IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO, **S-1-SC-39691**

Plaintiff-Appellee,

v.

SEIG ISAAC CHAVEZ,

Defendant-Appellant.

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT
SAN MIGUEL COUNTY, NEW MEXICO
THE HONORABLE ABIGAIL ARAGON

STATE OF NEW MEXICO'S ANSWER BRIEF

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Citations to the Record

Citations to filings in the record proper will be in the form **[(volume #) RP (Page #)]**

References to the digitally recorded audio Compact Disc of the proceedings below are cited, at first occurrence, in a full form citation indicating the date of recording followed by "CD", and the time of the passage as indicated when played on "For the Record" software (e.g., May 9, 2007, counter 9:23:21 to 9:23:37 is cited as **[5-9-07 CD, 9:23:21-37]**). Subsequent occurrences, where applicable, will utilize a short form citation that includes "*Id.*" followed by the time of the passage cited (e.g., **[*Id.* 9:24:45-25:15]**).

Statement of Compliance Pursuant to Rule 12-318(G)

Pursuant to New Mexico Rule of Appellate Procedure 12-318(G), I certify that the body of this Answer Brief, written in 14-point Times New Roman contains: **9,907** words. The answer brief therefore complies with Rule 12-318(F)(3). I relied on the word count provided by Microsoft Word, Microsoft Office Standard.

INTRODUCTION

Defendant appeals his convictions for first-degree murder and tampering with evidence. He claims the convictions are not supported by substantial evidence, that the district court should have granted his motion for a change of venue based on pretrial media coverage, that the prosecution impermissibly commented on his silence, and that improper propensity evidence was introduced against him resulting in plain error. Each claim fails.

Both convictions were supported by ample evidence that Defendant hunted down the victim, lured the victim into his vehicle, stabbed the victim repeatedly, then completely changed the appearance of his vehicle to evade detection. The district court correctly denied the request for a change of venue because there was no evidence of publicity-induced bias on the part of any juror. The prosecutor did not comment on Defendant's silence, but rather remarked on the implausibility of the defense's theory of the case. The alleged propensity evidence Defendant complains of was relevant to identity, modus operandi, intent, motive, and consciousness of guilt, and was therefore admissible.

Because Defendant has not demonstrated any error, let alone error worthy of reversal, his convictions for first-degree murder and tampering with evidence should be affirmed.

SUMMARY OF FACTS AND PROCEDURE

William "Skip" Smith, a developmentally disabled 71-year-old Las Vegas resident who was well-known within the community, was stabbed 24 times and left to die in an alleyway in the summer of 2019. **[State's Ex. 9; 9-26-22 CD, 3:01:39-03:02]** Following a comprehensive investigation that led to the discovery of Mr. Smith's blood in Defendant's vehicle and on a jacket found inside his home, law enforcement identified Defendant as the killer. The State charged Defendant with first-degree murder (willful and deliberate) and tampering with evidence.

While in jail awaiting trial, Defendant placed several phone calls to his family members, which were recorded. In one call, he suggested to his mother that Mr. Smith's blood was found in his vehicle by police because Mr. Smith "maybe . . . had a cut or something" when Defendant drove him somewhere to get a burger on the day of his death. **[State's Ex. 12, 2-5-21 recording]** In another call, Defendant forcefully instructed his son to kill anyone who "looks at" or "gets close" to him by stabbing them in the throat repeatedly. **[State's Ex. 12, 3-8-20 recording]** Defendant stipulated to the admission of both phone calls before trial. **[2 RP 272]**

Defendant requested a change of venue prior to trial. **[1 RP 102-139]** He argued that as a result of alleged "pervasive" media local coverage of the case he could not receive a fair trial in San Miguel County, yet attached only eight neutrally-written news articles and a few online postings of Mr. Smith's obituary to his motion

as support for the claim. **[Id.]** The district court elected to reserve ruling until after jury selection and ultimately denied Defendant's request when no publicity-induced bias was expressed by potential or empaneled jurors during voir dire. **[6-7-22 CD, 3:24:37]**

The following evidence was presented at Defendant's trial. Mr. Smith was well-known to Las Vegas residents, who often observed him walking through the community and frequenting local businesses. He was known to walk up and down Grand Avenue in particular and sit outside establishments drinking coffee or eating a burrito, and he was regarded as "a big part of" the community. Mr. Smith lived at a boarding home in town and did not work or drive, as he was developmentally disabled. **[9-26-22 CD, 3:01:39-03:02, 3:37:00]**

On the night of August 15, 2019, Mr. Smith was discovered lying face down in an alleyway between 5th and 6th Streets in Las Vegas, deceased.[1] **[Id. 2:55:00-3:01:38; State's Ex. 1C, 2B, 2D; 1 RP 8-9]** He had been stabbed 24 times in the head, neck, chest, abdomen, arm, and leg. **[State's Ex. 2F, 9]** Some of the stab wounds were as deep as 19 centimeters and penetrated Mr. Smith's heart, left lung, and liver. **[State's Ex. 9]**

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[1] A witness first observed Mr. Smith's body in the alleyway at some point after 5:30 PM that night but, because it was dark, the witness mistook Mr. Smith for a large bag. It was not until the next morning when the witness returned to the area that he realized the "bag" was in fact a body and called the police. **[9-27-22 CD, 10:50:20-11:05:00]**

Commander Elias Rael of the Las Vegas Police Department (LVPD) was responsible for investigating Mr. Smith's death. **[9-26-22 CD, 2:30:19, 2:55:00]** Knowing Mr. Smith's daily habit of walking along Grand Avenue, Commander Rael went to several business there to talk with staff and gather surveillance video from the hours before Mr. Smith was killed. He obtained footage from Dairy Queen, the Hillcrest Restaurant, KFC, the Sunshine Hotel, the Palomino Hotel, Little Moon Restaurant, and the Better Stop. **[Id.]**

From the footage, which was admitted in evidence and played for the jury **[State's Ex. 11, 24]**, Commander Rael learned the following: Mr. Smith was inside the Dairy Queen alone at 5:50 PM[2] on August 15, and he did not appear to be injured at that time. **[State's Ex. 11, Dairy Queen recording]** From there, Mr. Smith walked north through the Hillcrest Restaurant parking lot, crossed Grand Avenue, briefly entered the KFC, then walked past the Palomino Hotel at 6:31 PM. **[State's Ex. 11, Hillcrest recordings; KFC recording; Palomino Recordings]**

In the Palomino Hotel footage, a gold Chevy pickup truck with a silver toolbox in the bed is seen driving past Mr. Smith as he walks down the sidewalk. **[Id. Palomino Recording #1; 9-26-22 CD, 3:34:04-50:02]** Immediately after passing Mr. Smith, the truck pulls into the parking lot of the Townhouse Hotel, turns

[2] The time stamp on the video reads 7:51 AM, but Commander Rael clarified that the time stamp was not correct. **[State's Ex. 11; 9-26-22 CD, 3:38:18-32]**

around and drives back out on to Grand Ave. heading in Mr. Smith's direction and passing him a second time, turns around again and heads back the other way, then slows down before making a U-turn and pulling into the parking lot of the Little Moon Restaurant where Mr. Smith had walked. **[State's Ex. 11, Palomino recordings; 9-26-22 CD, 3:50:15-52:37]** Commander Rael believed the driver of the truck appeared to be "stalking" Mr. Smith, or at least actively driving around looking for and trying to make contact with him. **[9-27-22 CD, 9:33:50-35:36]**

Footage from Little Moon showed Mr. Smith had briefly entered the restaurant, gotten a beverage, and taken a seat on the sidewalk just outside the entrance. **[State's Ex. 11, Little Moon recordings #1-3, 5]** Just after sitting down, Mr. Smith is approached by a man Commander Rael later identified as Defendant. **[Id. recording #4]** After a very brief discussion, Mr. Smith and Defendant leave together in the gold pickup truck with Defendant driving south on Grand Ave. **[Id. recording #6; 9-26-22 CD, 3:54:30-4:05:29]** Mr. Smith is not seen in any surveillance footage after that point, and was left in the alleyway within a few hours.[3] **[9-27-22 CD, 10:50:20-11:05:00]**

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[3] In his brief in chief, Defendant states as fact that he and Mr. Smith "traveled down the street to get some food" and that "[a]fter buying Skip a hamburger, [he] dropped Skip off, and Skip returned to the boarding home." **[BIC 1]** He does not point this court to any actual evidence in the record that he drove Mr. Smith "down the street to get some food" and purchased Mr. Smith a hamburger, and no such evidence was presented at trial. Indeed, Defendant cites only testimony indicating that he *offered* to buy Mr. Smith food before Mr. Smith got into his truck. **[BIC 1]**

Ten days later, LVPD officers saw the Chevy truck parked outside a home near the LVPD station. By this time, however, the truck's appearance had changed—the gold paint had been recently sanded off leaving the truck gray in color, and the previously-silver toolbox was freshly painted with black paint. **[State's Ex. 5C-5H]** Through a registration check, officers determined Defendant was the registered owner of the truck and, when he approached the truck, they indeed identified him as the same person in the Little Moon surveillance footage. **[9-26-22 CD, 4:09:30-12:10]** Two of Defendant's neighbors confirmed that Defendant's truck was previously colored gold, but Defendant had recently removed the tool box and sanded the truck, leaving it a dull gray color. **[9-27-22 CD, 3:41:18-46:00, 3:56:00-57:27]**

Commander Rael secured search warrants for the truck and Defendant's residence. **[Id. 4:12:45, 4:19:50-23:56]** During the search of the truck, officers sprayed Blue Star—a solution that reacts to human blood and creates a temporary "vibrant stain"—on the upholstery of the passenger seat, and there was a positive reaction suggesting there had been blood on the seat. **[9-28-22 CD, 8:35:00-54:00]** Forensic lab testing confirmed that Mr. Smith's blood was indeed found on the underside of the passenger's seat. **[Id. 9:26:19-28:30; State's Ex. 10A]** Testing also

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There was no evidence establishing where Defendant took Mr. Smith after leaving the Little Moon parking lot.

confirmed that a jacket collected from Defendant's residence had Mr. Smith's blood on it in two different places. **[9-27-22 CD, 2:45:00-49:40; 9-28-22 CD, 9:31:00-35:40; State's Ex. 6E-6D, 10A]** Officers also located sandpaper and multiple cans of black spray paint believed to be the same paint used to change the color of the truck's tool box. **[9-27-23 CD, 8:39:00-9:01:30; State's Ex. 5J, 6B-6, 10A]**

The recorded jail calls mentioned above—in which Defendant claimed Mr. Smith had a cut when he rode in Defendant's truck, and advised his son to kill people by stabbing them repeatedly—were played for the jury. The defense did not present evidence or witnesses, but advanced the theory that Defendant innocently picked up Mr. Smith from the Little Moon in order to buy him a burger and then dropped him off. **[9-28-22 CD, 11:42:00-12:00:00]** Unconvinced, the jury found Defendant guilty of first-degree murder and tampering with evidence. **[2 RP 423, 425]**

ARGUMENT

I. Sufficient evidence supports Defendant's convictions.

Defendant claims the evidence was insufficient to support either of his convictions. **[BIC 6]** This Court "evaluates the sufficiency of the evidence in a criminal case by viewing the evidence in the light most favorable to the verdict, resolving all conflicts and indulging all permissible inferences in favor of upholding the conviction, and disregarding all evidence and inferences to the contrary." *State v. Trujillo*, 2012-NMCA-092, ¶ 5. The test for sufficiency 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 of the offense." *State v. Torrez*, 2013-NMSC-034, ¶ 40 (internal citation omitted). Importantly, "[a] reviewing court may neither reweigh the evidence nor substitute its judgment for that of the jury." *State v. Sutphin*, 1988-NMSC-031, ¶ 23, 107 N.M. 126.

A. The State presented sufficient evidence to sustain Defendant's conviction for first-degree murder.

Defendant claims his conviction for first-degree murder was not supported by sufficient evidence. **[BIC 8-12]** First-degree, willful and deliberate murder is "the killing of one human being by another without lawful justification or excuse ... by any kind of willful, deliberate and premeditated killing." NMSA 1978, § 30-2-1(A)(1) (1994). The jury was instructed on the elements of the offense consistent with Section 30-2-1 and UJI 14-201 NMRA. The instruction indicated in relevant part that to convict Defendant, the jury had to find: (1) Defendant killed Mr. Smith; (2) the killing was done with a deliberate intention to take away the life of Mr. Smith. **[2 RP 410]** Also consistent with the UJI, the instruction thoroughly defined "deliberate intent." **[Id.]** UJI 14-201 NMRA.

A jury may infer "from all of the facts and circumstances of the killing" whether a killer's actions were "arrived at or determined upon as a result of careful thought and the weighing of the consideration for and against the proposed course of action." UJI 14-201 NMRA. It is well-established that "[a] calculated judgment

and decision may be arrived at in a short period of time." *Id.* Ultimately, "[t]o constitute a deliberate killing, the slayer must weigh and consider the question of killing and his reasons for and against such a choice." *Id.* "Intent is subjective and is almost always inferred from other facts in the case, as it is rarely established by direct evidence." *State v. Sosa*, 2000-NMSC-036, ¶ 9, 129 N.M. 767 (internal quotation marks and citation omitted). Thus, "[d]eliberate intent may be inferred from the particular circumstances of the killing as proved by the State through the presentation of physical evidence." *State v. Duran*, 2006-NMSC-035, ¶ 8, 140 N.M. 94; *see also State v. Guerra*, 2012-NMSC-027, ¶ 28 ("In determining whether a defendant made a calculated judgment to kill, the jury may infer intent from circumstantial evidence; direct evidence of a defendant's state of mind is not required.").

The evidence established that Defendant oddly followed Mr. Smith after he spotted him walking along Grand Avenue, turning his vehicle around at least three times to track Mr. Smith's location before eventually finding him in the Little Moon parking lot. **[State's Ex. 11]** He approached Mr. Smith and apparently convinced Mr. Smith to get in the truck with him. Mr. Smith was dead within hours after being stabbed 24 times. After the killing, Defendant engaged in significant efforts to completely change the appearance of his truck. The presence of blood—specifically Mr. Smith's blood—was detected on the passenger's seat of the truck *and* in two

different places on a jacket found inside Defendant's home. In a recorded jail phone call after his arrest, Defendant described an identical manner of murder when he instructed his son to "keep [a] fuckin' knife on" his person and kill anyone who "gets close to" or "looks at" him by stabbing them in the throat "over and over" until the "don't fuckin' move," or by "bury[ing]" a knife in their throat. **[State's Ex. 12, 3-8-20 recording]**

From this evidence, a reasonable jury could have found beyond a reasonable doubt that Defendant killed Mr. Smith with the deliberate intent necessary to sustain his conviction. *See Duran*, 2006-NMSC-035, ¶ 8 (finding a reasonable jury could have believed the defendant had the deliberate intent to kill the victim by inferring from the physical evidence of a prolonged struggle and multiple stab wounds—some of which were on the victim's throat—and the defendant's statements about "stabbing a lady" after the victim's death); *Guerra*, 2012-NMSC-027, ¶ 29 (finding the jury could infer deliberate intent from evidence that the defendant stabbed the victim thirteen times and that many of the wounds were to vital organs, which supported a finding of "overkill"); *State v. Thomas*, 2016-NMSC-024 (finding sufficient evidence to sustain first-degree murder conviction where the body of the victim, who sustained a large number of wounds, was found in a parking lot and there were no witnesses to the killing but DNA on the victim's body matched the defendant's—who claimed to have never met the victim).

Defendant ignores the bulk of the evidence discussed above and claims the State's "only" potential evidence of premeditation was Commander Rael's testimony that Defendant was "stalking" Mr. Smith before convincing him to get in the truck. **[BIC 14-15]** This claim is plainly belied by *Duran*, *Guerra* and *Thomas*. Defendant also unsuccessfully relies on *State v. Garcia*, 1992-NMSC-048, 483 P.3d 590, for the notion that deliberate intent was not proven here. **[BIC 12-13]** *Garcia* can be easily distinguished, however. In that case, reversal of the defendant's first-degree murder conviction was based on a factual finding that the defendant had not weighed or considered the question of killing the victim. *Id.* Specifically, this Court considered whether the defendant's statement, "Remove [the victim] away from me or you're not going to see him for the rest of the day," supported an inference of deliberation. *Id.* ¶ 31. This Court concluded the statement did not support such an inference because, although it suggested the defendant intended to fight the victim, it did not indicate an actual intent to kill. *Id.*

This case is factually different from *Garcia*. Here, there was no verbal statement made to a third party prior to the killing which could be assessed for indicia of deliberate intent. Contrary to Defendant's suggestion, however, the lack of such a statement has no bearing on whether the other evidence of intent was sufficient. It is well-settled that deliberate intent can certainly be proven in the absence of a defendant's explicit declaration. *Sosa*, 2000-NMSC-036, ¶ 9. In this case, again,

there are several distinct pieces of evidence that support an inference of deliberate intent: Defendant's act of following Mr. Smith and luring him into his vehicle, the number and location of stab wounds inflicted upon Mr. Smith, Defendant's emotional description of an *identical* method of intentional homicide to his son after he was arrested, and Defendant's clear consciousness of guilt. *See State v. Cunningham*, 2000-NMSC-009, ¶ 29, 128 N.M. 711 (distinguishing *Garcia* and confirming that "circumstantial evidence is sufficient to uphold a first-degree murder conviction," including the defendant's statements about committing homicide); *Duran*, 2006-NMSC-035, ¶ 5 ("In our determination of the sufficiency of the evidence, we are required to ensure that a rational jury *could* have found beyond a reasonable doubt the essential facts required for a conviction." (emphasis in original)).

Defendant makes much of hearsay testimony that suggested Mr. Smith may have returned to the boarding house after his time with Defendant, and urges that this evidence alone established he could not have killed Mr. Smith. First, no live witness testified to seeing Mr. Smith at the boarding house during the relevant time period. Rather, an investigator was apparently told by an employee of the boarding home said Mr. Smith might have been there at 7:00 PM for dinner. **[9-27-22 CD, 9:40:00-40:33]** *See State v. Vigil*, 1982-NMCA-058, 97 N.M. 749 (noting that generally, hearsay evidence is incompetent to establish a fact). Second, it was up to

the jury to weigh any "contradictory" evidence and either believe or disbelieve such testimony. *State v. Foster*, 1999-NMSC-007, ¶ 42, 126 N.M. 646. Third, Mr. Smith being at the boarding house for dinner would not categorically disprove Defendant's guilt—all the remaining evidence is more than sufficient to establish that Defendant killed Mr. Smith.

The jury was simply not obligated to accept Defendant's claim that he innocently took his "friend" Mr. Smith to eat, that Mr. Smith must have "had a cut" which accidentally transferred blood onto the seat of Defendant's truck, and that Defendant then dropped Mr. Smith off and left. *See State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438 ("Contrary evidence supporting acquittal does not provide a basis for reversal[,] because the jury is free to reject [a defendant's] version of the facts."); *see also State v. Flores*, 2010-NMSC-002, ¶ 17, 147 N.M. 542 ("The law does not require testimony from a witness who personally saw [the] Defendant at the very moment he actually stabbed his victim."), *overruled on other grounds by State v. Martinez*, 2020-NMSC-002; *State v. Duran*, 1988-NMSC-082, ¶ 3, 107 N.M. 603 ("Just because the evidence supporting the conviction was circumstantial does not mean it was not substantial evidence.").

Similarly, on appeal this Court is not obligated to accept Defendant's assertions that he was not "stalking" Mr. Smith but rather they were "two friends meeting in a happenstance manner," that had he in fact stabbed Mr. Smith there

would have been a larger amount of blood in his vehicle, or that law enforcement "did not fully investigate" the murder such that someone else is likely responsible. **[BIC 9-12, 16]** *See Rojo*, 1999-NMSC-001, ¶ 19. Defendant's entire insufficiency argument hinges on his suggestion that this Court should completely disregard the State's evidence, override the jury's sound judgment, and blindly accept appellate counsel's theory of the case, which is improper. *See Cunningham*, 2000-NMSC-009, ¶ 30 (making clear that "the issue of deliberate intent [is] a question for the jury" and this Court "will not substitute [its] judgment for that of the trier of fact as long as there is sufficient evidence to support the verdict."). Defendant's conviction for first-degree murder was supported by sufficient evidence.

B. The State presented sufficient evidence to sustain Defendant's conviction for tampering with evidence.

The jury was instructed on the elements of tampering with evidence consistent with UJI 14-2241 NMRA. The instruction indicated in relevant part that to convict Defendant of the offense, the jury had to find: (1) Defendant destroyed, changed, hid, or fabricated the pickup truck; and (2) by doing so, he intended to prevent his apprehension, prosecution, or conviction for the crime of murder. **[2 RP 411]** Even in cases where there is "no other evidence of the specific intent ... to disrupt the police investigation, intent is often inferred from an overt act of the defendant." *Duran*, 2006-NMSC-035, ¶ 14.

The evidence at trial established that during the ten days after Mr. Smith's body was discovered, Defendant engaged in overt acts to drastically change the appearance of his truck by sanding off all the gold paint—leaving the truck a matte gray color completely different from its appearance at the time of the murder—and painting the once-silver toolbox in the truck bed with black spray paint. **[State's Ex. 6B-6C; and compare State's Ex. 8C-8D with 5C-5E]** This was sufficient to support the jury's verdict. *See State v. Chavez*, 2022-NMCA-007 (finding sufficient evidence to support conviction for conspiracy to tamper with evidence where, after the defendant shot the victim while the two stood outside their respective vehicles, the defendant parked his car in an alley and he and another man lit it on fire in an attempt to destroy it); *and compare State v. Silva*, 2008-NMSC-051, ¶¶ 18-19, 144 N.M. 815 (holding the State failed to meet its burden of proof where it "effectively asked the jury to speculate that an overt act of ... hiding [the murder weapon] had taken place, based solely on the fact that such evidence was never found" (alteration in original) (internal quotation marks and citation omitted)). Both Defendant's convictions were supported by substantial evidence, and the convictions should be affirmed.

II. The district court correctly denied Defendant's motion for a change of venue.

Defendant argues the district court erred by denying his motion for a change of venue, which he asserts should have been granted based on "extensive pretrial publicity" in the local community resulting in fixed opinions on the part of jurors. **[BIC 22-30]** Trial courts have broad discretion regarding change of venue and their rulings will not be disturbed absent a clear abuse of that discretion. *State v. Barrera*, 2001-NMSC-014, ¶ 11, 130 N.M. 227. A reviewing court will affirm a venue determination if it is "convinced that the trial court, in exercising its discretion, was 'guided by law, caution, and prudence.'" *State v. House*, 1999-NMSC-014, ¶ 31, 127 N.M. 151 (citation omitted). As the party opposing the district court's ruling on appeal, Defendant bears the burden to establish an abuse of discretion. *Barrera*, 2001-NMSC-014, ¶ 11.

Where a Defendant's request for a change of venue is opposed, he must establish by clear and convincing evidence that he cannot obtain a fair trial in the county where his case is pending, either because the inhabitants of the county are prejudiced against him or because, due to such prejudice, an impartial jury cannot be obtained. NMSA 1978, § 38-3-3(B) (2003); *State v. Lasner*, 2000-NMSC-038, ¶ 26, 129 N.M. 806. Prejudice may be actual or presumed. *State v. Astorga*, 2015-NMSC-007, ¶ 68. Arguments involving pretrial media coverage implicate claims of presumed prejudice. *House*, 1999-NMSC-014, ¶ 46.

Presumed prejudice occurs when "evidence shows that the community is so saturated with inflammatory publicity about the crime that it must be presumed that the trial proceedings are tainted." *Id.* ¶ 46. However, "the mere fact that publicity is widespread and that many people are familiar with a case does not automatically lead to the presumption that a venue has been impermissibly tainted." *Id.* ¶ 60. "Given the modern state of communications, it is not only unnecessary, but realistically impossible to expect jurors to be totally ignorant of the facts and issues of a case." *Id.* ¶ 51. The determinative inquiry is whether the barrage of publicity is so "demonstrably prejudicial" that jurors are left affirmatively and "strongly predisposed" against the defendant. *Id.* ¶¶ 57-58.

The *House* court set forth several factors to consider, the first being the neutrality and timing of pretrial publicity. *Id.* ¶ 60. Publicity will not be found prejudicial, even where it is pervasive and frequent, if it is "fair, neutral, unemotional, and generally limited to a recitation of the established facts," or where emotional and opinionated publicity occurred "months or years before the beginning of [the] trial." *Id.* (internal quotations omitted). The second factor is the form of the publicity: television coverage is considered more impactful on potential jurors than print coverage. *Id.* ¶ 62. The third factor is the size and nature of the community, and a larger metropolitan community with a population in the millions where "hundreds of murders are committed each year" will be "less likely to be corrupted by

sensational publicity about a trial." *Id.* ¶ 65. The fourth and sixth *House* factors examine actual juror prejudice and "fixed opinions," which may be evidenced by juror's statements that indicate "opinions that prevent[] them from making a judgment exclusively on the evidence presented at trial." *Id.* ¶¶ 70, 73. The fifth factor is statements by politicians about a case. *Id.* ¶ 71.

In *House*, extensive pretrial media coverage of a DWI-related accident that killed a mother and her daughters on Christmas Eve was found prejudicial enough to warrant a change of venue. 1999-NMSC-014, ¶ 77. The accident "became one of the most widely publicized cases in New Mexico history" such that "[t]he accident, and the defendant himself, became figureheads for those who were urging more punitive DWI laws in New Mexico." *Id.* ¶ 8. The media frenzy was so extensive that the trial court issued gag orders to the parties. *Id.* ¶ 10. The population of the county where the trial took place was only 23,000. *Id.* ¶ 65. There was also evidence of actual jury prejudice—after speaking with the jury, the judge concluded some jurors entered the proceeding with fixed opinions that prevented them from making a judgment on the evidence. *Id.* ¶ 70. Local politicians made inflammatory public comments about the trial in various local newspapers. *Id.* ¶¶ 71-72.

The pretrial publicity in this case was nothing like the pervasive, emotionally-charged media coverage in *House*. The degree to which local news outlets covered Mr. Smith's death and the ensuing investigation is to be reasonably expected when

a well-known individual is murdered in a relatively small community. And under the first *House* factor, the coverage was neutral. Defendant points to less than ten unremarkable, benign news articles or Facebook posts by news outlets between August 19, 2019 and February 27, 2020 that simply reported Mr. Smith's death, Defendant's arrest, other neutral facts about law enforcement's investigation, or the details of Mr. Smith's life in the Las Vegas community. **[BIC 26-27; 1 RP 102-139]** Under *House*, this is not the type of media coverage that warrants a change of venue.

Moreover, the fact that some community members commented on some of these articles with expressions of negative feelings regarding the homicide, or compassion for Mr. Smith, does not equate to a finding that the media coverage *itself* was anything other than "fair, neutral, unemotional, and generally limited to a recitation of the established facts." *House*, 1999-NMSC-014, ¶ 60. The timing of the coverage—roughly two years before Defendant's trial—also undercuts any claim of prejudice. *Id.* ¶ 60 (citing *Patton v. Yount*, 467 U.S. 1025, 1034 (1984) ("That time soothes and erases is a perfectly natural phenomenon, familiar to all."); *Murphy v. Florida*, 421 U .S. 794, 802 (1975) (finding the defendant's motion for change of venue was properly denied where the last significant publicity regarding his case was seven months before jury selection)).

Defendant also references a few websites that published Mr. Smith's obituary, where those who knew Mr. Smith left comments expressing sympathy or fond

memories. **[1 RP 102-139]** The online publishing of a deceased's obituary is a normal, routine occurrence following a death, and should not be regarded as "publicity" or "news coverage." Indeed, the obituary contained no reference to the facts of this case—or even Mr. Smith's manner of death—and was in no way inflammatory. **[Id.]** Accordingly, the first *House* factor does not weigh in Defendant's favor, nor does the second—Defendant points only to brief, printed articles rather than pervasive television coverage. *House*, 1999-NMSC-014, ¶ 62.

As to the third factor, although the State acknowledges that many members of the Las Vegas community became aware that Mr. Smith was murdered, Defendant has failed to establish any connection between that awareness and pretrial publicity. *See id.* ¶ 65 (explaining that with regard to this factor, "[t]he size and nature of a community are factors that can promote or dissipate the probability of prejudice *resulting from pretrial publicity*."). Defendant relies on written statements by potential jurors in supplemental juror questionnaires indicating their beliefs regarding guilt, but there is no discernable link between those beliefs and any media coverage. **[BIC 28-29]** As he points out, Las Vegas is a "tight-knit" community—its residents could have quickly learned of Mr. Smith's death by word-of-mouth rather than publicity. And given Mr. Smith's status in the community, it is not unreasonable that some residents expressed strong feelings regarding his death in general. But again, Defendant has made no effort to demonstrate a nexus between

those feelings and the handful of news articles he attached to his motion for change of venue. This factor therefore does not weigh in his favor.

Importantly, none of the potential jurors Defendant quotes in his brief in chief were actually summoned for voir dire—the parties agreed to strike and excuse each one based on their questionnaire answers over three months before the matter convened for jury selection. **[Compare 2 RP 266-271 with 6-7-22 CD, 2:09:42-41:00]** Even more importantly, Defendant's suggestion that the attitudes of these once-potential jurors reflected a bias common to the entire jury pool is demonstrably baseless. **[BIC 30]** During voir dire, none of the 61 remaining venire members or the 14 empaneled jurors expressed any bias, prejudgment of guilt, or fixed opinions based on media coverage. **[2 RP 384-87; 9-26-22 CD, 8:51:18-10:27:50]** This case is therefore unlike *House*, where seated jurors were later discovered to have harbored bias. And as this Court explained in *Barrera*, "[a] finding of no actual prejudice following voir dire, if supported by substantial evidence, necessarily precludes a finding of presumed prejudice." 2001-NMSC-014, ¶ 16; *see also State v. Romero*, 2019-NMSC-007, ¶ 17 (holding that the district court acted within its discretion in denying a motion to change venue because "[t]he jurors selected did not exhibit actual prejudice"); *State v. Montoya*, 2005-NMCA-078, ¶ 16, 137 N.M. 713 (upholding denial of motion to change venue based on "extensive pretrial publicity" in homicide case because "the trial court conducted extensive individual voir dire

and struck many members of the venire," and the defendant did "not show that there was any problem with any of the jurors seated for his trial").

Regarding the remaining *House* factor—statements by politicians—Defendant again fails to present anything that might tip the balance in his favor. Unlike *House*, there is no evidence here that any politician made a statement about the case. Rather, Defendant points only to the fact that the Mayor of Las Vegas signed a form approving the placement of a park bench commemorating Mr. Smith. **[BIC 30; 2 RP 96-100]** This is not a "statement" by a politician within the meaning of *House*, where politicians made inflammatory public comments about the defendant in multiple local newspapers. Even if it can be considered a statement, it in *no way* involved Defendant and was not at all inflammatory. Defendant would have this Court believe that any time a community grieves the loss of one of its members in a normal, unremarkable way, a change of venue is in order. This is simply not what *House* or Section 38-3-3(B) stand for.

Absent a presumption of prejudice, the district court correctly denied Defendant's request for change of venue. *See State v. Hernandez*, 1993-NMSC-007, ¶ 50, 115 N.M. 6 (rejecting a claim of presumptive prejudice based on pretrial publicity because "while many of the prospective jurors had read or heard about the case, all but a few could not remember what they had heard or read," and the

"[d]efendant was able to question these jurors and was able to challenge those who indicated partiality."). Defendant was not entitled to a change of venue.

III. The prosecution did not impermissibly comment on Defendant's constitutionally protected silence.

Defendant argues the prosecution improperly commented on his constitutionally protected right to remain silent at trial, but admits that he failed to object to the comment. **[BIC 31-32]** Without citation to the record proper, Defendant takes issue with statements made by the prosecutor in rebuttal closing regarding the defense's failure to plausibly explain how Mr. Smith's blood got into Defendant's truck. **[BIC 32-33]** Defendant fails to provide this Court with the whole picture though, which shows that the prosecutor was merely commenting on the evidence and Defendant's theory of the case rather than on his failure to testify.

The Fifth Amendment to the United States Constitution protects a defendant's decision not to testify at trial from prosecutorial comment. *State v. DeGraff*, 2006-NMSC-011, ¶ 12, 139 N.M. 211. Absent a timely objection to a purported comment on that decision, this Court reviews the issue for fundamental error. *State v. Allen*, 2000-NMSC-002, ¶ 27, 128 N.M. 482. This Court "first determine[s] whether any error occurred, i.e., whether the prosecutor commented on the defendant's protected silence[,]" and if so, this Court "then determine[s] whether the error was fundamental." *DeGraff*, 2006-NMSC-011, ¶ 21. An error is fundamental only if "there is a reasonable probability that the error was a significant factor in the jury's

deliberations in relation to the rest of the evidence before them." *Id.* (internal quotation marks and citation omitted).

Within this framework, this Court has identified "three factors that appear to carry great influence" in its analysis: "(1) whether the statement invades some distinct constitutional protection; (2) whether the statement is isolated and brief, or repeated and pervasive; and (3) whether the statement is invited by the defense." *State v. Sosa*, 2009-NMSC-056, 147 N.M. 351. This Court has held that no fundamental error occurs "where the prejudicial effect of the prosecutor's comments was minimal and the evidence presented by the prosecution was overwhelming." *DeGraff*, 2006-NMSC-011, ¶ 21 (internal citation omitted).

At the first step of the analysis, this Court "consider[s] whether the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on the accused's exercise of his or her right to remain silent." *Id.* ¶ 8. This Court "evaluate[s] the statement in context to determine the manifest intention that prompted the remarks, as well as the natural and necessary impact on the jury." *Id.* ¶ 9. Examining the prosecutor's statements in context here, it is clear that the prosecutor was not commenting on Defendant's failure to testify.

Months before trial, the defense stipulated to admission of the recorded jail phone call wherein Defendant told his mother that Mr. Smith's blood was found in

his truck and suggested that Mr. Smith "maybe . . . had a cut or something" when Defendant drove him somewhere. **[2 RP 272, 282; 9-26-22 CD, 2:26:17-29; State's Ex. 12, 2-5-21 recording]** The prosecutor told the jury in his opening statement that they would hear the recording, in which:

> [Defendant] acknowledges that he picked up Mr. Smith . . . and took him to [eat] . . . And he claims in that recording that—and I ask you to pay particular attention—that Mr. Smith 'must've had a cut' because there's a small amount of his blood on [Defendant's] vehicle and there must be some explanation . . . 'he must've had a cut.'

[9-26-22 CD, 2:16:05-16:54] The prosecutor posited that the evidence would show, however, that the blood actually came from Mr. Smith at the time he was stabbed to death. **[Id.]**

Per the parties' stipulation, the recording was played for the jury. **[9-27-22 CD, 9:04:00-05:05]** Witness testimony established that the blood law enforcement found in Defendant's truck indeed belonged to Mr. Smith. **[9-28-22 CD, 8:44:00-54:49, 9:22:18-29:15]** In his summation, the prosecutor reminded the jury: "You heard from the recording . . . that [Mr. Smith] must've had an injury—must've had a blood injury—and that's how he transferred blood to [Defendant's] vehicle. You hear that in the recording. That's the explanation he's giving to his mother." **[9-28-22 CD, 11:03:00-14:27]** Later in his closing, the prosecutor noted: "'Maybe he had a cut or something'—that's [the Defendant's] excuse, that's his explanation to you ladies and gentlemen [for] why Skip's blood is in his truck. That's his explanation."

[Id. 11:38:00] The prosecutor cast doubt on that explanation by noting there were no preexisting injuries located on Mr. Smith's body which might explain an incidental blood transfer, nor was there any visible blood on his clothing in the videos depicting him just before getting into Defendant's truck. **[Id.]** The prosecutor argued that, therefore, the only explanation for the blood in the truck was that Defendant stabbed Mr. Smith. **[Id. 11:33:00-34:00]**

In response, defense counsel argued to the jury that if Mr. Smith had been stabbed in Defendant's truck as the State theorized, there would have been blood "all over the truck," but instead, only a small amount of Mr. Smith's blood was found. **[Id. 11:53:09-56:01]** In the prosecutor's rebuttal, he argued:

> The last thing I want to touch base on, which [defense counsel] just ignored—no explanation whatsoever—[defense counsel] talks about the quantity of blood. 'You stick someone in the throat, folks, there's going to be blood everywhere.' I agree. I agree there would be a large volume of blood. But who had possession of the vehicle to clean it? [inaudible] Even if you're saying 'that's a lot of blood, how did he clean it, out of all those crevices, all of that,' how does he explain—and there is no explanation, zero—how [Mr. Smith's] blood was in his truck? None. No explanation.

[Id. 12:02:57-03:57] Defendant asserts this amounted to impermissible comment on his failure to testify because the prosecutor improperly argued he had not "provided" an explanation. **[BIC 32]**

The prosecutor's statement was certainly not a direct comment on Defendant's silence at trial. *See State v. Sena*, 2020-NMSC-011, ¶ 19 (explaining

that comments on a defendant's right not to testify may be direct or indirect, and that a direct comment "explicitly refers to the fact that the defendant did not testify"). Nor was the statement an indirect comment on the topic, because it was not "reasonably apt to direct the jury's attention to the defendant's failure to testify." *Id.* When viewed in the context of the trial as a whole, the prosecutor's statement was a comment on the evidence and the defense's theory of the case, and it did not implicate Defendant's silence. *See DeGraff*, 2006-NMSC-011, ¶ 8 (explaining that in determining whether a prosecutor improperly commented on a defendant's silence, this Court "consider[s] whether the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on the accused's exercise of his or her right to remain silent," and "evaluate[s] the statement in context to determine the manifest intention that prompted the remarks, as well as the natural and necessary impact on the jury.").

By the time the prosecutor made the statement, Defendant obviously *had* offered an explanation for Mr. Smith's blood being found in his truck—that Mr. Smith likely had a cut when Defendant picked him up—via the recorded jail phone call. The jury was plainly aware of this explanation, as the prosecutor explicitly mentioned it in his opening statement, later played the recording in open court, and even discussed the explanation *twice* in his closing argument. Accordingly, it would be illogical for the prosecutor to posit—only a few minutes after repeatedly

acknowledging Defendant's explanation—that Defendant offered no explanation whatsoever. Rather, the prosecutor was attempting to undercut Defendant's *implausible* explanation for the blood by suggesting there was no *rational* explanation other than that Defendant committed the charged murder. *See id.* ¶ 9 ("Where comments by the prosecutor are ambiguous, we consider what inference the jury was asked to draw from the defendant's silence and the propriety of that inference.").

Moreover, the jury was not asked to draw any inference of guilt from Defendant's decision not to testify—a decision which, again, was not mentioned. *Cf. State v. Gutierrez*, 2003-NMCA-077, ¶ 16, 133 N.M. 797 (collecting New Mexico cases declining to reverse convictions based on prosecutorial comments on silence where the comments were made for reasons other than proving the defendant's guilt). Instead, the prosecutor was permissibly commenting on the implausibility of Mr. Smith's blood ending up in Defendant's truck by innocent or inadvertent means. *See State v. LaMadrid*, 1997-NMCA-057, ¶ 10, 123 N.M. 463 (finding prosecutor's statement in closing that "[t]he only one who can tell you [his motive] is the Defendant" was not comment on the failure to testify because "the prosecutor was not suggesting that if Defendant were innocent, he would have testified to the motive," but rather, "[i]n the context of the earlier remarks . . . she was simply asking the jury to convict even though it could not know [the defendant's motive]."); *State*

v. Aaron, 1984-NMCA-124, ¶¶ 19-20, 102 N.M. 187 (finding prosecutorial comment on the defendant's failure to call an expert witness was not an improper comment on silence, but rather a permissible comment on the evidence or lack thereof).

Importantly, "during closing argument, both the prosecution and defense are permitted wide latitude[.]" *State v. Smith*, 2001-NMSC-004, ¶ 38, 130 N.M. 117 (internal quotation marks and citations omitted). "[R]emarks by the prosecutor must be based upon the evidence or be in response to the defendant's argument[,]" *id.*, which is precisely what occurred here. The prosecutor did not comment on Defendant's right to silence. *Compare Sena*, 2020-NMSC-011, ¶¶ 25, 31 (finding prosecutor's comments in closing that "directly asked the jury to draw adverse conclusions from the fact that Defendant did not take the witness stand and explain himself" warranted reversal) *and Gonzales v. State*, 1980-NMSC-070, ¶¶ 2-3, 94 N.M. 495 (finding prosecutor commented on the defendant's failure to testify when he argued in closing that the defendant "didn't deny" that he committed the crime and "didn't tell you what the reason was . . . [he] didn't give you any justification.").

Even if this Court finds the prosecutor's statement was somehow a comment on Defendant's decision not to testify, the comment did not result in fundamental error because there is no reasonable probability that it was a significant factor in the jury's deliberations in relation to the rest of the ample evidence before them.

DeGraff, 2006-NMSC-011, ¶ 21. Again, the jury *did* hear Defendant's explanation for the blood in his truck at least four times during trial—three from the prosecutor and once from Defendant himself on the recorded jail call. The comment was isolated and brief and, as Defendant acknowledges, "[t]he general rule is that an isolated comment made during closing argument is not sufficient to warrant reversal." **[BIC 34 (quoting *Sosa*, 2009-NMSC-056, ¶ 24)]** Moreover, immediately after the comment was made, the jury was instructed that "the burden is always on the state to prove guilt beyond a reasonable doubt" and that they must "not draw any inferences of guilt from the fact that the defendant did not testify[.]" **[2 RP 409, 414]** *See State v. Benally*, 2001-NMSC-033, ¶ 21, 131 N.M. 258 (confirming that the jury is presumed to follow instructions given by trial court).

Any possible prejudicial effect of the prosecutor's statement was outweighed by the ample evidence against Defendant. *DeGraff*, 2006-NMSC-011, ¶ 21. As explained earlier in this brief, the evidence of Defendant's guilt was more than sufficient to support his conviction for first-degree murder. Weighed against the ample evidence, and in light of the fact that the jury was well-aware of Defendant's explanation for Mr. Smith's blood being found in his truck, the prosecutor's statement did not rise to the level of fundamental error. Defendant's claim therefore fails.

IV. Defendant failed to preserve any objection to admission of the jail call on propensity grounds, and even if his claim is reviewed, no plain error occurred.

Defendant asserts the district court committed plain error when it permitted the admission of the recorded jail call between Defendant and his son wherein he ordered his son to kill people by stabbing them repeatedly in the throat. **[BIC 36]** He claims the phone call was improper propensity evidence prohibited by Rule 11-404 NMRA. **[BIC 38]**

A. Defendant's unpreserved claim should not be considered.

Defendant concedes that, below, he never objected to the call on propensity grounds. **[BIC 38]** Rather, after the State filed notice of its intent to introduce the call **[1 RP 161-67]**, defense counsel stipulated that there was an adequate foundation for its admission but vaguely asserted he did not "know how it's relevant." **[6-7-22 CD, 2:04:29-09:05]** The prosecutor explained the call was not hearsay because it was Defendant's own statement and that it was relevant because Defendant described acts consistent with the manner in which Mr. Smith was killed. **[Id.; 1 RP 164]** The district court ruled the call would be admitted, reasoning it met the "low bar" for relevance and that the danger of unfair prejudice did not substantially outweigh its probative value. **[6-7-22 CD, 2:04:29-09:05]**

Defendant later stipulated to admission of the call **[2 RP 272]** and it was played for the jury during trial. **[9-27-22 CD, 9:05:50-07:18]** In it, Defendant stated to his son:

> And you don't trust anybody. You keep that door locked. And you keep your fucking knife on you. Anybody gets close to you, **you stick 'em in their fuckin' throat, and you stick 'em again and again**. I ain't fucking around. This is your daddy telling you this. Anybody tries touching you, **you put that fuckin' knife straight in their fuckin' throat, and you do it again and again until they don't fuckin' move**. **Then you do it to everybody**. You're the man of the house. You are the one to protect everyone . . .
>
> I'm ordering you. **And I'll go down and go to hell for it**. You don't worry about that shit. I'm telling you to do this. You keep that knife in your pocket, that I got you, that sharp one. And you keep it on you at all times. And you never let that fucking thing out of your sight. You understand me? . . . **And I don't give a fuck who it is**. **If they look at you funny** or, you don't trust nobody. You don't turn your back on nobody. You make sure them doors are locked at all fucking times. **And you get up—anybody tries touching you—you stick that fucker, you bury it in their fucking throat**. You understand me?
>
> . . . I ain't fucking around dude. **Daddy's going to prison**.

[State's Ex. 12, 3-8-20 recording]

On appeal, Defendant's claim that the call was inadmissible propensity evidence is not preserved. *See* Rule 12-321(A) NMRA ("To preserve an issue for review, it must appear that a ruling or decision by the trial court was fairly invoked."); *State v. Montoya*, 2015-NMSC-010, ¶ 45 ("In order to preserve an issue for appeal, a defendant must make a timely objection that specifically apprises the trial court of the nature of the claimed error and invokes an intelligent ruling

thereon."). Defendant barely opposed admission of the phone call and did so only on relevance grounds. *See State v. Salazar*, 2006-NMCA-066, ¶ 9, 139 N.M. 603 (stating that "parties cannot change their arguments on appeal"). Given this failure to preserve the issue, this Court should decline to consider it. *See State v. Arvizo*, 2021-NMCA-055, ¶ 44 (declining to review the defendant's argument that a recorded phone call was inadmissible propensity evidence because, at trial, the defendant objected to the call only on relevance grounds, meaning his propensity claim was unpreserved); *c.f. State v. Trujillo*, 2002-NMSC-005, ¶ 13, 131 N.M. 709 (declining to address the defendant's Confrontation Clause claim that was not preserved through objections to testimony on hearsay and impeachment grounds).

If Defendant's unpreserved claim is considered, he agrees that a plain error standard of review applies. **[BIC 36]** *State v. Lucero*, 1993-NMSC-064, ¶ 13, 116 N.M. 450. "To establish plain error, the error complained of must have affected substantial rights although [the plain errors] were not brought to the attention of the judge." *Id.* (internal citation and quotation marks omitted, alterations in original). To find plain error, this Court "must be convinced that admission of the [evidence] constituted an injustice that created grave doubts concerning the validity of the verdict." *Montoya*, 2015-NMSC-010, ¶ 46 (internal citation omitted). Here, no such grave doubts exist and therefore no plain error occurred.

B. The jail call was not "other bad act" evidence under Rule 11-404, and even if it was, it was admissible because it was relevant to identity, intent, motive, modus operandi, and consciousness of guilt.

As the prosecutor argued below, the State may generally introduce an opposing party's statement as non-hearsay evidence under Rule 11-801(D)(2) NMRA. **[1 RP 164]** Additionally, relevant evidence is admissible unless it is otherwise prohibited by law. Rule 11-401 NMRA. Under Rule 11-404(B)(1)-(2) NMRA, evidence of other crimes or bad acts "is not admissible to prove a person's character" to show that "the person acted in accordance with the character," but may be admitted to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." This list is not exclusive. *State v. Gallegos*, 2007-NMSC-007, ¶ 22, 141 N.M. 185. "Although modus operandi is not expressly stated under Rule 11–404(B), New Mexico case law has generally regarded Rule 11–404(B) as being inclusive rather than exclusive . . . and the use of modus-operandi evidence to prove identity has frequently been recognized." *State v. Peters*, 1997-NMCA-084, ¶ 13, 123 N.M. 667 (internal citations omitted).

Whether the jail call even qualified as "other bad act" evidence within the confines of Rule 11-404 is debatable. Defendant merely advised his son on how to handle a hypothetical future situation in which Defendant himself would not be involved. This was certainly not an "other crime" and, although Defendant's advice was patently unreasonable, his words did not amount to an "other act." In *Allen*, this

Court held the defendant's post-arrest statement about his intent to "shoot it out" with police prior to his arrest was not a "prior bad act" within the meaning of Rule 11-404 "because no evidence was presented to show that Defendant carried out his intent." 2000-NMSC-002, ¶ 44. The same is true here—Defendant's post-arrest statement to his son merely referenced a hypothetical intent that Defendant did not later carry out or even indicate that he intended to carry out himself. Therefore, under *Allen*, this Court should find the jail call was not "other bad act" evidence subject to Rule 11-404's admissibility restrictions, and was admissible as a statement by a party-opponent

Even if the call did qualify as bad act evidence, it was nevertheless admissible for several non-propensity purposes. First, it was probative of the identity and modus operandi of Mr. Smith's killer. Evidence is admissible to prove identity despite Rule 11-404 concerns "when it demonstrates a unique or distinct pattern easily attributable to one person." *State v. Lovett*, 2012-NMSC-036, ¶ 40 (internal quotation marks, citation, and alteration omitted). The relevancy of such evidence "depends on the degree of similarity." *Id.* Obvious similarities in separate acts can also establish a suspect's modus operandi because they "could logically lead a jury to the inference" that the acts were committed by the same person. *State v. Peters*, 1997-NMCA-084, ¶ 15, 123 N.M. 667.

In *Peters*, our Court of Appeals concluded that evidence of the defendant's prior armed robbery was admissible for identity and modus operandi purposes at trial for his more recent armed robbery because the two crimes were practically the same—"[b]oth were armed robberies and rapes of elderly female victims, committed in the victims' homes at night, using a knife, in the same neighborhood." *Lovett*, 2012-NMSC-036, ¶ 40 (discussing *Peters*, 1997-NMCA-084, ¶¶ 3-5, 15). This Court distinguished *Peters* in *Lovett*, where it held the defendant's acts during two murders were too distinct to constitute admissible identity evidence. There, the killer "used different weapons, left the victims in different locations, left entirely different physical evidence at each scene, and inflicted different wounds on the victims" such that investigators "never recognized any pattern in the two crimes[.]" 2012-NMSC-036, ¶ 41.

This case mirrors *Peters* and is easily distinguishable from *Lovett*. In the jail call, Defendant essentially described Mr. Smith's *exact* manner of death—repeated stabbing that included multiple stab wounds to the neck/throat area—which is a unique modus operandi. **[State's Ex. 9]** *See also State v. Corbin*, 1991-NMCA-021, ¶ 22, 111 N.M. 707 (finding uncharged acts of child sex abuse were admissible as modus operandi evidence because all the victims were boys in the same age group who worked for the defendant and were similarly abused by him during a single time period). Unlike the defendant in *Lovett*, Defendant discussed the same weapon and

identical wounds to those present in this case. The jail call was admissible identity and modus operandi evidence.

Second, the jail call bore on Defendant's intent. As he admits in his brief in chief, the call was "the State's most probative evidence of premeditated and deliberate murder in this case." **[BIC 43]** Indeed, in the call Defendant explicitly contemplated repeatedly stabbing any person, or "everybody," in the throat in order to end their life if they did something he took issue with. *See State v. Gattis*, 1986-NMCA-121, ¶ 23, 105 N.M. 194 (noting "[t]he proven circumstances from which an accused's state of mind or intent can be inferred are his acts, conduct and words" and finding that the intent to commit an offense can be shown by other instances of the defendant committing that same offense); *State v. Marquez*, 1974-NMCA-129, ¶ 35, 87 N.M. 57 (finding evidence that homicide defendant got into an argument with some carnival workers and fired shots into the ground using the same gun he used to kill the victim with two days later was relevant to his intent because it showed "the state of mind of the defendant, [and] his characteristic conduct in the use of a gun");

The call also evidenced a potential motive for the killing of Mr. Smith. Defendant advised his son to kill anyone who "gets close to" him, "tries touching" him, or "looks at" him by "bury[ing a knife] in their fucking throat." This suggests Defendant could have been motivated to stab Mr. Smith because Mr. Smith engaged

in the relatively innocuous behaviors that Defendant apparently finds unacceptable and worthy of death. **[State's Ex. 12, 3-8-2020 recording]** *See, e.g., State v. Ibn Omar-Muhammad*, 1987-NMSC-043, ¶¶ 28-30, 105 N.M. 788 (holding evidence of the defendant's unauthorized departure from a detention facility six weeks before he drove through a police barricade and killed a bystander was admissible motive evidence at his trial for the bystander's murder).

Finally, the call indicated consciousness of guilt—particularly Defendant's assurances that he would "go down" and "go to hell" for any stabbings deaths and that he was "going to prison." **[Id.]** Defendant is mistaken that the prosecutor made a "propensity argument" when, in closing, he argued that Defendant "acknowledged his culpability." **[BIC 43]** Propensity and culpability are not the same thing, and evidence that might be otherwise inadmissible may still be relevant to show consciousness of guilt. *See State v. Martinez*, 1999-NMSC-018, ¶ 29, 127 N.M. 207 (acknowledging that evidence of a defendant's prior bad act was admissible under Rule 11-404 because it demonstrated the defendant's consciousness of guilt under the circumstances).

If anything, the prosecutor's closing argument confirms the jail call was *not* introduced for propensity purposes but rather was relevant to this issues discussed above. The prosecutor pointed out the similarity between Mr. Smith's manner of death and the jail call regarding the number of stab wounds—Mr. Smith was stabbed

24 times including twice in the neck, and Defendant told his son to "stick [someone] in the neck . . . over and over again." **[9-28-22 CD, 10:55:00-56:40]** As already explained, this is an appropriate remark on modus operandi and identity. The State disagrees with Defendant's characterization of the call as "the focal point" of the State's case **[BIC 43]**. Although the prosecutor obviously discussed the call in his summation—as he did all the relevant evidence that had been presented—there was not the kind of undue emphasis on the call that Defendant claims there was. For this reason, and in light of the other ample evidence of Defendant's guilt and his failure to preserve a claim under Rule 11-404, Defendant's alternative harmless error argument fails. **[BIC 43]** *See State v. Rivas*, 2021-NMSC-008, ¶ 51 (explaining that when considering harmless error, a court examines in part the importance to the prosecution's case of the erroneously admitted evidence).

Any of the above-mentioned exceptions to Rule 11-404's bar on bad act evidence justified admission of the jail call, if the call can be considered bad act evidence at all. As the district court reasoned, the probative value of the call also outweighed any danger of unfair prejudice. *State v. Woodward*, 1995-NMSC-074, ¶ 19, 121 N.M. 1 ("Because a determination of unfair prejudice is fact sensitive, much leeway is given trial judges who must fairly weigh probative value against probable dangers."). The call was highly probative of several issues unrelated to propensity, and in it, Defendant did not confirm that he had *actually committed* some prior crime.

Thus, the chances that the jury viewed the call only as evidence that Defendant has a propensity to stab people is quite low. Importantly, even if the call did present some degree of risk of suggesting such a propensity, that does not render the call unfairly prejudicial. *See State v. Otto*, 2007-NMSC-012, ¶ 16, 141 N.M. 443 ("Evidence is not unfairly prejudicial simply because it inculpates the defendant . . . Rather, prejudice is considered unfair when it goes *only* to character or propensity." (internal quotation marks and citation omitted, emphasis added)).

To the extent Defendant argues the call should not have been introduced without the context of his being threatened or attacked while in custody awaiting trial, that context would not change the probative nature of the call as it pertains to identity, modus operandi, intent, and potential motive. Because the call was non-propensity evidence that was more probative than prejudicial, no plain error resulted from its admission. Defendant's convictions should be affirmed.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm Defendant's convictions.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that on August 7, 2023, I filed the foregoing pleading electronically through the Odyssey/E-File & Serve System, which caused opposing counsel, Marc Lowry and Roshanna Toya, to be served by electronic means at: mlowry@rothsteinlaw.com and rtoya@rothsteinlaw.com, respectively.

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