



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

vs.

No. S-1-SC-40728

JEANNINE JARAMILLO,

Defendant-Appellant.

APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT
SANTA FE COUNTY, NEW MEXICO
THE HONORABLE MARY MARLOWE SOMMER PRESIDING

DEFENDANT-APPELLANT'S BRIEF IN CHIEF

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NOTE ON RECORD CITATIONS

The remaining district court proceedings were audio-recorded using For The Record software. FTR CDs were reviewed using The Record Player and are cited by date and timestamp in the form **[mm/d/yy CD hour:minute:second]**, with subsequent citations set forth as **[*Id.* hour:minute:second]**.

Citations to the Record Proper are in the form **[Vol. RP page number]**.

Exhibits are cited as **[Ex. number]** and, where applicable, by clip and/or timestamp **[Ex. number, minute:second]**

CERTIFICATION OF COMPLIANCE

The body of this brief exceeds the limit of 35 pages set forth in Rule 12-318(F)(2) NMRA. Undersigned counsel certifies that this brief is written in Times New Roman, a proportionally spaced font, and that the body of the brief contains fewer than 11,000 words (specifically 10,612). This word count was obtained using Microsoft Office 365.

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NATURE OF THE CASE

Jeannine Jaramillo was convicted of two counts of first degree murder (felony murder and in the alternative depraved mind murder) for a head-on collision between two other individuals, both of whom died. “First-degree murder is reserved for the most blameworthy or the most heinous and reprehensible class of homicides.” *State v. Brown*, 1996-NMSC-073, ¶ 15, 122 N.M. 724. Hence, New Mexico law does not extend liability for felony murder or depraved mind murder to situations where the defendant or a codefendant do not commit the fatal act. *State v. O’Kelly*, 2004-NMCA-013, ¶¶ 16, 18, 46, 135 N.M. 40. Because Jeannine herself did not commit the fatal act here and the evidence was otherwise insufficient to support her conviction, she appeals her convictions for first degree murder on legal and factual sufficiency grounds.

Jeannine also appeals the district court’s admission of evidence of a prior fleeing incident which acted as improper propensity evidence and was highly prejudicial. She asks for a new and fair trial.

Finally, Jeannine argues that her convictions for aggravated fleeing and reckless driving subject her to double jeopardy because several other convictions are also based on her ongoing driving conduct. Her convictions for aggravated fleeing and reckless driving must therefore be vacated.

FACTUAL SUMMARY

Late in the morning on March 2, 2022, Richard Musser encountered a woman and man, later identified as Jeannine Jaramillo and Jerry Chavez [12/10/24 CD 1:57:53-58:10], sitting in a white Chevy Malibu outside the Vizcaya Apartments in Santa Fe, New Mexico. [12/6/24 CD 9:44:30-47:16] The woman, who was in the driver's seat, was visibly upset and yelled to Mr. Musser to call the police, saying the man was threatening her with a knife and would not get out of the car. [*Id.* 9:46:29-49:40] Mr. Musser did not see the man doing anything threatening but observed a club or stick in his hand (which Mr. Chavez later identified as a folding cane). [*Id.* 9:46:29-49:40, 10:09:45-10:43] Mr. Musser called the police as he backed away and the car started to drive off. [Ex. 2] Mr. Musser went to the manager's office. While there, he saw the car return only to leave again. This time, he only saw a female driving and did not see a male passenger. [12/6/24 CD 9:52:40-54:12]; [Ex. 6]

Santa Fe Police officers quickly responded to the area, saw the white Chevy Malibu driving away from the apartments, and followed it. [12/6/25 CD 10:22:00-10, 2:13:36-15:08, 2:18:22-20:46] Initially, the pursuing officer did not initiate his lights and sirens and was merely following the white Chevy Malibu to get the plate number. [*Id.* 2:18:22-20:46] When the car turned, accelerated quickly, and drove through an intersection, the officer tried to initiate a traffic stop, but the car continued

speeding away despite the lights and sirens. **[Id. 2:21:00-23:34]** Soon, other officers joined the pursuit, resulting in four police units pursuing the white Chevy Malibu. **[Id. 2:32:31-33:34, 3:26:13-27:06]** This included a unit driven by Officer Robert Duran, who ended up as the secondary vehicle involved in the pursuit. **[Id. 2:23:15-24:40, 3:26:13-27:06]**

As the officers followed the car with their lights and sirens activated, the white Chevy Malibu sped through town, made several U-turns, and drove on the wrong side of the road. *See* **[Ex. 16, Clip 1]** Eventually, the white Chevy Malibu went onto highway I-25 and drove into oncoming traffic in both directions with the officers still in pursuit. **[12/6/24 CD 3:27:42-28:13]; [Exs. 16, Clip 1, 17, 22]** During the chase, as oncoming cars were pulling over or swerving out of the way, Officer Duran's police unit collided head-on with a truck driven by Frank Lovato; both men died. **[Ex. 17]; [12/6/24 CD 3:53:13-54:27, 4:00:00-01:13]; [12/10/24 CD 9:03:02-04:00]** Officer Gilbert Phillip Montano's vehicle also collided with a car driven by Alexis Jenkins; both individuals survived but Ms. Jenkin's arm was injured. **[12/6/24 CD 3:54:27-55:42, 4:02:54-03:22]; [12/9/24 CD 1:30:09-33:11, 1:35:45-40:22, 1:41:58-42:56]; [12/11/24 CD 11:27:51-28:06]** A short time later, the white Chevy Malibu itself collided with a car driven by Benino Salas, who injured his hand but survived. **[12/6/24 CD 11:11:10-14:55]; [12/9/24 CD 11:14:53-13]; [12/10/24 CD 9:00:57-9:02:38]**

After the white Chevy Malibu collided with Mr. Salas's car, Jeannine got out of the driver's side door and ran to a nearby police officer. **[12/9/24 CD 11:16:15-17:04]; [Ex. 21, 2:00-34]** She was distraught **[12/9/24 CD 1:58:30]** and insisted that a man named Mark Lopez—who was wearing a red shirt, black jacket, dark jeans, and a black hat **[Ex. 21, 5:52-6:08]**—had threatened her with a knife and gun, hit her, threatened to light her on fire, and fled the vehicle. **[Ex. 21, 2:40-5:00]** Jeannine repeated and elaborated on this story when questioned on her way to and at the hospital **[Exs. 24, 26]**, when questioned at the police station **[Exs. 29, 146, 147]**, and when confronted by a news station **[Ex. 55]**.

However, during their investigation, police officers gathered evidence casting doubt on Jeannine's story, including the fact

- the passenger's side airbag did not deploy, and the passenger seat's sensors did not sense a person sitting there **[12/11/24 CD 11:01:00-50, 11:38:47-41:38, 1:26:53-27:23]**;
- no individual was seen in the passenger seat or getting out of the car after Jeannine **[12/9/24 CD 11:18:18-37, 11:29:02-43]**;
- civilian witnesses saw a woman driving the fleeing vehicle **[12/6/24 CD 4:16:00-49]; [12/9/24 CD 1:09:44-10:40]**;
- the Mark Lopez Jeannine identified at the hospital had an alibi **[12/9/24 CD 3:53:08-55:48]**; and
- DNA and forensic examination of Jeannine's clothes and the air bag in the Chevy Malibu indicated that Jeannine was driving. **[12/10/24 CD 3:43:23-45:38]** (finding a DNA match); **[12/11/24 CD 9:10:40-30:05]** (similar pattern on airbag and shirt reflecting transfer during

deployment of air bag), **9:31:54-52:00** (similar particles found on shirt and air bag again indicating transfer at time of deployment)]

PROCEDURAL SUMMARY

On March 25, 2022, a criminal information was filed charging Jeannine, in relevant part, as follows¹:

Count 1: first degree felony murder or in the alternative first degree depraved mind murder or in the alternative homicide by vehicle (reckless driving) for the death of Frank Lovato;

Count 2: first degree felony murder or in the alternative first degree depraved mind murder or in the alternative homicide by vehicle (reckless driving) for the death of Robert Duran;

Count 3: great bodily harm by vehicle (reckless driving) for injury to Alexis Jenkins;

Count 4: aggravated fleeing a law enforcement officer;

Count 5: receiving or transferring a stolen vehicle;

Count 6: making a false report;

Count 7: reckless driving.

[1 RP 1-3]; [2 RP 355]

In July and September of 2022, Jeannine sent the prosecutor's office letters.

[12/10/24 CD 2:11:43-14:40]; [Exs. 9, 63] In them, she acknowledged that she had

¹ The original Count 6 was bringing contraband into the jail (for methamphetamine), but the State dropped that charge prior to trial and renumbered the other counts. **[1 RP 1-3]; [2 RP 354-56]** It is unclear why it was dismissed. Intoxication can be a defense to depraved mind murder. *See State v. Brown*, 1996-NMSC-073, ¶¶ 13, 19, 34-35, 122 N.M. 724.

been recklessly driving in a stolen vehicle and running from law enforcement, which she admitted were not good choices, but she denied that she had ever intended anyone harm and explained her traumatic history and issues with drugs (which she was working on). [12/10/24 CD 2:15:22-25:57]; [Exs. 9, 63] Jeannine said she was sorry to the friends and families of Officer Duran and Mr. Lovato. While recognizing that she made poor choices and was not blameless, she denied involvement in the crash and questioned why officers continued pursuit. *Id.*

Before trial in her case, the State filed a notice of intent to use 11-404(B) evidence at trial. [1 RP 77-79, 96-98] Of relevance here, the State sought to admit evidence from an incident in 2021 in Cibola County where Jeannine had led police on a chase in stolen vehicle and later claimed to have been held at knifepoint by a man who was described as wearing clothes similar to the description in this case. [1 RP 77, 96] The State argued that the fact she had engaged in similar conduct previously was admissible to show her intent, plan, identity, opportunity, lack of accident, and lack of credibility. [1 RP 78-79, 97-98]

The defense filed a response, explaining that Jeannine would not be testifying and arguing that the evidence was more prejudicial than probative as it was essentially bad act character evidence and was not relevant to her state of mind in this case. [1 RP 106-08]

The State filed a reply, attaching police reports from the prior incident² and reiterating its argument. **[2 RP 332-40, 345-53]**

The Court addressed the motion before trial on December 6, 2024, and concluded that evidence of the prior Cibola County incident was admissible. **[12/6/24 CD 8:39:50-55:20]**

At Jeannine's five-day trial, the State presented evidence from civilian witnesses who witnessed the white Chevy Malibu driving or were involved in a collision **[12/6/24 CD 11:22:17, 4:12:37]; [12/9/24 CD 1:05:38, 1:20:03]**, including Ms. Jenkins **[12/9/24 CD 1:27:49]** and Mr. Salas **[12/6/24 CD 11:08:44]**. The State also called numerous officers who were involved in the pursuit and investigation of Jeannine. **[12/6/24 CD 2:07:47, 3:17:50]; [12/9/24 CD 8:42:44, 8:54:49, 10:40:30, 1:45:15, 3:18:05, 3:46:53]; [12/10/24 8:45:13]; [12/11/24 3:08:55, 3:20:56]** Additionally, the State called a variety of experts. First, the State called experts who tested and verified matches involving DNA samples and transfer materials from the air bag, Jeannine's clothing, and Jeannine. **[12/10/24 CD 3:43:23-45:38; [12/11/24 CD 9:10:40-30:05, 9:31:54-52:00]** Then, the State presented testimony from the medical examiner who performed the autopsies. **[12/6/24 CD 12:57:18]** The State also presented testimony from an accident reconstruction expert

² According to the police reports in that case, methamphetamines were involved in that incident. **[2 RP 349, 353]**

who testified that, based on his review of the evidence, the events leading to the fatal accident occurred “very fast at a very rapid rate.” He explained that as the white Chevy Malibu approached Mr. Lovato’s truck, Mr. Lovato swerved left to avoid it, while the Chevy Malibu and lead officer in pursuit also swerved to avoid Mr. Lovato. **[12/11/24 CD 10:34:46-40:37]** The expert indicated that this left Mr. Lovato and Officer Duran with insufficient time to react and avoid each other. ³ **[Id. 2:07:27-12:20]** The expert testified that Jeannine missed colliding with Mr. Lovato, albeit narrowly, and that Jeannine was 100 to 150 feet away when the accident occurred. **[Id. 2:10:38-12:20, 2:26:53-32:43]**

The State’s last witness was an officer who testified about the prior fleeing incident out of Cibola County where she had made several U-turns and driven into oncoming traffic. **[12/11/24 CD 4:03:46-08:12]** He also discussed and played his interview with Jeannine where she claimed she had fled because a man named David Lopez—who was wearing a red shirt, black jeans, and a black jacket—had held her at knifepoint and forced her to drive. **[12/11/24 CD 4:10:56-22:37]; [Ex. 148]** The officer did not mention methamphetamines being involved in that incident, but he

³ The expert estimated that it was less than a second based on Jeannine’s estimate in her letter of 150 feet, but in exhibit 19, it appears to have been a few seconds later. **[12/11/24 CD 2:11:10-12:20]; [Ex. 19, 00:06-00:10]** According to the expert’s testimony about 1.6 seconds is the average time needed to react. **[12/11/24 CD 2:05:19-06:03]**

testified that, during jail calls, she admitted to having driven and said that it was exciting like a video game. **[12/11/14 CD 4:23:30-24:39]**

In addition to witness testimony, the State also played Mr. Musser's initial 911 call **[Ex. 2]** and video from the apartment complex **[Ex. 6]**, presented numerous diagrams and photographic exhibits **[Exs. 1, 3-4, 10-15, 18, 28, 30-53, 56-57, 60-62, 68-144, 149-50]**, read Jeannine's letters **[Exs. 9, 63]**, displayed several lapel and dash camera videos showing the pursuit and accident **[Exs. 16, 17, 19, 21-24, 145]**, and played interviews with Jeannine **[Exs. 21, 24, 26, 29, 55, 146, 147]**.

The defense questioned officers about whether the official pursuit policy was followed **[12/6/24 CD 3:05:53-10:40, 4:03:37-05:30]**; **[12/9/24 9:43:26-53:12, 11:33:27-43:31]**; **[Ex. 20]**, and about Jeannine exhibiting signs of being under the influence, which one officer admitted was the case even hours after the incident. **[12/10/24 CD 2:38:52-40:20]** Following the State's presentation of evidence, the defense moved for a directed verdict on several, but not all, counts. **[12/11/24 CD 4:25:43-38:40]** With respect to the murder charges in Counts 1 and 2, the defense argued that pursuant to *State v. O'Kelly*, 2004-NMCA-013, 135 N.M. 40, Jeannine could not be held liable for first degree felony murder or depraved mind murder because her act was not the fatal act which caused Mr. Lovato or Officer Duran's deaths. **[Id. 4:25:43-36:12]** For Count 3 (great bodily harm by vehicle (reckless driving)), the defense argued that there was insufficient evidence Jeannine caused

Ms. Jenkins's injuries or that her injuries amounted to great bodily harm. [*Id.* 4:36:12-37:06] Lastly, with respect to Count 5 (possession of a stolen vehicle), the defense maintained that there was insufficient evidence the vehicle was stolen. [*Id.* 4:37:15-38:06]

The State responded that, for Counts 1 and 2, the New Mexico Supreme Court had found aggravated fleeing to be a proper predicate felony in *State v. Groves*, 2021-NMSC-003, 478 P.3d 915. Additionally, the State maintained the issue was not one of agency, but of causation and the jury would be instructed on causation. The State otherwise pointed to Jeannine's driving conduct as sustaining the other elements of Counts 1 and 2. [*Id.* 4:38:40-45:42] For Count 3, the State argued that Ms. Jenkins had testified that although she regained the full range of motion for her elbow, she still had issues holding things and performing daily tasks, which was sufficient to establish great bodily harm. [*Id.* 4:45:42-46:37] For Count 5, the State noted there was sufficient evidence the car was stolen based on (1) testimony from two officers who discussed reports of the vehicle being stolen in Las Vegas on February 28, 2022, (2) Jeannine's identification of herself in photographs near the scene where the vehicle was taken right around the time it was spotted driving away, and (3) a video of the now-deceased owner identifying it as her car. [*Id.* 4:46:40-49:04]

The district court denied the defense’s motion for a directed verdict. [*Id.* 4:49:04-51:00, 4:57:17-40]

Jeannine did not testify or call witnesses on her behalf. [12/12/24 CD 8:45:55-46:06, 9:24:28-25:40]

In closing argument, the State pointed to Jeannine’s conduct in speeding and repeatedly driving the wrong way—including doing so in town, in residential neighborhoods, and on the highway in both directions—as evidence that she acted with the requisite intent for depraved mind murder. [12/12/24 CD 10:00:57-04:44, 10:18:22-19:56] The prior incident in Cibola County was offered as proof that Jeannine must have engaged in this conduct because she found it fun, establishing a total disregard for the safety of others. [*Id.* 9:59:47-10:01:48, 10:19:20-56] For felony murder, the State argued that she was guilty of felony murder because she committed the crime of aggravated fleeing, knowing that her acts created a strong probability of death or great bodily harm, and the deaths occurred during the commission of the fleeing. [*Id.* 10:19:56-22:08] With respect to causation, the State argued that she had caused the deaths and other accident because “she played chicken with [Mr. Lovato’s] car forcing him to the left and he could not get out of the way.” [*Id.* 10:12:31-13:17, 10:16:45-17:17]

The State discussed the other charges, but to a lesser degree, barely mentioning the reckless driving charge. [*Id.* 10:27:44-28:02, 10:28:43-29:11]

The defense admitted that Jeannine had driven recklessly and filed a false police report [*Id.* 10:31:33-33:52], and did not dispute the aggravated fleeing charge. [*Id.* 10:36:38-50] However, the defense argued the State failed to establish causation or show Jeannine had the requisite intent for first degree murder. [*Id.* 10:37:53-43:10, 10:44:41-49:44] The defense also took issue with the lack of evidence showing the white Chevy Malibu had been stolen or that Jeannine had taken it and maintained that the State had not shown that Ms. Jenkins suffered prolonged impairment. [*Id.* 10:33:52-37:53]

Jeannine was convicted of first degree murder in Counts 1 and 2 [2 RP 420, 425], in addition to being found guilty of the other offenses charged in Counts 3-7 [2 RP 429, 431-32, 435, 436]. *See also* [12/12/24 CD 3:11:09-13:28]

On Counts 1 and 2, Jeannine was sentenced to consecutive life sentences. [2 RP 438-39] The district court had Count 4 merge with Counts 1 and 2, but did not vacate it. [2 RP 439] Finally, the court sentenced her to the maximum time for the remaining charges but had them run concurrent with each other and concurrent to Count 2. [2 RP 438-39] This appeal followed.

ARGUMENT⁴

I. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN SEVERAL OF JEANNINE'S CONVICTIONS.

A. Standard of Review.

As a matter of due process, the State must present sufficient evidence to support a finding of guilt beyond a reasonable doubt for each element of an offense. U.S. Const. amends. V, XIV; N.M. Const. art. II, § 18; *State v. Garcia*, 1992-NMSC-048, ¶ 27, 114 N.M. 269. When this Court reviews a jury verdict for sufficiency of the evidence, the “[e]vidence is viewed in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict.” *State v. Garcia*, 2016-NMSC-034, ¶ 15, 384 P.3d 1076. “[J]ury instructions become the law of the case against which the sufficiency is to be measured.” *Id.* (cleaned up⁵). The question is “whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction.” *State v. Dowling*, 2011-NMSC-016, ¶ 20, 150 N.M. 110 (cleaned up).

⁴ Additional facts are discussed in the Argument Section as necessary.

⁵ This brief uses “(cleaned up)” to indicate that internal quotation marks, alterations, and citations have been omitted from quotations. See Jack Metzler, *Cleaning Up Quotations*, 18 J. App. Prac. & Process 143 (2017).

“Contrary evidence supporting acquittal does not provide a basis for reversal because the jury is free to reject the Defendant’s version of the facts.” *State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438. Nonetheless, determining the sufficiency of evidence “does require appellate court scrutiny of the evidence and supervision of the jury’s fact-finding function to ensure that, indeed, a rational jury could have found beyond a reasonable doubt the essential facts required for a conviction.” *Id.* “[I]t is the independent responsibility of the courts to ensure that the jury’s decisions are supportable by evidence in the record, rather than mere guess or conjecture.” *State v. Slade*, 2014-NMCA-088, ¶ 14, 331 P.3d 930. “[E]vidence from which a proposition can be derived only by speculation among equally plausible alternatives is not substantial evidence of the proposition” *Id.* ¶ 14.

When sufficiency of the evidence turns on a matter of law or statutory interpretation, the issue is reviewed de novo. *State v. Marquez*, 2016-NMSC-025, ¶ 12, 376 P.3d 815.

B. Jeannine’s convictions for first degree murder are not legally or factually sustainable.

Jeannine was convicted of two counts of first degree murder in general verdicts based on her committing either felony murder or depraved mind murder. [2 RP 387-88, 397-98, 420, 425] “[A] jury’s general verdict will not be disturbed in such a case where substantial evidence exists in the record supporting at least one of the theories of crime presented to the jury.” *State v. Salazar*, 1997-NMSC-044, ¶ 32,

123 N.M. 778. However, “a conviction under a general verdict must be reversed where it is based on more than one legal theory and at least one of those theories is legally...invalid.” *State v. Mailman*, 2010-NMSC-036, ¶ 12, 148 N.M. 702.

1. Felony Murder.

Felony murder is “the killing of one human being by another without lawful justification or excuse...in the commission of or attempt to commit any felony.” NMSA 1978, § 30-2-1(A)(2) (1994). To establish that Jeannine committed two counts of felony murder, the State had to prove that she “committed the crime of Aggravated Fleeing a Law Enforcement Officer under circumstances or in a manner dangerous to human life,” that she caused the deaths of Mr. Lovato and Officer Duran “during the commission of” aggravated fleeing, and that she intended to kill or knew that her acts created a strong probability of death or great bodily harm. **[2 RP 387, 397]**; UJI 14-202 NMRA. In addition, the jury was also instructed on causation and required to find that the deaths were a foreseeable result of Jeannine’s conduct and that her actions were a significant contributing cause of the deaths. **[2 RP 392-93, 402-03]**; UJI 14-251 NMRA; UJI 14-252 NMRA.

Because of its potentially expansive reach, there are legal limitations on felony murder, including that (1) the predicate felony must be the actual and proximate cause of the death; (2) the predicate felony must be inherently dangerous; (3) felony murder is not appropriate where the victim of the predicate felony kills the

defendant's accomplice; (4) the defendant must possess at least the intent required for second degree murder, and (5) the predicate felony may not be a lesser included offense of second degree murder. *State v. O'Kelly*, 2004-NMCA-013, ¶ 24, 135 N.M. 40

This Court has already determined that aggravated fleeing is a collateral felony and “may serve as a predicate felony [for felony murder] so long as the requisite mens rea is also present.” *See State v. Groves*, 2021-NMSC-003, ¶ 2, 478 P.3d 915. However, because the defendants in *Groves* were directly involved in the fatal crash, *Groves* did not resolve the question of whether a defendant can be charged with felony murder when the defendant is not directly involved in the fatal accident and it instead occurs between other individuals on the road during the fleeing incident. 2021-NMSC-003, ¶¶ 10-11 (recognizing that there must be “a fundamental nexus between the act of the felony and the death. That is the actus reus of the felony must have an actual connection to the cause of the death” and finding it satisfied in that case).

In *O'Kelly*, the Court of Appeals considered whether a defendant could be charged with felony murder and held “responsible for lethal acts of third parties who are not accomplices;” the Court found felony murder inapplicable in such circumstances. 2004-NMCA-013, ¶ 20. There, following a rowdy party, the defendant and others were holding a gun to and beating an individual in the parking

lot. Another individual, Tellez, lived in a nearby apartment and, after being harassed by other partygoers, armed himself and left his apartment. Upon doing so, Tellez spotted the defendant and told him to let the individual go. The defendant pointed his gun at Tellez, who fired at defendant, causing defendant to return fire. In the ensuing gun battle, the defendant fired four shots, while Tellez fired 20, including one which fatally wounded an innocent bystander. *Id.* ¶¶ 2-5. None of defendant's gunshots wounded anyone, but he was nonetheless charged with felony murder and depraved mind murder. *Id.* ¶¶ 5-6.

In determining that felony murder did not apply because the death directly resulted from the acts of a third party, the Court of Appeals considered the extent to which our felony murder statute permits a defendant to be held liable for the acts of others. First, the *O'Kelly* Court noted that jurisdictions take two approaches to the liability of non-accomplices and either follow an “agency theory,” where a defendant is only liable for murder if the defendant or her co-felon actually performed the lethal act,” or they hold third parties liable under a “proximate cause theory” where a defendant is liable “for any death proximately resulting from the forcible felony or attempted forcible felony.” *Id.* ¶ 33 (cleaned up). The Court then examined New Mexico's caselaw and determined that New Mexico follows an “agency theory” and only holds a defendant liable for the fatal acts of codefendants

who are engaged in a common enterprise. *Id.* ¶¶ 34-45. Accordingly, the Court dismissed the felony murder charge. *Id.* ¶ 46.

Similar reasoning applies here. The evidence was not sufficient to prove that Jeannine or an accomplice performed the lethal act. Jeannine’s car did not hit either Mr. Lovato’s vehicle or Officer Duran’s vehicle directly.⁶ Instead, Officer Duran was in a head-on collision with Mr. Lovato’s vehicle and it occurred soon *after* Jeannine (and the initial pursuing police unit) had passed by Mr. Lovato’s vehicle. **[12/11/24 CD 2:08:50-09:42]; [Ex. 19]** Although the accident reconstructionist testified that Mr. Lovato and Officer Duran had insufficient time to avoid colliding after she passed by **[Id. 2:07:27-09:42, 2:10:38-12:20]**, he also indicated Jeannine was about 100-150 feet away when the fatal collision occurred. **[12/11/24 CD 2:26:53-32:43]** Consequently, Jeannine was not the individual who performed the lethal act resulting in death in this case.

Nor were Officer Duran or Mr. Lovato acting as Jeannine’s co-defendants or engaged in a common enterprise. Officer Duran pursued Jeannine’s vehicle initially because Jeannine had told Mr. Musser to call the police. **[Ex. 2]** However, as the

⁶ In *State v. Hertzog*, 2020-NMCA-031, ¶ 18, 464 P.3d 1090, the Court of Appeals indicated that, for purposes of the leaving the scene of accident statute, “accident” referred to more than just “collision,” but the Court did not offer a definition for “accident” beyond that, Jeannine was not charged with any offense under that statute, and it is not clear that its interpretation of that statute applies here.

other pursuing officers explained in their testimony, each individual officer independently chose not to terminate the pursuit and to continue pursuing the vehicle. [12/6/24 CD 3:15:32-16:51]; [12/9/24 9:29:00-30:44, 10:54:21-59] The pursuing officers also determined how close they wanted to be, how fast they wanted to travel, and the manner of their pursuit. *See* [12/6/24 CD 2:34:18-35:40, 2:44:17-45:33, 4:04:44-05:30] In sum, Jeannine maintains that, in accordance with *O’Kelly*, felony murder was not meant to be extended to this situation since the evidence did not establish that she or a co-defendant were directly involved in the fatal act. The basis of at least one of her convictions is therefore legally erroneous and reversal is required. *Mailman*, 2010-NMSC-036, ¶ 12.

Alternatively (or additionally), Jeannine maintains that the evidence was insufficient to sustain her conviction because it failed to establish that her acts caused the deaths of Mr. Lovato and Officer Duran. To prove that she caused the deaths of these men, the State had to prove that the deaths were a foreseeable result of her fleeing from law enforcement and that her conduct was a significant cause of death, that is her conduct was an act which, “in a natural and continuous chain of events, uninterrupted by an outside event, resulted in the death and without which the death would not have occurred.” *See* [2 RP 392, 402]; UJI 14-251. “There may be more than one significant cause of death. If the acts of two or more persons significantly contribute to the cause of death, each act is a significant cause of death.” *Id.* The jury

was similarly advised about contributory negligence and told that the negligent acts of another will “not relieve the defendant of responsibility for an act that significantly contributed to the cause of death so long as the death was a foreseeable result of the defendant’s actions. However, if you find the negligence of a person other than the defendant was the only significant cause of death or constitutes an intervening cause that breaks the foreseeable chain of events,” then the defendant is not guilty of first degree murder. **[2 RP 393, 403]**; UJI 14-252.

In *State v. Montoya*, 2003-NMSC-004, ¶¶ 20-21, 133 N.M. 84, this Court discussed causation when multiple actors contribute to a death and recognized that it applied when the defendant’s conduct directly caused or hastened a person’s death. *See id.* ¶ 21 (after analogizing the significant contribution language to the substantial factor test, explaining that the substantial factor test “only applies to situations ‘where two causes, *each alone sufficient to bring about the harmful result*, operate together to cause it’”). In *Montoya*, the victim was shot and the defendant (who had assisted the shooters) drove the victim away from the hospital to a levee far from the highway where the defendant left the victim alone to bleed out and die. *Id.* ¶¶ 2-8. According to medical testimony, the victim was likely die to regardless of medical intervention, but the expert said there was a chance the victim could have lived if taken to the hospital. *Id.* ¶ 27. Thus, in *Montoya*, the defendant’s conduct potentially contributed to or hastened death in a direct way which is absent here.

Jeannine was not directly involved in the fatal accident and had already passed by Mr. Lovato's vehicle when the accident occurred. Although the accident reconstructionist testified that Jeannine caused the fatal accident here because, in moving to avoid her, Mr. Lovato could not avoid a collision with Officer Duran, Jeannine does not believe that this makes her conduct a significant cause of death since her conduct, by itself, could not have caused their deaths. **[12/11/24 CD 2:08:50-09:42]**

Finally, even if sufficient evidence establishes causation, the evidence was not sufficient to prove she acted with the requisite intent. In *Groves*, this Court explained that New Mexico's felony murder statute requires "proof that the defendant *intended* to kill (or was knowingly heedless that death might result from his conduct). An unintentional or accidental killing will not suffice." 2021-NMSC-003, ¶ 34 (cleaned up). "Therefore, the proper inquiry focuses on where a certain defendant lies on a spectrum of intent with 'unintentional or accidental' sitting on one end and 'intentional' on the other. The closer the circumstances of a particular case are to intentional, the more appropriate it is to infer the requisite culpable mental state." *Id.*

In closing, the State admitted, "I don't know that she intended to kill," but maintained that Jeannine knew "that what she was doing was greatly dangerous to human life." **[12/12/24 CD 10:20:00-21:07]** As the State acknowledged, there was no evidence Jeannine specifically intended to kill anyone. The individuals involved

in the crash were strangers and Jeannine herself did not collide with them. The evidence indicated that she was trying to get away from the police and swerving to avoid vehicles.

The question then becomes whether the evidence was sufficient to show that she “fled the police with such disregard for human life that a reasonable jury could find that [Jeannine] knew [her] acts created a strong probability of death or great bodily harm.” *Groves*, 2021-NMSC-003, ¶ 37. The evidence in this case demonstrated that Jeannine fled from police by speeding and repeatedly driving the wrong way on roads in town and on the highway, but it did not demonstrate that she was trying to cause an accident. In addition, the State submitted evidence that she had engaged in such conduct previously, but that no one had gotten hurt in that incident. Accordingly, Jeannine maintains that the evidence did not show that she knew her acts created a strong probability of death or great bodily harm. Her conviction for felony murder must be reversed as it is legally erroneous and unsupported by sufficient evidence.

2. Depraved Mind Murder.

Depraved mind murder is defined as “the killing of one human being by another without lawful justification or excuse ... by any act greatly dangerous to the lives of others, indicating a depraved mind regardless of human life.” § 30-2-1(A)(3); *State v. Candelaria*, 2019-NMSC-004, ¶ 8, 434 P.3d 297.

Similar to her argument about the limits of felony murder, Jeannine maintains that she also cannot be held legally accountable for first degree depraved mind murder for deaths brought about by a third-party who is not an accomplice. In *O'Kelly*, the Court of Appeals also considered whether to “extend the depraved mind murder statute to include cases where the defendant sets in motion a chain of events that leads to the accidental death of a bystander” at the hands of another. 2004-NMCA-013, ¶ 16. The Court found that depraved mind murder did not apply in such circumstances and thus, did not cover unintentional killings where the lethal act was not committed by the defendant or an accomplice. *Id.* ¶ 17.

The same reasoning applies here. As explained, the evidence was not sufficient to show that Jeannine was directly involved in the lethal act. Consequently, first degree depraved mind murder is also an inapplicable theory of liability in this case and her convictions in Counts 1 and 2 must, therefore, be vacated.

If, however, this Court disagrees and finds that the evidence was sufficient to show Jeannine was directly involved in the lethal act, she maintains the State failed to show causation or that she acted with the requisite intent or knowledge. To convict Jeannine of first degree murder (depraved mind), the jury had to find that she (1) drove the wrong way on I-25 into oncoming traffic at a high rate of speed; (2) her act caused the death of Frank Lovato/Robert Duran; (3) her act was greatly dangerous to the lives of others, indicating a depraved mind without regard for

human life; and (4) she knew the act was greatly dangerous to the lives of others. [2

RP 388, 398]; UJI 14-203 NMRA. The jury was instructed that

[a] person acts with a depraved mind by *intentionally engaging in outrageously reckless conduct with a depraved kind of wantonness or total indifference for the value of human life. Mere negligence or recklessness is not enough. In addition, the defendant must have a corrupt, perverted, or malicious state of mind, such as when a person acts with ill will, hatred, spite, or evil intent.* Whether a person acted with a depraved mind may be inferred from all the facts and circumstances of the case.

Id. (emphasis added). As was true of felony murder, the jury was also required to find that the deaths were a foreseeable result of Jeannine’s conduct and that her actions were a significant contributing cause of the deaths. [2 **RP 392-93, 402-03]**; UJI 14-251; UJI 14-252.

The four indicators of a depraved mind are: (1) “more than one person [was] endangered by the defendant’s act,” (2) the defendant’s act was “intentional” and “extremely reckless,” (3) the defendant had “subjective knowledge that his act was greatly dangerous to the lives of others,” and (4) the defendant’s act “encompass[ed] an intensified malice or evil intent.” *State v. Dowling*, 2011-NMSC-016, ¶ 11, 257 P.3d 930 (cleaned up).

The subjective awareness requirement means that the defendant must know that (1) other people are in the zone of danger, and (2) her actions will hurt them. *See State v. Candelaria*, 2019-NMSC-004, ¶¶ 13, 24, 434 P.3d 297 (holding that a

defendant must be aware that a car is full of passengers for his shooting into the car to be depraved mind murder).

To prove that Jeannine had the requisite intent, the State pointed to the fact she crossed a barrier in order to drive against the flow of traffic, she drove on the wrong side of the road repeatedly during the pursuit, and she drove at a high rate of speed while doing so. [12/12/24 CD 10:00:57-04:44, 10:18:22-19:56] The State also relied upon evidence that Jeannine had done this previously, although there is no evidence anyone was injured during that incident. [*Id.* 9:59:46-10:01:48, 10:19:20-56] Jeannine does not believe this evidence shows her subjective awareness of the risks. On the contrary, the fact she had previously engaged in such behavior without hurting anyone suggests that she did not expect anyone to get hurt this time either.

Even if the evidence established her subjective awareness of the risks, the State had to prove that, under the totality of the circumstances, Jeannine was in fact acting with a depraved mind – i.e., “a corrupt, perverted, or malicious state of mind such as when a person acts with ill will, hatred, spite, or evil intent” when he exposed the victims to danger. *See* UJI 14-203; *State v. Reed*, 2005-NMSC-031, ¶ 24, 138 N.M. 365 (requiring an “intensified malice or evil intent”); *Candelaria*, 2019-NMSC-004, ¶ 14. This element requires the defendant’s acts to go far beyond mere recklessness and into what is often described as danger caused with intentional

“outrageousness.” *See Dowling*, 2011-NMSC-016, ¶¶ 11, 45; *Reed*, 2005-NMSC-031, ¶ 29 (recognizing that “[i]f recklessness were all the State ha dot prove... there would be little principled distinction between depraved mind murder and second-degree murder”). While the manner of Jeannine’s driving involved recklessness, she maintains that neither it nor evidence of the prior incident which did not involve harm to others established that she acted with an intensified malice or evil intent required to commit depraved mind murder.

3. Requested relief.

If this Court concludes that either basis for conviction was legally erroneous, then Jeannine’s convictions in Counts 1 and 2 must be vacated with retrial permitted only on legally viable grounds. *See Mailman*, 2010-NMSC-036, ¶ 12. If this Court concludes that both bases for conviction were factually insufficient, then she asks that her convictions in Counts 1 and 2 be vacated and the lesser offenses of vehicular homicide entered in their place.⁷ *See State v. Tafoya*, 2012-NMSC-030, ¶ 55, 285 P.3d 604 (remanding the case for entry of attempted second-degree murder where there was not sufficient evidence of first degree murder).

⁷ Although trial counsel suggested that the reasoning in *O’Kelly* might extend to vehicular homicide [12/11/24 CD 4:25:43-36:12], the *O’Kelly* Opinion indicates that depraved mind murder and felony murder do not extend to lethal acts by unrelated third parties because of the seriousness of those offenses. 2004-NMCA-013, ¶¶ 17, 38, 43. In addition, as a less serious crime, the vehicular homicide statute appears to take a broader approach to liability. *See State v. Munoz*, 1998-NMSC-041, ¶¶ 20-23, 126 N.M. 371.

C. The evidence was insufficient to establish great bodily harm by vehicle (reckless driving).

To establish great bodily harm by vehicle in Count 3, the State had to prove beyond a reasonable doubt that Jeannine operated a motor vehicle in a reckless manner and that her doing so caused great bodily harm to Alexis Jenkins. **[2 RP 407]**; UJI 14-240(D) NMRA; NMSA 1978, § 66-8-101(B) (2016). Great bodily harm was defined as “an injury to a person which results in permanent or prolonged impairment of the use of any member or organ of the body.” **[2 RP 408]**; UJI 14-131 NMRA. The State also had to show Ms. Jenkins suffered “permanent loss of full use of her elbow” and that this injury was a foreseeable result of Jeannine’s conduct, which conduct was a significant cause of Ms. Jenkins’s injury. **[RP 409]**; UJI 14-134 NMRA.

Pursuant to *State v. Franklin*, 1967-NMSC-151, ¶¶ 9-10, 78 N.M. 127, and *State v. Boyer*, 1985-NMCA-029, ¶ 17, 103 N.M. 655, Jeannine first maintains that the State failed to present sufficient evidence that her conduct caused Ms. Jenkins’s injury. Ms. Jenkins testified that when she saw the white Chevy Malibu and lights and sirens, she took evasive action and pulled off onto the median. **[12/9/24 CD 1:30:09-32:27]** She avoided Jeannine’s vehicle but said that, seconds later, she heard a crash and then her vehicle was hit by a police vehicle pursuing Jeannine’s car. **[Id.]** Although the accident reconstructionist indicated that Jeannine’s driving had left Ms. Jenkins and Officer Montano without sufficient time to avoid the crash

[12/11/24 CD 10:34:46-40:37, 2:07:27-09:21], Jeannine maintains that because she was not directly involved in the accident the evidence was not sufficient to show that her act of reckless driving caused Ms. Jenkins's injuries.

Jeannine also maintains that there was not sufficient evidence establishing that Ms. Jenkins suffered great bodily harm or the prolonged or permanent impairment in the full use of her elbow. At trial, Ms. Jenkins testified that as a result of the accident, she sustained a coronoid tip fracture on her elbow. [12/9/24 CD 1:35:45-37:09] After months of physical therapy, she said she was able to regain full range of motion in her elbow, but that she still suffered from the injury because, when doing certain activities like yoga or holding her baby for longer than 20 minutes, she experienced pain, stiffness, and muscle weakness. [*Id.* 1:37:51-40:22, 1:42:37-56] She testified that she still experienced the pain, stiffness, and weakness years later and, based on her doctor, thought it was possible she would experience these issues for the rest of her life. [*Id.*]

Although “[p]rolonged impairment” is not a technical term, it generally means a “lengthy or unusually long time under the circumstances.” *See State v. Cordova*, 2016-NMCA-019, ¶ 19, 366 P.3d 270 (finding prolonged impairment established where the victim suffered extreme and immobilizing pain for months with recurrent bouts of pain). Jeannine does not believe that occasional pain or stiffness when doing some activities constitutes prolonged, let alone permanent, impairment.

Additionally, Ms. Jenkins's testimony that she thought it was *possible* her injury would bother her for the rest of her life was speculation and not sufficient to establish permanent impairment beyond a reasonable doubt. *Cf. Slade*, 2014-NMCA-088, ¶ 14 (explaining that "evidence from which a proposition can be derived only by speculation among equally plausible alternatives is not substantial evidence of the proposition"). Jeannine's conviction must, therefore, be vacated.

D. The evidence was insufficient to establish possession of a stolen vehicle.

To establish that Jeannine committed the crime of possession of a stolen vehicle, the State had to establish beyond a reasonable doubt that Jeannine possessed the white Chevy Malibu, that it had been stolen or unlawfully taken, and that Jeannine knew or had reason to know that the vehicle had been stolen or unlawfully taken at the time she possessed it. [2 RP 411]; UJI 14-1652 NMRA. Pursuant to *Franklin*, 1967-NMSC-151, ¶¶ 9-10, and *Boyer*, 1985-NMCA-029, ¶ 17, Jeannine maintains that there was insufficient evidence of that the vehicle was stolen or that she knew as much at the time she possessed it.

To establish that the vehicle was stolen, the State submitted:

- Jeannine's letters acknowledging that she had been in a stolen car when fleeing from police and that it was an unwise decision on her part [Exs. 9, 63];
- testimony from two police officers who investigated the matter and mentioned the car was reported stolen and that Jeannine had blamed it on Mark Lopez [12/10/24 CD 10:36:03-37:00, 11:12:47-13:11, 1:59:31-2:07:44]; [12/11/24 CD 3:25:37-26:30, 3:27:00-28:43];

- a video of a woman watching a video of the car driving off on February 28, 2022, and verifying that it was her car [12/10/24 CD 1:59:55-2:04:00]; [Ex. 59]; and
- photographs of Jeannine in Las Vegas in the area where the car was taken only minutes before the car was taken [12/10/24 CD 2:04:00-07:44]; [12/11/24 CD 3:25:37-26:30, 3:27:00-28:43]; [Exs. 60-62]

Jeannine submits that reports of the vehicle were hearsay and that this evidence was not sufficient to establish that the vehicle was stolen. *Cf. People v. Canty*, 153 A.D.2d 640, 641 (NY. 1989) (finding insufficient evidence because “[a]n officer may not testify that a car is stolen based upon his ‘own personal knowledge’ where the source of that knowledge is a police radio transmission, since such testimony constitutes hearsay. Similarly, an officer’s testimony is hearsay where his ‘personal knowledge’ is based upon computerized sources or reports from unknown third parties”). She also maintains that this evidence was insufficient to establish that she knew or had reason to know the vehicle was stolen.

II. THE DISTRICT COURT ERRED IN ADMITTING EVIDENCE OF THE PRIOR INCIDENT IN CIBOLA COUNTY.

Before trial in her case, the State filed a notice of intent to use 11-404(B) evidence at trial, including evidence from the Cibola County incident where Jeannine had led police on a chase in stolen vehicle and later claimed to have been held at knifepoint by a man whose description was similar to the description in this case. [1 RP 77, 96] The State argued that the fact she had engaged in similar conduct

previously was admissible to show her intent, plan, identity, opportunity, lack of accident, lack of credibility, and to show she possessed the intent required for depraved mind murder. [1 RP 77-79, 96-98]; [2 RP 332-40]

The defense filed a response, arguing that the evidence was more prejudicial than probative and, even for the State's cited reasons, was essentially bad act character evidence that was not admissible in this case. [1 RP 106-08]

The district court held that evidence of the prior incident was admissible. In particular, the court found it was relevant for a non-propensity purpose and that its probative value was not substantially outweighed by the danger of unfair prejudice or confusing the issues. [12/6/24 CD 8:53:28-54:14]

The State's last witness at trial was therefore permitted to testify about and admit evidence related to the prior incident. [12/11/24 CD 4:03:46-24:39]; [Ex. 148] In closing, the State cited the prior incident as proof that Jeannine must have engaged in this conduct because she found it fun and that it proved she had a total disregard for the safety of others. [12/12/24 CD 9:59:47-10:01:48, 10:19:20-56]

A. Standard of Review.

"We review a trial court's decision to admit evidence under Rule 11-404(B) for abuse of discretion." *State v. Romero*, 2006-NMCA-045, ¶ 73, 139 N.M. 386. "An abuse of discretion occurs when the district court's decision can be

characterized as clearly untenable or not justified by reason.” *State v. Ervin*, 2008-NMCA-016, ¶ 9, 143 N.M. 493 (cleaned up).

B. The evidence of the prior incident was inadmissible propensity evidence that was substantially more prejudicial than probative.

Rule 11-404(B)(1) NMRA precludes the admission of evidence of a prior bad acts “to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.” Such evidence is unfairly prejudicial because it has “an undue tendency to suggest [a] decision on an improper basis, commonly, though not necessarily, an emotional one.” *State v. Stanley*, 2001-NMSC-037, ¶ 17, 37 P.3d 85 (cleaned up). Emotional bases include those “best characterized as sensational or shocking, provoking anger, inflaming passions, or arousing overwhelmingly sympathetic reactions, or provoking hostility or revulsion or punitive impulses, or appealing entirely to emotion against reason.” *State v. Sweat*, 2017-NMCA-069, ¶ 17, 404 P.3d 20 (cleaned up).

Rule 11-404(B)(2) permits admission of such evidence “for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” The district court “may exclude relevant evidence if its probative value is substantially outweighed by a danger of ... unfair prejudice.” Rule 11-403 NMRA; *State v. Jones*, 1995-NMCA-073, ¶ 5, 120 N.M. 185 (recognizing that “even if the evidence is admissible under [§] 11-404(B), district courts may exclude it” under 11-403).

The State said it wanted the evidence of the prior incident for non-propensity reasons such as proving intent, absence of mistake, and knowledge. However, “more is required to sustain a ruling admitting [other-acts] evidence than the incantation of the illustrative exceptions contained in the Rule.” *State v. Gallegos*, 2007-NMSC-007, ¶ 25, 152 P.3d 828. Even when used to show Jeannine’s state of mind, the evidence of the prior incident did so only by acting as improper character evidence.

[T]he defendant’s state of mind at the time of the present offense was proved by showing a state of mind on a previous occasion and positing that such a state of mind probably continued over time and across separate transactions. A state of mind that continues over time and governs otherwise unconnected acts is generally called a person’s character trait or propensity. It is difficult to understand how the evidence of other wrongs ... was relevant on any theory other than to show that the two defendants acted in conformity with their characters.

Lee Teitelbaum & Nancy Hertz, *Evidence II: Evidence of Other Crimes as Proof of Intent*, 13 N.M. L. REV. 423, 430 (1983). Likewise, “[e]vidence showing the recurrence of a similar result is just impermissible propensity evidence described using different words.” *State v. Lovett*, 2012-NMSC-036, ¶ 43, 286 P.3d 265. “We are hard pressed to determine how such evidence is probative other than by its tendency to establish that the defendant committed the charged crime because he committed a “strikingly similar” crime in the past. This is propensity evidence pure and simple and, albeit logically relevant, is exactly the kind of evidence that Rule 11-404(B) is meant to exclude.” *Gallegos*, 2007-NMSC-007, ¶ 31; *see also Jones*,

1995-NMCA-073, ¶ 11 (recognizing that “evidence of other bad acts should not be admissible to prove intent or mental state when all the acts show is propensity”).

Although evidence of a prior incident may therefore be relevant to show that the defendant committed the crime by acting consistently with his or her past conduct, such evidence is generally inadmissible because “the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect.” *Old Chief v. United States*, 519 U.S. 172, 181 (1997); *Gallegos*, 2007-NMSC-007, ¶ 21.

Beyond being inadmissible propensity evidence, the evidence was also inadmissible because it was far more prejudicial than probative. By the time the State admitted evidence of the prior incident, it had already presented significant evidence that Jeannine had fled police in a reckless manner and that she had lied about doing so. That is, the State had evidence in this case bearing upon the disputed elements here, making proof of her guilt in a prior case unnecessary. The availability of other means of proof is a factor to consider in determining probative value. *State v. Otto*, 2007-NMSC-012, ¶ 15, 157 P.3d 8. Since “there were alternative means of establishing the same fact,” the probative value of the evidence of the other acts was minimal. *State v. Villanueva*, 2021-NMCA-016, ¶ 37, 488 P.3d 680. At the same time, there is no question that the evidence of the prior incident of flight was highly

prejudicial. *Lovett*, 2012-NMSC-036, ¶¶ 50-51 (finding that evidence of a prior gruesome murder was inadmissible propensity evidence in a case also involving a gruesome murder because it “had the potential for significant prejudicial effect” due to its inflammatory and sensational nature).

C. The erroneous admission of evidence related to the prior incident was not harmless.

Non-constitutional errors require reversal when there is a reasonable probability that the errors contributed to the defendant’s conviction. *See State v. Tollardo*, 2012-NMSC-008, ¶¶ 32, 36, 275 P.3d 110. “In assessing the probable effect of evidentiary error, we should evaluate all of the circumstances surrounding the error. These circumstances include the source of the error and the emphasis placed on the error,” other evidence of guilt, and whether the error was cumulative. *State v. Duran*, 2015-NMCA-015, ¶ 20, 343 P.3d 207 (cleaned up); *Tollardo*, 2012-NMSC-008, ¶¶ 34, 43-44 (discussing a non-exhaustive list of factors).

In this case, the State submitted the evidence during its case in chief, but did so *after* having presented an entire case focused on the allegations directly at issue here. Thus, the State presented the evidence as being untethered to its main case but as a final, additional reason to convict Jeannine. [12/11/24 CD 4:03:46-24:39]; [Ex. 148] In closing, the State cited the prior incident as proof that Jeannine was guilty of first degree murder because, given the prior incident, she must have engaged in this conduct because she found it fun previously and thus had a total disregard for

the safety of others. [12/12/24 CD 9:59:47-10:01:48, 10:19:20-56] Given the State's presentation of the evidence as a distinct prior instance of misconduct and its reliance upon it as propensity evidence, it is more likely that it adversely impacted the jury's verdicts in this case.

Finally, although the State presented significant evidence related to the manner of Jeannine's flight and her subsequent lies about what occurred, there were disputed aspects of the case—such as Jeannine's actual involvement in the various accidents and causation—that were likely to be adversely impacted by the admission of the prior incident. Accordingly, the evidence of the prior incident admitted in this case was likely to adversely impact the jury, especially as to Counts 1, 2, and 3 since they were the most disputed aspects of the case. Reversal for a new trial is necessary.

III. JEANNINE'S CONVICTIONS FOR AGGRAVATED FLEEING AND RECKLESS DRIVING VIOLATE HER RIGHT TO BE FREE FROM DOUBLE JEOPARDY GIVEN THE OTHER CONVICTIONS IN HER CASE.

“The Double Jeopardy Clause protects against successive prosecutions for the same offense after acquittal or conviction and against multiple criminal punishments for the same offense.” *State v. Gonzales*, 2013-NMSC-016, ¶ 15, 301 P.3d 380 (cleaned up); U.S. Const. amends. V and XIV; N.M. Const. art. II, § 15. In the multiple punishment context, “the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.” *Missouri v. Hunter*, 459 U.S. 359, 366 (1983). Double jeopardy claims

may be raised for the first time on appeal and are reviewed de novo. *State v. Reyes-Arreola*, 1999-NMCA-086, ¶ 5, 127 N.M. 528.

In “double description” cases such as this, courts apply a two-pronged test to assess a potential violation. *Swafford v. State*, 1991-NMSC-043, ¶¶ 8-11, 112 N.M.

3. Courts must determine *first* “whether the conduct underlying the offenses is unitary, *i.e.*, whether the same conduct violates both statutes,” *Id.*, ¶ 25, and *second* “whether the legislature intended to impose multiple punishments for the unitary conduct.” *State v. Carrasco*, 1997-NMSC-047. ¶ 22, 124 N.M. 64.

A. The aggravated fleeing conviction must be vacated as it is subsumed in the murder charges.

Jeannine was convicted of aggravated fleeing and sentenced on that charge despite the aggravated fleeing forming the basis for the felony murder charge. [2 RP 442] It is well established that, under New Mexico law, a predicate felony is subsumed by the felony murder charge and, absent evidence of a distinct and additional instance of it, must be vacated if the defendant is also convicted of felony murder. *See State v. Frazier*, 2007-NMSC-032, ¶¶ 23-27, 142 N.M. 120. This is true even when, as here, the defendant is convicted under a general verdict with an alternative potential basis of liability. *See e.g., State v. Cardenas*, 2025-NMSC-____, ¶ 54, ____P.3d____, slip op. S-1-SC-39517 (Mar. 27, 2025) (explaining that there is a presumption conduct is unitary where instructions provide alternative bases

for conviction of an offense, one of which violates double jeopardy, and where the record fails to disclose which alternative the jury relied upon).

It appears that the district court recognized that this was double jeopardy and “merged” the aggravated fleeing count. [2 RP 443] However, “double jeopardy resulting from multiple convictions for the same offense is not cured by the merger of the offenses for sentencing purposes.” *State v. Vallejos*, 2000-NMCA-075, ¶ 27, 129 N.M. 424. Accordingly, the “district court was required not only to ‘merge’ Defendant’s convictions ... but to vacate one of those alternative convictions; simply sentencing Defendant for only one conviction was not enough.” *State v. Schoonmaker*, 2008-NMSC-010, ¶ 50, 143 N.M. 373. Jeannine’s conviction for aggravated fleeing, which acted as the predicate felony in the felony murder charges (and which conduct also formed the basis for the depraved mind murder) must be vacated.

B. Jeannine’s reckless driving conviction should be vacated as it is subsumed in the great bodily harm by vehicle, aggravated fleeing, and murder convictions.

Many of the charges in this case—including reckless driving, aggravated fleeing, the first degree murders (with vehicular homicide (reckless driving) as a lesser), and great bodily harm by vehicle (reckless driving)—arose during one continuous act of driving and are directly premised on the ongoing driving conduct. [1 RP 1-2]; [2 RP 387-90, 397-400, 407, 410, 413] The State did not attempt to

separate the reckless driving conduct from these other charges. [12/12/24 CD 10:28:43-29:11] Nor, given the continuous nature of the driving conduct, would it have been appropriate to do so because “[t]he Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units.” *Frazier*, 2007-NMSC-032, ¶ 23 (cleaned up); *see also State v. Padilla*, 2006-NMCA-107, ¶¶ 28, 30, 140 N.M. 333 (finding that although the defendant fled in a car and then on foot, the defendant’s conduct was unitary because “there was one course of flight from the police,” and “it is artificial to parse conduct when a suspect flees from the police in one way and then immediately continues to flee in another way”). Accordingly, Jeannine maintains that her conviction for reckless driving subjects her to double jeopardy with respect to multiple convictions and must be vacated.

For double-description cases, the *Swafford* Court adopted a two-pronged test for determining legislative intent to punish. Under the first prong, courts ask “whether the conduct underlying the offenses is unitary, i.e., whether the same conduct violates both statutes.” 1991-NMSC-043, ¶ 25. Under the second prong, courts consider whether the Legislature intended to permit dual punishment for the unitary conduct. *Swick*, 2012-NMSC-018, ¶ 11. “Only if the first part of the test is answered in the affirmative, and the second in the negative, will the double jeopardy

clause prohibit multiple punishments in the same trial.” *State v. Reed*, 2022-NMCA-025, ¶ 8, 510 P.3d 1261 (cleaned up).

1. Reckless driving and great bodily harm by vehicle (reckless driving).

“The conduct question depends to a large degree on the elements of the charged offenses and the facts presented at trial.” *Swafford*, 1991-NMSC-043, ¶ 27. “The proper analytical framework is whether the facts presented at trial establish that the jury reasonably could have inferred independent factual bases for the charged offenses.” *State v. Franco*, 2005-NMSC-013, ¶ 7, 137 N.M. 447. The State did not specify a particular basis for the reckless driving in the indictment, instructions, or in closing argument [1 RP 2]; [2 RP 413]; [12/12/24 CD 10:28:43-29:11], but there is no question that the great bodily harm by vehicle (reckless driving) conviction *required* the jury to find reckless driving since that was one of the elements of that offense. [2 RP 407] Accordingly, absent any clarification or reason to believe the jury understood the reckless driving had a distinct basis, the presumption is that these convictions relied upon unitary conduct. *Cardenas*, ____-NMSC-____, ¶ 54.

This presumption is further supported by consideration of various factors, including “whether acts were close in time and space, their similarity, the sequence in which they occurred, whether other events intervened, and the defendant’s goals for and mental state during each act.” *Franco*, 2005-NMSC-013, ¶ 7; *accord State v. Gonzales*, 2019-NMCA-036, ¶ 15, 444 P.3d 1064. Jeannine’s driving conduct was

continuous, occurring over the course of less than 15 minutes [Ex. 16, Clip 1], in the same town and done with the same intent of avoiding police. The conduct was therefore unitary.

When conduct is unitary, the Court proceeds to the second prong of the double-description inquiry “to determine if the Legislature intended for the unitary conduct to be punished as separate offenses.” *State v. Montoya*, 2011-NMCA-074, ¶ 40, 150 N.M. 415. In addressing legislative intent for double-description cases, the Court first looks to the statutes at issue to determine if they expressly provide for multiple punishments. *Swafford*, 1991-NMSC-043, ¶¶ 9-12. If they do not, the Court applies the *Blockburger* test or the modified test, and compares the elements of the relevant statutes and the State’s legal theory of the case to determine if the Legislature intended multiple punishments. *See State v. Gutierrez*, 2011-NMSC-024, ¶ 58, 150 N.M. 232. If the *Blockburger* or modified test “establishes that one statute is subsumed within the other, the inquiry is over and the statutes are the same for double jeopardy purposes—punishment cannot be had for both.” *State v. Almeida*, 2008-NMCA-068, ¶ 9, 144 N.M. 235 (cleaned up). “[I]f each statute requires an element of proof not required by the other, we presume that the legislature intended to punish the offenses separately.” *Id.* (cleaned up). “However, this is only an inference that leads to an examination of other indicia of legislative intent.” *Swick*, 2012-NMSC-018, ¶ 13.

The statutes do not expressly permit dual punishment. *See* NMSA 1978, § 66-8-113 (1987) (reckless driving); § 66-8-101 (homicide or great bodily harm by vehicle). Applying the modified test, the great bodily harm by vehicle (reckless driving) conviction clearly subsumes the reckless driving conviction because reckless driving is an element of the former. **[2 RP 407]** Indeed, our Courts have already recognized as much in similar contexts. *See e.g., State v. Santillanes*, 2000-NMCA-017, ¶ 15, 128 N.M. 752 (recognizing that DWI had to be vacated as it was subsumed in “the greater offense of vehicular homicide” based on DWI), *rev’d. on other grounds, State v. Santillanes*, 2001-NMSC-018, 130 N.M. 464; *State v. Brown*, A-1-CA-39233, 2022 WL 10225171, at *1 (N.M. Ct. App. Oct. 17, 2022) (non-precedential) (agreeing that “Defendant’s convictions for both reckless driving and great bodily harm by vehicle violate the constitutional prohibition of double jeopardy). Because the reckless driving conviction is subsumed in the great bodily harm by vehicle (reckless driving) conviction, “the inquiry is over and ... punishment cannot be had for both.” *Swafford*, 1991-NMSC-043, ¶ 30. The reckless driving conviction must be vacated.

2. Reckless driving and aggravated fleeing.

A similar analysis applies to reckless driving and aggravated fleeing. First, because this was all one ongoing act of flight, the conduct at issue is again unitary. Likewise, although worded slightly differently, the aggravated fleeing conviction

required the jury to find that Jeannine “drove willfully and carelessly in a manner that endangered the life of another person.” **[2 RP 410]** This language is markedly similar to that required for reckless driving: “[t]he defendant drove carelessly and heedlessly in willful or wanton disregard of the rights or safety of others and without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property.” **[2 RP 413]** Moreover, given the State’s general discussion of the basis for the aggravated fleeing and the absence of any specification in the reckless driving instruction or the State’s discussion of it in closing argument at trial, the State’s theory of liability for each charge relied upon the same general driving conduct for both convictions. **[12/12/24 CD 10:21:07-22:08, 10:28:43-29:11]**

3. Reckless driving and felony murder or depraved mind murder.

The felony murder convictions were premised on aggravated fleeing and thus also relied upon reckless driving. **[2 RP 387, 397]** Furthermore, it is clear that the depraved mind murder convictions were similarly premised on reckless driving. The instructions for depraved mind murder required the jury to find that Jeannine “drove the wrong way on I-25 into oncoming traffic at a high rate of speed” and that this act “was greatly dangerous to the lives of others.” **[2 RP 388, 398]** And the lesser alternative for all of the murder charges was homicide by vehicle (reckless driving) which directly required the jury to find that Jeannine “operated a motor vehicle in a

reckless manner.” [2 RP 389-90, 399-400] In sum, regardless of the theory, the State premised the murder charges on the ongoing reckless driving conduct. Accordingly, the reckless driving conviction was also subsumed in the murder allegations and must be vacated as subjecting Jeannine to double jeopardy in light of these convictions as well.

CONCLUSION

For the reasons set forth above, Jeannine Jaramillo respectfully requests that several of her convictions be vacated on double jeopardy or legal or factual sufficiency grounds. She additionally or alternatively asks for a new and fair trial.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this pleading was e-filed in the Odyssey File & Serve system and thereby electronically served on Van Snow at the New Mexico Department of Justice this 21st day of July, 2025.

/s/ Mary Barkot

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