IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

S-1-SC-39691

STATE OF NEW MEXICO,

Plaintiff-Appellee,

vs.

SEIG ISAAC CHAVEZ,

Defendant-Appellant.

DEFENDANT-APPELLANT SEIG ISAAC CHAVEZ'S BRIEF-IN-CHIEF

Appeal from the Judgment and Sentence,
The Honorable Abigail Aragon, District Judge, Presiding,
No. D-412-CR-2021-00026

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FACTUAL BACKGROUND

On August 15, 2019, Defendant Chavez, traveling through Las Vegas, New Mexico, and saw William "Skip" Smith walking on a main street in Las Vegas. Skip was well known in the Las Vegas community, **[9-26-22 CD 3:37:37-43]** and lived at a local Boarding House. Skip had some mental incapacities, was not employed, and meandered the streets of Las Vegas daily. **[9-26-22 CD 3:37:02-21; 9-27-23 CD 1:53:05-58]**. As he frequently did, Mr. Chavez stopped to ask Skip if he had anything to eat or drink that day. **[*See* 1 RP 11]**. Mr. Chavez offered to buy Skip a hamburger, so Skip joined Mr. Chavez in his truck and travelled down the street to get some food. **[9-27-23 CD 9:37:57-38:40; 10:45:26-15; 2:37:44-38:39]**. After buying Skip a hamburger, Mr. Chavez dropped Skip off, and Skip returned to the Boarding House. **[9-27-22 CD 9:40:00-42:18]** Law Enforcement never fully investigated the Boarding House to confirm precisely when Skip arrived after departing Mr. Chavez's company. **[*Id.*]**

The next day, on August 16, 2019, another community member, Mr. Montano, found Skip lying in an alleyway, unresponsive. Mr. Montano asked a neighbor to call the police. **[1 RP 7-9]**. When the Las Vegas Police Department ("LVPD") arrived, they found Skip in a pool of blood, with a trail of blood spots leading from Skip's body, but no clear indication of whether the blood trail was coming from or going to the nearby roadway. ***Id.*** The Office of Medical Investigators ("OMI") later

reported that Skip had been stabbed 24 times, some in the throat, most likely on the night of August 15, 2019. **[1 RP 7, 14]**.

LVPD interviewed people in the neighborhood and people associated with nearby businesses. Officers reviewed video surveillance from private and commercial establishments on or near the alleyway and along Grand Avenue on August 15, 2019. They also reviewed OMI reports, forensic evaluations of the evidence found at the scene and from a search of Mr. Chavez's property. **[*See* 1 RP 9-15].** Law enforcement learned from surveillance videos that Skip stopped at the Little Moon restaurant on August 15, 2019, where Mr. Chavez picked Skip up in his truck to go get some food. **[1 RP 11]**. A witness told investigators that Mr. Chavez and Skip departed in Mr. Chavez's truck. ***Id.*** Surveillance cameras placed Mr. Chavez and Skip leaving the Little Moon restaurant at 6:40 p.m. **[1 RP 10]** Testimony indicated that Skip returned to the Boarding House later that evening and ate dinner. **[9-27-22 CD 2:20:37-21:39; 9:40:55-41:10]** (citing State's Ex. 9, autopsy report).

Based on the vehicle description in the surveillance videos and the LVPD's investigation, the State claimed at trial that Mr. Chavez was the last person to see Skip before he was killed. The evidence, however, shows that was not the case. The trial testimony showed that the Boarding House owners were the last people to see Skip alive. **[*Id.*]** The State never accounted for what happened to Skip after Skip ate

dinner at the Boarding House. Skip's movements after returning to the Boarding House were not captured on surveillance video. The timeframe after the Boarding House dinner was not thoroughly investigated by LVPD. Sgt. Elias Rael, the lead investigator, admitted that he did not talk to the Boarding Home's staff or residents, even though he was made aware that Skip was present at the Boarding House after leaving Mr. Chavez's company. **[9-27-22 CD 9:39:48-42:17]**. Officer Gutierrez testified that she failed to follow up with the Boarding House owners about Skip after learning that Skip ate his evening dinner there. **[9-27-23 CD 2:24:02-51]**.

Based on the trial evidence, the State failed to present sufficient evidence for a reasonable jury to convict Mr. Chavez of a first-degree murder charge and a tampering with evidence offense. Further, the prosecutor tainted the jury with his improper character evidence and arguments, warranting a reversal of Mr. Chavez's convictions. The trial included structural errors that guaranteed an emotional reaction and decision from the jurors despite the weaknesses in the State's case. Las Vegas, New Mexico is a small provincial community, and the prosecutors were well-aware that community members could be persuaded toward a finding of guilt if their sympathies and emotions were invoked. The insufficient evidence of guilt, combined with a small community that had already clearly expressed their belief that Skip was

guilty[1] and prosecutorial misconduct all contributed to improper findings of guilt by this jury.

PROCEDURAL BACKGROUND

On February 9, 2021, **[1 RP 5-6]** the State charged Seig Isaac Chavez ("Mr. Chavez") in a Criminal Information alleging First Degree Murder, contrary to NMSA § 30-2-1(A)(1) & (3), and with Tampering with Evidence, contrary to NMSA § 30-22-5, related to a homicide that took place on August 15, 2019. **[1 RP 1-2]**. The pre-trial litigation addressed a local community that was hostile toward Mr. Chavez. **[1 RP 90-139]** (Mr. Chavez's change of venue motion); **[2 RP 266-271]** (addendum to Mr. Chavez's change of venue motion). During trial, the prosecutor played on the sympathies of the jurors advising them we "should have protected him" and that "we as a society failed." **[9-28-22 CD 10:47:15-33]** During trial, the jurors were improperly and prejudicially influenced by a phone conversation that an incarcerated Mr. Chavez had with his son – after life was threatened by other inmates – wherein Mr. Chavez tells his son it is his responsibility to protect the family because Mr. Chavez was in jail. **[*See* 9-27-22 CD at 9:05:16]**; and **[9-28-22 CD at 11:39:14]**.

[1] Before trial, the parties litigated a change in venue motion. The district court reserved ruling on Mr. Chavez's change in venue motion **[1 RP 90-139]** pending the results of a supplemental questionnaire. **[*See* 2 RP 266]**. The supplemental questionnaire was completed by 120 members of a jury panel. **[*Id.* ¶ 4]** Of those 120 supplemental questionnaires, approximately half indicated strong presumptions of Mr. Chavez's guilt. **[*See* 2 RP 266-270]** (providing direct quotes from the supplemental questionnaires presuming Mr. Chavez's guilt).

Mr. Chavez's call was unrelated to this case, but he wanted his son to know to be very careful because he could not trust anyone. Mr. Chavez wanted his son to be on guard if a stranger tried to harm their family.

PRESERVATION STATEMENT

Defense counsel did not move for a directed verdict when the state concluded its case in chief, because the district court stated that a motion for a directed verdict would not be required because of recent case law requiring the court to make a determination regarding directed verdict. **[9-28-23 CD 10:09:14-49]**; *see e.g. State v. Martinez*, 2022-NMSC-004, ¶ 7, 503 P.3d 313 (holding "the court shall determine the sufficiency of the evidence, whether or not a motion for directed verdict is made"). The district court concluded there was sufficient evidence presented by the state to proceed with a first-degree murder charge.

Defense counsel objected to the improper admission of the recorded jail calls, by filing a pre-trial pleading and requesting a motions hearing where Mr. Chavez argued relevancy and argued that the calls should not be used to show habit. **[S*ee* 1 RP 213-216; 6-7-22 CD 2:07:40-08:38]** The Court overruled this objection and stated that the bar for relevancy was low and on the facts of this case the danger of unfair prejudicial value did not substantially outweigh the probative value.[2] **[6-7-22**

[2] As discussed below, the defense failed to argue that the jail call was impermissible character evidence.

CD 2:08:38-50]. While defense counsel did not preserve any ruling regarding the improper statements made by the prosecutor during closing arguments, those issues are reviewable under a fundamental error standard.

Although the issues of sufficiency of the evidence and the trial court's admission of a phone call between Defendant Chavez and his son were not raised in the Statement of the Issues filed January 5, 2023 by trial counsel, it is proper for the Court to consider them nonetheless. "Once a case is assigned to the general calendar, parties may raise for the first time in the brief-in-chief arguments not raised in the docketing statement." *State v. Lucero*, 1999-NMCA-102, ¶ 19, 127 N.M. 672, 986 P.2d 468; *see also State v. Salgado*, 1991-NMCA-044, ¶¶ 1-4, 112 N.M. 537, 817 P.2d 730 (holding that under the new amendments to the New Mexico Rules of Appellate Procedure, a docketing statement does not govern issues that may be raised for cases assigned to the non-summary calendar). The Court assigned this case to the general calendar on January 30, 2023.

LEGAL ARGUMENTS

I. A rational jury could not have found beyond a reasonable doubt that Mr. Chavez committed a deliberate and premeditated killing.

A. *The legal standard for sufficiency of the evidence.*

An appellate court views "the evidence 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. Cunningham*, 2000-NMSC-009, ¶ 26, 128

N.M. 711, 998 P.2d 176. Appellate courts "do not search for inferences supporting a contrary verdict or re-weigh the evidence because this type of analysis would substitute an appellate court's judgment for that of the jury." *State v. Graham*, 2005-NMSC-004, ¶ 13, 137 N.M. 197, 109 P.3d 285. While "appellate courts are highly deferential to a jury's decisions, it 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 (internal quotation marks omitted).

B. The evidence in this case is not sufficient to sustain the convictions.

The State did not present sufficient evidence on either of the charges to support guilty verdicts. First, the state did not provide sufficient direct material evidence that connected Mr. Chavez to the murder. At best, the state provided circumstantial evidence demonstrating a *possible* connection to the crime. That circumstantial evidence, however, and the interpretation of that evidence, was remarkably tainted by the State's improper arguments and remarks designed to improperly influence the jury's decision-making capacities. Second, the state did not present sufficient evidence to show that Mr. Chavez had the requisite intent to satisfy the *mens rea* element of first-degree murder. Third, the state did not present sufficient evidence to show that Mr. Chavez had tampered with evidence.

It is "an appellate court's duty on review of a criminal conviction to determine whether *any* rational jury could have found each element of the crime to be established beyond a reasonable doubt." *State v. Garcia*, 1992-NMSC-048, ¶ 27, 114 N.M. 269, 837 P.2d 862 (emphasis in original). This kind of review requires "appellate court scrutiny of the evidence and supervision of the jury's fact-finding function to ensure that . . . a rational jury *could* have found beyond a reasonable doubt the essential facts required for a conviction." *Id.* (emphasis in original). The question before this Court "is not whether [it] would have had a reasonable doubt [about guilt] but whether it would have been impermissibly unreasonable for a jury to have concluded otherwise." *See State v. Rudolfo*, 2008-NMSC-036, ¶ 29, 144 N.M. 305, 187 P.3d 170.

C. There was insufficient evidence presented to prove that Mr. Chavez killed Skip.

The State charged Mr. Chavez with a violation of NMSA 1978, Section 30-2-1(A) (1994), murder in the first degree. Under the law, the State must prove, beyond a reasonable doubt, that Skip was killed, without lawful justification or excuse, "by any kind of willful, deliberate and premeditated killing." Section 30-2-1(A). A deliberate intention is defined as "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." *Cunningham*, 2000-NMSC-009, ¶ 25, 128 N.M. 711 (quoting UJI 14–

201 NMRA 1999).[3] "To prove first-degree murder, the State has a heightened burden commensurate with the severity of punishment reserved for that crime." *State v. Adonis*, 2008-NMSC-059, ¶ 14, 145 N.M. 102, 194 P.3d 717.

During trial, defense counsel asserted that the LVPD only investigated a story that supported their theory of the case, namely that Mr. Chavez killed Skip. The only available evidence presented during trial was circumstantial evidence. The only direct evidence that connects Mr. Chavez to Skip's death was two spots of blood that were found on the padding under the seat of his truck, and a jacket found at his home that also had a small speck of blood on it that was deemed to be a match to Skip's DNA. It is unreasonable to think that Mr. Chavez stabbed Skip 24 times but left such a miniscule amount of blood.

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[3] The jury here was instructed that "deliberate intention" was:

> A deliberate intention refers to the state of mind of the defendant. A deliberate intention may be inferred from all of the facts and circumstances of the killing. The word deliberate means 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. A calculated judgment and decision may be arrived at in a short period of time. A mere unconsidered and rash impulse, even though it includes an intent to kill, is not a deliberate intent to kill. To constitute a deliberate killing, the slayer must weigh and consider the question of killing and his reasons for and against such a choice. **[*See* 2 RP 410; *see also* UJI 14-201]**.

Inexplicably, the LVPD did not fully investigate what happened to Skip after Mr. Chavez dropped him off the night of his murder. **[9-27-22 CD 9:40:00-42:18]** Sgt. Rael did not speak to the owners of the Boarding Home where Skip went, but Officer Gutierrez advised Sgt. Rael that Skip was at the Boarding Home around 7:00 p.m. and that he might have been having dinner there. What is clear is that neither Sgt. Rael nor Officer Gutierrez followed up on this lead. The State did not call any witness from the Boarding House to testify that they did in fact see Skip return that evening and ate dinner there. **[*See* 9-27-22 CD 1:55:04-44; 2:20:36-58]**. Officer Gutierrez testified about talking to the Boarding House owners, but the Boarding House owners reported that Skip was there that evening, but they were not sure of the actual time. **[*Id.* 2:22:30-46]**. Officer Gutierrez's report indicated the Boarding House owners told her the clothes Skip was wearing in the alleyway were the same clothes he wore when he ate at the Boarding House that evening. **[*Id.* 2:21:08-36]**. Additionally, the jurors were presented with State's Exhibit 9, an autopsy report that indicated Skip "was last seen on August 15, 2019 by his caretakers at dinner," which is what Officer Gutierrez told the OMI. **[*See* State's Exhibit 9]**. The investigators testified that they did not further investigate this lead because the other residents there, like Skip, had mental challenges. **[9-27-22 CD 2:24:05-:50]**. But that was not a reason not to interview the Boarding Home's owners or staff.

Additionally, the pathologist's evaluation of Skip's body either never looked for, or never found, DNA evidence that could be linked to the identity of a perpetrator. Apparently, Mr. Chavez's DNA was not located on Skip's body. The record reflects no DNA standard was obtained from Mr. Chavez or at least no DNA standard from Mr. Chavez was ever sent to the laboratory for testing. **[9-28-22 CD 9:38:53-:39:40]**. It is not clear whether DNA of any potential suspects was located on Skip's body. This issue was never addressed during trial.

Finally, there is the fact that there was only a miniscule amount of blood found in Mr. Chavez's truck and on a jacket that was located in his home. Each of the blood-stained areas tested was less than one-inch in diameter, including the cuttings from the vehicle upholstery of Mr. Chavez's truck. **[9-28-22 CD 9:44:30-45:44; *see* State's Exhibits G(3)(B) and G(3)(C)]**. If Skip was stabbed 24 times in Mr. Chavez's truck, as the State apparently claims, common sense suggests that there would be massive amounts of blood inside his truck.

The evidence here does not support that theory. While the jacket found inside Mr. Chavez's home also had Skip's DNA on it, it also had the DNA of three other "unknown" individuals – likely men – on it. **[*See* 9-28-22 CD 9:41:28-42:09]**. The State did not indicate whether the "unknown" DNA was tested against Mr. Chavez, or anyone else. Sgt. Rael confirmed that Mr. Chavez's DNA standard was never collected during the LVPD's investigation. **[9-27-22 CD 9:47:12-40]**. He admitted

though that "it could have helped" to know if Mr. Chavez's DNA was on the jacket. **[9-27-22 CD 9:48:07-:16]**.

While it is true that circumstantial evidence can be sufficient to support a conviction in a criminal case, the record evidence here does not rise to the level of proof sufficient to demonstrate beyond a reasonable doubt that Mr. Chavez actually murdered Skip.

D. There was insufficient evidence to prove a deliberate or premeditated intent.

There was no evidence presented about any motive Mr. Chavez had to kill Skip. The State did not provide any evidence showing that Mr. Chavez exercised any kind of desire to murder Skip, as required for a first-degree murder conviction. While it is true that deliberation and premeditation can be formed within a short period of time, "mere evidence of sufficient time to form a deliberate intent is not enough to prove first-degree murder." *Slade*, 2014-NMCA-088, ¶ 20. In order to meet its burden for a first-degree murder, the State must prove that the act of killing a victim was not just intentional, but was also deliberate and premeditated. *See id.* ¶ 17.

The facts in this case can be analogized to *State v. Garcia*, 1992-NMSC-048. This case, like *Garcia*, a victim was stabbed to death. *Id.* ¶ 3. In both cases, the defendant and the victim were acquaintances. *Id.* ¶ 4. As in *Garcia*, the defendant and the victim here spent time together on the day of the stabbing. *Id.* In both cases, the defendant and the victim shared drinks together. *Id.* ¶¶ 4-6. One significant

difference though is that in *Garcia*, the defendant admitted multiple times to stabbing the victim. *See id.* ¶¶ 7-11. For example, the *Garcia* defendant stated things like, "I'm going to mess you up like I messed up your boyfriend," to the victim's girlfriend, *id.* ¶ 7; or when turning himself in to law enforcement he stated, "I did it. I did it. I'm not ashamed to admit it." *Id.* ¶ 11.

Despite those seeming admissions in *Garcia*, this Court held that the evidence was insufficient to find the defendant guilty of first-degree murder. *Garcia* held that "[t]here was no evidence enabling the jury to find, beyond a reasonable doubt, that defendant had the requisite states of mind—a 'willful, deliberate and premeditated' intention to kill the victim. *Id.* ¶ 15. The *Garcia* Court examined whether the killing was deliberate and premeditated, or merely rash and impulsive. *Id.* ¶ 23. The Court noted that, "[t]here is no question that the jury could infer from the nature of the act itself—stabbing the victim in the chest after several quarrels—that the killing was willful—*i.e.*, intentional." *Id.* Notwithstanding that finding, however, the Court grappled with whether there was evidence for the jury to *infer*, beyond a reasonable doubt, that the defendant deliberated and premeditated *before* he stabbed the victim. *Id. Garcia* held that without evidence that would allow a rational jury to find the essential components of deliberation, the simple admission of stabbing the victim was insufficient to form the basis for a first-degree murder conviction. *Id.* ¶ 28.

There is less evidence of premeditation and deliberation in this case than there was in *Garcia*. Here, witness testimony presented to the jury indicated that Mr. Chavez, in a non-aggressive manner, approached Skip. Joe Alirez testified that Mr. Chavez's voice was not aggressive with Skip, Skip did not need convincing to join Mr. Chavez, and that nothing about that interaction gave Mr. Alirez any concern. **[9-27-22 CD 10:48:00-48:25]**. Mr. Chavez invited Skip to get some food, and the two men departed amicably in Mr. Chavez's truck. **[9-27-22 CD 9:37:57-38:40; 10:45:19-56; 2:37:44-38:39**]. No one testified that Mr. Chavez forced Skip to join him. Sgt. Rael testified that Skip did not have to be convinced to get in the truck, that the two men were not arguing, and that there was no visible hostility between them. **[9-27-22 CD 9:39:11-:20]**. There is no evidence at all that these two men were even together at the time of Skip's murder, much less evidence that Mr. Chavez premediated or deliberated killing Skip. *Cf. State v. Smith,* 1966-NMSC-128, ¶ 13, 76 N.M. 477, 416 P.2d 146 (a jury may consider the animus of the accused toward the deceased in determining deliberate intent).

The only evidence offered by the State that comes close to a showing of premeditation or deliberation is the testimony by Sgt. Rael alleging that Mr. Chavez was "stalking" Skip. Sgt. Rael agreed with defense counsel's question that it appeared as though Mr. Chavez was "stalking" Skip. According to Sgt. Rael, it "appeared that [Mr. Chavez] was trying to make contact with Mr. Skip[.]" **[*See* 9-**

27-22 CD 9:33:59-9:34:05]. Sgt. Rael defined "stalking" as "actively looking for someone . . . and trying to get 'em, and trying to make contact with him." **[*Id.* 9:34:12-:55]**. Sgt. Rael's definition of stalking is much different than the legal definition of stalking which is, "knowingly pursuing a pattern of conduct, without lawful authority, directed at a specific individual when the person intends that the pattern of conduct would place the individual in reasonable apprehension of death, bodily harm, sexual assault, confinement or restraint of the individual or another individual." *See* NMSA 1978, § 30-3A-3(A) (2009). To be sure, Sgt. Rael never testified that Mr. Chavez approached Skip with overt hostility or that Skip was placed in reasonable apprehension of fear of violence by Mr. Chavez' presence.

By characterizing Mr. Chavez as "stalking" Skip, Sgt. Rael was attempting to unfairly characterize Mr. Chavez's conduct to bolster the case for premeditation. Sgt. Rael unfairly – and without foundation – characterized Mr. Chavez's conduct in a menacing and threatening way, when in fact, the facts as testified to by Sgt. Rael indicated Mr. Chavez:

> Cut [Skip] off, he came, Mr. Chavez could have drove away and went somewhere else. But at that point in time, then he went, he passed by him again, and then he turned around, he waited, drove by *again*, passing by where Mr. Smith was, and actually flipping a U-turn . . . turning around *again* where Mr. Smith was going and parking and sitting there for a while and then going and making contact.

[9-27-22 CD 9:35:46-36:27].

While Sgt. Rael characterized this as stalking, it is equally consistent with two friends meeting in a happenstance matter. Mr. Chavez could have simply been set on checking on the welfare of Skip or set on offering Skip a burger or something to drink that day, as he had on numerous other occasions. It was not out of the ordinary for Mr. Chavez to offer to help homeless people. **[1 RP 11]**. It is also critical to note that contrary to Sgt. Rael's assertion that Mr. Chavez's conduct amounted to stalking, there is absolutely no evidence of any pattern of conduct that would have supported such unfounded opinion testimony from a police officer. *See State v. Armijo*, 2014-NMCA-013, ¶¶ 7-11, 316 P.3d 902 (holding a law enforcement cannot offer opinion testimony without a proper foundation). The conduct described by Sgt. Rael is a single instance of innocent conduct, not a pattern of criminal harassment. *See* UJI 14-331 NMRA (defining a pattern of conduct as "more than one occasion"). Aside from Sgt. Rael's unfounded opinion testimony that Mr. Chavez's otherwise innocent conduct amounted to "stalking" Skip, the State presented no evidence that would support, beyond a reasonable doubt, a finding that Mr. Chavez had premeditated or deliberated Skip's murder. *Garcia*, 1992-NMSC-048, ¶ 32 (holding that "evidence equally consistent with two inferences does not, without more, provide a basis for adopting either one – especially beyond a reasonable doubt"). Following the *Garcia* case, this case should be remanded for a new trial so Mr. Chavez can have a meaningful opportunity to explore what the Boarding House employees said about

Skip's being there *after* he departed Mr. Chavez's company. *See Id.* ¶ 37. In the light most favorable to the jury's decision, no evidence was presented here that could be fairly construed as Mr. Chavez premeditating or deliberately killing Skip.

Even assuming, *arguendo*, that it could be proven that Mr. Chavez stabbed Skip to death – which Mr. Chavez denies – no evidence exists that such a stabbing was the culmination of a series of arguments that occurred just before Skip's death, as in *Garcia*. Even more in this case than *Garcia*, there is no way to know – assuming for the sake of argument that Mr. Chavez did stab Skip – that such an act was the result of a "mere unconsidered and rash impulse" or a premeditated and deliberate thought process to kill Skip in cold blood. *See Garcia*, 1992-NMSC-048, ¶ 32; *see also Slade*, 2014-NMCA-088, ¶ 18 (citing UJI 14-201(2)). The only evidence before the jury was that at some point in time on August 15, 2019, Mr. Chavez and Skip were in Mr. Chavez's truck together sharing food and drinks because they were acquaintances. Leaping from that body of evidence to make a finding of premeditation and deliberation requires the jury to speculate, guess, or make inferences about how or why the stabbing may have happened. For this Court to find that the jury's decision was supported by record evidence, the State needed to have presented evidence "beyond the temporal aspect of the crime in order to find sufficient evidence of deliberation." *Slade*, 2014-NMCA-088, ¶ 20 (quoting *State v. Tafoya*, 2012-NMSC-030, ¶ 42, 285 P.3d 604). Unfortunately, the jurors had no basis

other than speculation, guesswork, or conjecture, to conclude Skip was killed deliberately and with premeditation. Such guesswork does not satisfy New Mexico's exacting standards for a first-degree murder conviction. *See Garcia*, 1992-NMSC-048, ¶ 32.

It bears repeating that the conviction here is a for a *first-degree murder*. It is "well settled" that "due to the steep penalty reserved for first degree murder convictions, the Legislature did not mean for first degree murder to serve as a catch-all category for every intentional killing." *Id.* ¶ 17 (quoting *Tafoya*, 2012-NMSC-030, ¶ 38). Historically, this Court has found that a homicide resulting from multiple stab wounds could be either a first-degree murder with deliberation because of evidence of a prolonged struggle by a victim, *State v. Duran*, 2006-NMSC-035, ¶ 9, 140 N.M. 94, 140 P.3d 515, or a second-degree murder without deliberation when the defendant and the victim "quarreled, made up, then quarreled again and traded punches immediately before defendant stabbed the victim." *See id.* ¶ 10 (citing *Garcia*, 1992-NMSC-048, ¶ 28). While the multiple stab wounds here include some defensive wounds, there is no overt evidence of a prolonged struggle or anything that would preclude finding a rash impulse. On our facts, there is simply insufficient

evidence to prove, beyond a reasonable doubt, that this was a premeditated and deliberate murder.[4]

The State certainly will argue that the purported "post-murder" conduct of Mr. Chavez, that is his sanding down the body of his truck down and spray painting his toolbox, was evidence proving consciousness of guilt and, by extension, intentional first-degree murder. *See State v. Flores*, 2010-NMSC-002, ¶ 23, 147 N.M. 542, 226 P.3d 641, *overruled on other grounds by State v. Martinez*, 2021-NMSC-002, 478 P.3d 880 (noting that not only can a defendant's "acts before and during the crime provide evidence of intent, evidence of flight or an attempt to deceive the police may prove consciousness of guilt." (internal quotation marks and citations omitted)). Consciousness of guilt, however, falls exceedingly short of proving, beyond a reasonable doubt, deliberation and premeditation sufficient to satisfy the *mens rea* element of first-degree murder.

Sanding down one's truck or even spray-painting parts of it would not be considered unusual in the Northern communities of New Mexico. In fact, Mr. Finnestad, Chavez's landlord, testified that when he would see Mr. Chavez outside of his home sanding his truck down to get ready for painting and, they would often talk about it, because Mr. Finnestad happened to also be doing the same project on

[4] In fact, the wounds on Skip's body may have been inflicted by one or more people. There was no effort to tie all the wounds to a single weapon.

his truck at the same time. **[9-27-22 CD 3:56:06-37:38]**. Any assertion that Mr. Chavez's truck rehabilitation project could be considered evidence sufficient to prove a first-degree murder case is simply too speculative and too consistent with innocent conduct to sustain this conviction. *Garcia*, 1992-NMSC-048, ¶ 32. Sgt. Rael testified that Mr. Chavez's truck did not have side mirrors on it on August 15, 2019, suggesting that Mr. Chavez was sanding his truck before the murder took place. **[9-6-22 CD 4:02:10-14]**. At best, such evidence may be relevant to a tampering with evidence charge, but plays no meaningful role in clarifying whether a murder was in the first or the second degree.

E. There was insufficient evidence to find Mr. Chavez guilty of tampering with evidence.

Mr. Chavez was found guilty of tampering with evidence for the work he did to his truck during the timeframe following Skip's murder. **[1 RP 1-2; 2 RP 426]**. To find Mr. Chavez guilty of tampering with evidence under NMSA 1978, Section 30-22-5, the State was required to have proved beyond a reasonable doubt that:

1. The defendant destroyed, changed, hid, or fabricated the pickup truck;

2. With the intent to prevent the apprehension, prosecution, or conviction of himself for the crime of murder; and

3. That this happened in New Mexico on or about the 15th day of August, 2019.

[*See* 2 RP 411] (Jury instruction).

The State did not satisfy its burden under this instruction. For a conviction on tampering with evidence to be upheld, there must be sufficient evidence from which the jury can infer: (1) the specific intent of the Defendant to disrupt the police investigation; and (2) that Defendant actively "destroyed or hid physical evidence." *Duran*, 2006-NMSC-035, ¶ 14 (internal quotation marks omitted). The State's assertion that Mr. Chavez's work on his truck was an overt act to destroy evidence is flimsy at best. In fact, Sgt. Rael described Mr. Chavez's truck on the day of the murder as not having rear view mirrors on it, **[9-26-22 CD 4:02:10-14]**, indicating that Mr. Chavez may have been in the process of preparing his truck to be sanded that day. Mr. Chavez's landlord testified that they would talk about the work he was doing to his truck because the landlord also was sanding down his truck. **[9-27-2022 CD 3:57:13-:38]**. Further, the State never claimed that Mr. Chavez wiped down his truck, bleached it or used chemicals to rid it of any traces of blood. It is common sense to think that if in fact Skip was stabbed 24 times in Mr. Chavez's truck, the truck would have been completely covered in blood. If that theory was correct, traces of blood would have remained in the stitching of the seat, or in the seams of the seat, or elsewhere, but that was not the case. **[*See e.g.* Ex. 5(J)]** (noting the prominent stitching that would have been stained by blood). Testimony indicated Skip was stabbed in major arteries – arteries that would have bled profusely at the time. **[*See* State's Ex. 9]** (OMI Report). The stab wounds on Skip's body were up to seven

inches deep. **[*See id.*]**. The State's theory was that the murder took place inside Mr. Chavez's truck because Skip had most of his stab wounds on the left side of his body. **[*See* 9-26-22 CD 1:59:45-2:00:44]** (State's opening statement). Because the evidence demonstrates that Mr. Chavez was in the process of repairing his truck on the day in question, the totality of the evidence fails to support, beyond a reasonable doubt, that Mr. Chavez altered his truck with the intent to disrupt this murder investigation.

II. The District Court Abused Its Discretion When It Denied Defendant's Motion To Change Venue.

A. The Legal Standard of Review For Assessing A Denial of Change of Venue

"This Court reviews a grant or denial of a motion for change of venue under an abuse of discretion standard." *State v. Barrera*, 2001-NMSC-014, ¶ 11, 130 N.M. 227, 22 P.3d 1177. "The burden of establishing an abuse of discretion is borne by the party that opposes the trial court's venue decision" *State v. House*, 1999-NMSC-014, ¶ 31, 127 N.M. 151, 978 P.2d 967. "The standard of review required in assessing most abuse-of-discretion claims is whether the trial court's venue determination is supported by substantial evidence in the record." *Id.* at ¶ 32. "Substantial evidence consists of relevant evidence that might be accepted by a reasonable mind as adequate to support a conclusion." *Barrera*, 2001-NMSC-014, ¶ 12.

On July 7, 2021, before the trial commenced, Mr. Chavez moved the District Court for a change of venue, citing NMSA 1978, §§ 38-3-3 & 7, the extensive local publicity surrounding Skip's murder, law enforcement's public investigation, and ultimately Mr. Chavez's arrest. **[1 RP 90-139]**. NMSA 1978, § 38-3-3(B) states:

> The venue in all civil and criminal cases shall be changed, upon motion, to another county free from exception: … (B) when the party moving for a change files in the case an affidavit of himself, his agent or attorney, that he believes he cannot obtain a fair trial in the county in which the case is pending because:… (2) the inhabitants of the county are prejudiced against the party; [or] (3) of public excitement or local prejudice in the county in regard to the case or the questions involved in the case, an impartial jury cannot be obtained in the county to try the case ….

In *State v. House*, 1999-NMSC-014, the New Mexico Supreme Court identified six factors indicating when a fair trial is not reasonably probable in a particular county due to prejudice flowing from pretrial publicity. The six factors are: 1) neutrality and timing of publicity; 2) television, radio, and newspaper publicity; 3) size and nature of the community; 4) juror prejudice; 5) statements by politicians; and 6) fixed opinions. *Id.* ¶¶ 60-75.

B. The Facts of This Case, Which Demonstrated Severe Hostility Towards Mr. Chavez In The Community, Warranted A Change of Venue

Mr. Chavez argued that due to extensive pretrial publicity in this small community, all six of the *House* factors favored a change of venue to another county. **[1 RP 92]**. Mr. Chavez argued that Skip was a well-known figure in the small town of Las Vegas, New Mexico, and the extensive local media coverage of Skip's death

sparked emotional, and at times, punitive responses from the public. **[1 RP 92-94]**. To demonstrate the highly emotional and punitive responses from the public, Mr. Chavez included with his motion several online local news articles detailing Skip's death and Mr. Chavez's arrest. **[1 RP 101-139]**.

Those online news articles featured dozens of comments from the public that outlined how beloved Skip was in the community. Some comments called for strong retribution towards Skip's killer. **[1 RP 106-113]**. Mr. Chavez also noted that the City of Las Vegas contemplated installing a public bench dedicated to Skip in a local park to commemorate Skip's life. **[1 RP 96-100]**.

Under NMSA 1978, § 38-3-3, Mr. Chavez attached to his Motion for a Change of Venue a notarized affidavit. In the affidavit, defense counsel swore that he believed Mr. Chavez could not obtain a fair trial in San Miguel County because the inhabitants of the county were so outraged by Skip's death that the public excitement and local prejudice would make a fair trial impossible. **[1 RP 95]**.

On July 21, 2021, the State responded to the Motion to Change Venue. **[1 RP 147-153]**. The State argued that Mr. Chavez had failed to lay an appropriate foundation for a change of venue, and analyzed the six *House* factors. The State argued that a majority of the online news articles attached as exhibits to Defendant's Motion were neutral in tone, but conceded that the online comments to the articles were certainly non-neutral. **[1 RP 150]**. The State argued, without any citation to

authority, that the nature of San Miguel County was such that many "of its residents live by necessity or by choice 'off the grid' where internet access and phone reception is unreliable or even non-existent," making it unlikely that "many" residents were exposed to the case's pretrial publicity. The State argued that while Mr. Chavez had provided documents demonstrating that the Las Vegas City Mayor had approved the proposal for the commemorative park bench to be installed in Skip's honor, that approval did not constitute a statement by a politician. Finally, the State argued that Mr. Chavez's arguments about juror prejudice and fixed opinion were speculative. **[1 RP 150-152]**.

On July 26, 2021, after a hearing, the District Court reserved ruling on Defendant's Motion to Change Venue pending the results of a supplemental juror questionnaire. **[1 RP 159]**. On May 25, 2022, Mr. Chavez received one hundred and twenty supplemental juror questionnaires. On June 6, 2022, Mr. Chavez filed an Addendum to Defendant's Motion for a Change of Venue based on those questionnaires. He argued that the proliferation of the fixed opinions surrounding Mr. Chavez's yet unproven guilt warranted a change of venue. Mr. Chavez cited to thirty-seven of the supplemental responses verbatim regarding the venire's fixed opinion of his guilt. **[2 RP 266-268]**. He also noted twenty-seven of the supplemental responses indicated the potential juror's inability to presume him innocent. **[2 RP 268-270]**. Finally, Mr. Chavez cited to a front-page story published in the Las Vegas

Optic just three days earlier that falsely stated that the trial court had denied a motion to delay Defendant's trial. The front-page story detailed the investigation and the evidence against Mr. Chavez that generated even more negative comments towards Mr. Chavez online. To make matters worse, that story published details of another case against Mr. Chavez, highlighting his status as an inmate at the local jail. Finally, the story informed the public that Mr. Chavez was on his fourth publicly appointed attorney, making Mr. Chavez appear to be unlikeable. **[2 RP 270-271]**.

On June 9, 2022, the District Court denied the Motion to Change Venue. **[2 RP 289]**. On September 26, 2022, Mr. Chavez's trial began in San Miguel County, where a jury – without sufficient evidence of premeditation or deliberation – convicted Mr. Chavez with first-degree murder.

C. The press coverage and related publicity was not neutral.

The District Court abused its discretion in denying Mr. Chavez's Motion for a Change of Venue. The defense presented substantial evidence that undercuts the trial court's decision that an impartial jury could be obtained in San Miguel County. Turning to the first *House* factor, the defense presented substantial evidence of extensive online local newspaper coverage of the Skip's death, the criminal investigation and Mr. Chavez's arrest. **[1 RP 101-139]**. Skip was a beloved local figure in the Las Vegas community. The extensive local news coverage discussing Skip's murder precipitated a universal outpouring of compassion for Skip that

likewise spawned a strong disgust for his killer. **[Id.]** Skip's popularity instigated a public candlelight vigil in a local Las Vegas park with live music to support the collection of donations for the local park bench to be constructed in Skip's honor. **[1 RP 127]**. The details of Skip's murder and Mr. Chavez's arrest were extensively covered in the Las Vegas Optic, sparkling a plethora of public online comments calling for Mr. Chavez's swift conviction. **[1 RP 105-117, 127-132, 139]**. Mr. Chavez demonstrated, based on the juror questionnaires, that the pre-trial publicity unfairly tainted the jury pool, creating a prevailing notion that Mr. Chavez's guilt had already been decided. To ensure Mr. Chavez was unfairly smeared, the Las Vegas Optic published a front-page article concerning Defendant's case that was factually incorrect, stating "judge denies motion to delay murder trial." **[2 RP 270]**. The publicity and publicly available comments about the case, including the juror questionnaires, reflected widespread sympathy for Skip and condemnation of Mr. Chavez.

D. Mr. Chavez Presented Substantial Evidence of Unfavorable Local News Coverage

As described above, Defendant presented substantial evidence of local newspaper coverage, in print and online, of this case. As such, the second *House* factor substantially weighs in favor of granting a change of venue.

E. Mr. *Chavez Demonstrated That The Size and Nature of The Community Made The Jury Pool Prone to Unfair Media Influence*

Turning to the third and fourth *House* factors, the defense presented substantial evidence that the small and close-knit nature of the Las Vegas community were such that a fair trial for Mr. Chavez was unlikely in that community. **[*See* 1 RP 90-139; 2 RP 266-271]**. An insular, tight-knit community like Las Vegas is prone to be influenced by extensive, local pretrial publicity. In this case, such publicity detailed Skip's widespread popularity juxtaposed against Mr. Chavez's unflattering portrayal as a local criminal. The size and nature of this community resulted in the selected jury pool candidates making comments like:

- "I feel strongly that Mr. Chavez is guilty!"
- "I already believe he's guilty"
- "That finally the monster who murdered Skip was apprehended"
- "That it was a totally nonsense killing can't figure why he would of killed someone like Skip and for what" (sic)
- "In my eyes Mr. Chaves is guilty. No Matter what." (sic)
- "He should not have done it, if he did, I guess I have basically found him guilty before knowing the whole story"
- "Must have take advantage of a man who people knew and would be offered coffee all over town." (sic)
- "I believe he is guilty due to being seen with Skip and Skip was gentle & Chavez has aggressive history" (sic)

- "Mr. Chavez was a former patient at the state hospital and suffers from some type of mental illness"

- "[O]f what I read he is not innocent"

- "I think he (Chavez) was a mean spirited person to hurt an innocent man"

- "From what I've read, sounds to me like he is guilty"

- "Mr. Chavez is very guilty"

- "I'm waiting to see him in an orange suit"

- "From what I have heard about their case it seems to me that the defendant murdered a helpless person."

- "Skip never caused harm to anyone. Mr. Chavez seemed to have evidence pointing towards his guilty" and "I already believe he's guilty"

- "William Skip Smith was a good man he never hurt anyone. This should have never happened to poor Skip. This person that did this should be locked up for life or hung. This was like harming an innocent child"

- "I have already decided on my person side" (sic), "We raised money to honor Skip with a bench"

- "Yes" (regarding guilt) "From what I have read and heard from people he knew what he (Chavez) was doing even if he is mentally ill"

- "Given articles that I have read it hard to presume he is innocent" (sic)

- "I find images such as those (graphic evidentiary photos) unsettling and disturbing especially since Skip was well known"

[2 RP 266-269]. Such comments underscore how biased the jury pool had become against Mr. Chavez, thus satisfying the third and fourth *House* factors.

F. Political Statements Unfairly Influenced The Case

Turning to the fifth *House* factor, Mr. Chavez presented evidence addressing the mayoral support for a public memorial commemorating Skip's memory. While such comments were not as detailed as the political speech discussed in *House*, the evidence here indicated that the highest local elected official went on the record engendering community empathy for Skip, which could only foster anger toward his unjustified murder. Once again, the comments in the supplemental juror questionnaires underscore how bias in the community was augmented by the mayor's comments about Skip. **[*See* 1 RP 96-100]**.

G. The Opinions Of A Significant Portion Of The Jury Pool Were Fixed, And Those Opinions Tainted The Entire Jury Pool

Turning to the sixth and final *House* factor, Mr. Chavez presented substantial evidence to the trial court of the fixed opinions of the potential jurors who would hear his case. This Court need only to examine the Addendum to Defendant's Motion for a Change of Venue, which documented the widespread fixed negative opinions of the potential jurors in this case. Those individuals had already made up their mind about Mr. Chavez's guilt before even hearing the actual evidence in the case. **[2 RP 266-271]**. That so many of the jury pool had concrete, fixed feelings about Mr. Chavez's guilt, and their inability to assume his innocence, simply highlights how

effective the local press coverage had been in polarizing the community against Mr. Chavez.

Given the totality of these facts, the District Court abused its discretion in denying Mr. Chavez's Motion for a Change of Venue. The defense presented substantial evidence that a jury in Las Vegas, New Mexico could not be fair when deciding Mr. Chavez's case. The fact that the jury convicted Mr. Chavez without any record evidence showing Skip's murder was a premediated and deliberate act underscores how tainted the local jury pool became. This Court should find that the failure to move this case to an impartial jurisdiction was an abuse of discretion under these facts and order a new trial in this matter.

III. The state improperly commented on Mr. Chavez's silence during the trial.

When an argument encounters an objection by opposing counsel, giving the district court the opportunity to make a ruling, the review is for abuse of discretion. *See State v. Sosa,* 2009-NMSC-056, ¶ 26, 147 N.M. 351, 223 P.3d 348 ("Where error is preserved at trial, an appellate court will review under an abuse of discretion standard.") (citing *State v. Duffy*, 1998-NMSC-014, ¶ 46, 126 N.M. 132, 967 P.2d 807). If the error is unpreserved, the appellate court is limited to a fundamental error review. *State v. Clark*, 1989-NMSC-010, ¶ 50, 108 N.M. 288, 772 P.2d 322, *disapproved of on other grounds by State v. Henderson*, 1990-NMSC-030, ¶ 38, 109 N.M. 655, 789 P.2d 603 (holding that the prosecutor's comment on a defendant's

failure to testify "violates the privilege against self-incrimination"). Fundamental error occurs when prosecutorial misconduct in closing statements compromises a defendant's right to a fair trial. In such cases, the court may reverse a conviction despite defense counsel's failure to object. *See State v. Rojo*, 1999-NMSC-001, ¶ 55, 126 N.M. 438, 971 P.2d 829. Under the fundamental error inquiry, the verdict may be upset if (1) guilt is so doubtful as to shock the conscience, or (2) there has been an error in the process implicating the fundamental integrity of the judicial process. *See State v. Barber*, 2004-NMSC-019, ¶ 18, 135 N.M. 621, 92 P.3d 633.

During the final moments of the State's rebuttal argument during closings, the prosecutor impermissibly commented on Mr. Chavez's constitutional right to remain silent and to not testify at trial. *See Clark*, 1989-NMSC-010, ¶ 48. The State argued that Mr. Chavez had provided "zero" explanation as to how the drops of blood got on the seat of his truck. Such comments reflect both impermissible burden shifting as the State carries the burden to prove guilt (Mr. Chavez has no burden to prove innocence), as well as Mr. Chavez's constitutional right to remain silent throughout his trial as guaranteed by the Fifth and Fourteenth Amendments of our federal constitution and section 15 of New Mexico's constitution. *Id.* Despite the impermissible comment, defense counsel did not object.

There are three factors the court may consider when reviewing whether closing arguments rise to the level of fundamental error. *Sosa*, 2009-NMSC-056, ¶ 26. Those factors are:

> (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. In applying these factors, the statements must be evaluated objectively in the context of the prosecutor's broader argument and the trial as a whole.

Id.

"With respect to the first factor, our courts have been most likely to find reversible error when the prosecution's comment invades a distinct constitutional protection." *Id.* ¶ 27. When a prosecutor makes a comment that invites the jury to draw an adverse conclusion from a defendant's failure to testify, the defendant's fundamental constitutional right to remain silent is violated. *State v. DeGraff*, 2006-NMSC-011, ¶ 8, 139 N.M. 211, 131 P.3d 61 (citing *Griffin v. California*, 380 U.S. 609, 614 (1965)). Commenting that Mr. Chavez failed to explain away the State's evidence is a serious intrusion on two structural rights that Mr. Chavez possesses under the constitutions that protect him: his right to remain silent and his right to have the State carry the burden of proof of guilt beyond a reasonable doubt. The prosecution's gratuitous argument has no place in a fundamentally fair trial, and constitutes fundamental error. *State v. Sena*, 2020-NMSC-011, ¶ 18, 470 P.3d 227, 235 (citing *Rojo*, 1999-NMSC-001, ¶ 55). This Court has noted that even drawing

subtle attention to a defendant's failure to testify is impermissible. *Sena*, 2020-NMSC-011, ¶ 22.

"The second factor [the courts] consider is whether the challenged statement was only brief and isolated." *Sosa*, 2009-NMSC-056, ¶ 29. "The general rule is that an isolated comment made during closing argument is not sufficient to warrant reversal." *State v. Brown,* 1997-NMSC-029, ¶ 23, 123 N.M. 413, 941 P.2d 494.

The prosecutor's remarks that Mr. Chavez presented "zero evidence" about "how the blood got in his truck" was the last statement made by the State before asking the jurors to find him guilty. While the statement is arguably isolated, it was the very last thing the jurors heard from the State before deliberations began. Our cases have held that the last comment a jury hears before retiring to deliberate has "considerable potential to influence how the jury weighs the evidence." *Sosa*, 2009-NMSC-056, ¶ 24. The jurors here departed to deliberate thinking – given the State's comment and the lack of a defense objection – that Mr. Chavez has some duty to explain to them why and how Skip's blood was inside his truck. This unfair comment on Mr. Chavez's right to remain silent clearly violated the standards set forth by the Court for a fundamentally fair trial. *See Sena*, 2020-NMSC-011, ¶ 25 (noting that a prosecutor cannot ask the jury to draw adverse conclusions from the fact that defendant "did not take the witness stand and explain himself").

Regarding the third factor, the courts "are least likely to find error where the defense has 'opened the door' to the prosecutor's comments by its own argument or reference to facts not in evidence." *Sosa*, 2009-NMSC-056, ¶ 33. Defense counsel did not invite the State to comment on Mr. Chavez's silence by promising he would prove how the blood got on his truck during opening statements or otherwise. *See, e.g., State v. Smith*, 2001-NMSC-004, ¶¶ 37, 40, 130 N.M. 117, 19 P.3d 254 (holding that the defendant's Fifth Amendment rights were not violated when the prosecution commented on the conduct of the defendant in response to an assertion made by defense counsel in opening statement); *State v. Henry*, 1984-NMSC-023, ¶ 10, 101 N.M. 266, 681 P.2d 51 ("[U]nder certain circumstances, defense counsel may 'open the door' during an opening statement to comments [on a defendant's silence] by the prosecutor during closing."). This prosecutorial misconduct here was a self-inflicted wound.

The prosecutor's remark in the final portion of closing argument, combined with the lack of sufficient evidence to prove guilt beyond a reasonable doubt that Mr. Chavez was responsible for Skip's death, meets the threshold required to reverse his convictions. *See Sosa*, 2009-NMSC-056, ¶ 34 ("context is paramount" to an analysis of improper remarks on a defendant's silence at closing argument and absent overwhelming evidence of guilt, it is more likely that there is reversible error.). "A guilty verdict must be based upon the evidence and the reasonable inferences

therefrom, not on an irrational response which may be triggered if the prosecution unfairly strikes an emotion in the jury." *Sena*, 2020-NMSC-011, ¶ 21. Given that the State made such remarks to overcome the scant evidence of guilt in this case, Mr. Chavez's convictions should be reversed.

IV. The Trial Court committed prejudicial, reversible error when it allowed the jury to hear the audio recordings of the jail call between Mr. Chavez and his son.

A. For Unpreserved Evidentiary Errors, the Court Reviews Claims Under A Plain Error Standard Of Review

The Court "may take notice of plain errors affecting substantial rights although they were not brought to the attention of the district court." *State v. Dylan J.*, 2009-NMCA-027, ¶ 15, 145 N.M. 719, 204 P.3d 44 (quoting *State v. Gutierrez*, 2003–NMCA–077, ¶ 19, 133 N.M. 797, 70 P.3d 787); *see also* Rule 11-103(D), NMRA. The doctrine of plain error is less strict than the doctrine of fundamental error, because under plain error review the court does not need to determine whether the conviction constitutes a "miscarriage of justice" or whether "the defendant's guilt is so doubtful that it would shock the conscience of the court to allow it to stand." *State v. Torres*, 2005-NMCA-070, ¶ 9, 137 N.M. 607, 113 P.3d 877 (quoting *State v. Lucero*, 1993-NMSC-064, ¶ 13, 116 N.M. 450, 863 P.2d 1071). Courts will reverse convictions for plain error when it is "convinced that admission of the testimony constituted an injustice that creates grave doubts concerning the validity of the verdict." *State v. Lucero*, 1993-NMSC-064, ¶¶ 12, 22, 116 N.M. 450, 863 P.2d 1071

(quoting *State v. Barraza*, 1990-NMCA-026, ¶ 17, 110 N.M. 45, 791 P.2d 799). Plain error requires the Court to find "(1) error, that is (2) plain, and (3) that affects substantial rights." *State v. Hill*, 2008-NMCA-117, ¶ 21, 144 N.M. 775, 192 P.3d 770 (internal quotation marks and citation omitted).

B. Because The Impermissible Jail Calls Were The State's Best Evidence of Premeditation and Deliberation, The Court Plainly Erred By Allowing The Jury To Hear Them

The district court improperly admitted a jail house recording of a phone call between Mr. Chavez and his son. The call involved Mr. Chavez discussing with his son how to defend the family from any threats by using a knife to stab individuals in the neck. The State purported to have this evidence introduced under the ordinary rule of relevance. *See*, Rule 11-401 NMRA. In reality, however, the State used this evidence as prohibited character evidence showing the propensity of Mr. Chavez to stab people, especially in the neck, just like Skip had been stabbed. *See* Rule 11-404(A)(1). Given the lack of evidence of premeditation or deliberation, this evidence had a detrimental effect on the jury's ability to fairly assess the evidence presented to them. The court below plainly erred by allowing the jury to hear this prohibited character evidence.

An excerpt of the call shows Mr. Chavez told his son:

> Keep that door locked and you keep your fucken knife on you. Anybody gets close to you, then you stick them in the fucken throat, and you stick them again and again. I ain't fucking around. This is your daddy telling you to do this. Anybody try touching

> you, you put that fucken knife straight in their fucken throat and you do it again and again until they don't fucken move. Then you do it to everybody. You are the man of the house. You're the one to protect everyone.

[6-7-22 CD 2:06:09-59]

Before trial, the State filed a pleading notifying Mr. Chavez that it intended to present to the jury a recorded jail phone call that took place between him and his son. **[*See* 1 RP 213-216]**. The State argued that the phone call at issue was "admissible evidence as an admission by the defendant." **[1 RP 164]**. Defense counsel argued only that the recordings were irrelevant. **[S*ee* 1 RP 213-216; 6-7-22 CD 2:07:40-08:38]**.

Throughout the record involving this piece of evidence, neither the State, the defense, nor the trial court ever addressed Rule 11-404 or the requirement of that Rule to justify the use of character evidence by explaining how the "proffered evidence makes the consequential fact 'more probable or less probable' *in a way that does not depend upon an inference of a propensity for criminal behavior.*"[5] *State v. Kerby*, 2005-NMCA-106, ¶ 25, 138 N.M. 232, 118 P. 3d 740 (internal citations omitted) (emphasis in original). The closest the State came to making a

[5] Rule 11-404(B) limits the uses for character evidence (*e.g.* to prove motive, opportunity, intent) and requires that the State "articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose." Rule 11-404(B)(3)(b). Here the State and the lower court failed to properly justify the use of this character evidence.

character evidence argument was to suggest, wrongly, that this evidence may have been admissible under Rule 11-406 addressing habits. Apparently, the State ignored Rule 11-406's requirement that habit be proved by "testimony in the form of an opinion or by *specific instances of conduct sufficient in number* to warrant a finding that the habit existed or that the practice was routine." Rule 11-406(B) NMRA (emphasis added). Unfortunately, neither the defense nor the Court saw this evidence for what it truly was – prohibited character evidence. Rule 11-404(A)(1). The defense, failing to appreciate that this was impermissible character evidence, never raised Rule 11-404 as a defense. Defense counsel, without explicitly addressing prohibited character evidence, argued that even if the recordings were being used to show a habit in that "this is the way I stab people," it was inadmissible. *See, e.g.,* Rule 11-404(A)(1) (stating that evidence "of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait"). **[6-7-22 CD 2:08:20-:38]**. Focusing only on the relevancy argument, the district court held that "relevancy is a low burden" and that the danger of unfair prejudice did not substantially outweigh probative value. **[*Id.* 2:08:38-:50; *see also* 2 RP 290]**.

This inappropriate character evidence was explicit and disturbing. Mr. Chavez spoke to his son in an alarming, halting manner that would have easily upset any ordinary juror tasked with weighing the evidence and determining whether evidence

of premeditation and deliberation existed. Any rational juror would be upset by hearing a vivid conversation where a father tells his son to stab anyone who comes near the family home – especially if that same juror was tasked with deciding if a homicide was a rash or impulsive act or if it was a premediated or deliberate one.

To make matters worse, the jurors did not have any context for the jail calls to understand why those conversations took place. These jail calls were made after Mr. Chavez was in custody at the San Miguel County Detention Center ("SMCDC") approximately a week after his arrest. **[*See* 1 RP 17]** (Mr. Chavez was arrested on February 27, 2020); and **[1 RP 161 at ¶ 13]** (jail call made to his son on March 8, 2020). While in custody at SMCDC, Mr. Chavez was the victim of multiple physical attacks. **[1 RP 223, ¶ 5]** Within one month of being in custody at SMCDC, Mr. Chavez moved the district court to reopen and reconsider his pretrial detention. **[1 RP 221-225]** In his motion, Mr. Chavez informed the district court that "due to the popularity of the victim in this case" Mr. Chavez had been the victim of multiple physical attacks, some so severe that Mr. Chavez was hospitalized. **[1 RP 223, ¶ 5]** The inmates as SMCDC had not just threatened Mr. Chavez's life, but they acted out on those threats by sending him to the hospital. At this time, due to the widespread publicity surrounding his case, inmates had threatened his life and his family. Mr. Chavez was reasonably in fear for his family's safety given the physical harm he was experiencing inside the jail. This context is critical, but the jurors were

never privy to this information. Hearing the recordings without context, as the jurors did, exacerbated the unfair prejudice to Mr. Chavez by the introduction of this impermissible character evidence.

As the State told the jury during the trial, the community of Las Vegas knew Skip, saw him as harmless, and felt that they had some type of moral duty to protect him. **[*See e.g.*, 1 RP 90-131**; **2 RP 266-271; *see also,* 9-28-22 CD 10:46:37-48:06]** (State's closing arguments that Skip "had no immediate family but he was part of our community;" Skip "was a person we should have protected; we as a society failed;" Skip was "no threat to anyone."). The inmates in SMCDC obviously also knew Skip and felt that retaliation on Mr. Chavez was appropriate given Skip's murder charge levied against him. When Mr. Chavez spoke to his son on March 8, 2020, he warned his son that he needed to protect their family.

Given the jury verdict of first-degree murder in this case, the Court can see that the recorded jail calls were misused by the jury to make an impermissible inference of premeditation and deliberation based on this impermissible propensity evidence. This evidence kept the jury from deciding if Skip's murder was based on a rash or impulsive act. In other words, the jury took this evidence to indicate Mr. Chavez stabbed Skip "again and again," which our courts have held is improper. *Kerby*, 2005-NMCA-106, ¶ 25 (citing *Old Chief v. United States*, 519 U.S. 172, 180-81 (1997) and noting that it is improper to "generalize a defendant's uncharged

bad act into bad character and to infer that bad character raises the odds that the defendant did the later bad act now charged"). Character evidence is prohibited under our rules of evidence precisely because it is inherently and unfairly prejudicial. *See* Rule 11-404(A)(1) (noting that evidence "of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait").[6]

Mr. Chavez's defense was extremely prejudiced by the recorded jail call. **[*See* 9-27-22 CD 9:05:16-07:19]**. Any reasonable person would be offended by Mr. Chavez's endorsement of gratuitous violence discussed in the call, especially without being provided with full the background about the threats and acts of violence directed toward him and his family that precipitated the call. Indeed, Mr. Chavez's paranoia was evident to the jury during the trial, as one juror asked the Court to direct Mr. Chavez to sit quietly during the trial because his "continual fidgeting [and] looking at the people behind him [was] very distracting." **[*See* 2 RP 404-405]**.

[6] Applying Rule 11-404 also requires the Court to perform a balancing test under Rule 11-403 before admitting character evidence. Given that nobody below understood that the jail recording was impermissible character evidence, the Court below never performed the Rule 11-403 balancing test. Such a test was impossible here because the State failed to offer a legitimate, non-propensity purpose to conduct the balancing analysis test our evidence rules demand.

Introducing the jail calls were not harmless error either. *See State v. Tollardo*, 2012-NMSC-008, ¶ 36, 331 P.3d 930 ("[N]on-constitutional error is harmless when there is no reasonable *probability* the error affected the verdict." (emphasis in original) (internal quotations and citations omitted)). Critical to this analysis is the fact that the prosecution relied heavily on this particular jail call by playing it for the jury during the presentation of evidence, and then emphasizing the call during the State's closing arguments. **[*See* 9-27-22 CD at 9:05:16;** and **9-28-22 CD at 11:39:14- 41:03]**. The first thing the prosecutor said after playing the call for the jury in his closing statement is that the recording showed Mr. Chavez "acknowledges his culpability." **[9-28-22 CD at 11:40:59-41:03]** Here, the trial court allowed the State to use character evidence to make an improper propensity argument. Because that evidence played a significant role in the jury's determination that this was a first-degree murder case, the admission of that evidence was reversible error. *Kerby*, 2005-NMCA-106, ¶ 33 (noting that where the introduction of the evidence "contributed to the jury's guilty verdicts" the error was not harmless). This recorded jail call was a focal point of the State's case, was highly emphasized, and was played for the jurors during the State's closing statement. In reality, Mr. Chavez's jail call discussing stabbing people with his son was the State's most probative evidence of premeditated and deliberate murder in this case. Given that New Mexico's Rules of Evidence and case law clearly hold that the introduction of this impermissible

character evidence is prohibited by law, the Court should reverse his convictions and order a retrial, even under a plain error analysis.

PRAYER FOR RELIEF

"Cumulative error requires reversal of a defendant's conviction when the cumulative impact of errors which occurred at trial was so prejudicial that the defendant was deprived of a fair trial." *State v. Martin*, 1984-NMSC-077, ¶ 17, 101 N.M. 595. This Court may not be convinced that anyone of Mr. Chavez's arguments warrants reversal. But it is impossible to avoid the conclusion that, "in aggregate, they were so prejudicial that [Mr. Chavez] was deprived of the constitutional right to a fair trial." *Duffy*, 1998-NMSC-014, ¶ 29.

Mr. Chavez contends that any one of his arguments addressed above warrants a new trial. Most certainly, taken in the aggregate, the cumulative effects of the errors in this case justifies vacating Mr. Chavez's convictions and ordering a new trial in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2023, I caused a copy of the foregoing to be filed with the Odyssey File and Serve System which caused a copy of the foregoing to be emailed to opposing counsel of record:

/s/ Marc M. Lowry
ROTHSTEIN DONATELLI LLP

CERTIFICATE OF COMPLIANCE

Pursuant to New Mexico Rule of Appellate Procedure 12-318(F)(3) & (G), I hereby certify that this brief complies with the type-volume limitation and contains 10979 words – not counting the cover page, table of contents, table of authorities, statement regarding oral argument, certificates of counsel, signature block and proof of service, excluded from the length limit by New Mexico Rules of Appellate Procedure 12-318(F)(1) – according to the word count utilized by Microsoft Word 2016.

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