



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
REPLY BRIEF

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

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August 30, 2023

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LEGAL ARGUMENT

This appeal arises from the jury's verdict finding Defendant-Appellant Seig Isaac Chavez guilty of first-degree murder and tampering with evidence. [2 RP 422-23, 425-26]

In his Brief in Chief, Mr. Chavez argued: (1) the convictions for committing a deliberate and premeditated first-degree murder and tampering with evidence are not supported by sufficient evidence [BIC 6-12]; (2) the district court abused its discretion when it denied Mr. Chavez's motion to change venue [BIC 22-30]; (3) that the State improperly commented on Mr. Chavez's silence during the trial; [BIC 31-36] and (4) that the district court improperly admitted evidence that violated Rule 11-404. [BIC 36-37] In this Reply Brief, Mr. Chavez will address points raised in the State's Answer Brief.

I. The State has Missed the Opportunity to Argue for Evidence to be Admitted Pursuant to Rule 11-404(B)(2)

While Mr. Chavez acknowledges his trial counsel argued against the admission of the recorded jail call based on relevance and vaguely as prohibited character evidence, this Court now has the opportunity to reverse the conviction under a plain error standard if it is convinced that admission of the testimony constituted an injustice that creates grave doubts concerning the validity of the verdict. The State argues that Mr. Chavez missed the opportunity to preserve this argument, but ironically contends that the jail call can be admitted under Rule 11-

404(B). The State, however, failed to lay the appropriate foundation for admission of the jail calls under Rule 11-404(B)(2) before trial.

A. The State's Pre-trial Motions Relied on Different Rules for Admissibility and Cannot Correct That Problem on Appeal

During pre-trial litigation, the State filed a *motion in limine* seeking admission of the jail calls, arguing for their admission because (1) they were statements made as an admission by defendant under Rule 11-801(D); (2) defendant had no right to privacy in jail calls, and; (3) the jail provided notice that the phone calls were being recorded. **[1 RP 164-167]**

On appeal, the State asserts that the evidence should be admissible under a completely different theory. The State contends that the jail calls would have been admissible under Rule 11-404(B)(2). **[AB 35-38]** Rule 11-404(B)(2) provides an exception to the Rule that evidence of a crime, wrong, or other act is not admissible, unless it is being offered for another purpose such as “proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” *See* NMRA 11-404(B)(2). The State now claims that the statements Mr. Chavez made during the jail call could have been offered to show (1) identity and modus operandi; (2) intent; and (3) consciousness of guilt **[AB 35-38]**. The State failed to invoke or rely on this Rule in the District Court and has not preserved any of these arguments for the admissibility of the jail call. On appeal, the Court should

not allow the State to change course and characterize the jail calls as something other than what the State held them out to be before the District Court.

The State goes to great lengths and comparative analyses to explain why this evidence could have been properly admitted under 11-404(B)(2). The State, however, overlooks the straightforward mandate of 11-404(B)(3) in its analysis. Under Rule 11-404(B)(3), the State is required to give notice to the defendant before trial if it intends to introduce propensity evidence for an authorized purpose.

*B. Even if the Evidence Was Admissible Under Rule 11-404(B)(2),
the State Failed to Properly Invoke the Rule*

Rule 11-404(B)(3) provides that “[i]n a criminal case, the prosecution *must* provide reasonable *notice* of any evidence of crimes, wrongs, or other acts,” and articulate in writing “the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose.” (Emphasis added). The Rule’s language is mandatory, not permissive. While there is no “specific guidance on exactly how this notice is to be accomplished,” and courts have allowed some flexibility, “at a minimum, the State must give direct notice that it specifically intends to introduce prior bad acts evidence under Rule 11-404(B)(2).” *State v. Acosta*, 2016-NMCA-003, ¶ 19, 363 P.3d 1240. If the evidence is not identified specifically as intended to be introduced under 11-404(B), it “misses the point of the rule, which is to inform the defendant of crimes the state intends to introduce and to

allow the defendant time to respond by *motion in limine* or otherwise.” *Id.* (internal quotation marks and alterations omitted).

Here, during the pre-trial litigation over the admissibility of the recorded jail calls, the State’s arguments were based solely on hearsay rules and relevancy. [**1 RP 164-167**] The State never indicated the jail calls were evidence of *modus operandi* or intent, evidence of identity, or for evidence of guilty conscience, as it now asserts. [**See id.; AB 31-40**] The State did not provide even minimal notice of any intent to use the calls for such purposes. As acknowledged in Mr. Chavez’s Brief in Chief, his trial counsel never raised Rule 11-404 as barring this evidence, though he did argue, without explicitly addressing the Rule, that the jail call was inadmissible to “show a habit in that ‘this is the way I stab people.’” [**BIC 39 (citing Rule 11-404(A)(1))**]. That argument was certainly a comment about the improper use of propensity evidence, albeit without mentioning Rule 11-404. While the State claims that the jail call does not fall under the rubric of Rule 11-404(B), the call was certainly an “other act” used by the State to prove Mr. Chavez acted in conformity with the language he employed during the call. That is exactly why the State introduced this call and the only reason the State did so – for its utility as prohibited propensity evidence.

The State, in an effort to bolster its argument that the jail call does not fall under Rule 11-404(B), has attempted to expressly rewrite the Rule. The State claims

repeatedly that the jail call was not an “other bad act” under Rule 11-404(B). [AB 34-35] Rule 11-404(B), however, does not refer to an “other bad act;” it refers to “crimes, wrongs, or *other acts*.” There is nothing in the rule to suggest that the other act needs to be “bad” to be subject to the Rule’s prohibitions. To make matters worse, the call is taken completely out of context, and fails to address Mr. Chavez’s concern when the call was made, even if irrational, that not only he, but his family, were in mortal danger due to his charges in this case.

In an attempt to fit the jail call into rubric of Rule 11-404(B), the State makes much of the notion that the call was “probative of the identity and modus operandi of [Skip’s] killer,” because the phone call showed “a unique or distinct pattern to one person.” [See AB 35-36 (*citing State v. Lovett*, 2012-NMSC-036, 286 P.3d 265; and *State v. Peters*, 1997-NMCA-084, 123 N.M. 667)] That argument fails under our case law.

State v. Peters conducted a 404(B) analysis to determine whether “a unique or distinct pattern ha[d] been demonstrated” such that two separate attacks “displayed sufficiently distinctive similarities to permit an inference of pattern for purposes of proving identity.” *State v. Peters*, 1997-NMCA-084, ¶¶ 12, 19, 20. In *Peters*, the defendant appealed the introduction of “other act” evidence arguing that it was unfairly prejudicial. *See id.* ¶ 11. The court noted that the defendant did have a modus operandi because he committed crimes using a “signature,” making the evidence

probative of identity. *Id.* ¶¶ 15, 20. The crimes were so similar that police and an emergency room nurse noted the similarities. *Id.* There were two separate crimes and both showed the following similarities: (1) armed robberies; (2) rapes of elderly females; (3) committed in their homes; (4) at night; (5) using a knife, and; (6) in the same neighborhood. *Id.* In each case, the perpetrator entered the homes through a window, hit the women in the face or head, used his knife to control them, tied their hands and feed, gagged them, covered their faces, raped them, and ejaculated. *Id.* Then the defendant asked the victims where their purses were, and took money from each purse. *Id.* The similarities were so striking that the *Peters* court held the evidence “demonstrate[d] a unique or distinct pattern easily attributable to one person.” *Id.* ¶ 14. That is a far cry from this case .

The State itself conceded as much. [*See AB 35* (the “**statement to his son merely referenced a hypothetical intent that Defendant did not later carry out**”)]. The State’s argument that the jail call was properly admitted because it “described the *exact* manner of death” should be rejected by this Court as it does not serve the same probative purpose as in *Peters*.

The State did not provide proper notice under Rule 11-404(B)(2) and, on appeal, this Court should hold it is too late to justify admitting the jail call to prove something other than propensity evidence. There are specific steps that must be taken when invoking the Rule and the State simply failed to comply with those steps.

*C. Use of Evidence Under Rule 11-404(B)
Still Requires an Analysis of 11-403*

The State argued that the jail call was admissible because “it was not hearsay, because it was Defendant’s own statement and that it was relevant[.]” **[AB 31 (citing 6-7-22 CD 2:04:29-09:05; 1 RP 64)]** Defense Counsel argued he did not know “how its relevant” **[6-7-22 CD 2:04:29-09:05]** and that it was inadmissible to show “this is the way I stab people.” **[Id.]** The district court concluded that the jail call was admissible because it was (1) relevant; (2) that “relevancy is a low burden,” and; (3) that the danger of unfair prejudice did not substantially outweigh the probative value. **[6-7-22 CD 2:08:38-:50; see also 2 RP 290]** On appeal, the State offers that even if the jail call suggested some propensity, such propensity did not make it unfairly prejudicial. **[AB 40]** The State’s analysis of 11-403 is wrong.

Assuming, *arguendo*, the jails calls were admissible under Rule 11-404(B), a district court must still evaluate it under Rule 11-403. *State v. Jones*, 1995-NMCA-073, ¶ 5, 120 N.M. 185, 899 P.2d 1139. The jury’s exposure to the jail call offers little probative value other than propensity when weighed against the unfair prejudice it subjected Mr. Chavez to in the form of “this is the way I stab people.” *See Old Chief v. United States*, 519 U.S. 172, 180 (1997) (noting that unfair prejudice under Rule 11-403 means “an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one”) (internal quotation marks omitted).

The admission of this evidence was error, and such error in a criminal trial is not harmless “if there is a reasonable possibility that the excluded evidence might have affected the jury’s verdict.” *State v. Balderama*, 2004-NMSC-008, ¶ 41, 135 N.M. 329, 88 P.3d 845. This Court should order a new trial where the parties can litigate pre-trial, whether any use of jail calls is proper. *See State v. Acosta*, 2016-NMCA-003, ¶ 20 (affirming the decision of a district court to *sua sponte* grant a new trial when the State failed to give the defendant articulated notice of intent to admit evidence under 11-404(B)(2)). The district court also would also be able to create a formal record about whether any probative value existed aside from propensity that plausibly outweighed its prejudicial effect. *See State v. Beachum*, 1981-NMCA-089, ¶ 6, 96 N.M. 566, 632 P.2d 1204 (holding that a court must conduct this Rule 11-403 analysis).

***II. Mr. Chavez’s Statements in the Jail Call to His Mother
Were Not Directed to the Jury***

“Comment by the prosecutor upon a defendant’s failure to testify violates the privilege against self-incrimination guaranteed by the Fifth and Fourteenth Amendments.” *State v. Clark*, 1989-NMSC-010, ¶ 48, 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 (*citing Griffin v. California*, 380 U.S. 609 (1965)). When the defense fails to object in closing arguments, review is limited to fundamental error. *Id.* at ¶ 50.

During rebuttal argument, the prosecutor improperly commented on Mr. Chavez's constitutional right to remain silent. The State exclaimed repeatedly during its closing rebuttal that Mr. Chavez gave "no explanation," "zero," and "none! no explanation!" as to how the blood got in his truck and on the jacket. **[9-28-22 CD 12:03:04-03:57]** On appeal, however, the State argues that it could not have commented on Defendant's silence because Mr. Chavez was not silent. The State argues that "Defendant obviously *had* offered an explanation" to the jury about how Skip's blood got in Mr. Chavez's truck. **[AB 27]** The State points to a jail call to demonstrate that "obviously" Mr. Chavez told the jury that Skip "likely had a cut when [Mr. Chavez] picked him up." **[Id.]** The State's logic is flawed. Mr. Chavez was speaking on the phone to his mother, not to the jury. If Mr. Chavez had testified in his own defense, the jury would have had much more context from Mr. Chavez about how the blood may have been there. The State does not cite to any authority that allows it to infer that unsworn, non-hearsay comments made by a defendant during a recorded jail phone call—like the one here—can be considered as direct testimony to the jury. *Matter of Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 (holding that where arguments are unsupported by cited authority the court may assume no supporting authority exists). Had Mr. Chavez taken the stand to testify in his own defense, the State's comments may have been fair. But Mr. Chavez did not choose to testify, so the State cannot comment on his silence by

unfairly claiming that he did not explain adequately to the jury why blood was found inside his car.

The State asserts that because there was ample evidence against Mr. Chavez, there is no possible prejudicial effect that the prosecutor's statement could have created and, thus, no fundamental error. This is not true. Mr. Chavez's arguments about the State's misconduct are all intertwined and cumulative. Mr. Chavez's assertion of prosecutorial misconduct builds on the argument related to the improper admission of the jail call about stabbing people in the neck. Notwithstanding the jail call to his mother, the prosecutor should not be allowed to use that call as a foundation to comment on Mr. Chavez's decision not to testify at trial. Such conduct should not be condoned by the Court.

The State's improper comment on Mr. Chavez's silence, combined with the insufficient evidence to convict him of first-degree murder, constitutes fundamental error. *See State v. Duffy*, 1998-NMSC-014, ¶ 59, 126 N.M. 132, 967 P.2d 807, (holding prosecutorial misconduct during closing arguments, may be deemed harmless only if "evidence of guilt is so overwhelming that there can be no reasonable probability that the conviction was swayed by the misconduct."). Here, there is no overwhelming evidence supporting the first-degree murder conviction. That is why the State resorted to gimmicks (the use of propensity evidence, comments on the defendant's silence) to secure a conviction. Those gimmicks, when

assessed against the evidence as a whole, rise to fundamental error such that this Court should reverse the conviction. *See State v. Rojo*, 1999-NMSC-001, ¶ 55, 126 N.M. 438, 971 P.2d 829.

III. But for the Cumulative Errors, the Jury Would Likely Not Have Found that the Evidence was Sufficient to Support Guilt Beyond a Reasonable Doubt

The State wants this Court to uphold the guilty verdicts based on facts indicating that Mr. Chavez “oddly followed Mr. Smith” around, Skip was later found stabbed to death over 24 times, and there were a few droplets of blood in Mr. Chavez’s truck and on a jacket found in his home. The State asserts that these circumstantial facts support a finding of a deliberate intent to kill. Mr. Chavez maintains he did not kill Skip. Here, there is marginal evidence to support a conviction for murder, since there is no motive for Mr. Chavez to have killed Skip, and no evidence of premeditation. Mr. Chavez’s most fundamental argument is that the jury viewed all the State’s circumstantial evidence with a more emotional mind set due to the impermissible comments on his silence, the propensity evidence, and the pretrial publicity.

A. There Was Insufficient Evidence to Prove a Deliberate or Premeditated Intent

To state that a large number of stab wounds, or evidence of “overkill,” *see State v. Flores*, 2010-NMSC-002, ¶ 22, 147 N.M. 542, 226 P.3d 641, are enough to infer a finding of deliberate intent to commit first-degree murder, without more, is

an oversimplification. For example, the State points to *State v. Duran* to support this assertion. 2006-NMSC-035, 140 N.M. 94, 140 P.3d 515. **[AB 11]** *Duran* found that the jury could have reached a finding of deliberate intent to kill when there were a large number of stab wounds, evidence of a prolonged struggle, evidence of the defendant's attitude toward the victim, and the defendant confessing to the murder. *Id.* ¶¶ 8-9. The defendant in *Duran* made multiple statements to acquaintances and law enforcement that he killed the victim. *Id.* ¶ 4. One witness testified that the defendant said that he "had hurt a lady and stabbed her eight or nine times." *Id.* Another woman testified that she heard the defendant state that he "had hurt some lady and stabbed her with a knife." *Id.* A third person testified that defendant told him that he "straight-up murdered some bitch." *Id.* A deputy who was involved in the case testified that when defendant was given a copy of the criminal complaint, the "[d]efendant commented they charged me for killing two people and I only killed one." *Id.* The defendant denied killing the victim during his testimony, but did he admit to engaging in consensual sex with the victim. *Id.* ¶ 3. It was the totality of the evidence in *Duran* that permitted a finding of deliberate intent and a first-degree murder. That quantum of evidence is missing here.

Other cases where a sufficiency analysis is conducted based on multiple aggressive wounds and evidence of overkill, the jury has been presented with substantially more evidence upholding its deliberate intent element. *See State v.*

Guerra, 2012-NMSC-027, 284 P.3d 1076 (the defendant told his friends he stabbed the victim eight or nine times); *State v. Begay*, 1998-NMSC-029, 125 N.M. 541, 964 P.2d 102 (the defendant spoke regularly to friends about “pulling a fatality,” and told another acquaintance that he stabbed the victim eight times with his knife, which was the precise number of stab wounds found on the victim); *State v. Flores*, 2010-NMSC-002, (the defendant stabbed the victim 21 times which the court called evidence of “overkill,” but the jury also heard other evidence addressing deliberate intent). Unlike those cases, the only evidence of deliberation here is the number of stab wounds.

One case cited by the State that might provide for a closer analogy to the case at hand would be *State v. Thomas*. 2016-NMSC-024, 376 P.3d 184. In *Thomas*, the victim died from blunt force injuries to her head. *Id.* ¶ 1. The injuries were believed to have been caused by a “paver stone.” There were no statements that connected the defendant to the victim’s death like in *Duran*, *Guerra*, *Begay*, or *Flores*, but in *Thomas*, the defendant’s DNA evidence was found on the victim’s body and on the paver stone which indicated he caused those injuries. While the defendant denied ever having met the victim, the defendant’s semen was found on her thigh and under the fingernails of her right hand. *Id.* ¶ 39. While *Thomas* is closer to Mr. Chavez’s case, a critical distinction is that Mr. Chavez’s DNA was not found anywhere on Skip’s body or where his body was found. [**See BIC 11**] The primary physical

evidence linking Mr. Chavez to Skip's death were droplets of blood found inside his truck.¹ Even the jacket that had droplets of blood on it was not a reliable indicator. The jury never heard any statements to confirm whether the jacket belonged to Mr. Chavez or if it was left behind in the truck by Skip. While the jacket had Skip's DNA on it, the DNA of three other unknown individuals were also on it. **[See BIC 11]** *Thomas* did find sufficient evidence to uphold a finding of deliberate intent given the totality of the evidence in that case, but nothing approaching that quantum of evidence exists here.

“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. **[See BIC 9]** The State's evidence failed to meet this burden here; when compounded with the cumulative trial errors, this Court should reverse Mr. Chavez's convictions.

IV. The Multiple Errors Amount to Reversible Cumulative Errors, Especially Because the Way the Errors Intertwined to Deprive Mr. Chavez of a Fair Trial

The cumulative-error doctrine “requires reversal of a defendant's conviction when the cumulative impacts of errors which occurred at trial was so prejudicial that

¹ If the State's theory of the case is correct and Skip was murdered in the front seat of Mr. Chavez's truck, there would have been blood throughout the cab of the truck. The investigators used Blue Star to locate blood inside the cab, however, and only found a miniscule amount. An objective assessment of the evidence does not support the State's theory that the murder took place inside the cab of the truck.

the defendant was deprived of a fair trial.” *State v. Martin*, 1984-NMSC-077, ¶ 17, 101 N.M. 595, 686 P.2d 937. This Court has the responsibility to “see that a person convicted of a crime shall have a fair trial with a proper defense, and that no conviction shall stand because of the absence of either.” *State v. Gomez*, 1965-NMSC-128, ¶ 9, 75 N.M. 545, 408 P.2d 48.

In this case, multiple errors uniquely intertwined to undermine the verdict. The error in admitting the jail call about stabbing people and playing it for the jury multiple times was highly prejudicial and a violation of the Rule 11-404; the prosecutor’s error of commenting on Mr. Chavez’s right to remain silent; the district court’s error in failing to recognize that the small community of Las Vegas was overwhelmed by the death of Skip, yet failing to grant a change of venue motion. All of those errors eviscerated the jury’s ability to decide the case fairly. The evidence presented here was otherwise insufficient to meet the elements for a first-degree murder conviction, but the jury found Mr. Chavez guilty anyway due to these trial errors. Due to the accumulation of errors, Mr. Chavez did not receive a fair trial; this Court should reverse his convictions.

CONCLUSION

For the reasons discussed above and in his Brief in Chief Mr. Chavez respectfully requests that this Court vacate his convictions and remand the case for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 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)(2) & (G), I hereby certify that this brief complies with the type-volume limitation and contains 3,814 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.

/s/ Marc M. Lowry
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