S-1-SC-40701

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

vs.

TYJE GARRETT,

Defendant-Appellant.

Appeal from the Tenth Judicial District, County of Quay
D-1010-CR-2022-0047

DEFENDANT/APPELLANT'S REPLY BRIEF ON DIRECT APPEAL

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Statement Regarding Record Citations

District court proceedings were audio recorded and transcripts are CDs containing FTR files, which counsel reviewed using FTR. Proceedings are cited by date and FTR timestamp, i.e., 10.01.2024/9:31:10. The record proper is cited by page number, i.e., RP 1. Documentary and photographic exhibits are cited by number. State's exhibits are cited as "Exh.," while defense exhibits are cited as "Def.Exh."

Certification of Compliance

The body of this brief exceeds the page limit (15 pages) prescribed by Rule 12-213(F)(2) NMRA. Counsel used Century Schoolbook, a proportionally-spaced type style / type face.

As required by Rule 12-213(F)(3) NMRA, counsel certifies that this reply brief is proportionally spaced and the body contains 4,387 words. The brief was prepared using Corel Word Perfect, version X9.

A. Garrett maintains his fatal act was provoked by Arellano's relentless race-baiting.

In its answer, the state refuses to entertain the word, "nigger." It describes Arellano's utterances as "insults"and questions whether "nigger" was ever really said. AB 8-12. It says that those Arellano called said he never used such words. AB 4, 10-11. It argues if they didn't hear them, the jury reasonably concluded Arellano never said them. AB 8-12. Similarly, the state uses Arcelino's comment he didn't remember the "dialogue" or "racial slurs" as evidence none were made. AB 10-11. So too Gabriel. *Id.* He testified he could not remember what the two men said, which, to the state, again means racist provocation never happened. 10.01.2024/9:11:38.

It is odd the state tries to avoid the inflammatory role the word "nigger" played in Arellano's shooting and simultaneously eliminates a likely explanation for why it happened. It suffers this conundrum rather than admit Garrett was provoked as defined by UJI 14-222 NMRA. ("'Sufficient provocation' can be *any* action, conduct or circumstances which arouse, anger, rage, fear, sudden resentment, terror or other extreme emotions."). It studiously ignores the consistent testimony of those present; the people who heard "nigger" over and over and watched its withering effect on Garrett. It has shown no evidence that Arellano's racist taunting ever stopped or that Garrett's triggered emotional state ever cooled. And it still has not offered a

theory for why Garrett shot Arellano. Yet, even without motive, it must prove the shooting was carefully considered before the act. Garrett firmly maintains the state failed to meet its burden.

Garrett's account of his stepson, Arcelino's, graduation party is straightforward. Within minutes of arriving, Arellano was outside taking his shirt off, ready to fight. 09.30.2024/16:29:15; 10.01.2024/9:31:10. Those present heard him repeatedly say "fucking nigger" and "fuck you nigger." 10.01.2024/9:59:40, 10:00:00, 11:05:10; 10.02.2024/15:28:55. Arcelino made multiple attempts to get his father to leave as others tried to separate the men. 10.01.2024/9:33:15; 10.02.2024/15:29:45. Instead, Arellano's vitriol spilled onto Kirby: "Fuck you and your woman, she ain't worth a damn either." 10.01.2024/9:58:50. Urged to call for a ride home, Arellano instead made a call to "bring the guns, we're going to burn this motherfucker down." 10.01.2024/9:38:10, 9:41:10-:15. Relentlessly goaded by the cruelest, most pointed of racial taunts and with a new and armed threat on the way, Garrett lost the ability to reason and reacted violently.

Arellano knew exactly what he was doing when he chose the word,"nigger." It is a word uniquely meant to attack and disparage Black Americans. No other word carries its painful historical weight. If this is untrue, why do people murmur "the n-word" to avoid saying "nigger" out

loud? The word is used as a weapon. *See* Randall Kennedy, *Nigger: The Strange Career of a Troublesome Word*, 4-5 (Pantheon Books 2022). Even courts have found that "nigger" may provoke the strongest emotions and reactions from a Black person. *See Bailey v. Binyon*, 583 F.Supp. 923, 934 (N.D. Ill. 1984) ("nigger" is "different qualitatively" than "mere insults . . . because [it] conjure[s] up the entire history of racial discrimination in this country . . . generat[ing] a feeling of inferiority . . . that may affect their hearts and minds in a way unlikely ever to be undone.") (quotation marks, citations omitted). It is reasonable, then, to expect a Black person to become aggrieved or enraged to the point of temporarily losing the capacity to reason and maintain self-control. *See Brown v. East Mississippi Elec. Power Ass'n.*, 989 F.2d 858, 861 (5th Cir. 1993) ("nigger is a universally recognized opprobrium, stigmatizing African-Americans because of their race" and its persistent use before others of a different race "is racism."); *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2001) ("nigger" is "far more than a 'mere offensive utterance,' the word 'nigger' is pure anathema to African-Americans.") (citation omitted).

Arellano's intent in using "nigger" was consistent with its use for centuries - to show unmistakable scorn for Garrett as a man. In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), the Supreme Court described

"fighting words" as "those which by their very utterance inflict injury or tend to incite immediate breach of the peace." Arellano chose "fighting words" to injure and provoke – arguably, it is "nigger's" sole purpose. "Resort to epithets or personal abuse," the Court went on, "is not . . . safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." *Id.* (cleaned up). Here, *Chaplinsky* conceives "nigger" as tantamount to assault.

Why did Arellano repeatedly call Garrett a "fucking nigger" in front of his family, friends, and neighbors? The state has no answer because it cannot allow that such hateful words were ever said. But Arellano yelled "nigger" many times and, for Garrett, it summoned the cumulative racial trauma still borne by Black Americans. Race is a consequential objective fact that activates and heightens the reasonable person's perception of a racist verbal attack, especially when accompanied by threats. To deny a Black person the reality of his experiences is easy for someone who has had the good fortune to not have shared them. Then it is simple to write off racist assaults as "insults" that every Black person, including Garrett, should simply shrug off.

The state's inability to tell the how and why of what happened is partly due to its refusal to acknowledge a racist assault occurred and to recognize its profound effect on Garrett - an otherwise universally recognized effect. Thus,

the state finds itself arguing Garrett should have remained calm and unbothered. Arellano meant to emotionally gut Garrett with his words. Garret's pitched response overruled reason and his capacity to carefully deliberate. To ignore race is "to ignore the very real differences" between Black people and others in America and to deny the former "the full scope of the [] safeguards" guaranteed to the latter, in particular the mitigating element of sufficient provocation. *J.D.B. v. North Carolina*, 564 U.S. 262, 281 (2011). The state never proved Garrett acted without sufficient provocation. As a matter of law, it proved only that Garrett was guilty of voluntary manslaughter. *See Mullaney v. Wilbur,* 421 U.S. 684, 697-98 (1975) (prosecution must "prove beyond a reasonable doubt the absence of the heat of passion" to properly present a homicide case).

B. The state proposes seven factors that do not establish deliberate intent beyond a reasonable doubt.

The state enumerates seven factors it says prove deliberate intent. AB 13-16. Garrett reviews each factor and "all the facts and circumstances" that led to the shooting. UJI 14-201 NMRA. He will show through context and details the state either omits or fails to rebut that none of the factors, individually or together, are substantial evidence of careful deliberation. Similarly, the Court looks to the "totality of the evidence in [the] record" to decide whether evidence is constitutionally sufficient. *State v. Flores*, 2010-

NMSC-002, ¶ 24, 147 N.M. 542, *overruled on other grounds by State v. Martinez*, 2021-NMSC-002, 478 P.3d 880.

State Factor 1: *Multiple witnesses testified Arellano and Garrett "were engaged in a heated argument at Kirby's house.*" AB 13-14. "Heated argument" does not accurately describe the escalating emotions and chaos sparked by Arellano's arrival and near immediate hostility toward Garrett.[1] 10.01.2024/9:26:25; 9.30.2024/16:40:10 10.01.2024/10:52:20, 11:01:25; 10.02.2024/15:26:15. According to Arcelino, Arellano confronted Garrett in a "passive/aggressive" manner and accused him of looking at him "kind of funny." 9.30.2024/16:28:00; 16:28:45; 16:29:15. Arellano "stormed" off with Arcelino pleading with him to leave. 10.01.2024/9:31:10, 9:33:15. Garrett followed, angry with Arellano for "disrespect[ing]" him in his "domain." 9:35:05. Arellano responded, "fuck you, nigger. I'll kill you and all these niggers."[2] 10.02.2024/15:29:45. Enraged, Garrett said he "would shoot

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[1]The state claims Arcelino never said his father was intoxicated. AB 12. On the court recording, defense counsel asked, "based on your experiences with your dad it seemed to you like he was intoxicated?," to which Arcelino answered, "yea, sure." 9.30.24/16:40:35. The state also faults Garrett for omitting Crain and Daniel Arellano who said they didn't know if Arellano had been drinking or was intoxicated. AB 12; 9.30.24/16:03:50; 10.01.24/10:14:40. Arellano's postmortem exam showed a blood/alcohol concentration of 0.251, three times the legal threshold for intoxication in New Mexico. 10.02.2024/14:27:15.

[2]The state says only Garrett said his family was threatened, AB 11, and criticizes him for relying on his testimony as proof. Garrett's brief cited to the testimony of Kirby and Roybal, not Garrett. BIC 4-5. Kirby repeated Arellano's

[Arellano] and wouldn't feel bad." 9:35:05. Arellano responded, "Fuck you and your woman, she ain't worth a damn either." 9:58:50. He repeated "nigger, fuck you, nigger" several more times. 10.02.2024/15:28:55.

Garrett's rage and resentment were fed not only by Arellano's "conduct" but by the "circumstances" where it took place. *See* UJI 14-222 ("conduct or circumstances" relevant to "sudden provocation"). With the graduation party ruined and already feeling disrespected, the added humiliation of being publicly reduced to "nigger" was too much for Garrett. Just as the racist taunts were unceasing so was the emotional churn that consumed him. When, then, did Garrett carefully contemplate murder and thoughtfully weigh the consequences in the "calm and reasonable manner" required for first-degree? *State v. Kidd*, 1917-NMSC-056, ¶ 5, 24 N.M. 572. The state does not say.

State Factor 2: *Roybal testified that during this argument Garrett "repeatedly threatened to kill [Arellano] and stated he would shoot [Arellano] and not feel bad about it."* AB 14. Here, the timing of Garret's statement provides context. Garrett said he'd shoot him after Arellano called him a

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threats for jurors. 10.02.2024/15:29:45. Roybal heard Arrellano say, "we're going to burn this motherfucker down," as they stood across from the family's house. 10.01.2024/9:38:10. At trial, the state did not challenge, rebut, or impeach the women's testimony.

"nigger" and said, "I'll kill you." When Roybal heard Garrett say this, she first thought "he wanted to beat him up, maybe we should have let him." 10.01.2024/9:52:25. The men's back-and-forth threats to kill or "fuck you up," 9:52:25, "I'm right here, c'mon," 9:36:10, continued right up to Arellano's call to "bring the guns, we're going to burn this motherfucker down." 10.01.2024/9:38:10.

State Factor 3: *After the "heated argument" at Kirby's house Arellano "was escorted across the street" and Garret "continued to shout that he would kill" him.* AB 14. Garrett does not dispute that Arellano crossing the street did not end their conflict. *Both* men continued the hostility and aggression. Arellano shouted at Garrett. 10.01.24/9:34:35; 9:36:50; 9:59:40; 11:05:10; 11:04:05-11:06:33. Garrett yelled back. 9:34:35; 9:36:10; 10:51:15. It was evident to everyone there that they wanted to fight. 9:52:25; 10:52:20.

Arellano foiled Roybal's efforts to keep them apart by going back toward the house. 10.01.2024/9:36:50. Unable to create meaningful distance, she suggested Arellano call for a ride. *Id.* His brother claimed Arellano called and casually asked to be picked up.[3] 9:38:10. Roybal, standing next to him,

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[3]Daniel Arellano's claim his brother was neither upset nor angry contradicts Crain. She said Arellano did sound upset and could be heard 100 feet away. 09.30.2024/15:59:10-:21. In her own call back to Arellano, she reported he still was "very upset," repeatedly exclaiming "this motherfucker." Exh. 133; 09.30.2024/15:59:35.

heard Arellano say, "bro, shit's going down, bring the guns, bring the guys, we're going to burn this motherfucker down." *Id.*; 9:56:20. Moments later, he made a second call. 9:55:50-9:58:20. The fraught circumstances here explain why Garrett remained tense, on edge, rage and fear continuously stoked. More importantly, the events' swift and steady momentum allowed no time for weighty contemplation.

State Factor 4: *Garrett got in the truck, drove past Arellano, stopped at the end of the road "for a while sitting in his truck."* AB 14. The state takes any time to deliberate as proof of actual deliberation. Accounts vary widely as to how long Garrett sat in his truck. Gabriel said Garrett "stopped for a second." 10.01.2024/9:07:15. Roybal said he parked at the curb by the truck stop, then turned back toward Arellano. 10.01.2024/9:44:03-9:45:05. Kirby's father said Garrett stopped "for a while, did a u-turn and came back." 10:52:20-10:55:00. This Court has said that time alone is not evidence of actual deliberation. *State v. Adonis*, 2008-NMSC-059, ¶ 22, 145 N.M. 102.

The state argues the jury "inferred" deliberation. AB 13. Garrett explained in his opening brief, BIC 17-22, such an inference is purely speculative because the opposite is "equally plausible." *State v. Taylor*, 2000-NMCA-072, ¶ 23, 129 N.M. 376; *State v. Slade*, 2014-NMCA-088, ¶ 14, 331 P.3d 930 (jury's conclusion evidence is sufficient reversible if based on mere

speculation). Without more, it is just as likely Garrett never deliberated in the truck.

State Factor 5: *Garrett made a U-turn, stopped in middle of road, exited car with his firearm, and shot Arellano twice.* AB 14. The state's facts again do not prove Garrett had "cooled off" or deliberate intent. Witnesses described more yelling and both men as agitated as before. 9.30.2024/16:45; 10.01.2024/9:08:40-:48. As Garrett stood by the truck, Roybal said Arellano shouted, "I'm not scared, I'm right here," before "throwing his hands up at" Garrett.[4] 10.01.2024/9:44:30. Moreover, Garrett did not step out of the truck with a firearm. Arcelino did not see anything in Garrett's hands. 9.30.2024/16:45. Nor did Gabriel or Kirby's father. 10.01.2024/9:14:56; 10:57:15; 11:08:40. Roybal recalled at some point seeing a rifle silhouette. 9:47:05. Thus, the evidence that as Garrett got out of the truck he was intent on shooting Arellano is not beyond a reasonable doubt. *Compare State v. Kramer*, S-1-SC-37807, dec. ¶¶ 1-6, 41, 49 (N.M. September 9, 2021) (nonprecedential) (deliberate intent established when brought gun to office, audible shot struck victim, irreverent comments made while calmly standing over dying victim still crying out for help, prevented witness at gun point

[4]The state objects to Garret saying Arelleno moved toward him. AB 5. Given the charged circumstances in which they were facing off, Arellano's abrupt gesture could reasonably be seen as a move closer.

from calling for help, told responding officers no one inside was "bleeding out").

Garrett's actions also do not align with what the Court has found comprises deliberate intent. Garrett's acts did not show a "carefully crafted plan to kill." *State v. Riley*, 2010-NMSC-005, ¶ 17, 147 N.M. 557 (cleaned up). He did not lie in wait or stalk Arrellano. He did not put the rifle in the truck to use as a weapon against Arellano. *Compare Flores*, 2010-NMSC-002, ¶¶ 21-22. Nor was Garrett in "hot pursuit" as Arellano tried to get away. *Riley*, 2010-NMSC-005, ¶ 17. Rather, like in *Tafoya*, Arellano's shooting was unplanned and impetuous. 2012-NMSC-030, ¶ 47, 285 P.3d 604.

State Factor 6: *Garrett approached Arellano, "now on the ground, stopped a foot away and continued firing." He shot Arellano twelve times.* AB 15. Roybal, the closest witness, said Garrett's first shot, taken by the truck, missed. 10.01.2024/9:47:20. She said Garrett stepped toward Arellano, fired again, and Arellano "went down." *Id.*; 10:00:50. Garrett then stood at Arellano's feet and fired two more shots. 9:47:20. She heard six shots in all. 10:00:50.

The number of shots alone are not evidence of careful thought or calculated judgment. *See State v. Carmona*, S-1-SC-36031, dec., ¶ 31 (N.M. January 25, 2018) (nonprecedential) (Carmona guilty of second-degree

murder when he "thought about it" for five seconds before shooting victim in head). Here, constant yelling and aggression had created a combustible scene. Like "gas on a fire," 10.01.2024/10:52:10, Garrett's seething emotions erupted. Even the redundant number of bullets indicates sudden impulse.[5] A great many wounds is not dispositive "as such a killing is just as likely (or perhaps more likely) to have been on impulse." 2 Wayne R. LaFave, Substantive Criminal Law § 14.7(a), 481 & n.34 (2d ed. 2003).

State Factor 7: *Garrett gets in his truck, drives off to a gas station 30 miles away and tosses the rifle along the way.* AB 15-16. Garrett's actions after the shooting are not proof of deliberation before the shooting. Garrett left the cemetery in haste literally as Arellano's summoned brothers pulled into it. 10.01.2024/9:22:00/Exh. 7. The rifle being in the truck was not part of a plan. Numerous people saw Garrett and Arcelino shoot the same rifle earlier to celebrate the graduation. Tossing the rifle was more likely instinctual than to frustrate officers. When the officer detained him 30 miles away, Garrett was cooperative and polite. 10.01.2024/11:46:40. He complied

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[5] *Compare with State v. Robinson*, 1980-NMSC-049, ¶¶ 12-13, 94 N.M. 693 ("deliberate intent to kill" where defendant shot victim in chest, drove off, came back, and shot victim in head at close-range); *& State v. Gonzales*, S-1-SC-35291, dec., ¶¶ 3-4 (N.M. February 11, 2016) (nonprecedential) (deliberate intent established when after losing fight, defendant walked over to girlfriend to whom he had given gun before fight, loaded round in chamber, walked over to victim, and shot him in head).

with the officer's instructions while being cuffed so as not to endanger the officer. And he freely admitted he was the subject of the Tucumcari murder BOLO. 10.01.2024/11:36:35 (Exh. 8, Slate's body-camera recording). *Compare Kramer*, *supra.*

Factors that have persuaded the Court of deliberate intent are missing here. Most obviously, evidence of motive. *Compare State v. Rojo*, 1999-NMSC-001, ¶¶ 6, 24, 126 N.M. 438 (seeing victim with another man, prompted threat to kill before beating and later killing her). By all accounts, the families got along before that day. No one reported preexisting conflict, personal animus, threats or quarrels. 9.30.2024/15:44:20-:35; *compare Gonzales*, S-1-SC-35291, dec. ¶¶ 3, 22 (conflict history); *State v. Smith*, 1966-NMSC-128, ¶¶ 12-13, 76 N.M. 477 (harbored animus).

In *Carmona*, S-1-SC-36031, dec. ¶ 18, the Court explained the legislature did not intend to punish all intentional killings equally. Accordingly, the Court "impos[ed] several limitations on the breadth of the first-degree murder statute." Non-deliberate, rash, and impulse killings are not first-degree murder. For example, back-and-forth quarreling followed by a brief respite, then trading punches followed by a chest stabbing did not prove the "defendant engaged in the careful thought necessary" for deliberate intent. *Carmona*, ¶ 19 (cleaned up) (citing *State v. Garcia*, 1992-NMSC-048,

114 N.M. 102). Here, a racist jibe, public and unexpected, unleashed chaos and a torrent of emotion that never allowed Garrett's mind to cool and think calmly until he was 30 miles away. As Garrett has argued, no evidence produced shows otherwise. The state did not prove deliberate intent.

C. Garrett credibly raised a provocation defense and the trial court was constitutionally required to provide instruction that provocation was germane to the deliberate intent element of first-degree murder and the state had to prove beyond a reasonable doubt that Garrett did not act because of provocation.

Garrett argued that one sufficiently provoked, as defined in UJI 14-222, cannot form the deliberate intent necessary for first-degree murder as a matter of law. The state does not disagree: "Logically, one cannot kill 'as a result of careful thought and the weighing of the consideration for and against the proposed course of action,' UJI 14-201, while lacking the 'ability to reason [brought on by] a temporary loss of self-control.' UJI-14-222." AB 18 (brackets in original). The court should have informed the jury of the state's "duty to prove beyond a reasonable doubt the absence" of sufficient provocation in order to convict Garrett of first-degree murder. *United States v. Lofton*, 776 F.2d 918, 920 (10th Cir. 1985).

The state contends the phrase "an unconsidered and rash impulse" from UJI 14-201 includes actions resulting from "sufficient provocation." AB 18-19. When the jury rejected Garrett's acts were rash and impulsive, it rejected

he was sufficiently provoked. It argues against rash impulse because Garrett had time to deliberate when he "went back in the house" and when he drove briefly down the block. 10.03.2024/9:28:25, 9:55:19. Garrett already has addressed the 'time' argument. It also argued to mitigate murder, sufficient provocation required immediate action, like running over Arellano right after he said he'd kill Garrett. 10.03.2024/9:29:40; BIC 45-46. In other words, because Garrett didn't act right away, a provocation defense is unavailable.

Provocation can have no temporal requirement. It is the loss of control that produces the impulsive act. That tolerance threshold is neither fixed nor the same for everyone. One can absorb much abuse before control collapses, another's skin is thinner. But in both, provocation swamps the mind from the start with visceral emotions that intensify as provocation continues and disable the mind's capacity to reason and think clearly. When Garrett's self-control snapped, he committed an unconsidered act under severe emotional stress. Provocation as mitigation did not change because Arellano wasn't immediately run over. Even the word, "sufficient," intimates a quantitative measure rather than a time limit.

Lofton is instructive and should control here. Like Garrett, Lofton argued the trial court didn't instruct the jury her heat of passion (provocation) defense had an "effect on the government's burden of proof."

776 F.2d at 918. The court agreed and reversed her conviction. *Id.* The constitutionally defective instructions there were replicated here.

As in *Lofton*, the court here did not instruct the jury that finding sudden provocation "necessarily precluded finding" deliberate intent. *Id.* at 921-22. Like *Lofton*, provocation was explicitly linked to voluntary manslaughter. The jury could consider provocation "only if it first found" Garrett not guilty of the more serious homicides. *Id.* at 922. So structured, the instructions "precluded the jury from considering the effect of [his] defense on the murder count." *Id.* The flawed instructions here too are constitutionally defective because they did not "inform the jury of the theory of defense." *Id.* at 920; *see State v. Benavidez*, 1980-NMSC-097, ¶ 5, 94 N.M. 706 (defendant entitled to have theory of case submitted to jury under proper instructions). As in *Lofton*, the Court should rule the district court committed fundamental error and reverse Garrett's conviction for first-degree murder. 776 F.2d at 922.

The state argues that language in UJI 14-201 incorporates acts resulting from "sufficient provocation" and obviates the need for a separate instruction. Garrett believes an instruction linking sufficient provocation's effect to the deliberate intent element is critical. Without it, jurors had no understanding that "sufficient provocation" so affected the ability to form

deliberate intent that finding provocation required an acquittal on first-degree murder. Without it, jurors could have believed that Garrett was sufficiently provoked but dismissed it because the state convinced them the shooting wasn't an "unconsidered and rash impulse," *which is exactly what the state has said happened.* The jury made the wrong link. Garrett was convicted of first-degree murder when his conduct, mitigated by sudden provocation, might merit a lesser homicide conviction. With his liberty at stake, imprecision is costly.

D. Fundamental error is established by the state's willful misconduct at closing argument.

Garrett discussed state misconduct at trial in three broad categories: (1) distortions of evidence; (2) speculative legal theories; and (3) evidence not heard at trial. BIC 40-50. The state claims Garrett's argument is "unclear," untethered from the record and law. AB 24. Rather than examine whether it presented a confused argument that might have misrepresented facts and the law, the state critiques Garrett's efforts to decipher the closing and its impact on the jury. As he fully detailed the categories of misconduct in his opening brief, Garrett will focus here on (3).

The state proposes its statements that Arellano had defense wounds and Highway 54 was busy were "reasonable inferences" from the evidence. AB 42. "[I]nferences must be reasonably based on facts established by the

evidence, not upon conjecture or other inferences." *Hisey v. Cashway Supermarkets, Inc.*, 1967-NMSC-081, ¶ 7, 77 N.M. 638.

Here, Roybal did not provide the "defense wounds" inference the state now ascribes to her testimony. AB 42. She said Arellano dropped after Garrett's second shot, "lying straight on his left side . . . ." 10.01.2024/10:00:50. She was not asked if he moved or raised his arms "to block" shots while on the ground. To claim later that Arellano had defense wounds from blocking shots when it declined to ask Roybal if he ever moved is not a reasonable inference. *State v. Medema*, 2025-NMCA-011, ¶ 31, __P.3d__ (inference had "no support in the evidence.")

Likewise, Kerwin's testimony. She identified one entrance and one exit wound on the arms. 10.02.2024/14:14:25-14:19:30. Postmortem photographs revealed many wounds. The state may complain but Garrett's summary of her testimony is correct: "with some wounds she was uncertain where the projectile had entered and exited . . . with others she did not say or was not asked. 14:17:20." BIC 7, 48. Kerwin, a forensic pathologist and qualified expert, testified at trial. 13:54:45-13:57:30. Yet, the state declined to ask if any wounds were defensive before asserting at closing they were.

The state also failed to ask any witness about evening traffic on Highway 54. It could have asked testifying patrol officers. Again, it declined

to ask questions or ask to reopen its case. 10.02.2024/16:31:30. In its view, then, the evidence it had introduced satisfied its burden of proof. To claim later a detail as proven evidence when it "rejected that very [evidence] as unnecessary to its own case" is "highly improper." *State v. Lensegrav*, 2025-NMSC-016, ¶ 33, 572 P.3d 924.

At closing, the state inserted the unproven "defense wounds" and "busy road" as actual evidence. Although it was fundamental error, it did so to convince the jury of an essential offense element, deliberate intent. It implied continuing to shoot a man who was trying to defend himself showed blood had cooled. Navigating a "busy road" afterward was further proof. There is a "reasonable probability that the error was a significant factor in the jury's deliberation[.]"[6] *Medema*, 2025-NMCA-011, ¶ 35. (quotation, citation omitted).

The state believes "reasonable inferences" were a legitimate response to Garrett's "intoxication defense." AB 37. Garrett never argued he was "so intoxicated he couldn't mean to kill" Arellano. 10.03.2024/9:53:55. He focused on his inability to form intent due to sufficient provocation, not intoxication. Garrett's closing simply explained that alcohol had intensified

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[6]When the jury rejected Garrett's acts were rash and impulsive, it rejected he was sufficiently provoked, just as the state noted in its answer. AB 18-19.

the anger and adrenaline of both men. 10.03.2024/9:45:45-9:47:56, 9:48:25-9:49:20, 9:50:25-9:51:30.

In sum, there was no evidentiary basis for the state's "reasonable inferences." Its unproven comments were fabrications intended to convince the jury it had established the elements of first-degree murder. Notwithstanding the state's protests, it is misconduct. *Medema*, 2025-NMCA-011, ¶¶ 30-31. As it affected Garrett's constitutional rights, the Court should find fundamental error and set aside his first-degree murder conviction.

Respectfully submitted,

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Certificate of Service

I hereby certify that upon acceptance by Odyssey File & Serve, a copy of this brief, e-filed this 27th day of October, 2025, will be served electronically upon Tyler Sciara at TSciara@nmdoj.gov at the NMDOJ Solicitor General's Division.

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