



**IN THE SUPREME COURT
FOR THE STATE OF NEW MEXICO**

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

No. S-1-SC-40225

ALEXANDRO MONTELONGO-MURILLO,

Defendant-Appellant.

APPELLANT'S REPLY BRIEF

On Appeal from the Thirteenth Judicial District Court
Case No. D-1314-CR-2019-00180
The Honorable Cindy Mercer, District Court Judge

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ORAL ARGUMENT REQUESTED

September 27, 2024

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume, size, and word limitations of the New Mexico Rules of Appellate Procedure because it contains 1,564 words, excluding all text excluded by that rule, and was prepared in size 14 Century Schoolbook font, a proportionally spaced type face, using Microsoft Office as part of Microsoft Office 365.

/s/ Nicholas T. Hart
Nicholas T. Hart

TRANSCRIPT OF PROCEEDING

Citations to the Record Proper are delineated by “R.P.” followed by the page number. Citations to the transcripts are delineated by “TR.” followed by the date, the page number, and, if necessary, the line number of the transcript.

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Argument

I. The In-Court Identification of Mr. Montelongo was Reversible Error.

The State's Answer Brief puts forward two responses to the identification of Mr. Montelongo. First, the Answer Brief contends that the district court's conclusion that there was a good reason to engage in the identification procedure used by law enforcement. Answer Br. at 8-9. And second, the Answer Brief asserts that the identification procedure was not suggestive. *Id.* at 10-11. Neither is correct.

A. The emergency response did not merit law enforcement's identification procedures.

The State first asserts that there was a good reason for the State's identification procedures because there was a public emergency that demanded immediate answers. But that position is contradicted by the factual record. Law enforcement did not use seek to identify Mr. Montelongo until after the emergency subsided. By the time of the identification, Mr. Montelongo and his co-defendant had been apprehended. There were no reports of ongoing violence. In fact, the officer had waited in his unit for quite some time before he began the work to identify Mr. Montelongo and his co-defendant.

There is no reason why law enforcement could not wait to conduct a proper photo-array to identify Mr. Montelongo. Engaging in the unnecessarily suggestive procedures, as discussed below, violated Mr. Montelongo's right to due process. In turn, Scott Sandoval should not have been allowed to identify Mr. Montelongo before the jury.

B. The procedure used to identify Mr. Montelongo was unnecessarily suggestive.

Even if, however, there was a legitimate reason to deviate from a proper identification procedure, then there was still a violation of due process because that procedure was unnecessarily suggestive.

The officer showed a single photograph to Scott Sandoval when asking him to identify Mr. Montelongo. Using one photograph, or a low number of photographs, increases the likelihood of a false identification. *United States v. Sanchez*, 24 F.3d 1259, 1262 (10th Cir. 1994). This is because showing a witness a single photograph necessarily implies that the officer has already determined that the photograph is the target rather than a random individual. The officer also used verbal prompts, such as asking whether the picture was "Boxer," rather than using neutral language. The officer also failed to obtain identifiers or a description from Scott Sandoval. Doing so not only meant that the

officer could not use and fillers in the photographic show up, but it also means that the officer — and Mr. Montelongo — had no ability to verify if Scott Sandoval had an independent memory of the suspect that matched Mr. Montelongo.

Taken together, these errors resulted in an unnecessarily suggestive identification procedure. Taking a single photograph and asking Scott Sandoval if the person was the target is no different than taking a man in handcuffs before a witness and asking the witness if the man did it. Mr. Montelongo's convictions must be reversed because of this error.¹

II. The Admission of the Hearsay Statements was Reversible Error.

In its response, the State makes no effort to refute that the testimony about previous shootings or threats involving Boxer were inadmissible hearsay. The State instead contends only that any error

¹ The State argues that the identification procedure was not unnecessarily suggestive because the best practices contained in the New Mexico Statutes were not effective at the time of the identification of Mr. Montelongo. *See Answer Br.* at 12. But Mr. Montelongo raises a due process claim, not a statutory claim. The citation to those statutes illustrates the suggestive nature of the identification. That is true even if the statutes were not effective at the time of the identification.

caused by that testimony was either harmless or fails the plain error standard. Neither argument is correct.

A. The admission of the hearsay statements was not harmless because they likely contributed to Mr. Montelongo's conviction.

An evidentiary error is not harmless, and thus requires reversal, when there is a “reasonable probability” the inadmissible evidence contributed to a defendant’s conviction. *State v. Leyba*, 2012-NMSC-037, ¶ 24, 289 P.3d 1215 (quotations and citation omitted). This determination is made by looking at the totality of the circumstances including the source of the error, the emphasis on the error, and whether the error was cumulative or introduced new facts. *State v. Tollardo*, 2012-NMSC-008, ¶ 43, 275 P.3d 110. That there is other evidence of guilt is not controlling; the analysis instead focuses on whether the inadmissible evidence contributed to the guilty verdict. *Id.*

Here, the hearsay testimony of prior encounters with Boxer was not harmless and requires reversal. The State offered this hearsay testimony to show premeditation, an essential element of first-degree murder. In fact, the hearsay testimony was the only evidence of

premeditation. But there was also significant spillover effect from the inadmissible evidence.

Mr. Montelongo's sole connection to the evidence is his alleged connection to Boxer. This means that evidence, like the hearsay testimony, pointing the finger at Boxer necessarily accuses Mr. Montelongo. In other words, the hearsay testimony did not just go to premeditation, it also went towards identifying Mr. Montelongo.

It is impossible to conclude, given the importance of the hearsay testimony, that evidence of previous encounters with Boxer played no role in the jury's verdict. Admission of these hearsay statements thus requires reversal.

B. Even if Mr. Montelongo's challenge was not preserved, which it was, then the admission of the hearsay evidence was plain error.

The State contends that Mr. Montelongo failed to object to the admission of some of the hearsay statements and that plain error review applies. This argument fails because the State does not identify which statements Mr. Montelongo failed to challenge before the district court. It should be no surprise that the State failed to do so; after all,

Mr. Montelongo and his co-defendant vigorously opposed the admission of this hearsay testimony.

Even so, admission of the hearsay testimony was plain error. Plain error review looks to whether the admission of evidence affected a substantial right. Rule 11-103(E), NMRA. Plain error does not, like fundamental error, require “a miscarriage of justice or a conviction in which the defendant’s guilt is so doubtful that it would shock the conscience of the court.” *State v. Lucero*, 1993-NMSC-064, ¶ 13, 116 N.M. 450, 863 P.2d 1071. Rather, to find plain error, the Court “must be convinced that admission of the testimony constituted an injustice that created grave doubts concerning the validity of the verdict.” *State v. Contreras*, 1995-NMSC-056, ¶ 12, 120 N.M. 486, 903 P.2d 228. This standard is met here.

As discussed above, the hearsay testimony was the primary evidence of premeditation. It was the only evidence that showed that Boxer knew the alleged victim and that Boxer targeted the alleged victim. It provided the suspicion to Mr. Montelongo’s alleged association with Boxer. And it served as the primary force behind the identification of Mr. Montelongo. Admitting evidence used for such important

purposes, even without objection, is a miscarriage of justice that calls into question Mr. Montelongo's convictions for first-degree murder.

Mr. Montelongo's convictions must be reversed.

III. The Failure to Instruct the Jury on Second-Degree Murder was Reversible Error.

The State does not contend that Mr. Montelongo's challenge to the refusal to give a second-degree murder instruction is legally infirm. Instead, the State attacks Mr. Montelongo's claim as unreasonable, inauthentic, and illogical. Answer Br. at 16-17. The State, however, does not explain how Mr. Montelongo's contention that one view of the evidence—that is, that the alleged shooters saw the alleged victims and acted in a fit of rage rather than through premeditation—does not merit a lesser-included instruction.

A defendant is entitled to a lesser-included offense instruction when: “(1) the lesser offense is included in the greater, charged offense (2) there is evidence tending to establish the lesser included offense and that evidence established that the lesser offense is the highest degree of crime committed; and (3) the defendant has tendered appropriate instructions preserving the issue.” *State v. Jernigan*, 2006-NMSC-003, ¶ 21, 139 N.M. 1, 127 P.3d 537. In cases where a lesser-included

instruction is not given, “[t]here is a legitimate concern that conviction of the greater offense may result because acquittal is an alternative that is unacceptable to the jury.” *State v. Andrade*, 1998-NMCA-031, ¶ 11, 124 N.M. 690, 954 P.2d 755.

Here, one view of the evidence — which must be reviewed in the light most favorable to giving the lesser-included instruction, *see State v. Henley*, 2010-NMSC-039, ¶ 25, 148 N.M. 359, 237 P.3d 103 — is that the killing and shooting were spur of the moment actions caused by randomly coming across the alleged victims while they were working on a house where neither alleged victim lived. Because, therefore, second-degree murder is included in first-degree murder, and because Mr. Montelongo asked for the uniform instruction for second-degree murder, the district court’s failure to give the instruction was reversible error.²

² The State’s response to Mr. Montelongo’s sufficiency arguments are a criticism and not a substantive response. Mr. Montelongo, therefore, refers the Court to the arguments in his Brief-in-Chief about the sufficiency of the evidence against him. And renews his request that the Court find, for the reasons in that brief, that there was not sufficient evidence to convict him of first-degree murder and conspiracy to commit first-degree murder.

Conclusion

Mr. Montelongo's convictions must be vacated, and this case must be remanded with instructions to dismiss the charges or for a new trial.

Respectfully submitted,

/s/ Nicholas T. Hart

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Dated: September 27, 2024

CERTIFICATE OF SERVICE

I certify that, on September 27, 2024, I electronically filed this brief with the State of New Mexico's Tyler/Odyssey E-File & Serve system. All parties are registered as service contacts and were electronically served by that system.

/s/ Nicholas T. Hart
Nichols T. Hart