



IN THE SUPREME COURT FOR THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

*Plaintiff-Appellee,*

v.

No. S-1-SC-40305

MATTHEW H. WOOD,

*Defendant-Appellant.*

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**REPLY BRIEF**

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On Appeal from the Second Judicial District Court  
Case No. D-202-CV-2020-00847  
The Honorable David A. Murphy, District Court Judge

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**Oral Argument Requested**

October 21, 2024

## Table of Contents

Table of Authorities.....	iii
Argument.....	1
I.    Mr. Wood’s Convictions for Felony Murder and Shooting At or From a Motor Vehicle Were Not Support by Sufficient Evidence .....	1
A. There is not sufficient evidence that Mr. Wood helped, encourage, or participated in the armed robbery of Noah Tafoya.....	1
B. There was not sufficient evidence that Mr. Wood intended to kill Mr. Tafoya .....	3
C. The State’s failure to respond to Mr. Wood’s sufficiency arguments for the shooting at or from a motor vehicle charge is a concession that the conviction is not supported by sufficient evidence .....	5
II.   The State’s Summation Included Improper Inferences, Speculation, and Argument Unsupported by the Record .....	6
III.  A Conviction for Felony Murder When the Jury Hangs on the Underlying Felony Count Violates Due Process .....	10
IV.  The Jury Instructions Created Juror Confusion Resulting in Fundamental Error .....	12
V.   The Errors of the District Court Add Up to Cumulative Error Requiring Reversal.....	14

Conclusion .....	15
Certificate of Compliance .....	16
Certificate of Service .....	17

## Table of Authorities

### Cases

<i>Bates v. State</i> , 736 A.2d 407 (Md. 1999) .....	11
<i>Citizen Action New Mexico v. New Mexico Env't Dep't</i> , 2015-NMCA-058, 350 P.3d 1178 .....	14
<i>Doubleday v. People</i> , 364 P.3d 193 (Colo. 2016) .....	11
<i>Harris v. Okla.</i> , 433 U.S. 682 (1977) (per curiam).....	11
<i>Hicks v. State</i> , 414 So.2d 1137 (Fla. Ct. App. 1982) .....	12
<i>Mathis v. United States</i> , 579 U.S. 500 (2016).....	13
<i>State v. Clifford</i> , 1994-NMSC-048, 117 N.M. 508, 873 P.2d 254.....	6
<i>State v. Consaul</i> , 2014-NMSC-030, 332 P.3d 850.....	2
<i>State v. Duffy</i> , 1998-NMSC-014, 126 N.M. 132, 967 P.2d 607.....	8
<i>State v. Duttie</i> , 2017-NMCA-001, 387 P.3d 885 .....	6

<i>State v. Frazier</i> , 2007-NMSC-032, 142 N.M. 120, 164 P.3d 1.....	10
<i>State v. Lopez</i> , 762 P.2d 545, 551 (Ariz. 1988).....	11
<i>State v. Ortega</i> , 1991-NMSC-084, 112 N.M. 554, 817 P.2d 1196.....	5
<i>State v. Smith</i> , 2001-NMSC-004, 130 N.M. 117, 19 P.3d 254.....	9
<i>State v. Torres</i> , 2012-NMSC-016, 279 P.3d 740.....	8
<i>State v. Torrez</i> , 2013-NMSC-034, 305 P.3d 944.....	10
<i>State v. Veleta</i> , 2023-NMSC-024, 538 P.3d 51.....	11
<i>State v. Vigil</i> , 2010-NMSC-003, 147 N.M. 537, 226 P.3d 363.....	2, 3
<i>Whalen v. United States</i> , 445 U.S. 684 (1980).....	12
<b>Court Rules</b>	
UJI 14-6006, NMRA.....	3

## Argument

### I. **Mr. Wood's Convictions for Felony Murder and Shooting At or From a Motor Vehicle Were Not Supported by Sufficient Evidence.**<sup>1</sup>

#### A. **There is not sufficient evidence that Mr. Wood helped, encouraged, or participated in the armed robbery of Noah Tafoya.**

The State identifies three pieces of evidence that apparently support the jury's finding that Mr. Wood helped, encouraged, or caused the death of Noah Tafoya. First, the State argues that Mr. Wood helped, encouraged, or caused the death of Mr. Tafoya because Mr. Wood knew that firearms would be used to rob Mr. Tafoya. *See* Ans. Br. at 34. Second, the State contends that Mr. Wood helped, encouraged, or caused the death of Mr. Tafoya because Isaac Cutrer's testimony established that Mr. Wood knew in advance that Trey McNab was going to rob Mr. Tafoya at gunpoint. *See id.* And third, the State argues that

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<sup>1</sup> As a preliminary matter, the State characterizes Mr. Wood's challenge to the sufficiency of the evidence as an attack on Chavez's credibility as a witness. *See* Ans. Br. at 32. That is incorrect. Mr. Wood never asserted that there was insufficient evidence to sustain a conviction because Mr. Chavez was not credible. Mr. Wood instead contended, and argues again here, that even if Mr. Chavez's testimony is taken at face value, then there is still insufficient evidence to support Mr. Wood's conviction for first-degree murder.

Mr. Wood helped, encouraged, or caused the death of Mr. Tafoya because Mr. Wood drove Mr. McNab to the apartment complex where the attempted robbery took place. *Id.* But these conclusions are conjecture, not reasonable inferences. Mr. Cutrer did not testify that he overheard Mr. McNab say to Mr. Wood that he would rob Mr. Tafoya at gunpoint; he only overheard Mr. McNab talk about pretending to buy a gun from a young man and then robbing the gun instead. *See* BIC at 14-15. And Mr. Cutrer testified that he did not see Mr. Wood or Mr. McNab leave the house with any firearms before the robbery. *Id.*

Mr. Wood does not, as the State asserts, argue that a conviction is only valid if the evidence showed that he shot and killed Mr. Tafoya. *See* Ans. Br. at 35. Rather, Mr. Wood's conviction is not supported by sufficient evidence because the State's arguments for conviction are based on "a range of possibilities," *See State v. Consaul*, 2014-NMSC-030, ¶ 70, 332 P.3d 850, rather than reasonable inferences or proof.

Here, the evidence that Mr. Wood encouraged or even participated in the killing of Mr. Tafoya was based on speculation. And speculation is never sufficient evidence to support a conviction. *See State v. Vigil*, 2010-NMSC-003, ¶ 4, 147 N.M. 537, 226 P.3d 636 (explaining that "the

independent responsibility of the courts [is] to ensure that the jury's decisions are supportable by evidence in the record, rather than mere guess or conjecture"); UJI 14-6006, NMRA (stating that the "verdict should not be based on speculation, guess[,] or conjecture"). The jury was not presented sufficient evidence that Mr. Wood helped, encouraged, or caused Mr. Tafoya's death.

**B. There was not sufficient evidence that Mr. Wood intended to kill Mr. Tafoya.**

The Answer Brief similarly fails to identify sufficient evidence that Mr. Wood intended to kill Mr. Tafoya. Like the helped or encouraged prong, the Answer Brief instead masks innuendo and speculation as evidence of intent.

For example, the State contends that "[e]vidence of the possession, use[,] and deployment of firearms by McNab and [Mr. Wood] . . . was sufficient to establish that . . . [Mr. Wood] knew or must have known such acts created a strong probability of great bodily harm." *See* Ans. Br. at 37. Possession alone cannot show use. And even if it was, the only evidence that Mr. Wood possessed a firearm is a series of inferences based on Mr. Chavez testifying that he believed he saw a magazine of bullets in Mr. Wood's pocket. That is not sufficient evidence that Mr.



Wood possessed a firearm let alone used it. After all, if Mr. Wood had a firearm, then why would he approach Mr. Chavez with a knife? A man does not bring a knife when he knows that all the other parties would have and use firearms.

Similarly, the State contended that Mr. Wood “engaged in communications with McNab regarding the true purpose of robbing Victim and regarding the use of a firearm to do so under the pretense of purchasing a 9mm Glock handgun.” Ans. Br. at 38. This argument appears to rely on the testimony of Mr. Cutrer, but Mr. Cutrer testified that he did not see Mr. Wood or Mr. McNab with firearms and did not hear them talking about using a firearm in this alleged robbery. *See* BIC, at 32. Mr. Cutrer only testified that he overheard Mr. McNab tell Mr. Wood about a potential robbery. *Id.* That limited testimony, while sufficient evidence of a conspiracy, does not allow the inference that Mr. Wood and Mr. McNab talked about bringing firearms with them or using a firearm to rob Mr. Tafoya.

Finally, the State asserts that discharging a firearm at Mr. Chavez was sufficient to establish Mr. Wood’s intent to kill. *See* Ans. Br. at 38. This argument fails for two reasons. First, it is undisputed that

Mr. Chavez shot Mr. Wood first; that supports that had Mr. Wood returned fire then he did so to protect himself from further gunshot wounds and not with an intent to kill Mr. Chavez. Second, the question is not whether Mr. Wood intended to kill Mr. Chavez; the question is whether Mr. Wood intended to kill Mr. Tafoya. Returning fire after being shot does not allow such an inference.

It is not enough that a conviction for felony murder be based on proof of intent to commit the predicate felony; there must separately be evidence of an intent to kill. *See State v. Ortega*, 1991-NMSC-084, 112 N.M. 554, 817 P.2d 1196. But Mr. Wood's conviction for felony murder was not based on any evidence that Mr. Wood intended to kill Mr. Tafoya or that Mr. Wood took any action where he should have known that Mr. Tafoya was at risk of serious bodily harm or death. Mr. Wood's conviction for felony murder must be vacated and remanded with instructions enter a judgment of acquittal.

**C. The State's failure to respond to Mr. Wood's sufficiency arguments for the shooting at or from a motor vehicle charge is a concession that the conviction is not supported by sufficient evidence.**

The Answer Brief performs no analysis of Mr. Wood's arguments that there was not sufficient evidence that he was guilty beyond a

reasonable doubt of shooting at or from a motor vehicle. Rather, the Answer Brief makes the conclusory statement that “the presentation of evidence in the factual background and elsewhere” shows that Mr. Wood “*could* have fired a number of shots” at Mr. Chavez’s vehicle. *See* Ans. Br. at 39-40 (emphasis added). But this is no response at all. And neither Mr. Wood nor this Court should be forced to do the work of the State by deciphering the reasons the State thinks the shooting at or from a motor vehicle conviction is supported by sufficient evidence. *See, e.g., State v. Clifford*, 1994-NMSC-048, ¶ 19, 117 N.M. 508, 873 P.2d 254 (noting that appellate courts need not do counsel’s research); *State v. Duttie*, 2017-NMCA-001, ¶ 34, 387 P.3d 885 (“For this Court to rule on an inadequately briefed [ ] issue would essentially require us to do the work on behalf of Defendant, which we will not do.”). The Court should therefore find that this failure to fully respond is a concession that Mr. Wood’s conviction for shooting at or from a motor vehicle was not supported by sufficient evidence.

**II. The State’s Summation Included Improper Inferences, Speculation, and Argument Unsupported by the Record.<sup>2</sup>**

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<sup>2</sup> The State contends that Mr. Wood “does not cite to the record to show how or when” any objection to the prosecutor’s closing argument

The State does not dispute, in its Answer Brief, that a prosecutor arguing improper inferences to a jury is prosecutorial misconduct.

Rather, the State only argues that the inferences argued by the prosecutor were “non-unreasonable.” Ans. Br. at 40-41.

First, the State argues that the prosecutor’s remarks that Mr. Wood, after being shot, stood up, opened fire on Mr. Chavez, shot Mr. Tafoya in the thigh, removed Mr. Tafoya from the vehicle, then got in the vehicle with Mr. McNab and drove off are “non-unreasonable” inferences. *Id.* But the State ignores how this argument is based on speculation and the improper stacking of attenuated inferences. For example, while Mr. Wood being observed with a magazine of bullets may allow the inference that he had a gun, it does not allow the inference that Mr. Wood used that firearm. And it is not evidence that Mr. Wood engaged in an action-movie-style response to being shot that included him returning fire towards his shooter, shooting at a speeding

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“was preserved.” Ans. Br. at 40. But Mr. Wood recognized that this issue was not preserved below and restates that this issue, which is being raised for the first time on appeal, should be reviewed for fundamental error. *See* BIC at 35-36.

car, killing another man, and then dumping the body from the car to flee.

Second, the State asserts that the prosecutor's argument that Mr. Wood possessed and fired a certain firearm because he could not be excluded from the DNA profile found on the stock and barrel of the gun "was a reasonable explanation of the technical usage of a phrase."<sup>3</sup> Ans. Br. at 41. But the DNA expert's testimony was that Mr. Wood could not be included or excluded. This testimony is like testifying that it cannot be determined whose DNA was on that firearm. To take that conclusion and argue that Mr. Wood had to have possessed that firearm because he could not be excluded from the DNA profile is misleading and disingenuous. This is the paradigm of prosecutorial misconduct during closing argument. *See State v. Duffy*, 1998-NMSC-014, ¶ 56, 126 N.M. 132, 967 P.2d 607 ("It is misconduct for a prosecutor to make prejudicial statements not supported by evidence.").

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<sup>3</sup> The State seems to argue, according to *State v. Torres*, 2012-NMSC-016, ¶ 10, 279 P.3d 740, that the prosecutor's DNA argument was in response to an argument that Mr. Wood was conclusively excluded from having possessed that firearm. But Mr. Wood did not make that argument. And even if he did, the State made this argument in its initial summation, not its rebuttal. The statement therefore could not have been invited by the defense.

And third, the State contends that the prosecutor's argument that the cash found on the driver's side of Mr. Wood's vehicle belonged to Mr. Tafoya was reasonable because "there would have been no necessity to bring to the planned robbery the quantities of cash found in the Toyota Camry."<sup>4</sup> Ans. Br. at 41-42. But cash being found in the vehicle is equally probative of a legitimate purchase. And this is especially true when, as here, the money was found on the floorboard of the driver's seat where Mr. McNab was sitting during his interaction with Mr. Tafoya. The prosecutor therefore made arguments that Mr. Wood was guilty of accessory to an armed robbery of cash that was possessed by Mr. Tafoya without any evidence. Like the other arguments discussed in this section, that is prosecutorial misconduct resulting in fundamental error. *State v. Smith*, 2001-NMSC-004, ¶ 38, 130 N.M. 117, 19 P.3d 254 (explaining that "remarks by the prosecutor must be based upon the evidence or be in response to the defendant's argument").

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<sup>4</sup> Making this statement during closing argument is not, as the State argues, irrelevant to this appeal. As discussed in the Brief-in-Chief, the scattered cash tends to show that Mr. McNab either intended to purchase the gun or that Mr. Tafoya tried to rob Mr. McNab of the money. *See BIC*, at 39-40.

### III. A Conviction for Felony Murder When the Jury Hangs on the Underlying Felony Count Violates Due Process.

The State next argues that Mr. Wood's conviction for first-degree felony murder, which necessarily included a decision that Mr. Wood committed the felony of armed robbery, while the jury hung on the substantive armed robbery count did not deprive Mr. Wood of due process. In making this argument, the State relies on *State v. Torrez*, 2013-NMSC-034, 305 P.3d 944. But *Torrez* did not address the issue raised by Mr. Wood.

In *Torrez*, the issue before this Court was whether a conviction for felony murder and the predicate felony would require that the predicate felony be consumed by the felony murder charge. *Id.*, ¶ 15. There, this Court noted restated "that when a jury convicts a defendant of both felony murder and the same felony upon which the felony murder convicted is predicated, the predicate felony must be vacated to avoid a double jeopardy violation." *Id.* (citing *State v. Frazier*, 2007-NMSC-032, ¶ 1, 142 N.M. 120, 164 P.3d 1). But the issue here is not whether convicting Mr. Wood of both felony murder and armed robbery would violate double jeopardy. The issue is whether convicting Mr. Wood of felony murder with the predicate felony being armed robbery deprives

him of due process when the jury is unable to come to a verdict of the underlying felony.

As noted in the Brief-in-Chief, a conviction for felony murder cannot be had “without conviction of the lesser crime.” *Harris v. Okla.*, 433 U.S. 682, 682 (1977) (per curiam). While this per curiam opinion did not state a general rule under the federal constitution, several states have explicitly adopted the rule that a conviction for felony murder is improper if there is not a conviction for the underlying felony. *See, e.g., Doubleday v. People*, 364 P.3d 193, 198 (Colo. 2016); *State v. Lopez*, 762 P.2d 545, 551 (Ariz. 1988). *See also Bates v. State*, 736 A.2d 407, 416 (Md. 1999) (requiring that a jury be instructed that a defendant cannot be convicted of felony murder if he is not first convicted of the predicate felony).

Put simply, the State’s attempt to frame Mr. Wood’s due process argument as a double jeopardy argument is unavailing because this Court has already decided that it only reviews judgments of conviction when deciding double jeopardy claims. *See State v. Veleta*, 2023-NMSC-024, ¶ 32, 538 P.3d 51 (“This Court reviews inconsistent convictions.”). But this case does present the question of whether due process protects



a defendant from being convicted of felony murder when underlying felony is charged but does not result in a conviction.<sup>5</sup> Because the State made the decision to charge Mr. Wood with both felony murder and the underlying felony, then the conviction for felony murder cannot stand when there is no conviction on the underlying felony. Doing otherwise would violate Mr. Wood's right to due process. *See Whalen v. United States*, 445 U.S. 684, 693-94 (1980) (explaining that “[a] conviction for killing in the course of a rape cannot be had without proving all of the elements of the offense of rape”).

#### **IV. The Jury Instructions Created Juror Confusion Resulting in Fundamental Error.**

The State first argues that the jury instructions did not result in juror confusion because the jury was read an accessory liability instruction. *See* Ans. Br. at 46-47. But the accessory liability instruction was only given for the armed robbery count, it was not given for the felony-murder count. R.P. 180. That the stand-alone armed robbery

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<sup>5</sup> To be clear, the State could have charged Mr. Wood with felony murder without charging the underlying felony. But when the State charges a defendant with felony murder and the predicate felony, then the State runs the risk that the jury may return a verdict that violates a defendant's due process rights. *See Hicks v. State*, 414 So.2d 1137, 1141 (Fla. Ct. App. 1982).

count included definitions that were not provided for the felony murder count was error. And that error led to juror confusion.

The State fails to address this argument. For example, the Answer Brief states that Mr. Wood believes that armed robbery and accessory to robbery are two offenses requiring two instructions. *See* Ans. Br. at 46-47. But Mr. Wood did not make that argument.

Mr. Wood asserted that the court should have instructed the jury on both theories of the armed robbery during the instruction for felony murder just as it did for the instruction on armed robbery because each theory raises different essential elements. *See* BIC at 45-46. The failure to include one of the theories in the felony murder instruction deprived Mr. Wood of an instruction that required the jury to decide each element of the charge. *See Mathis v. United States*, 579 U.S. 500, 504 (2016).

Instead of substantively opposing this argument, the State just attacks it as illogical. *See* Ans. Br. at 48. But the logic and juror confusion are clear—when properly instructed on each of the State’s theories of robbery, the jury could not come to a decision; when faced with just one, the jury found the robbery was committed. This shows

that there was disagreement among jurors about the different theories presented during the trial. And that disagreement created juror confusion as the verdict both found and failed to find that Mr. Wood committed an armed robbery beyond a reasonable doubt. The jury instructions therefore resulted in fundamental error.

**V. The Errors of the District Court Add Up to Cumulative Error Requiring Reversal.**

The State summarily rejects Mr. Wood's cumulative error argument without response because it believes there were no errors before the district court. *See* Ans. Br. at 48. This position, the same as a failure to respond, should be taken as the State forfeiting any arguments it otherwise may have against Mr. Wood's cumulative error argument. *See Citizen Action New Mexico v. New Mexico Env't Dep't*, 2015-NMCA-058, ¶ 26, 350 P.3d 1178. The State's prosecutorial misconduct, the confusing jury instructions, and the deprivation of due process add up to cumulative error. The Court should therefore reverse and remand Mr. Wood's case for a retrial should it find that the district court committed errors but none of those errors were prejudicial or fundamental.

## Conclusion

Mr. Wood's convictions for first-degree murder, shooting at or from a motor vehicle, and aggravated assault must be vacated, and this case must be remanded with instructions to dismiss those charges with prejudice.

Respectfully submitted,

/s/ Nicholas T. Hart

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Dated: October 21, 2024

## **Certificate of Compliance**

I certify, according to Rule 12-328(F), NMRA, that this brief complies with the type-volume, size, and word limitations of the New Mexico Rules of Appellate Procedure because it contains 3,088 words, excluding all text excluded by that rule, and was prepared in size 14 Century Schoolbook font, a proportionally spaced type face, using Microsoft Word as part of Microsoft Office 365.

*/s/ Nicholas T. Hart*  
Nicholas T. Hart

## **Certificate of Service**

I certify that, on October 21, 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*  
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