



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. S-1-SC-39283

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v.

DEBORAH GREEN,

Defendant-Appellee.

STATE OF NEW MEXICO'S REPLY BRIEF

**DIRECT APPEAL FROM THE
THIRTEENTH JUDICIAL DISTRICT COURT
CIBOLA COUNTY, NEW MEXICO
THE HONORABLE JAMES SANCHEZ, PRESIDING**

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STATEMENT OF RECORD CITATIONS

Citations to the record proper were made in accordance with Rule 23-112 NMRA. Citations to the recorded transcripts also were made in accordance with Rules 23-112 and 12-213 NMRA.

INTRODUCTION

The issues in this case are very limited. Defendant's answer brief discussed the variety of contentions that she made at trial: she did not have the legal obligation to take E.M., a 12-year-old child living on the Cibolo property that belonged to Defendant, to the doctor; she did not prevent Stacy Miller, E.M.'s mother, from obtaining medical care for E.M.; and diseases other than the flu, like Huntington's Disease, could have killed E.M. [AB 3-4, 7] However, in its written order granting the habeas petition and dismissing the case, the trial court found that: Defendant "was in fact a custodian of the child . . . and she exercised extreme control over the child's life and welfare"; she "acted equally with the child's mother and was responsible for the safety and health of the child"; she and the child's mother "failed to seek medical attention for the child in a timely manner"; and "[t]he evidence in this case was sufficient to show that the failure to obtain medical treatment caused E.M.'s condition to worsen." [8 RP 1988] Defendant did not file any motion to reconsider those findings, so they are now final and not before this Court.

The only issues in this appeal are: (1) whether the trial court erred in finding that "[t]he State did not present sufficient expert testimony on causation to support a first-degree felony charge for [c]hild [a]buse [r]esulting in [g]reat [b]odily [h]arm; (2) whether the court erred in focusing on the "[w]orsen[ing of] the child's condition" as opposed to E.M.'s actual injuries; and (3) whether this Court should

apply the standard for determining sufficiency from *State v. Garcia*, 2021-NMSC-019, which necessarily focuses on whether E.M. might have survived with treatment, when Defendant pled to causing his injuries, rather than his death. [*Id.*] Defendant makes two main arguments in her answer brief: this Court should decline the State’s request to “abandon [the] bedrock principle” of *Montoya*, which allows a habeas petitioner to make a claim of actual innocence [AB 21-23]; and the evidence introduced did not prove that her actions were the proximate cause of E.M.’s death or great bodily injuries. [AB 30-36] For the reasons discussed, both these arguments fail.

ARGUMENT

I. PETITIONER DID NOT ESTABLISH THAT SHE QUALIFIED FOR HABEAS RELIEF UNDER MONTOYA V. ULIBARRI.

Defendant points this Court to *Montoya v. Ulibarri*, 2007-NMSC-035, ¶ 21, 142 N.M. 89, and its holding that the New Mexico Constitution provides greater protection than its federal counterpart for an innocent person, including a person like her who is “innocent” because of a change in the law. [AB 21-22] The State does not dispute the holding in *Montoya*; however, it does dispute Defendant’s characterization of the State’s position as a request that “this Court . . . abandon th[e] bedrock principle” of *Montoya* and “erect a procedural barrier to actual innocence review.” [AB 22] This characterization is not correct. The State is not urging this

Court to abandon *Montoya*; instead, the State's position is that, under the guidelines set forth in the case, Defendant cannot make the showing required to qualify for habeas relief. **[BIC 16-22]**

A habeas petitioner, when making a freestanding claim of innocence, must demonstrate by "clear and convincing evidence that no reasonable juror would have convicted" that petitioner in light of any new evidence. *Montoya*, 2007-NMSC-035, ¶ 30. In analyzing whether a petitioner makes the required demonstration, this Court does not restrict itself to consideration of only new evidence not known as of the original proceedings, in this case, the plea. *Id.* ¶ 32. Instead, this Court considers all the reliable evidence presented; but whether a petitioner brings forth any truly new evidence still carries weight in the balancing equation. *Id.*

Petitioner incorrectly views the State position's to be that, because she did not introduce any new evidence that she did not know at the time of her plea, she is disqualified from making a claim under *Montoya*. **[AB 22]** In so doing, she fails to address the State's actual position, which was that, *because she introduced no new evidence*, the trial court granted the habeas petition on less evidence than what is required to justify a new trial, which contravenes *Montoya*: The burden on a habeas petitioner "should be more rigorous than the standard imposed on defendants who [make] a motion for a new trial based on newly discovered evidence." *Id.* ¶ 29.

In Petitioner's case, she cannot make this showing required by *Montoya*,

precisely because her freestanding innocence claim is based on a change in the law, not on any new evidence that exonerates her. The State does not ask this Court to abandon *Montoya*. Instead, the State asks this Court to apply the principles of the opinion to the facts in this case. If Petitioner bases her freestanding innocence claim on a change in the law, rather than new, exonerating facts, she cannot carry the rigorous burden *Montoya* imposes to present, at the very least, more evidence than she would have needed to prevail on a timely motion for new trial. In other words, without any new, exonerating facts, the remaining reliable evidence was insufficient to warrant the granting of her habeas petition.

II. THE EVIDENCE PROVED THAT DEFENDANT'S ACTIONS WERE THE PROXIMATE CAUSE OF E.M.'S GREAT BODILY INJURIES.

Defendant characterizes the State's causation arguments as a request that this Court excuse the State from showing proximate causation because the conviction was not for causing E.M.'s death. [AB 30] Again, this characterization is incorrect. The State's position is that the causation standard from *Garcia*, which was tailored for a case involving only medical neglect in which the victim dies, does not apply here. *Garcia* requires the State to prove proximate causation in a medical neglect case with expert testimony that establishes that the victim, with treatment, would have lived or, at least, would have lived a little longer. *Garcia*, 2021-NMSC-019, ¶ 30. That requirement has no meaning here, where Defendant was convicted of

causing great bodily injuries, not death. Accordingly, the proper causation question in this case should inquire whether, but for Defendant's failure to obtain medical care for E.M. and her failure to provide him with over-the-counter medicine and food, E.M.'s condition would have gotten better and would not have resulted in great bodily injuries. **[BIC 28-32]**

Additionally, the State points this Court to *Luna v. State*, 264 S.W.3d 821 (Tex. Ct. App. 2008). Although certainly not binding, the case is relevant here despite the fact that it involved a direct appeal as opposed to a habeas petition. In *Luna*, a Texas Court of Appeals rejected the defendant's argument that the evidence was legally insufficient to prove that she caused the death of the child: "This is not the specific question we must address because [the defendant] was not convicted of capital murder." *Luna*, 264 S.W.3d at 827. *Luna* clarified that that the correct question was whether the failure to provide food and medical care caused the child great bodily injury. *Id.*

A. Even Assuming That the Trial Court Considered the Food Evidence, the Court Committed Error in Finding the Evidence Insufficient to Support the Endangerment Charge.

Defendant entitles Section III(C)(i) of the answer brief as follows: "The food deprivation theory failed to meet the Child Abuse statute's causation standard." **[AB 32-35]** But her actual argument is that the trial court considered and rejected the food deprivation as insufficient to support a conviction for endangerment. **[Id.]**

Even if this Court agrees with Defendant that the trial court considered the food evidence, Defendant's argument still fails because she neglected to address the State's position that the food evidence, combined with other types of neglect, sufficiently supports an endangerment charge under New Mexico law. *See State v. Jensen*, 2006-NMSC-045, ¶ 15, 140 N.M. 416 (holding that the combination of supplying the child with pornography and alcohol and the failure to supply him with proper food constituted sufficient evidence of endangerment), *abrogated on other grounds by State v. Chavez*, 2009-NMSC-035, ¶¶ 26-29, 146 N.M. 434.

B. The State's Medical Neglect Theory Included Sufficient Evidence of Proximate Causation.

Defendant asserts that "Dr. Campbell was never able to give an opinion other than that the failure to get medical care for E.M. 'could have' improved his condition." [AB 35] According to her, Dr. Campbell admitted "that she could not say for certain . . . whether medical care would have improved or prevented E.M.'s injuries and death." [AB 35] Defendant concludes that "[t]he State's evidence was limited to testimony that it was probable or possible that E.M.'s condition would not have worsened if he [had] received medical attention," so the State's evidence "was not probative beyond a reasonable doubt[.]" [AB 36] This argument fails for three reasons.

First, in the portion of Defendant's answer brief in which she makes the

statements described in the immediately preceding paragraph, she does not provide any citations to the record, so her argument may be rejected at the outset.¹ *See Ross v. City of Las Cruces*, 2010–NMCA–015, ¶ 18, 148 N.M. 81 (reiterating that “[w]here a party fails to cite any portion of the record to support its factual allegations, [this] Court need not consider its argument on appeal”).

Second, Defendant’s broad allegation that Dr. Campbell testified to only possibilities or probabilities regarding causation is not correct. When describing the progression of E.M.’s illness, Dr. Campbell testified that, given her experience with sinus infections, “the lack of medical care caused [E.M.’s] condition to get worse.” [1/21/2022 TR 54:9-12] The trial court also asked her pointedly: “Can you say that[,] with a certain degree of medical *certainty*[,] that earlier medical intervention would have made a difference in this case in terms of [E.M.]’s life?” [1/21/2022 TR 54:7-55:12] Dr. Campbell replied that she could, based on the fact that she had cared for another child with the same condition that E.M. had. She stated that her former patient, just like E.M., “had a brain abscess from . . . a sinusitis gone bad and, basically, he needed surgical intervention and antibiotic treatment . . . but he did survive.” [*Id.*] Dr. Campbell was clear that, because E.M. did not receive proper

¹ Defendant does provide citations to the record for Dr. Campbell’s testimony in Defendant’s Statement of Facts section of her answer brief (pages 12-15); however, none of the pinpoint citations she provides support the broad, general statements that she makes in her Argument, III(C)(ii) (pages 35-36).

medical care, his flu worsened and the pressure in his sinuses caused his head to become misshapen, forcing his eye to close and causing the remainder of his injuries that included paralysis. [State’s Ex. 2, pp. 3-6; 1/20/22 TR (sealed) 7:23-11:22; 1/21/2021 TR 44:16-25, 51:12-17, 54:7-55:12]^{2 3}

Third, Defendant’s answer brief fails to address the point made in the State’s brief-in-chief that all of the evidence together—the deprivation of basic cold medicine and the use of poultices to “treat” E.M.’s loss of sight and paralysis, the deprivation of food, and the failure to obtain medical care—proves beyond a reasonable doubt that Defendant’s actions were the proximate cause of E.M.’s great bodily injuries. [BIC 32-36; State’s Ex. 2, pp. 3-6; Def. Ex. D; 7 RP 1688, 1698; 8 RP 1772, 1795, 1815, 1820-26; 1/20/22 TR 7:4-18, 20:13-22:4, 63:20-64:22, 104:7-105:9, 108:22-109:14, 126:17-127:17; 1/19/2022 TR 20:9-20:9; 1/20/2022 TR 51:12-52:11, 66:8-25; 1/20/22 TR (sealed) 7:23-11:22; 1/21/2022 TR 48:19-50:5] Instead, Defendant relies on the same set of medical neglect cases upon which she relied in her briefing to the trial court. [AB 26] In each of these cases, the State relied on a single fact to prove endangerment: the failure to obtain medical care.

² The trial court sealed the testimony by Stacy Miller on January 20, 2022, so any citation to the record with the parenthetical “sealed” refers to Ms. Miller’s statements.

³ As discussed in the brief-in-chief, Dr. Campbell’s testimony about the progression of E.M.’s flu to sinusitis went unchallenged by Defendant. [BIC 34-37]

See State v. Nichols, 2016-NMSC-001, ¶¶ 38-47; *State v. Villalobos*, A-1-CA-363188, mem. op. ¶ 14 (N.M. Ct. App. June 5, 2019) (non-precedential); *State v. Causas*, A-1-CA-35349, mem. op. ¶¶ 28-30 (N.M. Ct. App. November 21, 2018) (non-precedential); *State v. Garcia*, 2021-NMSC-021, ¶¶ 4-6, 18-21, 27-47. However, this case does not involve just the failure to obtain medical care.

Rather, the State relied on all the different factors listed in the immediately preceding paragraph; and this idea, that a combination of failures, taken together, could establish beyond a reasonable doubt that a defendant's actions endangered a child, is not a novel one in New Mexico law. *See State v. Schaaf*, 2013-NMCA-082, ¶ 12 (holding that the endangerment in the case arose “from a ‘combination of risks’”); *Jensen*, 2006-NMSC-045, ¶ 15 (holding that “this case is not exclusively about filthy living conditions” and that it was a combination of conduct that formed the basis of the charge of child abuse by endangerment).

Neither is the idea a novel one to other states. As mentioned, *Luna* considered whether the failure to provide food and medical care caused the child victim great bodily injury. The Court held that the evidence was sufficient because of both factors combined. The defendant knew that the child had lost weight due to a genetic condition and knew that the child had an additional, unrelated illness that required medical care, but she had failed to feed the child properly and failed to take her the doctor. *Luna*, 264 S.W.3d at 827. In the same way, Defendant's multiple failures,

taken together, demonstrated that, but for her conduct, E.M.'s condition would not have worsened and he would not have developed great bodily injuries. Because of that showing, Defendant did not meet her burden under *Montoya* to demonstrate that no reasonable juror would have convicted her. Therefore, the trial court erred when it granted Defendant's habeas petition.

CONCLUSION

For all these reasons, the State asks this Court to reverse the trial court's grant of habeas relief and reinstate Defendant's conviction for child abuse by endangerment that resulted in great bodily injury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2023 the undersigned filed the foregoing electronically through the Odyssey/E-File & Serve System, causing service on Nicholas Hart and Carter Harrison, IV, on April 28, 2023, at the following email addresses: nick@harrisonhartlaw.com and carter@harrisonhartlaw.com.

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Laurie Blevins