IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v. **No. S-1-SC-40225**

ALEXANDRO MONTELONGO-MURILLO,

Defendant-Appellant.

STATE OF NEW MEXICO'S ANSWER BRIEF

Appeal from the Thirteenth Judicial District Court
Valencia County, New Mexico
Cindy Mercer, District Judge

RAÚL TORREZ
Attorney General

TERESA RYAN
Assistant Solicitor General

Attorneys for Plaintiff-Appellee
408 Galisteo Street
Santa Fe, New Mexico 87501
(505) 490-4060
tryan@nmdoj.gov

Table of Contents

Citations to the Record

Citations to the record proper are in this form: **[(Vol.) RP (pg.)]**. Where appropriate, a short-form citation is used: **[*Id.* (pg.)]**. Citations to the stenographic transcripts of the proceedings are in this form: **[(MM)-(DD)-(YY) Tr. (pg.):(line)]**. Where appropriate, a short-form citation is used: **[*Id.* (pg.):(line)]**.

Note: Two of the stenographic transcripts are identified as the proceedings for November 3, 2022. The second of those (identified also as Jury Trial (Day 5)) should be have been identified as the proceedings for November 4, 2022. The transcript from that day are cited in this brief as **11-4-22 Tr.**

Table of Authorities

Introduction

Defendant Alexandro Montelongo-Murillo asks this Court to vacate his convictions of first-degree murder, attempted first-degree murder, and conspiracy to commit first-degree murder. **[BIC 1]**

Defendant was convicted of these crimes on the evidence that he conspired with his co-defendant, Jesus Garcia (nicknamed Boxer) to murder Daniel Sandoval, and in the process of murdering him, attempted to kill his brother, Scott Sandoval. **[2 RP 293–95, 310–12]** On the afternoon of the murder, the co-defendants drove in an SUV to Daniel's house in Meadow Lake, New Mexico. **[11-3-22 Tr. 95:4–128:6, 55:18-56:5]** Daniel recognized the co-defendant as someone trying to kill him and yelled to Scott, who was outside the house with him, to get in his car. **[*Id.*]** They fled in the car and were chased down neighboring roads as both of the SUV's occupants fired guns at them. **[*Id.*]** Daniel told Scott that the offender was Boxer. **[*Id.*]** After one of the bullets struck Daniel, the driver, the car went off the road. **[*Id.*]** Scott got out, and, amid the gunfire, ran into and then out of a nearby house. **[*Id.*]** Eventually the shooting stopped, and Scott went back to the car, pushed his brother's body into the passenger seat, and drove off to his mother's house. **[*Id.*]**

Defendant seeks reversal on four main grounds.

1. Eyewitness identification of Defendant.

In the initial police response to the incident, the sergeant trying to determine the identities of the shooters showed the surviving victim three photographs, each of a suspect, and asked in each case if it was Boxer. The district court later found that, under the circumstances, the sergeant had good reason to use this procedure. The court therefore denied Defendant's motion to suppress evidence showing that the victim had identified the person in the second photograph as the passenger in the SUV. Under this Court's interpretation of the state constitutional right to due process, such suppression is not called for when the police have good reason to use a particular eyewitness procedure.

Defendant asks this Court to reverse his convictions because of the court's ruling, but he does not directly attack any finding of fact supporting it or convincingly undermine its legal conclusion. He should thus not be granted relief on this issue.

2. Out-of-court statements by the murder victim relayed at trial.

Some of the trial testimony was of what the murder victim had said before the incident to others about Boxer. Defendant objected to some of the statements on hearsay grounds. The district court deemed those statements both present sense impressions and excited utterances, and it admitted them.

Defendant asks this Court to recognize that all the statements, even those not objected to, were inadmissible and that their entry into evidence is cause for reversal. It is well established, however, that even inadmissible evidence does not warrant reversal unless it can be seen as having likely affected the verdict—i.e., as having brought about, by its admission, harmful error. Defendant overlooks this requisite to reversal and, by extension, does not engage in the corresponding, essential analysis. This Court should thus not reach this issue's merits.

3. Second-degree murder jury instruction.

In relation to the murder charge, Defendant asked the district court to instruct the jury that it could acquit him of first-degree murder and instead find him guilty of second-degree murder (if finding him guilty of murder at all). When probed for evidence on which the jury could rationally find him guilty of second-degree murder, however, his counsel could articulate none. The court thus denied his request.

Defendant asks this Court to deem the denial error, but he still offers no justification for the instruction. He does not, that is, provide a reasonable view of the evidence supporting a theory that second-degree murder was the highest degree of crime he committed. As it was before, this deficiency is fatal to his claim.

4. Sufficiency of the evidence supporting the convictions.

Defendant also challenges the sufficiency of the evidence supporting his convictions. The trial was replete with substantial evidence tying him to all three crimes. Most of that evidence he ignores. The appellate rules, however, require that this evidence be recognized in briefing on the issue, or the challenge is deemed waived.

In any event, a look at the record reveals that the inadequacies in the evidence that Defendant charges are not inadequacies at all. All considered, this issue, too, furnishes no basis for reversal.

Argument

Regarding issues 1 through 3, in which Defendant is challenging rulings of the district court, those rulings are presumed correct, and Defendant, as the appellant, must defeat that presumption to find relief through this proceeding. *See, e.g.*, *State v. Aragon*, 1999-NMCA-060, ¶ 10, 127 N.M. 393.

1. The district court did not err in denying the identification-based suppression motion.

Two standards of review apply to the order denying the suppression of eyewitness identification evidence. *See State v. Martinez*, 2021-NMSC-002, ¶ 25.

Under the first, this Court defers to the district court's factual findings, as long as there is substantial evidence to support them. *See State v. Ortiz*, 2023-NMSC-026, ¶ 7. That said, this Court will probe the evidence only if in his briefing,

Defendant both singles out for criticism at least one finding of fact and sets forth all the evidence bearing on it; otherwise all the findings of fact are accepted as true. *See* Rule 12-318(A)(4) NMRA ("The argument shall set forth a specific attack on any finding, or the finding shall be deemed conclusive. A contention that a . . . finding of fact is not supported by substantial evidence shall be deemed waived unless the argument identifies with particularity the fact or facts that are not supported by substantial evidence . . . ."); *Martinez v. Sw. Landfills, Inc.*, 1993-NMCA-020, ¶ 18, 115 N.M. 181 ("[A]n appellant is bound by the findings of fact made below unless the appellant properly attacks the findings, and . . . the appellant remains bound if he or she fails to properly set forth all the evidence bearing upon the findings.").

Under the second standard, this Court reviews de novo the district court's application of the law to those facts. *See Martinez*, 2021-NMSC-002, ¶ 25.

Defendant specifically attacks none of the findings of fact made by the district court and embodied in its order, so the question is whether the court's ultimate ruling, which drew on those facts, comports with the law.

The law on out-of-court and in-court identifications of criminal suspects provides for suppression of evidence under the New Mexico Constitution when the procedure used for the initial, police-conducted identification is deemed improper. Specifically, if the procedure is "unnecessarily suggestive and conducive to

irreparable misidentification," then that identification and any subsequent (i.e., in-court) identification must be suppressed. *Id.* ¶ 79; *see id.* ¶¶ 34, 85. (This standard reflects that the state right to due process is interpreted more broadly than its federal counterpart. *See id.*)

To decide whether the procedure is unnecessarily suggestive, one considers whether the police had a good reason to use it. *Id.* ¶ 79. This inquiry turns on the totality of the circumstances surrounding the police–eyewitness encounter. *Id.* Said another way, if the procedure is deemed (or assumed to be) suggestive, then as long as there is clear and convincing evidence that the police had good reason to employ it, suppression is not required. *See id.* ¶ 80.

In this case, the district court concluded that Defendant's due process rights were upheld because the police had good reason to employ the identification procedure, in that (1) there was a state of emergency at the time it was used; and (2) the approach was "necessary to assist law enforcement in their quick apprehension of suspects" who were at large in the area and considered armed and dangerous. **[1 RP 194]** (The court also implicitly either decided the procedure was suggestive, or assumed as much for purposes of the analysis.) The court reached this conclusion having specifically found the following.

1. A state of emergency existed in the area on the day of the incident: many 911 calls had come in reporting a two-vehicle chase. **[*Id.* 191]**

2. The victims in this case were in the vehicle being chased and shot at. **[*Id.*]** One of the shots killed the brother of the surviving victim. **[*Id.* 191–92]**

3. The sergeant on the scene who conducted the identification procedure was in charge of coordinating law enforcement efforts to repress the violence in the area. **[*Id.* 192]**

4. The surviving victim of the chase told the sergeant that someone named Boxer was responsible for shooting the other victim. **[*Id.*]**

5. The sergeant believed that the two people in the vehicle chasing the victims were still at large; armed and dangerous; and in the area. **[*Id.*]**

6. Sheriff's deputies notified the sergeant, while he was meeting with the surviving victim, that 911 callers were reporting that two people abandoned a vehicle whose description, it was determined, matched that of the suspects', and had tried to enter homes in the area. **[*Id.*]**

7. The sergeant was later notified that the police had apprehended those people, having found them hiding in a ditch. They were identified as Jesus Garcia and Defendant. **[*Id.*]**

8. The sergeant showed the victim Motor Vehicle Department photographs of three suspects. The victim confirmed with certainty that the first, of

Jesus Garcia, was Boxer, and that he was responsible for the shooting. **[*Id.* 193]**

9. The next photograph was of Defendant. The sergeant asked the victim if the person in the photograph was Boxer. The victim said that he did not know that person, but that he was fairly certain the person was the one in the passenger seat of the vehicle chasing them. **[*Id.*]**
10. When asked if the person in the third photograph was Boxer, the victim said he did not know the person and said he believed he was not involved in the incident. **[*Id.*]**
11. In this time, more 911 calls were coming in, this time reporting a different, two-victim shooting in the area. **[*Id.*]**
12. The sergeant did not know if the shootings were connected. **[*Id.*]**
13. The sergeant believed a formal lineup need not have been then used, given the victim's representation that he knew the suspect. **[*Id.*]**
14. The victim indeed knew Jesus Garcia through prior interactions. **[*Id.*]**
15. The victim did not know Defendant from before, but recognized him as an occupant of the vehicle chasing and shooting at the car he and his brother were in. **[*Id.* 194]**

The court's "good reason" conclusion was valid. Two suspects in the shooting had been detained in its immediate aftermath. Meanwhile, there were reports of a

second shooting, against different victims, in the area. The sergeant coordinating police efforts to quell the violence and keep people safe needed to know whether the detained suspects were the two involved in the first incident because, if not, then the police would need to keep looking for the perpetrators of that crime—two people who would be armed and dangerous, on the run, and liable to commit more violent acts in their attempt to flee or evade detection. The possibility that those two were still at large was made all the more likely given the reports of ongoing shooting in the area.

Defendant attacks this "good reason" conclusion with arguments that ultimately do not undercut its validity. He first takes issue with some of what the sergeant said at the hearing: that the procedures (in Defendant's words) (1) "were necessary because [the sergeant] was confirming identity rather than identifying a suspect"; and (2) "[the sergeant] needed to help apprehend suspects that had created an emergency within the community." **[BIC 28]**

Challenging some of what the sergeant said in the hearing, however, is a necessarily misguided approach. To properly undermine the district court's ruling, Defendant would have to convincingly show that at least one of the court's factual findings, specifically identified by him, is not backed up by substantial evidence. *See* Rule 12-318(A)(4).

Besides that, Defendant's first point in this regard is fraught with error. The sergeant did not say the procedures were necessary because he was confirming identity—but, rather, said that a photo lineup was *not* necessary for that reason. **[10-29-21 Tr. 33:20–34:21]**

And though it drew no conclusion on the point, the court might well have credited this statement by the sergeant. He had learned from the witness that someone named Boxer was one of the shooters and that the witness knew Boxer. The sergeant showed the witness the first photograph and asked if the person in it was Boxer. The witness said it was. In an apparent attempt to confirm that the witness was not mistaken, the sergeant showed him the second photograph and asked if the person in *it* was Boxer. The witness said no, adding that that person (whom we now know was Defendant) looked like the other shooter.

These facts show that the type of identification procedure used was not what is considered "selective," or the kind ordinarily subject to the requirements (e.g., a formal lineup) meant to protect against mistaken identifications—but rather "confirmatory," the kind which ordinarily is not. *See generally Reyes v. State*, 292 A.3d 416, 427–36 (Md. App. 2023) (describing a confirmatory identification as "typically an informal procedure that relies upon a witness's prior familiarity with a suspect" and noting that that type of procedure does not implicate due process concerns to the same extent as the selective-identification procedure does).

These facts also show that the witness identified Defendant spontaneously, having been prompted, if anything, to identify him as someone else. That lends strong support to the notion that, as it related to Defendant, the procedure was not suggestive at all.

Moving on, Defendant cannot legitimately claim as he next does that "[t]here was no ongoing emergency as all the scenes of the alleged shooting were secured and there were no reports of continuing shootings." **[BIC 29]** His claim is directly contradicted by the record and what the court (in numbers 1, 3, 5, and 11, above) found: there was indeed an ongoing emergency, and there were indeed reports of ongoing shooting. **[10-29-21 Tr. 151:18–152:1; 180:2–11; 22:4–18]**

The remainder of Defendant's attack on the ruling is likewise untenable. He argues the procedure the sergeant used deviated from the statutory measures law enforcement must take to minimize the possibility of mistaken identifications. **[BIC 27–28]** The measures are listed in the Accurate Eyewitness Identification Act, NMSA 1978, §§ 29-3B-1 to -4 (2019). The act became effective on July 1, 2019 and provides that, by January 1, 2020, law enforcement agencies conducting eyewitness identifications must adopt policies reflecting those requirements. *See* § 29-3B-3(A), (E).

This is the second time Defendant has commented on these "best practices"; the first was in his suppression motion. **[1 RP 93–95]** In its written response to that

motion, the State correctly pointed out that the incident occurred on March 2, 2019; that the act's deadline for adoption of these practices was the following January; and that therefore the sergeant cannot have known about, let alone followed, them. **[1 RP 57 ¶ 1, 61 ¶ 30, 67–68]** Defendant by all appearances conceded the point and dropped the argument at the hearings on the motion. **[10-6-21 Tr.; 10-29-21 Tr.]** To whatever extent this matter cannot, by reason of his silence at those hearings, be deemed unpreserved and therefore not subject to review, it suffers from the logical flaw the State has already brought to Defendant's attention. *See* Rule 12-321 NMRA ("To preserve an issue for review, it must appear that a ruling or decision by the trial court was fairly invoked."); *State v. Franklin*, 2018-NMSC-015, ¶ 8 ("It is essential that the ground or grounds of the objection or motion be made with sufficient specificity to alert the mind of the trial court to the claimed error or errors, and that a ruling thereon then be invoked." (alteration, internal quotation marks, and citation omitted)).

That being the extent of his argument against the ruling denying suppression, Defendant has not succeeded in overcoming the presumption of correctness that accompanies it. He neither properly attacks any of its factual underpinnings, nor offers a cogent reason why its legal conclusion is invalid.

2. Reversal cannot be had on the hearsay-related issues Defendant raises, largely because his analysis is vague and incomplete.

The object of Defendant's next challenge are what he calls hearsay statements originating with the murder victim and, he says, admitted by the court as excited utterances or present sense impressions. **[BIC 17–21, 30–33]**

Which statements, exactly, are at the heart of the challenge is unclear. Defendant does not describe or reference them specifically in his argument on this issue. **[BIC 30–33]** Instead he refers the reader to the factual background section of his brief in which he contends that certain statements he describes or quotes, statements either contemplated as being introduced at trial or actually introduced there, were inadmissible hearsay. **[BIC 31]** (Some of these statements, he says, the State moved to admit before trial as either excited utterances or present sense impressions. **[BIC 17–18]** But the pages of the record he cites in this context do not validate his assertion. Of the other set of statements, those elicited at trial, some were the subject of his counsel's objection, and some were not. **[BIC 18–21]**)

Putting that ambiguity aside, Defendant's manner of raising this issue is plagued with defects.

Chief among them are that his analysis is, at most, only halfway to where it would need to be for this Court to reverse on this issue. That is, even if Defendant did make a compelling case that the statements were neither excited utterances nor present sense impressions (which he does not), he would have to show that: (1) for

those statements that were not properly objected to, their entry into evidence can be said to constitute plain error; and (2) for those that were properly objected to, their admission was not harmless. *See, e.g.*, *State v. Vallejos*, 1996-NMCA-086, ¶ 34, 122 N.M. 318, *aff'd in part, rev'd in part*, 1997-NMSC-040, ¶ 34, 123 N.M. 739 ("In order for the admission of evidence to be reversible error, the defendant must show prejudice."); *State v. Pacheco*, 2023-NMCA-074.

Proving that the jury's having heard the statements was either plain or harmful error is no superficial exercise. To make the case for plain error, Defendant would have to show that the statements' entry into evidence "constituted an injustice that created grave doubts concerning the validity of the verdict." *State v. Montoya*, 2015-NMSC-010, ¶ 46 (internal quotation marks and citation omitted). To reach that conclusion would entail examining the alleged error in the context of the testimony as a whole. *See id.*

To make the case for harmful error, meanwhile, Defendant would have to analyze the statements against the backdrop of all the evidence that came out at his nine-day trial, including by considering the statements themselves; their source; the emphasis placed on them; the evidence of his guilt separate from the error; the importance of the statements to the prosecution's case; and whether the statements introduced new, or merely cumulative, facts. *See State v. Tollardo*, 2012-NMSC-010, ¶ 43.

In both cases, because the claimed errors are not of constitutional significance, Defendant bears the initial burden of persuasion. *State v. Astorga*, 2015-NMSC-007, ¶ 43. Yet he does nothing to carry this burden.

Defendant's argument on this issue is therefore incomplete. He does not allege that the at-issue evidence not objected to meets the plain-error standard. He also does not allege that the at-issue evidence that *was* properly objected to meets the harmless-error standard. And, in both cases, he refrains from engaging in the requisite, corresponding analysis. As such, this Court should not consider this issue. *See, e.g.*, *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶¶ 70–71 (declining to consider an inadequately briefed issue).

3. Defendant does not convincingly argue he was entitled to a second-degree murder jury instruction.

It is hard to see how, when presented with the facts of this case, any district court could have given the second-degree murder jury instruction Defendant contemplates. As Defendant acknowledges, for an instruction on a lesser-included offense to be given, there must be some reasonable view of the evidence under which the lesser offense is the highest degree of crime committed. *See, e.g.*, *State v. Skippings*, 2011-NMSC-021, ¶ 10, 150 N.M. 216. **[BIC 42]** Yet at trial, when this issue surfaced, Defendant (through his counsel) could not articulate such a view of the evidence—and that void goes unfilled here, too.

This issue arose at trial when counsel for the co-defendant expressed his view that a second-degree murder instruction was mandatory in all cases like this (presumably meaning cases in which first-degree murder is charged). **[11-9-22 Tr. 109:7–11]** The prosecutor, citing *State v. Aguilar*, 1994-NMSC-046, 117 N.M. 501, pointed out that the requested instruction should not be given when the evidence supports only first-degree murder. **[*Id.* 110:4–20]** The court agreed that that was the rule and asked defense counsel what evidence theoretically supported a second-degree murder charge. **[*Id.* 110:21–111:8, 112:8–24, 113:4–15]** Counsel for the co-defendant came up empty. **[*Id.* 111:9–112:7]** Defendant's counsel did, too. **[*Id.* 112:25–113:3]**

Were Defendant to now breathe new life into this claim, he would have to do what his trial counsel could not: tell what reasonable view of the evidence supports the theory that second-degree murder was the highest degree of crime committed. Instead of doing that, though, he first refers to details that never came out at trial. In his mind, (1) the murder victim had just moved into the house where the shooting spree began; and (2) both victims were doing construction work on the house at that time. **[BIC 42–43]** Defendant provides no record cites in his briefing on this issue, so we cannot know where this is coming from, but in any case, it appears it is lacking in authenticity. **[BIC 40–43; 11-2-22 Tr.; 11-3-22 Tr.; 11-4-22 Tr.; 11-7-22 Tr.; 11-8-22 Tr.; 11-9-22 Tr.; 11-10-22 Tr.]**

Defendant then observes that there was no evidence that the co-defendants were waiting at the house before the shooting began and that instead, the evidence showed that the co-defendant saw the murder victim as they were driving by the house. **[BIC 43]** In leaving it at that, Defendant leaves us guessing as to the logical connection between this fact and any conceivable case for a second-degree murder instruction.

All considered, Defendant does not overcome his burden of persuasion on this issue, either.

4. The convictions cannot be vacated for insufficient evidence.

Defendant's next challenge is aimed at the sufficiency of evidence to support his convictions. This is another issue whose merits this Court need not reach. That said, even if it did, there would be no question the convictions have adequate evidentiary support, as Defendant's attacks in this regard can be effortlessly quelled.

One reason not to reach the merits of this issue is the fallacy in Defendant's analytical approach: he excludes from his analysis the evidence he elsewhere contends was inadmissible (i.e., the out-of-court and in-court identifications and the statements he calls hearsay). Even if he were correct on those admissibility questions, that is, this evidence would still need to be considered. *See State v. Cofer*, 2011-NMCA-085, ¶ 20, 150 N.M. 483 ("When reviewing the sufficiency of

the evidence to support a conviction, we consider all the evidence, including evidence that was improperly admitted." (internal quotation marks and citation omitted)).

Another reason not to reach the merits of this issue is that Defendant does not—as he must to bring a proper sufficiency challenge—include in his summary of proceedings "the substance of the evidence bearing on the proposition . . . ." Rule 12-318(A)(3). What is meant by this phrase from the appellate briefing rules is more than just "selectively set forth evidence" supporting a result of acquittal. *Sw. Landfills*, 1993-NMCA-020, ¶ 5. It means "*all* evidence bearing upon the proposition"—the proposition in this case being that Defendant committed the three crimes. *Id.* ¶ 9.

Rather than set forth all the evidence establishing his guilt, Defendant briefly describes select examples of it taken from the trial transcripts. **[BIC 21–22]** In doing so, he overlooks the rest of that transcript-based evidence. Were that not enough, Defendant, having not designated for inclusion in the record on appeal any but two of the State's 122 trial exhibits,[1] overlooks the evidence of guilt revealed in the remaining 120 exhibits.

[1] The two exhibits designated for inclusion are the Department of Motor Vehicles driver's license photo of Defendant and that of his co-defendant.

One such exhibit was the recording of a 911 call the surviving victim placed while the car was being shot at. **[11-2-22 Tr. 112:6–113:19]** In that call, the murder victim can apparently be heard saying it was Boxer shooting at them. ***[Id.]*** Together with the plethora of evidence closely associating Boxer with Defendant—not only before and after, but also during, the incident—what was brought out in the call should be enough to put to rest Defendant's main concern in his sufficiency challenge, that there was insufficient evidence placing him in the SUV at the time of the shooting. **[11-4-22 Tr. 63:20–66:5, 69:7–21, 103:7–104:4, 99:10–100:7; BIC 37, 38]**

This is to say nothing of the fact that in voicing this concern, Defendant takes the wrong analytical approach. He suggests that Boxer and his having been found hiding in a culvert after the incident could give rise to the inference that they were trying to avoid detection not because of the shooting, but because they had been seen trying to break into a home earlier. **[BIC 37]** The approach is wrong because an appellate court "does not evaluate the evidence to determine whether some hypothesis could be designed which is consistent with a finding of innocence" and because the appellate court "must view the evidence in the light most favorable to the state, . . . indulging all permissible inferences therefrom in favor of the verdict." *State v. Sutphin*, 1988-NMSC-031, ¶ 21, 107 N.M. 126.

The same goes for Defendant's concern that "the admissible evidence [does not] allow the inference that [Defendant] fired a weapon, touched any bullets or projectiles, or even attempted to shoot [either victim]": on the contrary, there was ample evidence he did all these things. **[BIC 38]** The surviving victim testified that "they," meaning Boxer and Defendant, "started shooting at us" with "a .22 at first or a .25 or something" and that "then it started getting bigger, the guns started getting bigger and bigger; automatics, fully automatics." **[11-2-22 Tr. 101:11–15]** He also testified that there was not just one person shooting during the car chase—and that, afterward, "they" (again, meaning Boxer and Defendant) pulled up next to the victims' car, "shot up the whole car"; "unleashed whatever they had left" and "were shooting nonstop, like all kinds of guns[, l]ike it was a big, old war." **[*Id.* 138:1–10, 136:24–137:13]**

Defendant's last concern in this context is likewise untenable. He challenges his conspiracy conviction by quoting UJI 14-2814 NMRA, which says that "[e]vidence that a person was in the company of or associated with one or more other persons alleged or proved to have been members of a conspiracy is not, in itself, sufficient to prove that such person was a member of the alleged conspiracy." **[BIC 39–40]** The evidence here did not show that Defendant was merely in the company of others who had formed a conspiracy. It showed he was an active member of one.

5. The last two issues may be decided summarily.

In the first of two final attempts at obtaining relief, Defendant tries to co-opt an argument his co-defendant made in his appeal to this Court: that a defense witness was improperly excluded from testifying. **[BIC 23 n.3]** This Court has elsewhere recognized that briefing practices like this are unacceptable. *See United Nuclear Corp. v. State ex rel. Martinez* 1994-NMCA-031, ¶ 5, 117 N.M. 232 (refusing to examine issues that were made in other cases before this Court, but omitted from the appellate brief, and advanced for consideration nonetheless). This Court should do the same here, if only to prevent Defendant from being allowed to circumvent the appellate rule on length limitations for briefs.

In the second of these attempts, Defendant calls for reversal based on the cumulative nature of the alleged errors. **[BIC 44–45]** Relief on this basis is not available when no error is recognized, which should be the case here. *See Aragon*, 1999-NMCA-060, ¶ 19 (observing that where there is no error in the actions and decisions of the trial court, there is no cumulative error).

Conclusion

What makes this case remarkable, if anything, is the eminent fairness of the trial Defendant got, as measured by the strength of his appeal. Presumably he brings to light here the most serious issues with his trial—yet they barely register as real claims. The identification procedure complained of was, under this Court's

recent iteration of the rules on out-of-court eyewitness identifications, acceptable; the out-of-court statements introduced into evidence were admissible; there was no justification for the second-degree murder instruction; and the evidence supporting the convictions was ample. It follows that Defendant's convictions should, without hesitation, be affirmed.

Respectfully submitted,

RAÚL TORREZ
Attorney General

/s/ Teresa Ryan
TERESA RYAN
Assistant Solicitor General
New Mexico Department of Justice
408 Galisteo Street
Santa Fe, New Mexico 87501
(505) 490-4060
tryan@nmdoj.gov

Certificate of Service

I certify that on August 30, 2024, I filed this document electronically through the Odyssey E-File & Serve System, which caused opposing counsel, Nicholas T. Hart, to be served electronically at nick@harrisonhartlaw.com.

/s/ Teresa Ryan
Assistant Solicitor General