-NMSC-015, ¶24 (discussing "[t]he modified *Blockburger* analysis 'demands that we compare the elements of the offense, looking at the State's legal theory [by] review[ing] the statutory language, charging documents, and jury instructions used at trial.")

Here, the statutes for solicitation and for conspiracy are separate from each other and one does not require the other. *See* NMSA 1978, Section 30-28-2 (1979) and NMSA 1978, Section 30-28-3 (1979) Each statutes location in the code and how they are charged, lead to a reasonable inference that the Legislature intended to create two separate crimes. In looking at the jury instructions, they were modeled off the Uniform Jury Instructions. **[*See* RP 278, RP 277]** The charging document sets out the facts much the same as were developed at trial. The charging document describes, by way of the timeline of the evidence, that Alonso was solicited to commit the murder some time toward the end of January 2018, he received $3,000 to commit the murder, but was arrested in mid-February 2018 before the murders took place. **[RP 1-7]**

Taken together the States offers that between the statutes, the jury instructions, and the charging document there was a separate factual basis for the conspiracy and the solicitation convictions. If this Court does not agree, it is only in this instance at

this part of the analysis that this Court would reach reviewing the parties opening statements, closings and testimony. *Sena*, 2020-NMSC-011, ¶ 46.

Defendant points to a moment in the States closing where the prosecutor stated that the solicitation charge was for hiring Alonso and the conspiracy charge was for both Flores and Alonso. **[03/11/22 CD 09:47:24-50]** Defendant attempts to extrapolate from this twenty-six seconds of a five day trial that the conduct was unitary—despite all of the other evidence, which pointed to the State's theory that Alonso was solicited and Flores and Defendant conspired. That would not follow our double jeopardy precedent. This Court has stated that "the *Foster* presumption is rebutted by evidence that each crime was completed before the other crime occurred." *Sena*, 2020-NMSC-011, ¶ 54. That is the case here.

Defendant finally argues that the Legislature did not intend to punish conspiracy and solicitation as unitary conduct and cites to *State v. Vallejos*, 2000-NMCA-075, in support of her argument. However, in *Vallejos*, there were only two players: the defendant and one other person. *Id.* ¶¶ 3-4. The defendant had been convicted of conspiracy and solicitation. *Id.* ¶ 2. The district court merged the two convictions for sentencing purposes and the defendant appealed, in part, due to a double jeopardy violation. *Id.* ¶ 20. The *Vallejos* Court ultimately determined there was a double jeopardy violation and vacated the solicitation sentence. *Id.* ¶ 28. It only did so, however, because part of the criminal solicitation statute, NMSA 1978,

Section 30-28-3(D) (1979), prohibits conviction for that crime when "the solicitation constitutes a felony offense other than criminal solicitation, which is related to but separate from the offense solicited." In *Vallejos*, the solicitation constituted the separate felony of offense of conspiracy; the defendant solicited and conspired with a single person. *Vallejos* does not apply here. Here, the conduct was not unitary and there was, therefore, no double jeopardy violation.

CONCLUSION

The jury verdict finding Defendant guilty as to first-degree murder, conspiracy, and solicitation should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2023, I filed the foregoing brief electronically through the Odyssey/E-File & Serve System, which caused counsel of record to be served by electronic means.

/s/ Serena R. Wheaton

SERENA R. WHEATON