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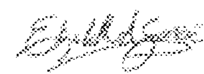

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

vs.

CRISTAL CARDENAS, **No. S-1-SC-39517**

Defendant-Appellant.

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

DEFENDANT-APPELLANT'S BRIEF IN CHIEF

Oral argument is requested.

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NOTE ON RECORD CITATIONS

The district court proceedings were audio-recorded using For The Record software. FTR CDs were reviewed using The Record Player and are cited by date and timestamp in the form **[mm/dd/yy CD hour:minute:second]**. Citations to the Record Proper are in the form **[RP page number]**. Exhibits are cited as **[Ex. number]**.

CERTIFICATION OF COMPLIANCE

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 the brief contains fewer than 11,000 words (specifically, 10,929). This word count was obtained using Microsoft Word 2016.

NATURE OF THE CASE

Cristal Cardenas's trial for murder, conspiracy, and criminal solicitation was marred by significant errors. First, the district court violated Ms. Cardenas's constitutional right to a public trial by prohibiting visitors from taking notes in the courtroom. This was structural error, and it requires reversal.

Second, there were numerous errors during the trial. The State was permitted to introduce prejudicial bad-acts evidence without giving notice or articulating a basis for admissibility. One witness vouched for the credibility of another. The State misrepresented evidence to the jury, and the court appeared to endorse the misrepresentations. Together, these errors had a reasonable probability of swaying the outcome of the trial.

Third, the State failed to present sufficient evidence of the murder charge. There was evidence from which the jury could have found that Ms. Cardenas conspired to commit murder, but no evidence that either Ms. Cardenas or a co-conspirator actually killed anyone. The only evidence collected from the crime scene was exculpatory. The State's case for murder relied on impermissible speculation and conjecture.

Finally, if this Court does not reverse Ms. Cardenas's convictions, she asks this Court to vacate her solicitation conviction on double jeopardy grounds.

SUMMARY OF FACTS AND PROCEEDINGS

In the early morning of March 25, 2018, Mario Cabral and Vanessa Mora were shot to death in their home. **[*See* 3/8/22 CD 4:19:20-4:23:43, 5:09:04-17; 3/9/22 CD 9:50:46-9:56:26; 3/10/22 CD 8:57:57-8:58:15]** Ms. Mora's daughter, who was in her early teens, heard the gunshots from another room but did not see who shot them. **[*See* 3/8/22 CD 4:07:03-15, 4:19:20-4:23:43]**

Less than 24 hours later, police searched the home of Mr. Cabral's ex-girlfriend Cristal Cardenas. They seized her vehicles and phones, and they took her to the police station, where she gave a statement denying any involvement in the murders. **[3/9/22 11:03:35-11:04:00, 11:32:33-11:33:23; 3/10/22 CD 9:03:10-9:05:50, 10:04:52-10:05:21, 10:35:37-10:37:39, 1:40:42-1:43:40; Ex. 386]** She and her boyfriend, Luis Flores, were eventually charged with murdering Mr. Cabral and Ms. Mora. Their cases were severed for trial. **[RP 20, 25; 2/23/21 CD 2:45:50-59]**

At trial, the State's theory of the case was that Ms. Cardenas and Mr. Flores conspired to commit the murders, and Mr. Flores was the shooter. The State argued that Ms. Cardenas killed Mr. Cabral over a child custody dispute. **[*See* 3/8/22 CD 9:20:53-9:24:14; 3/11/22 CD 8:58:50-8:59:40]**

The defense argued that the victims were likely targeted because of Mr. Cabral's drug dealing. **[*See* 3/8/22 9:46:42-9:48:25; 3/11/22 CD 10:29:52-**

10:30:48, 10:38:11-42] The defense theory was, essentially, that Ms. Cardenas was being set up.

I. The evidence at trial

The State's first witness was George Dougherty, a former agent with the Federal Bureau of Investigation. **[3/8/22 CD 10:08:28-10:11:20]** In late February 2018, before the murders, Agent Dougherty met a federal inmate named Edward Alonso, who was facing a federal probation violation and other charges. **[*Id.* 10:12:35-10:15:12]**

Mr. Alonso told the FBI that he had information about a murder-for-hire plot. **[*Id.* 10:17:30-40]** He said that a woman named Crystal (whom the FBI later identified as Cristal Cardenas) had offered him $10,000 to kill someone named Mario over a custody case. He gave Agent Dougherty an address and directions to Mario's house, as well as physical descriptions of the people involved. **[*Id.* 10:25:15-10:27:03, 10:34:56-10:36:15, 10:38:25-10:39:27]**

Agent Dougherty testified that people in federal custody often try to make deals to get out of trouble. **[*See id.* 10:15:12-10:16:50]** Therefore, Agent Dougherty tried to verify Mr. Alonso's story.

He never corroborated any phone contact between Mr. Alonso and Ms. Cardenas. Mr. Alonso had four phones with him when he was arrested, but he told agents that she contacted him on a different phone. **[*Id.* 10:27:03-10:28:20]** The

FBI picked up another phone from Mr. Alonso's father, but they could not get into it—it was missing a battery or needed a passcode. **[*Id.* 10:28:20-10:30:20, 11:47:45-11:48:24]** Mr. Alonso told the FBI this was also the wrong phone, and his father had given the relevant phone to someone else. **[*Id.* 10:28:20-10:30:20]** Mr. Alonso told them that Ms. Cardenas had texted a photo of the target to a phone that belonged to someone else, "a girl named Amanda," whom he did not know how to reach. **[*Id.* 11:38:11-33]**

Agent Dougherty was, however, able to follow Mr. Alonso's directions to a house that matched Mr. Alonso's description. **[*Id.* 10:30:20-10:32:45]** He learned that Vanessa Mora and Mario Cabral lived there, and Mr. Cabral was involved in a custody fight with Ms. Cardenas. **[*Id.* 10:39:27-10:42:36]** Because all of this information matched Mr. Alonso's tip, Agent Dougherty testified that he believed Mr. Alonso's story "had merit to it." **[*Id.* 10:34:25-56]** As Agent Dougherty testified, he made more comments about Mr. Alonso's credibility: "This stuff that he's telling us is truthful." **[*Id.* 10:41:42-10:42:36]** "[T]hrough 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." **[*Id.* 10:45:38-10:46:35]**

Agent Dougherty warned Mr. Cabral that there was a threat against his life, without specifying the source. **[*Id.* 10:47:17-10:50:25-45]** Mr. Cabral said that he

was involved in a child custody case with Ms. Cardenas and that he had once had words with her boyfriend, Mr. Flores. **[*Id.* 10:51:58-10:53:00, 10:55:44-10:56:43]** Mr. Cabral's attorney thought he might be in danger "because of something in his past," but Agent Dougherty assured him the threat was unrelated to that. **[*Id.* 10:56:43-10:57:24]** Agent Dougherty testified that he believed Mr. Cabral and Mr. Alonso both had some history with illegal drugs. **[*See id.* 11:32:58-11:34:09]**

The State's next witness was Mr. Alonso. **[3/8/22 CD 1:56:20-1:57:28]** He testified that in 2018, Ms. Cardenas hired him to kill Mr. Cabral. He testified that shortly after he got out of prison in January 2018, he was out with a friend named Sylvia, and they went to a house to look for her kids. Sylvia went inside, then came out and said someone on the phone wanted to talk to Mr. Alonso. **[*Id.* 1:57:54-1:58:18, 2:37:36-2:38:28, 3:02:50-3:03:20]** On the phone was Ms. Cardenas, who asked if he would kill someone for her. He agreed to do it for $10,000, with half up front and half later. **[*Id.* 1:58:18-49, 2:05:38-2:08:00, 2:11:10-39]**

Mr. Alonso said that he met with Ms. Cardenas and Luis Flores shortly after that, and she said she had a narrow time frame for the murder because of her custody battle, about 60 days. **[*Id.* 2:12:00-30]** She gave him a description of Mr. Cabral's house, an address, and a photograph of Mr. Cabral. **[*Id.* 2:12:30-2:15:03]** She paid him $3,000 in hundred-dollar bills, less than what they had agreed to, so

Mr. Alonso said he decided to take the money but not do the job. **[*Id.* 2:14:19-47, 2:15:16-2:16:37, 2:47:28-43]**

Nevertheless, Mr. Alonso met with Ms. Cardenas and Mr. Flores several times and surveilled Mr. Cabral's house. He testified that Ms. Cardenas drove a black Cadillac at least twice, but once came in a Crown Victoria so that she would not draw suspicion. On that occasion, Mr. Alonso said, there was also another woman in the Crown Victoria. **[*Id.* 2:10:24-42, 2:16:37-2:17:38, 2:21:32-2:22:43]**

Mr. Alonso testified that at one of these meetings, Ms. Cardenas told him that if he was not able to do the job, Mr. Flores would do it instead. They showed Mr. Alonso a .45-caliber gun. **[*Id.* 2:24:25-2:25:38]**

Mr. Alonso testified that he went to Mr. Cabral's house around Valentine's Day 2018 with a woman named Brianna Lucero. They took a maroon Ford Explorer Sport Trac. **[*Id.* 2:21:00-32, 2:31:42-58, 2:44:21-51]** On the way back, he was arrested for having a gun while on federal probation. He told the FBI that Mr. Cabral would be murdered within the next month with a .45-caliber gun. **[*See id.* 2:23:41-2:24:25, 2:25:01-2:28:03, 2:45:49-2:46:02]**

On cross-examination, Mr. Alonso testified that he had trouble remembering dates of events, because he had used a lot of drugs. **[*Id.* 2:35:58-2:36:10, 2:37:10-36]** He testified that he lost the original photo of Mr. Cabral that Ms. Cardenas gave him. After that, Ms. Cardenas sent the photo to Mr. Alonso's own phone—he

said did not know a woman named Amanda. He testified that the sheriff collected the phone when he was arrested. **[*Id.* 2:44:51-2:47:28]**

Mr. Alonso did 37 months of prison on a federal gun charge. **[*Id.* 2:49:20-2:50:03]** He also entered a plea agreement in New Mexico for his involvement in this case. Defense counsel attempted to cross-examine Mr. Alonso about the terms of his plea agreement, but the State objected to entering the agreement itself into evidence, and Mr. Alonso did not testify about many details. **[*See id.* 2:30:38-2:31:10, 2:51:28-3:01:41]** He said that his sentences would run consecutive to one another, and the agreement required him to testify against Ms. Cardenas.[1] **[*Id.* 3:07:21-3:08:10, 3:08:10-3:08:56]**

A neighbor testified that about a month before the murders, she saw a maroon Ford truck driving slowly back and forth through the neighborhood. The woman driving the truck drove off when people approached her. She left behind a man in dark clothing, who ran away. **[3/8/22 CD 3:12:38-3:17:13, 3:18:22-43, 3:21:40-3:22:13, 3:23:15-32]** This was consistent with Mr. Alonso's testimony about surveilling the house with Brianna Lucero. The neighbor testified that she

[1] After trial, Mr. Alonso received a fully suspended sentence, with his eight-year habitual offender enhancements held in abeyance. *See* Repeat Offender Plea & Disposition Agreement, *State v. Alonso*, No. D-307-CR-2018-733 (3d. Jud. Dist. Ct. Feb. 25, 2021); Amended Judgment & Sentence, *id.* (Mar. 1, 2023).

never saw other vehicles hanging around the area, and never saw a black Cadillac. **[*Id.* 3:23:32-3:24:00]**

Ms. Mora's daughter testified about the night of March 24 into March 25, 2018. **[3/8/22 CD 4:07:57-4:08:31]** She was with Ms. Mora and Mr. Cabral. **[*Id.* 4:15:34-40]** They got home around 10 p.m. and watched TV until 11:45, and then she went to sleep. **[*Id.* 4:18:22-38, 4:19:20-4:20:03]** Later in the night—she estimated 1 or 2 a.m.—she heard a car nearby, then glass shattering, screams, and gunshots. She hid under a blanket and eventually fell asleep. **[*Id.* 4:20:03-4:22:28, 4:23:43-4:24:36, 5:02:37-5:03:30, 5:08:34-5:09:47]** She did not see the shooter. **[*Id.* 4:24:36-47]** In the morning, she woke up when she heard the adults' phones ringing. She saw their bodies in the living room and ran to a neighbor's house for help. **[*Id.* 4:22:28-4:23:43]**

The State called Anna Rodriguez. Ms. Rodriguez was Mr. Cabral's cousin but Ms. Cardenas's friend, and she took Ms. Cardenas's side in their custody dispute. **[3/9/22 CD 8:46:40-8:48:08, 9:10:39-55]** To help Ms. Cardenas, she agreed to take photographs of Mr. Cabral's truck parked at Ms. Mora's house, to prove that Mr. Cabral was lying about where he was living and working. **[*Id.* 8:48:42-8:49:45, 9:11:05-9:12:25]** She testified that Ms. Cardenas last asked her to take photos on the day before the murders, but Ms. Rodriguez was busy and did not go. **[*Id.* 8:53:06-8:54:32]**

The State showed Ms. Rodriguez photographs of the rear of the house that were found on a phone in Ms. Cardenas's car. The State asked Ms. Rodriguez if she took those particular photographs, and she answered, "I don't recall." **[*Id.* 8:51:13-55; *see* 3/10/22 CD 9:18:55-9:21:33; Ex. 425]** She agreed that the vehicle in the photos was not Mr. Cabral's truck, which she would have been looking for. **[3/9/22 CD 8:51:55-8:52:05]** The State asked if she ever took pictures from the back of the house, and she said, "Not that I recall." **[*Id.* 8:52:43-53]**

Ms. Rodriguez testified that she went to Ms. Cardenas's house on the morning of March 25 and told her about the murders. Ms. Cardenas cried when she learned the news. **[*Id.* 8:55:30-8:56:47, 9:14:16-49]** Ms. Rodriguez also talked about meeting up with Ms. Cardenas and Mr. Flores, driving them around, and taking them to the AT&T store after their cars and phones were seized. **[*Id.* 8:59:11-9:08:09, 9:18:36-9:21:08]**

Ms. Rodriguez testified that Mr. Cabral openly sold drugs. **[*Id.* 9:06:00-41]** She said that he had very limited visitation with the daughter he shared with Ms. Cardenas, but shortly before Mr. Cabral was killed, he began to have unsupervised visits. Ms. Rodriguez described Ms. Cardenas's reaction to that development as concerned for her daughter, but nothing beyond that. **[*See id.* 9:22:38-9:24:46]**

Mr. Cabral's aunt and uncle both testified about a gun. Mr. Cabral's aunt testified that Ms. Cardenas and Mr. Cabral gave her a case with a gun and asked

her to hold it. **[3/9/22 CD 3:23:55-3:25:38, 3:27:43-3:28:07, 3:29:18-47]** This was when Ms. Cardenas and Mr. Cabral were together, long before he was killed. **[*Id.* 3:25:38-3:26:06, 3:30:07-31]** She testified that later, Ms. Cardenas returned to pick up the gun because she was alone with her child and she was afraid. **[*Id.* 3:31:27-3:32:26]** She did not remember when this was, but Ms. Cardenas's daughter was around eight or nine years old (which would have been one or two years before the murders). **[*Id.* 3:34:55-3:35:11; *see* 3/10/22 CD 1:23:33-1:25:00 (older daughter was 14 at time of trial)]** The aunt testified that her brother was outside during this incident. **[3/9/22 CD 3:34:20-42]**

Mr. Cabral's uncle testified that Ms. Cardenas came over, and his sister said she was picking up a gun. **[3/9/22 CD 3:56:35-48, 3:58:14-3:59:08]** He testified that she wanted the gun for protection. **[*Id.* 4:00:21-4:01:54]** This happened eight or nine years ago (four or five years before the murders). **[*Id.* 4:06:51-4:07:44]** He testified that he was the one who opened the briefcase and gave the gun, which he said was a .45, to Ms. Cardenas. **[*Id.* 4:02:52-4:04:47]**

The State presented evidence from the search of Ms. Cardenas's house, which she shared with her boyfriend Luis Flores, her brother George, and her two children. Police found ammunition in one bedroom (including .45 caliber, but also other sizes), but no gun. **[3/9/22 CD 10:58:49-11:00:22, 11:30:15-27]** Ms. Cardenas told police that she did not own a gun, but her brother sometimes went to

the shooting range, and she did not know if he had a weapon. **[3/10/22 CD 9:49:48-9:52:44]**

Police seized three vehicles from Ms. Cardenas. A Jeep was parked outside, and there was a Chevy S-10 truck in the garage. **[3/9/22 11:03:35-11:04:00; 3/10/22 CD 10:35:37-10:36:19]** During the search, Ms. Cardenas drove home in her black Cadillac, and police seized it and the cell phones that were inside. **[*See* 3/9/22 CD 11:32:33-11:33:23; 3/10/22 CD 10:37:14-39]** They found a little over $5,000 in cash in the car, mostly in hundreds. **[3/10/22 CD 10:03:38-10:04:52]** The State presented no evidence of blood, gunpowder residue, or other physical evidence to tie the cars to the crime scene.

Police collected data from the cell phones found in the house and Cadillac. **[*Id.* 9:03:10-9:05:50]** In the trash folder of a phone in the Cadillac, police found three photographs of the back of the Mora-Cabral residence. **[*Id.* 9:18:55-9:21:33, 9:22:27-58]** On a different phone, found inside Ms. Cardenas's house, there were 37 aerial images of the area around the Mora-Cabral residence, "like a Google Map photo." **[*Id.* 9:22:58-9:32:10]** The State did not present evidence establishing which household member these phones belonged to.

The State presented some physical evidence from the Mora-Cabral residence. The glass door in the back of the house was shattered. Mr. Cabral and Ms. Mora were found in the living room. **[3/9/22 CD 9:52:35-9:56:26, 10:50:21-**

55] A forensic pathologist testified that Mr. Cabral was shot 12 times, including once in the head and six times around his crotch. **[*Id.* 1:29:15-50, 1:30:22-47, 1:38:31-53]** Ms. Mora had been shot three times in the head and torso. **[*Id.* 1:23:15-45]** Inside one of the bedrooms in the house, police found white powder, a scale, cash, and Mr. Cabral's wallet. **[*Id.* 3:18:31-3:19:15; 3/10/22 CD 11:24:41-11:27:23]**

There were several .45-caliber shell casings at the scene. **[3/9/22 CD 10:50:55-10:54:52, 2:55:53-2:56:35]** Three shell casings were examined for fingerprints, and Mr. Flores was eliminated as the source of the prints found on them. **[3/10/22 CD 10:51:31-10:52:12, 10:56:40-10:59:43]** Police found shoe impressions in the dirt outside—footprints going toward and away from the back of the house. All of the footprints appeared to come from the same person. **[3/9/22 CD 9:56:26-9:57:46, 10:04:11-21]** The footprints did not match Mr. Flores's shoes, which were seized from Ms. Cardenas's house. **[3/10/22 CD 10:31:30-51, 10:47:55-10:49:32]**

Police found fresh-looking tire marks in the dirt. The marks did not appear to match the tires of the vehicles found on the property. **[3/9/22 CD 10:22:53-59, 10:46:14-10:47:21, 11:06:05-28]** Police compared the tracks to tires from each of the vehicles found at Ms. Cardenas's house. The case agent testified that nothing "conclusive" came back; the State presented no evidence that any of her cars could

have made the tire tracks.[2] **[3/10/22 CD 10:31:51-59, 10:49:32-10:50:07]** The case agent also testified that surveillance cameras in the neighborhood showed nothing of value. **[*Id.* 10:31:59-10:32:36, 11:15:41-11:17:30]**

Ms. Cardenas testified in her own defense. She testified that she had two daughters, a 14-year-old with Mr. Cabral and a four-year-old with Mr. Flores. **[3/10/22 CD 1:23:33-1:25:00]** At the time of the murders, they would have been approximately 10 and less than a year.

Ms. Cardenas testified that she and Mr. Cabral started dating in 2005, and their daughter was born in 2007. Later, they broke up. **[*Id.* 1:26:25-1:28:04]** At the time Mr. Cabral died, Ms. Cardenas was living in a house that he had paid for. The house was supposed to be their daughter's, but Ms. Cardenas was formally an owner as well because the daughter was a minor. **[*See id.* 1:28:26-1:31:42]** Ms. Cardenas testified that she did not initially want the house, but accepted it for her daughter. The house cost a lot to maintain, and she was not working because she had a new baby. **[*Id.* 1:36:45-1:38:55]** She testified that she had a large amount of cash in her car when it was seized because she and Mr. Flores had just received their tax refunds, and they planned to pay their bills in cash. **[*Id.* 1:55:28-1:58:20]**

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[2] In opening statement, the State said that police "didn't find any fingerprints" and suggested that the tire tracks matched the dimensions of Ms. Cardenas's Chevrolet S-10. **[*See* 3/8/22 CD 9:43:53-9:44:50]** This was inconsistent with the case agent's testimony about the physical evidence.

Ms. Cardenas testified about her custody case with Mr. Cabral. She said she had primary custody of their daughter, and Mr. Cabral had visitation—initially supervised, then unsupervised. She was not angry about the decision to allow unsupervised visitation, just "wanted everything to go right for my daughter." **[*Id.* 1:32:17-1:36:45]** Mr. Cabral had started paying child support, $200 per month, shortly before he was killed. **[*Id.* 2:11:57-2:12:18]**

Ms. Cardenas testified that Anna Rodriguez was helping her out with the case by taking photographs and doing research on Google Earth. **[*Id.* 1:46:18-1:48:25]** Ms. Cardenas denied ever going to the Mora-Cabral residence and said she knew it only from pictures. **[*Id.* 1:52:25-54]**

Ms. Cardenas testified that she never got a gun from Mr. Cabral's aunt and uncle. Her Spanish was not good and she rarely spoke to them. **[*Id.* 2:08:11-2:10:02]** (Both testified at trial through a Spanish interpreter.) **[*See generally* 3/9/22 CD 3:22:14-3:36:16, 3:53:25-4:08:47]** She testified that she had never owned a gun. **[3/10/22 CD 2:10:22-39]**

Ms. Cardenas testified that she did not know Edward Alonso, never spoke to him, never paid him money, and never told him that Mr. Flores would kill Mr. Cabral. **[*Id.* 1:49:50-1:51:21, 2:11:20-57]** She testified she did not want Mr. Cabral dead. **[*Id.* 1:51:21-33, 2:13:31-2:14:15]**

During cross-examination of Ms. Cardenas, the State asked, "So why is it that your child tested positive for meth when y'all got arrested?" **[*Id.* 2:58:26-2:59:11]** Defense counsel immediately objected. At sidebar, he said that this was the first he had ever heard of a child testing positive, he had received no notice that the State planned to use this bad-acts evidence, and it was "so prejudicial, Judge. There is no probative value at all in this case." **[*Id.* 2:59:11-3:01:12]**

The State told the court that Luis Flores had pleaded guilty to endangering their baby daughter. This was relevant, the State argued, because "[t]hey're leading a misrepresentation on this jury of how great parents they are, how she's the only one who cared for them, that's all she ever wanted, that she didn't want that house." **[*Id.* 3:01:43-3:02:21]** The State asserted that notice of bad-acts evidence was necessary only if the State used the evidence in its case-in-chief. **[*Id.* 3:03:24-54]**

The district court allowed the State to ask whether Ms. Cardenas's baby daughter tested positive for methamphetamine. Ms. Cardenas testified, "I believe so." **[*Id.* 3:06:48-3:07:07, 3:13:55-3:14:10]**

On redirect examination, Ms. Cardenas testified that after the positive test, Mr. Flores was charged with child endangerment. She believed the charge against Mr. Flores had been dismissed, but she was not in court with him when it

happened. She personally tested negative for methamphetamine. **[*Id.* 4:05:26-4:06:43]**

In addition, the State asked Ms. Cardenas who took the photographs of the back of the Mora-Cabral residence. Ms. Cardenas answered that she believed Ms. Rodriguez took them.

"All three of them?" asked the State.

"I believe so," said Ms. Cardenas.

"Even though she sat here and told us that she did not?" asked the State.

"She's the only one that had went to, physically, to there, to take pictures," said Ms. Cardenas. **[*Id.* 3:23:17-3:24:05]**

Defense counsel objected that the State's question assumed facts not in evidence. Defense counsel said that he could not specifically recall Ms. Rodriguez's testimony, "but I don't think she testified that way." **[*Id.* 3:24:05-20]**

The State responded, in front of the jury, "She did, Your Honor. She said she had taken one of them, but not the other two."

The district court responded, "The court does agree those are facts in evidence. Overruled." **[*Id.* 3:24:20-42]**

II. The note-taking incident

On the second day of testimony, the State asked for a sidebar. "I just wanted to ask the Court a question. Usually, people who are not involved in the trial, or let's say the attorneys or the jurors, other than them, I don't think somebody should record the proceedings or write notes about what is happening. Is that [a] correct understanding, Judge?"

"That's correct," said the district court. "Who's writing notes?" **[3/9/22 CD 3:00:59-3:01:18]**

The note-taker, Kay Lilley, was sitting behind Ms. Cardenas and defense counsel. Defense counsel said she was a family friend of Ms. Cardenas and the sister of Jess Lilley, a local attorney. **[*See id.* 3:01:18-3:02:16]** Ms. Cardenas's trial took place under Covid-19 precautions, and she was allowed only one guest in the courtroom. **[*See id.* 3:05:23-59]** Ms. Lilley was that guest.

The State said, "Your Honor, I think this worries the State." **[*Id.* 3:02:16-20]**

Defense counsel said that people were not allowed to make audio or video recordings in court, "but I think people are allowed to take notes. It's a public trial. The media's allowed to be in here to take notes and do whatever." **[*Id.* 3:02:25-36]**

The district court said, "I'm going to ask a question. We're talking a civil attorney's sister is here?"

Defense counsel said, "She's a friend of the family, she's like a second mother to Cristal." He said he mentioned her relationship to a lawyer so it was clear "there's not anything inappropriate going on here. But it is a public trial, Judge." **[*Id.* 3:02:36-3:03:19]**

The district court said, "I'm going to ask her to leave the courtroom, sir."

"What?" said defense counsel.

"I'm going to ask her to leave the courtroom."

"Based on what, Judge? I mean, people are allowed to take notes."

The district court said, "Nobody that's coming in to visit is taking notes, has been taking notes, and all of a sudden we have a civil attorney's sister coming in here and taking notes?"

Defense counsel reiterated, "I think people are allowed to take notes. I mean, it's a public trial." **[*Id.* 3:03:19-53]**

He paused, apparently while someone off-microphone spoke. The person apparently suggested that Ms. Lilley could turn her notes over to the court. Defense counsel said, "Alternatively, I think that's a good idea." The trial court agreed that it was a "great idea." **[*Id.* 3:03:53-3:04:13]** The district court allowed Ms. Lilley to stay on the condition that she hand her notes over to the court and refrain from future note-taking. The court described the note-taking as "kind of an unheard-of

issue that's arising" and said it was on the verge of barring all family members from the courtroom. **[*See id.* 3:05:19-59]**

Later that afternoon, defense counsel and Ms. Lilley addressed the court. Defense counsel told the court that Ms. Lilley "wanted me to let you know that on her way in she asked if she would be allowed to take handwritten notes and was told, 'Yes.'" **[*Id.* 3:37:38-59]**

The district court said, "I will deal with the man up front, so that's not a problem. And he doesn't control the courtroom, but—"

Defense counsel said, "Judge, I just want to let you know that just that she didn't do anything in bad faith."

The court replied, "Oh, and I have never, never inferred that she did anything wrong, not at all. Just want to make sure that everything is fair for everybody." **[*Id.* 3:38:21-41]**

The district court looked over the notes and offered to let the State read them; the State declined. **[*Id.* 3:38:41-3:39:33]** Before adjourning, the district court said to Ms. Lilley, "And ma'am, believe me, I didn't in any way think you'd done anything wrong. I wanted to make sure it's safe for everybody." **[*Id.* 3:39:33-41]**

III. Closing argument and verdict

In closing argument, the State told the jury that "we know it is Luis, Luis Flores," who was the shooter. **[3/11/22 CD 8:59:04-40]** The State acknowledged the lack of physical evidence, but asked, "Does that mean, 'Oh, yep, we're out of luck. These people don't get justice'? [Is] that what it means? No, [that's not] what it means." **[*Id.* 9:14:30-40]**

The State reiterated its characterization of Anna Rodriguez's testimony about the photographs: "Anna [Rodriguez] denies taking these pictures. Flat-out denied. 'I never took pictures from this side of the house.' That's what she said." **[*Id.* 9:11:49-9:12:49]**

The State argued that Mr. Alonso was credible because he had predicted the murders ahead of time, and he had also incriminated himself and was facing up to 18 years in prison. **[*See id.* 9:14:55-9:17:00, 9:33:23-9:35:15]** The State reminded the jury about Agent Dougherty's corroboration of some of his story and said, "This is what gives credibility, more credibility to Edward [Alonso]." **[*Id.* 9:29:26-40]**

The State argued that Ms. Cardenas, by contrast, was not credible, based on "the things she says, the emotion that she shows, the body language that she has, that she has to look at her notes, this and that. Did she look credible? The things that she said, did you find them to be credible? Like [that] Anna took all the

pictures even though Anna is saying, 'No, I didn't.'" **[*Id.* 9:39:37-9:40:19]** The State also argued that Mr. Flores might have committed murder for Ms. Cardenas because he had three tattoos of her name. **[*Id.* 9:22:54-9:23:45]**

In the defense closing, defense counsel referred to the State's question about Ms. Cardenas's daughter's drug test, calling it "a punch below the belt . . . to bring up some other case regarding Luis, that the six-month-old child had a positive test for something. Case dismissed—"

The State interrupted, "Your Honor, objection, that case was not dismissed." The State said that defense counsel was "misrepresenting things." Defense counsel responded that a nolle was filed in Mr. Flores's case and that Ms. Cardenas testified that she thought the case had been dismissed. The court sustained the State's objection. **[*Id.* 10:39:35-10:40:41]**

In its rebuttal closing, the State suggested to the jury that Mr. Flores and Ms. Cardenas had a phone that was never found "that they used for all other purposes, like communicating with Alonso." "[W]hat if the phone that [was] used to contact Alonso and all that wasn't even recovered, or they got rid of it? What if the shoe that Luis wore to kill this person [was] gotten rid of? What if the clothes, the gloves that he was wearing [were] gotten rid of? How are we going to find those? Right? Doesn't that create an unreasonable expectation?" **[*Id.* 11:10:37-11:12:35]**

The State brought up Mr. Alonso's testimony that he once saw Ms. Cardenas driving a Ford Crown Victoria rather than her usual car. "The State doesn't have any proof showing that that Crown Vic, that specific Crown Vic was used for the murder. But there is also another vehicle out there that is unaccounted for, just like many cell phones that are unaccounted for." **[*Id.* 11:15:30-11:16:35]**

The jury acquitted Ms. Cardenas of the first-degree murder of Ms. Mora, but convicted her of the first-degree murder of Mr. Cabral, as well as conspiracy to commit first-degree murder and criminal solicitation of first-degree murder. She was sentenced to life imprisonment plus 24 years. **[RP 346-48]** After her conviction, Mr. Flores pleaded no contest to conspiracy to commit first-degree murder. *See* Judgment & Sentence, *State v. Flores*, No. D-307-CR-2018-372 (3d. Jud. Dist. Ct. Sept. 7, 2022).

ARGUMENT

I. The district court violated Ms. Cardenas's constitutional right to a public trial.

The right to a public trial belongs jointly to defendants and to the public at large: defendants have a right to be tried publicly, and the public has a right to observe the trial. "[T]he press and general public have a constitutional right of access to criminal trials," which is protected by the First Amendment. *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 603-04 (1982). For defendants, the right to a public trial is protected by the Sixth Amendment and by Article II, Section 14 of the New Mexico Constitution.

Courts have treated the public trial right as a single right protected by multiple constitutional sources. First Amendment cases about the public right of access to trials are "relevant precedents" for Sixth Amendment analysis. *See Waller v. Georgia*, 467 U.S. 39, 44 (1984). In *Waller*, a Sixth Amendment case, the U.S. Supreme Court relied heavily on analysis from First Amendment cases. "[T]here can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public." *Id.* at 46.

The public trial right is ultimately for the benefit of the defendant, *see id.*, but it benefits society as well. Trial publicity exposes government misconduct "to the salutary effects of public scrutiny." *Id.* at 47. "Public scrutiny of a criminal trial

enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole." *Globe Newspaper*, 457 U.S. at 606. "[O]pen trials are bulwarks of our free and democratic government: public access to court proceedings is one of the numerous checks and balances of our system, because contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *Richmond Newspapers v. Virginia*, 448 U.S. 555, 592 (1980) (Stevens, J., concurring) (cleaned up).[3] Public trials promote "public confidence in the administration of justice": "Secrecy is profoundly inimical to [the] demonstrative purpose of the trial process. Open trials assure the public that procedural rights are respected, and that justice is afforded equally. Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law." *Id.* at 595 (Brennan, J., concurring in the judgment).

The public trial right protects the right of visitors not only to be present in court, but also to gather and publish information. It has been described as both "a right of access" and "a right to gather information." *See id.* at 576 (opinion of Burger, C.J.). "A trial is a public event. What transpires in the court room is public property. . . . Those who see and hear what transpired can report it with impunity."

[3] This brief uses "(cleaned up)" to indicate that internal quotation marks, alterations, and citations have been omitted from quotations. *See* Jack Metzler, *Cleaning Up Quotations*, 18 J. App. Prac. & Process 143 (2017); *see, e.g.*, *Brownback v. King*, 141 S.Ct. 740, 748 (2021).

Craig v. Harney, 331 U.S. 367, 374 (1947). *See also Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 610 (1978) ("The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed.").

Implicit in this right to gather and report information is a right to take notes on the proceedings. Note-taking comes up in very few published cases, probably because most courts allow visitors to take notes. *See Goldschmidt v. Coco*, 413 F.Supp.2d 949, 953 (N.D. Ill. 2006) (note-taking is permitted in state and federal appellate courts nationwide, and there appear to be no local rules limiting note-taking in federal district courts). But in the cases in which it has come up, courts have overwhelmingly endorsed a right for the public to take notes during trials.

In *United States v. Columbia Broadcasting System*, 497 F.2d 102, 103, 106 (5th Cir. 1974), the U.S. Court of Appeals for the Fifth Circuit held that an order forbidding courtroom sketching was unconstitutionally broad. Although "[o]rdinarily the trial judge has extremely broad discretion to control courtroom activity," the court was "unwilling . . . to condone a sweeping prohibition of in-court sketching when there has been no showing whatsoever that sketching is in any way obtrusive or disruptive." *Id.* at 106. Several years later, relying in part on *Columbia Broadcasting*, the Fifth Circuit held that a judge could not impound notes taken during a criminal trial by the defense lawyer's paralegal. *United States*

v. Cabra, 622 F.2d 182, 182 (5th Cir. 1980). The court did not reach the First and Sixth Amendment questions—although it acknowledged "that constitutional issues are implicated in this case"—and simply held that "the district court's reasons for impounding the notes were based on unwarranted concerns, [and] the order was an improper exercise of the court's discretionary authority to control courtroom proceedings." *Id.* at 185, 185 n.3.[4]

Several other courts have recognized a right to take notes. Relying on *Cabra*, the Supreme Court of Oklahoma issued a writ of mandamus requiring a lower court to allow note-taking. *Doyle v. Couch*, 1991 OK 4, ¶¶ 1-2, 806 P.2d 71 (Okla. 1991). A federal district court recently wrote, "It is well-settled that the First Amendment guarantees the right of public access to criminal trials, including the right to listen, take notes, and to disseminate and publish what an individual observes at the proceeding." *Somberg v. Cooper*, 582 F.Supp.3d 438, 443 (E.D. Mich. 2022) (citing *Richmond Newspapers*, 448 U.S. at 575-80).

The most thorough analysis comes from *Goldschmidt*, 413 F.Supp.2d 949. A professor of criminal justice was prohibited from taking notes in the defendant's courtroom. He sued, arguing that the policy violated his and his students' First Amendment right of access to the courts. *Id.* at 950-52. The defendant moved to

[4] The defendants in *Cabra* were acquitted. The only issue on appeal was whether the trial judge could collect the paralegal's notes. *See Cabra*, 622 F.2d at 183-84.

dismiss for failure to state a claim, and the district court held that the First Amendment claim could go forward. *See id.* at 950, 954.

"A sweeping prohibition of all note-taking by any outside party seems unlikely to withstand a challenge under the First Amendment." *Id.* at 952. The court cited *Columbia Broadcasting*'s rejection of a ban on sketching and observed that "[t]aking notes is undoubtedly less obtrusive than sketching." *Id.* at 952. The court discussed the role note-taking plays in the public trial right: "A prohibition against note-taking is not supportive of the policy favoring informed public discussion; on the contrary it may foster errors in public perception." *Id.*

In Ms. Cardenas's case, the district court imposed a blanket ban on note-taking. The court prohibited Ms. Cardenas's sole guest from taking notes, threatened to expel her from the courtroom, and collected and read her notes. This was an infringement of Ms. Cardenas's right to a public trial, and it amounted to a partial closure of the courtroom.

This issue was preserved by defense counsel's statements that "it's a public trial" and "people are allowed to take notes." **[3/9/22 CD 3:02:25-3:03:53]** After it became clear that the district court planned to eject Ms. Lilley, defense counsel was able to keep her in the courtroom by agreeing that she would surrender her notes. **[*See id.* 3:03:53-3:05:19]** This did not waive his objection. Attorneys are allowed to "make the best of a bad situation" after losing an argument, and doing

so does not waive a previous objection. *See State v. Zamarripa*, 2009-NMSC-001, ¶ 50, 145 N.M. 402, 199 P.3d 846. Appellate courts review public trial claims de novo. *See State v. Turrietta*, 2013-NMSC-036, ¶ 14, 308 P.3d 964.

In New Mexico, any full or partial courtroom closure must pass the four-part test from *Waller*, 467 U.S. at 48. *Turrietta*, 2013-NMSC-036, ¶ 4. Under the *Waller* test, "[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." *Turrietta*, 2013-NMSC-036, ¶ 17 (cleaned up).

For a courtroom closure to be constitutionally permissible, all four prongs must be met. *Id.* ¶ 22. In this case, zero prongs were met. Therefore, the ban on note-taking violated Ms. Cardenas's right to a public trial.

The first prong of the test is that "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced." *Id.* ¶ 17. The State complained about the note-taking, so it was the State's burden to demonstrate an "overriding interest" in favor of closure. **[*See* 3/9/22 CD 3:00:59-3:01:26]** *See id.* ¶¶ 17, 20. The State did not do so. Instead, the State objected categorically to note-taking, with comments like, "I don't think somebody should record the

proceedings or write notes about what is happening," and "this worries the State." **[*Id.* 3:00:59-3:01:13, 3:02:16-20, 3:04:13-37]**

Because the State did not argue that any particular interest was likely to be prejudiced, the second and third prongs were not met. The court did no substantive *Waller* analysis and made no effort to narrow the closure or to consider alternatives. Additionally, under the second prong, "[t]he relationship between those excluded to the defendant must be taken into account when deciding whether a closure is constitutional." *Turrietta*, 2013-NMSC-036, ¶ 26. Because of Covid-19 precautions, Ms. Cardenas was allowed only one guest in the courtroom. The ban on note-taking was particularly pernicious in this situation, because it restricted Ms. Lilley's ability to share news from the trial with Ms. Cardenas's other friends and family.

The fourth prong requires the district court to make findings adequate to support the partial closure. *See id.* ¶ 17. The district court made no findings; like the State, the court treated note-taking as presumptively improper. The court also seemed worried that the sister of a civil attorney was monitoring the trial. **[*See* 3/9/22 CD 3:00:59-3:01:18, 3:02:36-3:03:37]** But this kind of scrutiny is a core interest protected by the public trial right, and it does not justify closing the courtroom.

A violation of the right to a public trial is structural error, and it is not subject to harmless error analysis. *See id*. ¶¶ 14, 40; *State v. Hood*, 2014-NMCA-034, ¶ 6, 320 P.3d 522. Therefore, because the ban on note-taking violated Ms. Cardenas's right to a public trial, Ms. Cardenas asks this Court to reverse her convictions.

II. Cumulative errors violated Ms. Cardenas's right to a fair trial.

Alternatively, Ms. Cardenas asks this Court to reverse based on a series of errors. The district court allowed the State to introduce evidence that Ms. Cardenas's baby tested positive for methamphetamine, and allowed an FBI agent to vouch for Edward Alonso's credibility. Additionally, the State mischaracterized evidence to both the court and the jury.

A. The State improperly introduced evidence that Ms. Cardenas's child tested positive for methamphetamine.

1. The State never gave the notice required by Rule 11-404(B) NMRA.

Under Rule 11-404(B)(2) NMRA, the State may admit evidence of a "crime, wrong, or other act" for a variety of purposes, "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." In a criminal case, the State must provide "reasonable notice" of 404(B) evidence before trial, or during trial if the court excuses the lack of pretrial notice for good cause.[5]

The State provided no notice that it might use evidence that Ms. Cardenas's daughter tested positive for methamphetamine. This issue was preserved by

[5] During Ms. Cardenas's trial, this requirement was in Rule 11-404(B)(2). As of December 31, 2022, the notice requirements have moved to Rule 11-404(B)(3), and the rule now requires more detailed notice. The rule change does not significantly affect Ms. Cardenas's argument, and she relies on the version of the rule that was in effect during her trial in mid-2022.

defense counsel's contemporaneous objections. **[3/10/22 CD 2:59:04-3:04:42, 3:06:48-3:08:10]** Preserved evidentiary issues are reviewed for abuse of discretion, which "occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case," or the court "applies an incorrect standard, incorrect substantive law, or its discretionary decision is premised on a misapprehension of the law." *See State v. Fernandez*, 2023-NMSC-005, ¶ 8, 528 P.3d 621 (cleaned up). "Further, a misapprehension of the law upon which a court bases an otherwise discretionary evidentiary ruling is subject to de novo review." *Id.* (cleaned up).

The State argued that notice was not required, because "404 goes to notice of character evidence when you're trying to use that in your case-in-chief, not if the defendant is going to take the stand." **[*Id.* 3:03:24-39]** The court appeared to accept this argument and overruled the defense objection. **[*Id.* 3:06:48-3:07:07, 3:07:52-3:08:10]**

No such exception to the notice requirement exists in New Mexico law. The State must "give direct notice that it specifically intends to introduce prior bad acts evidence under Rule 11-404(B)(2) pursuant to an articulated permissible use." *State v. Acosta*, 2016-NMCA-003, ¶ 19, 363 P.3d 1240. This Court has implicitly recognized that Rule 11-404(B) applies to rebuttal evidence, writing that nothing in the rule "requires evidence admitted under [Rule 11-404(B)] be offered *only* to

rebut evidence presented by the defense." *State v. Otto*, 2007-NMSC-012, ¶ 11, 141 N.M. 443, 157 P.3d 8 (emphasis added). Under Federal Rule of Evidence 404, the prosecution must "provide notice, regardless of how it intends to use the extrinsic act evidence at trial, i.e., during its case-in-chief, for impeachment, or for possible rebuttal." Fed. R. Evid. 404 (advisory committee's note to 1991 amendments). "Because Rule 11-404 is similar to its federal counterpart, Federal Rule of Evidence 404, federal law interpreting the rule is instructive." *State v. Martinez*, 2006-NMCA-148, ¶ 12, 140 N.M. 792, 149 P.3d 108. Therefore, the evidence was admitted based on a misapprehension of the law, and its admission was an abuse of discretion.

"Courts have long recognized the dangers of unfair surprise associated with prior bad acts evidence." *Acosta*, 2016-NMCA-003, ¶ 21. If the State had complied with the notice requirements in Rule 11-404(B), the parties and court would have had time to catch the problems with this evidence that are discussed below. Moreover, this was so inflammatory that knowing about it could have affected Ms. Cardenas's decision to testify.

2. The State failed to articulate a basis for admissibility under Rule 11-404(B)(2).

"[I]t is incumbent upon the party seeking to offer Rule 11-404(B) evidence to identify the consequential fact to which the proffered evidence of other acts is directed." *Acosta*, 2016-NMCA-003, ¶ 18 (cleaned up). "Part of the proponent's responsibility is also to cogently inform the court . . . the rationale for admitting the evidence to prove something other than propensity." *State v. Gallegos*, 2007-NMSC-007, ¶ 25, 141 N.M. 185, 152 P.3d 828. After articulating this basis, "the proponent must establish that under Rule 11-403 NMRA, the probative value of the evidence . . . outweighs any unfair prejudice to the defendant." *State v. Serna*, 2013-NMSC-033, ¶ 17, 305 P.3d 936 (cleaned up).

The State did not articulate how Ms. Cardenas's daughter's drug test was relevant to any disputed fact or served any permissible purpose under Rule 11-404(B)(2). The State asserted that Ms. Cardenas had put her character at issue and "she does say she was peaceful and a good mother." **[3/10/22 CD 3:03:24-39, 3:05:46-3:06:43]** Ms. Cardenas testified about her family and her custody dispute, but she did not testify that she was a "good mother," and a positive drug test would not have rebutted or impeached Ms. Cardenas's testimony that she had no history of felonies or violent offenses. **[*See generally id.* 1:23:54-1:40:42, 1:53:44-1:54:58, 2:10:22-2:11:20]**

It is not clear how the drug test was relevant to Ms. Cardenas's character at all. The State based its question on a child endangerment charge that was filed against Luis Flores. **[*Id.* 3:01:43-56, 3:07:18-32]** *See* Grand Jury Indictment, *State v. Flores*, No. D-307-CR-2018-638 (3d. Jud. Dist. Ct. May 18, 2018). Ms. Cardenas was never charged with child endangerment or any drug-related crime. Accusations that Mr. Flores used drugs or endangered their child might be relevant to his character, but say very little about Ms. Cardenas.

The prejudice from admitting this evidence, however, was substantial. "Empirical studies indicate that uncharged misconduct is generally one of the most damning species of evidence." *State v. Aguayo*, 1992-NMCA-044, ¶ 25, 114 N.M. 124, 835 P.2d 840. "The potential for prejudice is especially great in cases where the evidence is entirely circumstantial and such uncharged conduct may thus assume a crucial role." *Id.* ¶ 27.

B. The State improperly introduced an FBI agent's opinion that Edward Alonso was telling the truth.

The State's first witness, immediately before Edward Alonso, was FBI Agent Dougherty. **[3/8/22 CD 10:08:28-10:11:20]** Based on his partial corroboration of Mr. Alonso's allegations, Agent Dougherty testified that Mr. Alonso's story "had merit to it." **[*Id.* 10:34:25-56]** "This stuff that he's telling us is truthful." **[*Id.* 10:41:42-10:42:36]** "[W]e couldn't find anything to show that he wasn't being 100% truthful." **[*Id.* 10:45:38-10:46:35]**

It is improper for a witness to opine that another witness is telling the truth. One witness's testimony may corroborate another's, but direct comments on credibility "are beyond the scope of permissible expert opinion testimony." *State v. Alberico*, 1993-NMSC-047, ¶ 89, 116 N.M. 156, 861 P.2d 192. "Determining the complainant's credibility or truthfulness is not a function for an expert in a trial setting, but rather is an issue reserved for the jury." *State v. Lucero*, 1993-NMSC-064, ¶ 18, 116 N.M. 450, 863 P.2d 1071. Although this issue usually arises with expert witnesses, *Alberico* and *Lucero* have never been specifically limited to experts, and their logic applies equally well to testimony by an FBI agent. Recently, the Court of Appeals applied *Lucero* to testimony from a detective. *State v. Chavez*, No. A-1-CA-38582, mem. op. ¶¶ 3, 13, 2022 WL 4379537 (N.M. Ct. App. Sept. 21, 2022) (non-precedential), *cert. denied*, No. S-1-SC-39615 (N.M. Nov. 2, 2022).

Defense counsel objected to Agent Dougherty's testimony as hearsay but did not specifically object to his testimony vouching for Mr. Alonso's credibility. **[*See* 3/8/22 CD 10:21:50-10:24:20]** Therefore, Agent Dougherty's statements are reviewed for plain error. "To establish plain error, the error complained of must have affected substantial rights although the plain errors were not brought to the attention of the judge." *Lucero*, 1993-NMSC-064, ¶ 13.

Courts have found plain error where an expert vouches for the truthfulness of a key witness whose credibility is at issue. This Court reversed for plain error in *Lucero*, where the only witnesses to the alleged offense were the defendant and the complaining witness, and "credibility was a pivotal issue." *Id.* ¶ 22. Because the expert repeated the witness's statements and "commented directly and indirectly upon [her] truthfulness," this Court expressed "grave doubts concerning the validity of the verdict and the fairness of the trial." *Id. See also State v. Garcia*, 2019-NMCA-056, ¶¶ 1, 12, 450 P.3d 418 (reversing for plain error where expert witness "repeatedly commented, both directly and indirectly," on victim's truthfulness); *Chavez*, No. A-1-CA-38582, mem. op. ¶ 2.

Agent Dougherty never found independent evidence of contact between Ms. Cardenas and Mr. Alonso. He was able to corroborate public facts about Ms. Cardenas, Mr. Cabral, and their families: names, addresses, vehicles, and relationships. If Agent Dougherty were applying for a search warrant in New

Mexico state court, these would be considered "innocent facts unrelated to the alleged illegal activity," and corroborating them would be insufficient to support a finding of probable cause. *See State v. Haidle*, 2012-NMSC-033, ¶¶ 25-26, 285 P.3d 668 (distinguishing between "innocent facts" and "critical details that are not widely known or easily discoverable by the public"). But here, during trial, Agent Dougherty relied on this corroboration of publicly available information to tell the jury that Mr. Alonso was trustworthy.

C. The State mischaracterized evidence to the court and the jury.

1. Factual basis for 404(B) evidence

In sidebar, the State told the district court that "Luis [Flores] pled guilty to [the child endangerment] charge" after his and Ms. Cardenas's daughter tested positive for drugs. **[3/10/22 CD 3:01:43-56, 3:07:07-32]** This was incorrect. The State dismissed the child endangerment charge in March 2020. *See* Nolle Prosequi, *Flores*, No. D-307-CR-2018-638 (Mar. 17, 2020). The State never corrected this misstatement to the court. *See* Rule 16-303(A)(1) NMRA (rule of candor toward the tribunal).

Defense counsel tried to argue in closing that the charge against Mr. Flores was dismissed. **[3/11/22 CD 10:39:35-10:40:41]** This was factually accurate, and it was grounded in the evidence; Ms. Cardenas had testified that she believed the case was dismissed. **[3/10/22 CD 4:06:28-43]**

In front of the jury, the State objected that the "case was not dismissed" and defense counsel was "misrepresenting things." **[3/11/22 CD 10:39:53-10:40:05]** There was no evidence in the record to support the State's objection. "It is misconduct for a prosecutor to make prejudicial statements not supported by evidence." *State v. Duffy*, 1998-NMSC-014, ¶ 56, 126 N.M. 132, 967 P.2d 807, *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, ¶ 37 n.6, 275 P.3d 110. *See also State v. Torres*, 2012-NMSC-016, ¶ 21, 279 P.3d 740.

The district court sustained the objection. The jury was left with the impression that Ms. Cardenas and her lawyer were lying.[6]

2. Testimony of Anna Rodriguez

Anna Rodriguez testified that she did not remember taking the photographs in Exhibit 425, she did not remember ever taking photographs from the back of the house, and she generally took pictures of Mr. Cabral's truck, which was not in the photographs. **[3/9/22 CD 8:51:13-8:52:53]** The State could have used this testimony to ask the jury to infer that Ms. Rodriguez did not take the photos.

Instead, later in the trial, the State told the jury that Ms. Rodriguez had expressly denied taking the photographs. On cross-examination of Ms. Cardenas, the State challenged her testimony that Ms. Rodriguez took the photos: "Even though she sat here and told us that she did not?"[7] **[3/10/22 CD 3:23:17-3:24:05; *see also id.* 3:22:56-3:23:09 (similar questions about aerial images)]** The defense objected to the State's characterization of the evidence and was overruled. In closing argument, the State said Ms. Rodriguez "flat-out denied" taking the

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[6] The State also argued to the jury that defense counsel was trying "to leave a false impression on you . . . That's all the defense is about," and criticized defense counsel for not pursuing a line of questioning. **[3/11/22 CD 9:34:46-9:35:15, 9:37:30-9:38:18]** Defense counsel did not object to these arguments.

[7] This question would have been inappropriate even if its premise were accurate. It is "categorically improper" for the State to ask a defendant "if another witness is mistaken or lying." *McClaugherty*, 2008-NMSC-044, ¶ 64.

photos, and argued that this discrepancy showed Ms. Cardenas was not credible. **[3/11/22 CD 9:11:49-9:12:49]**

It is improper for the State to misstate a witness's testimony to the jury or to use its questions to introduce facts not in evidence. *See State v. McClaugherty*, 2008-NMSC-044, ¶ 41, 144 N.M. 483, 188 P.3d 1234; *Torres*, 2012-NMSC-016, ¶ 21. The State distorted Ms. Rodriguez's equivocal testimony into a categorical denial of taking the photographs, then used the distortion to attack Ms. Cardenas's credibility.

The district court's rulings on the State's misstatements are reviewed for abuse of discretion. *Duffy*, 1998-NMSC-014, ¶ 46. Defense counsel tried to correct the misstatements: he objected to the initial question about methamphetamine, objected to the State's characterization of Ms. Rodriguez's testimony, and argued in closing that the child endangerment charge had been dismissed. Each time, the judge ruled in favor of the State. **[*See* 3/10/22 CD 2:59:04-3:08:10, 3:13:55-3:14:10, 3:23:17-3:24:42; 3/11/22 CD 10:39:35-10:40:41]** These rulings "placed the stamp of judicial approval" on the improper evidence and statements, "further magnifying the prejudice." *See State v. Sena*, 2020-NMSC-011, ¶ 20, 470 P.3d 227 (cleaned up).

D. It is reasonably probable that these errors affected the verdict.

"[A] non-constitutional error is harmless when there is no reasonable probability the error affected the verdict." *Tollardo*, 2012-NMSC-008, ¶ 36 (cleaned up and emphasis omitted). This Court could reverse based on any one of these errors. But the errors compounded and reinforced each other, and this Court should consider their cumulative impact on the trial. *See State v. Martin*, 1984-NMSC-077, ¶ 17, 101 N.M. 595, 686 P.2d 937 ("Cumulative error requires reversal of a defendant's conviction when the cumulative impact of errors which occurred at trial was so prejudicial that the defendant was deprived of a fair trial."). Cumulative error analysis may encompass both preserved and unpreserved errors. *See State v. Miera*, 2018-NMCA-020, ¶ 46, 413 P.3d 491.

In closing argument, the State presented this case as a credibility contest between Ms. Cardenas and Mr. Alonso. **[*See* 3/11/22 CD 9:14:55-9:19:27, 9:24:48-9:28:01, 9:29:02-9:35:15, 9:39:37-9:41:10, 9:45:07-9:46:52]** The errors would have skewed the jury's perceptions of Ms. Cardenas's and Mr. Alonso's relative credibility.

Agent Dougherty's testimony made Mr. Alonso sound credible and reliable. Because Agent Dougherty testified immediately before Mr. Alonso, he essentially told the jury that what they were about to hear was true. The State argued in

closing that Agent Dougherty's corroboration "gives credibility, more credibility to Edward [Alonso]." **[*Id.* 9:29:26-40]**

By contrast, based on the mischaracterizations of Ms. Rodriguez's testimony, the State argued that Ms. Cardenas's statements about the photographs were "a lie," and Ms. Cardenas was not credible because she testified that "Anna took all the pictures even though Anna is saying, 'No, I didn't.'" **[*Id.* 9:12:33-9:13:08, 9:39:37-9:40:19]** The evidence that Ms. Cardenas's baby tested positive for methamphetamine made her sound like a bad mother with criminal connections—the kind of person who would hire a hitman or commit a murder. The prosecutors openly contradicted defense counsel's argument (and Ms. Cardenas's testimony) that the child endangerment charges against Mr. Flores were dropped, further suggesting to the jury that Ms. Cardenas and her lawyer were not to be trusted.

The jury's verdicts depended on whether the jury believed Ms. Cardenas or Mr. Alonso. There was no evidence corroborating the plan—no phone communications, no testimony from the witnesses Mr. Alonso mentioned in his testimony. There was evidence that Mr. Alonso was sneaking around the Mora-Cabral home, but nothing other than his testimony tied his activities to Ms. Cardenas, rather than to some other plot to kill Mr. Cabral.

The other evidence was circumstantial and contested: evidence that the victims were killed with .45-caliber bullets, testimony that Ms. Cardenas at one point had a .45-caliber gun (which she denied), and photographs and Google Maps found on cell phones in Ms. Cardenas's house and car. The State's insistence that Ms. Rodriguez denied taking the photographs made them seem damning: the jury would have concluded that Ms. Cardenas went to the house and took the photos herself.

The State's theory was that Mr. Flores shot the victims—but there was no evidence that either Ms. Cardenas or Mr. Flores was near the Mora-Cabral home on the night of the murders. There were no eyewitnesses, no confessions, no security footage, no cell phone location data, and no incriminating physical evidence. In fact, the physical evidence found at the crime scene pointed *away* from Ms. Cardenas and Mr. Flores. Tire tracks at the scene did not match their cars, footprints did not match their shoes, and fingerprints on the shell casings did not come from Mr. Flores.

Because of the weakness of the other evidence, the credibility of the witnesses was of paramount importance. The evidentiary errors tended to make Ms. Cardenas seem less credible and Mr. Alonso more so. There is a reasonable probability that these errors, taken together, affected the verdict.

III. The State presented insufficient evidence to convict Ms. Cardenas of first-degree murder.

As discussed above, the State's case against Ms. Cardenas consisted of evidence that she conspired to commit murder or had the tools to commit murder. The State presented no evidence that she or Mr. Flores committed the shooting itself.

It is "an appellate court's duty on review of a criminal conviction to determine whether *any* rational jury could have found each element of the crime to be established beyond a reasonable doubt." *State v. Garcia*, 1992-NMSC-048, ¶ 27, 114 N.M. 269, 837 P.2d 862. A conviction based on insufficient evidence violates the defendant's constitutional right to due process of law. *Jackson v. Virginia*, 443 U.S. 307, 317-18 (1979). "A reviewing court must view the evidence in the light most favorable to the state, resolving all conflicts therein and indulging all permissible inferences therefrom in favor of the verdict." *State v. Sutphin*, 1988-NMSC-031, ¶ 21, 107 N.M. 126, 753 P.2d 1314.

This is a deferential standard of review. *See State v. Consaul*, 2014-NMSC-030, ¶ 42, 332 P.3d 850. However, it is not a rubber stamp. The review "take[s] into account both the jury's fundamental role as factfinder in our system of justice and the independent responsibility of the courts to ensure that the jury's decisions are supportable by evidence in the record, rather than mere guess or conjecture." *Id.* (cleaned up).

In this case, the State had no direct or circumstantial evidence to put Mr. Flores or Ms. Cardenas at the murder scene. The evidence it *did* have from the crime scene was exculpatory, and even in the light most favorable to the State, it did not support the State's theory that Mr. Flores was the shooter.

To compensate, in closing argument, the State speculated about evidence that it did not have. The State wondered aloud: "[W]hat if the phone that [was] used to contact Alonso and all that wasn't even recovered, or they got rid of it? What if the shoe that Luis wore to kill this person [was] gotten rid of? What if the clothes, the gloves that he was wearing [were] gotten rid of?" **[3/11/22 CD 11:11:53-11:12:35]** The State also brought up Mr. Alonso's testimony that he once saw Ms. Cardenas in a Crown Victoria. **[*Id.* 11:15:30-11:16:35]**

A jury may convict based on a "reasonable inference" from the evidence, but not on speculation or conjecture. *See State v. Slade*, 2014-NMCA-088, ¶ 14, 331 P.3d 930. "[E]ven when a permissible logical inference may be drawn from the facts, if it must be buttressed by surmise and conjecture in order to convict, the conviction cannot stand." *Id.* (cleaned up). Nor may a jury base its verdict on "a series of inferences": "A verdict may not rest on an overly attenuated piling of inference on inference." *Id.* (cleaned up). To be permissible, an inference "must be linked to a fact in evidence." *Id.*

"Although a jury is certainly entitled to draw reasonable conclusions from the circumstantial evidence produced at trial, it must not be left to speculate in the absence of proof." *State v. Trossman*, 2009-NMSC-034, ¶ 24, 146 N.M. 462, 212 P.3d 350 (cleaned up). That is exactly what happened in this case. The State encouraged the jury to imagine evidence that *might* exist, and events that *might* have happened, in order to explain apparently exculpatory evidence from the crime scene. There was no evidence that Ms. Cardenas had a secret phone, nor that she disposed of shoes or clothes before police searched her house. There was, similarly, no evidence that she ever bought, rented, or disposed of a Crown Victoria (which would have been hard to hide). It is not proof beyond a reasonable doubt for the State to posit the existence of evidence and argue that the defendant could have destroyed it. *Cf. State v. Silva*, 2008-NMSC-051, ¶ 19, 144 N.M. 815, 192 P.3d 1192 (insufficient evidence of tampering where defendant possessed a gun, police never found it, and State asked jury to speculate that defendant committed an overt act of hiding the gun).

The State essentially argued that because Mr. Alonso reported weeks before the murders that Ms. Cardenas planned to kill Mr. Cabral, and then Mr. Cabral and Ms. Mora were murdered, Ms. Cardenas *must* be responsible, despite the evidence from the crime scene. But this kind of conjecture is insufficient to support a conviction. "The jury must have a sufficient evidentiary basis to conclude that the

defendant actually committed the criminal act he is accused of, not just that he may have done it among a range of possibilities or that it cannot be 'ruled out' among other possible explanations, or even that it is more likely than not." *Consaul*, 2014-NMSC-030, ¶ 70.

The State also argued that the jury should convict because Ms. Cardenas was not credible. But doubting a defendant's testimony cannot substitute for affirmative proof of every element of the State's case. *See State v. Wynn*, 2001-NMCA-020, ¶ 6, 130 N.M. 381, 24 P.3d 816. Rejection of a defendant's testimony "[does] not justify a finding beyond a reasonable doubt that the opposite of [the] testimony [is] true." *Id.*

The State did not need to prove every detail about how Mr. Cabral was killed, but it needed to produce substantial evidence from which the jury could infer—not speculate—that Ms. Cardenas actually killed him. Ms. Cardenas asks this Court to reverse her conviction for first-degree murder and dismiss it with prejudice. *See Consaul*, 2014-NMSC-030, ¶ 41.

IV. The convictions for conspiracy and solicitation constitute double jeopardy.

Ms. Cardenas was convicted of conspiracy to commit first-degree murder and criminal solicitation of first-degree murder. Together, these convictions constitute double jeopardy under the Fifth Amendment.

Double jeopardy is a question of law that is reviewed de novo. *State v. Swick*, 2012-NMSC-018, ¶ 10, 279 P.3d 747. Double jeopardy arguments may be raised for the first time on appeal. *State v. Silvas*, 2015-NMSC-006, ¶ 10, 343 P.3d 616.

This is a "double-description case, where the same conduct results in multiple convictions under different statutes." *Swick*, 2012-NMSC-018, ¶ 10. A court first determines whether the underlying conduct is unitary; if it is, the court determines whether the legislature intended to impose multiple punishments for unitary conduct. *Id.* ¶ 11.

To determine whether conduct was unitary, courts examine "the elements of the charged offenses, the facts presented at trial, and the instructions given to the jury." *Sena*, 2020-NMSC-011, ¶ 46. The elements of conspiracy and solicitation are very similar, and this was reflected in the jury instructions. The conspiracy charge required the jury to find that Ms. Cardenas "and another person by words or acts agreed together" to commit murder and that they "intended to commit first-degree murder." **[RP 294]** The solicitation charge required the jury to find that Ms.

Cardenas "intended that another person commit first-degree murder" and that she "solicited, requested, induced, or employed the other person to commit the crime." **[RP 295]** The instructions required virtually identical findings of intent and agreement. The instructions had the same date of offense, and they both said "another person," without specifying who. **[RP 294-95]**

The evidence presented at trial did not establish separate factual bases for conspiracy and solicitation. In closing argument, the State argued that the solicitation charge was for hiring Mr. Alonso, and the conspiracy was with *both* Mr. Flores and Mr. Alonso. **[3/11/22 CD 9:47:24-50]** Courts "presume unitary conduct where the State's theory at trial relied on the same conduct to prove the two offenses at issue." *State v. Gonzales*, 2019-NMCA-036, ¶ 21, 444 P.3d 1064; *see also State v. Reed*, 2022-NMCA-025, ¶ 27, 510 P.3d 1261. Because the State invited the jury to rely on conduct with Mr. Alonso for both counts, this Court should presume the convictions are based on unitary conduct.

The legislature did not intend to punish unitary conduct as both conspiracy and solicitation. *See State v. Vallejos*, 2000-NMCA-075, ¶ 28, 129 N.M. 424, 9 P.3d 668; NMSA 1978, § 30-28-3 (1979). Therefore, if this Court does not reverse Ms. Cardenas's convictions for conspiracy and criminal solicitation on other grounds, she asks this Court to vacate her conviction for criminal solicitation.

CONCLUSION

Ms. Cardenas asks this Court to reverse her convictions because the court violated her right to a public trial, or alternatively because of the numerous evidentiary errors. In addition, she asks this Court to find insufficient evidence of murder and to bar retrial on that count.

If this Court does not reverse Ms. Cardenas's convictions for conspiracy and criminal solicitation, she asks this Court to vacate the criminal solicitation charge on double jeopardy grounds.

Finally, Ms. Cardenas requests oral argument to assist in resolving the issues in this case.

Respectfully submitted,

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CERTIFICATE OF DELIVERY
I hereby certify that on August 15, 2023, a copy of this pleading was uploaded to Odyssey File & Serve for service on Aletheia Allen in the Office of the Attorney General.

_/s/ *Caitlin Smith*___________
Law Offices of the Public Defender