Official Publication of the State Bar of New Mexico

Bar Bulletin

May 10, 2017 • Volume 56, No. 19

Ladder Back Woodpecker, by Don Johnson Jr. (see page 3) 3rd Street Arts

Inside This Issue

UNM School of Law Alumni/ae Association

YOUR ATTENDANCE Changes STUDENTS' LIVES

DISTINGUISHED ACHIEVEMENT Awards Dinner 2017

HONORING THE PAST | BUILDING THE FUTURE

SUBMIT YOUR NOMINATIONS FOR

2 AWARDS

Distinguished Achievement Award

Help the UNM Law Alumni/ae Association recognize accomplished members of our legal community.

NEW! Alumni Promise Award

Recognize an alumnus/a who graduated from the Law School within the last ten years and has contributed innovative or substantial service to the Law School, its students, or its community.

DEADLINE FOR ALL NOMINATIONS: MONDAY, MAY 15, 2017

SEE CRITERIA AND NOMINATION FORM lawschool.unm.edu/daad

For more information, call 505.277.1457

NOMINEES WILL BE RECOGNIZED AT THE UNM SCHOOL OF LAW
2017 DISTINGUISHED ACHIEVEMENT AWARDS DINNER ON FRIDAY, OCTOBER 20, 2017

STATE BAR of NEW MEXICO

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May 10, 2017, Vol. 56, No. 19

Table of Contents

Meetings

May

10
Taxation Section Board
11 a.m., teleconference

10
Children's Law Section Board
Noon, Juvenile Justice Center

11
Elder Law Section Board
Noon, State Bar Center

11
Public Law Section Board
Noon, Montgomery & Andrews, Santa Fe

12
Prosecutors Section Board
Noon, State Bar Center

16
Committee on Diversity in the Legal Profession,
Noon, State Bar Center

16
Senior Lawyers Division Board
4 p.m., State Bar Center

17
Real Property, Trust and Estate Section: Trust and Estate Division
Noon, State Bar Center

19
Family Law Section Board
9 a.m., teleconference

Workshops and Legal Clinics

May

15
Civil Legal Clinic
10 a.m.–1 p.m., Bernalillo County Metropolitan Court, Albuquerque, 505-841-9817

17
Family Law Clinic
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

24
Consumer Debt/Bankruptcy Workshop
6–9 p.m., State Bar Center, Albuquerque, 505-797-6094

June

3
Civil Legal Clinic
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

3
Divorce Options Workshop
6–8 p.m., State Bar Center, Albuquerque, 505-797-6003

15
Civil Legal Clinic
10 a.m.–1 p.m., Bernalillo County Metropolitan Court, Albuquerque, 505-841-9817

About Cover Image and Artist: Lieutenant Commander Don Johnson Jr. is an attorney at Johnson Family Law PC in Albuquerque. His work has focused on New Mexico cultural events and his law practice. The featured 20"x16" oil painting on canvas is a portrait of a Ladder Back Woodpecker that visits his law office frequently. The woodpecker is not a client and all attorney-client confidentiality rules have been observed.

Notices

Court News

Second Judicial District Court

Exhibit Destruction Notice

Pursuant to 1.21.2.617 Functional Records Retention and Disposition Schedules-Exhibits, the Second Judicial District Court will destroy exhibits filed with the Court, the Domestic (DM/DV) cases for the years of 1993 to the end of 2009 including but not limited to cases which have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits may be retrieved through May 26. Those with cases with exhibits should verify exhibit information with the Special Services Division at 505-841-6717, from 10 a.m. to 2 p.m., Monday through Friday. Plaintiff's exhibits will be released to counsel of record for the plaintiff(s) and defendant's exhibits will be released to counsel of record for defendants(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Seventh Judicial District

Judicial Notice of Vacancy

A vacancy on the Seventh Judicial District Court exists as of May 4 due to the retirement of Hon. Kevin Sweazea, effective May 3. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the administrator of the Court. Alfred Mathewson, chair of the Seventh Judicial District Court Judicial Nominating Commission, invites applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 28 of the New Mexico Constitution. Applications may be obtained at lawschool.unm.edu/judsel/application.php. The deadline is 5 p.m., May 11. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the office of the Secretary of State. The Seventh Judicial District Court Judicial Nominating Commission will meet at 9 a.m., May 18, in Socorro. The Commission meeting is open to the public those with comments will have an opportunity to be heard.

Bernalillo County Metropolitan Court

Investiture of Hon. Renée Torres

The judges and employees of the Bernalillo County Metropolitan Court invite members of the legal community and the public to attend the investiture of the Hon. Renée Torres, Division III at 5:15 p.m., June 1, in the Bernalillo County Metropolitan Court Rotunda. Judges who want to participate in the ceremony, including Tribal Court judges, should bring their robes and report to the First Floor Viewing Room by 5 p.m. Following the ceremony, a reception will be held on the first floor of the Metro Court.

Professionalism Tip

With respect to opposing parties and their counsel:

I will cooperate with opposing counsel's requests for scheduling changes.

I will not use litigation, delay tactics, or other courses of conduct to harass the opposing party or their counsel

U.S. District Court for the District of New Mexico

Documentary Premier and Black Tie Optional Event

The U.S. District Court for the District of New Mexico and the Bench & Bar Fund Committee invite members of the State Bar to a black tie optional premiere of the documentary "Taming New Mexico." The Bench and Bar Fund and numerous law firms have helped fund the KNME produced film. The event will begin at 5:30 p.m. on May 10 at the Pete V. Domenici United States Courthouse, 333 Lomas Boulevard NW, Albuquerque, New Mexico 87102. There will be heavy hors d'oeuvres. Members of the bar will also be able to receive CLE credit for the event. To R.S.V.P., email Corazon Events at info@corazonevents.com. This year marks the 18th anniversary of the Pete V. Domenici U.S District Courthouse. An optional black tie event was held in 1999 at its opening. The Court and Committee hope this year's event will be as memorable for today's attorneys as it was in 1999.

State Bar News

Attorney Support Groups

- May 15, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the third Monday of the month.)
- June 5, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)
- June 12, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets on the second Monday of the month.) Teleconference participation is now available. Dial 1-866-640-4044 and enter code 7976003#.

For more information, contact Hilary Noskin, 505-449-7984 or Bill Stratvert, 505-242-6845.

Appellate Practice Section

June Brown Bag Lunch with Judge Vargas

Join the Appellate Practice Section and YLD for a brown bag lunch at noon, June 2, at the State Bar Center with guest Judge Julie J. Vargas of the New Mexico Court of Appeals. The lunch is informal and is intended to create an opportunity for appellate judges and practitioners who appear before them to exchange ideas and get to know each other better. Those attending are encouraged to bring their own "brown bag" lunch. R.S.V.P. with Zach Ives at zach@ginlawfirm.com. Space is limited.

Committee on Women and the Legal Profession

Golf Swing Clinic

The Committee on Women and the Legal Profession invites all lady golfers to a Golf Swing Clinic on Saturday, May 20 at Sandia Resort & Casino. The instruction will be from 10 a.m.–noon, followed by lunch. The price is $70 per person, which includes instruction, rental clubs (if needed) and lunch. Registration is not limited to attorneys—all lady golfers of all skill levels are welcome. Register at http://www.sandiagolf.com/form.php?id=e677b417d4e23c7156eb2170de6016d1. For more information, contact Jocelyn Castillo at jcastillosd@yahoo.com.

UNM

Law Alumni/ae Association

15th Annual Law Scholarship Golf Classic

The UNM Law Alumni/ae Association invites members of the legal

Notice to Attorneys:

Electronic Filing Coming to the New Mexico Supreme Court

Beginning May 1, 2017, electronic filing and service became available for use on a *VOLUNTARY BASIS* for all new and pending cases in the Supreme Court through the same Odyssey File and Serve system used in state district courts throughout New Mexico. Paper filings will continue to be accepted by the Supreme Court until July 1, 2017, at which time *USE OF THE ELECTRONIC FILING SYSTEM FOR ALL PROCEEDINGS IN THE SUPREME COURT WILL BECOME MANDATORY*. The Supreme Court order and related rule amendments authorizing electronic filing in the Supreme Court are set forth in their entirety in the May 3, 2017, issue of the Bar Bulletin. See Supreme Court Order No. 17-8300-004 approving amendments to Rules 12-307.2, 17-202, 17-301, and 27-104 NMRA.

Unlike in the district court, electronic filing and service will be available in the Supreme Court at no charge. Payment of the $125 docket fee, however, cannot be accepted through the File and Serve system at this time. Accordingly, for those cases initiated in the Supreme Court through the File and Serve system for which a docket fee is due, payment must be made by check made payable to the New Mexico Supreme Court and received by the Supreme Court Clerk's Office no later than 5 days after the case is accepted for filing. For more information, please see Rule 12-307.2(C) NMRA.

The Supreme Court will be offering in-person and online training sessions in May and June for any attorney who is not already registered and familiar with the File and Serve system. Visit the Supreme Court's website at supremecourt.nmcourts.gov for more details.

community to the 15th Annual Law Scholarship Golf Classic presented by US Eagle Federal Credit Union on June 9 at the UNM Championship Golf Course. Proceeds from the Golf Classic benefit the Law School's only full-tuition merit scholarships. Register and learn about visible sponsorship opportunities at goto.unm.edu/golf or contact Melissa Lobato at lobato@law.unm.edu or 505-277-1457.

Call for Nominations

The UNM Law Alumni/ae Association requests nominations for the Distinguished Achievement Awards, recognizing accomplished members of the New Mexico legal community and the new Alumni Promise Award, recognizing an alumnus/a who graduated from the Law School within the last 10 years and has contributed innovative or substantial service to the Law School, its students, or its community. The deadline for all nominations is May 15. To submit nominations, visit lawschool.unm.edu/daad. For more information, contact Melissa Lobato at lobato@law.unm.edu or 505-2771457.

Law Library

Hours Through May 13

Building & Circulation	
Monday–Thursday	8 a.m.–8 p.m.
Friday	8 a.m.–6 p.m.
Saturday	10 a.m.–6 p.m.
Sunday	noon–6 p.m.
Reference	
Monday–Friday	9 a.m.–6 p.m.

New Mexico Lawyers and Judges Assistance Program

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505-228-1948 • 800-860-4914

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www.nmbar.org/JLAP

Other Bars

First Judicial District Bar Association

Spring Happy Hour

Join the First Judicial District Bar Association for a spring happy hour event. Admission is free for attorneys, plus a guest, and includes one drink and appetizers (while they last). The event is from 5:30–7:30 p.m., May 18, at Georgia Restaurant, 225 Johnson St., Santa Fe, NM 87501. R.S.V.P.s are not necessary. For more information, contact Mark Cox at mcox@hatcherlawgroupnm.com.

National College of Probate Judges

Spring Conference in Santa Fe

The National College of Probate Judges invites members of the State Bar of New Mexico to attend the NCPJ Spring Conference May 17–20 at the Eldorado Hotel in Santa Fe. To register, visit ncpj.org/2017_spring_conference/.

New Mexico Criminal Defense Lawyers Association

Fighting Forensics CLE

DNA and digital forensic evidence are two of the New Mexico Criminal Defense Lawyers Association's most requested topics for legal education. Join NMCDLA June 9 in Albuquerque for the Fighting Forensics CLE (6.0 G), the annual membership meeting and the Driscoll Award Ceremony. Topics include DNA, pathology, computer, cell phone and body camera forensics. Afterwards, NMCDLA members and their families and friends are invited to the annual membership party and silent auction. Visit www.nmcdla.org to join NMCDLA and register for the seminar today.

Report by Disciplinary Counsel
Disciplinary Quarterly Report

Reporting Period: Jan. 1–March 31, 2017

Final Decisions

Final Decisions of the NM Supreme Court 4

Matter of David A. Reyes, Esq. (Disciplinary No. 07-2016-745). The New Mexico Supreme Court accepted a conditional agreement and entered an order suspending Respondent from the practice of law for one (1) year for incompetence and a lack of diligence in two personal injury matters, and failing to communicate with clients. The Court deferred the suspension upon the following conditions: Respondent must: (a) reimburse clients and the Client Protection Fund; (b) not represent clients in personal injury/automobile accident matters; and (c) serve a one (1) year probationary period. Additionally, Respondent received a Formal Reprimand and paid costs to the Disciplinary Board.

Matter of Armando Torres, Esq. (Disciplinary No. 02-2016-740). The New Mexico Supreme Court entered an order suspending Respondent from the practice of law for a period of one (1) year for incompetence. Respondent was also ordered to pay costs to the Disciplinary Board.

Matter of D. Chipman Venie, Esq. (Disciplinary No. 01-2016-737). The New Mexico Supreme Court entered an order permanently disbarring Respondent from the practice for violating client confidences, counseling a client to engage in fraud, filing frivolous lawsuits, making false statements, offering false evidence, and charging overreaching/excessive fees. Respondent was also ordered to pay costs to the Disciplinary Board and reimburse money taken. An Opinion will be issued by the Supreme Court at a later date.

Matter of Andrea Christman, Esq. (Disciplinary No. 04-2014-689). The New Mexico Supreme Court entered an order reinstating Applicant to the practice of law with conditions. Applicant must also pay costs to the disciplinary board.

Summary Suspensions

Total number of attorneys summarily suspended 0

Administrative Suspensions

Total number of attorneys administratively suspended..... 2

Matter of Matthew E. Ortiz, Esq. (Disciplinary No. 10-2016-749). The New Mexico Supreme Court entered an order administratively suspending Respondent from the practice of law for the failure to cooperate with Disciplinary Counsel.

Matter of Elena Moreno Hansen, Esq. (Disciplinary No. 01-2017-750). The New Mexico Supreme Court entered an order administratively suspending Respondent from the practice of law for the failure to cooperate with Disciplinary Counsel.

Disability Suspensions

Total number of attorneys placed on disability suspension 0

Charges Filed

Charges were filed against an attorney for allegedly failing to provide competent representation to a client; failing to act with reasonable diligence and promptness in representing a client; failing to reasonably communicate with a client; knowingly making a false statement of material fact in connection with a disciplinary matter; engaging in conduct involving dishonesty, fraud, deceit and misrepresentation; and engaging in conduct prejudicial to the administration of justice.

Charges were filed against an attorney for allegedly failing to hold property separate from the attorney's own; knowingly disobeying an obligation under the rules of the tribunal; engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; and engaging in conduct that is prejudicial to the administration of justice.

Charges were filed against an attorney for allegedly failing to provide competent representation to a client; failing to hold a client's property separate from the lawyer's own property and failing to keep complete records of the account funds; knowingly disobeying an obligation under the rules of a tribunal; knowingly making a false statement of material fact in a disciplinary matter; engaging in conduct involving fraud, deceit, or misrepresentation; and engaging in conduct that is prejudicial to the administration of justice.

Charges were filed against an attorney for allegedly failing to provide competent representation to a client; failing to represent a client diligently; failing to inform the client of a hearing and an order, and obligation under the order; making a false statement of material fact in a disciplinary proceeding; and engaging in conduct that is prejudicial to the administration of justice.

Charges were filed against an attorney for allegedly failing to provide competent representation to a client; failing to act with reasonable diligence and promptness in representing a client; failing to keep the client reasonably informed about the status of the matter; failing to promptly comply with reasonable requests for information; charging an unreasonable fee; failing to hold the property of another separately; failing to maintain complete records of all client funds; failing to timely respond to a lawful demand for information from a disciplinary authority; failing to give full cooperation and assistance to disciplinary counsel; violating the Rules of Professional Conduct; and engaging in conduct that is prejudicial to the administration of justice.

Charges were filed against an attorney for allegedly representing a client when there is a significant risk that the representation of the client will be materially limited by the personal interest of the lawyer; failing to properly withdraw from representation when the lawyer's representation violates the Rules of Professional Conduct; knowingly failing to disclose a fact necessary to correct a misapprehension known by the lawyer to have arisen in the disciplinary matter; failing to give full cooperation and assistance to disciplinary counsel; engaging in conduct involving fraud, dishonesty, deceit, or misrepresentation; and engaging in conduct that is prejudicial to the administration of justice.

Petitions for Reciprocal Discipline Filed

Petitions for reciprocal discipline filed 0

Reinstatement from Probation

Petitions for reinstatement filed 1

John Wayne Higgins, Esq. (Disciplinary No. 09-2013-676) Respondent petitioned for reinstatement to the practice of law from probation. The Supreme Court granted the petition in an Order dated March 10, 2017.

Formal Reprimands

Total number of attorneys formally reprimanded 3

Matter of Merrie L. Chappell, Esq. (Disciplinary No. 04-2016-742) a Formal Reprimand was issued at the Disciplinary Board meeting of January 1, 2017, for the violation of Rule 16-304(C), knowingly disobeying an obligation under the rules of a tribunal; Rule 16-803(D), failing to give full cooperation to disciplinary counsel; Rule 16-804(C), engaging in conduct involving negligent misrepresentation; and Rule 16-804(D), engaging in conduct that was prejudicial to the administration of justice. The Formal Reprimand was published in the State *Bar Bulletin* issued February 8, 2017.

Matter of David A. Reyes, Esq. (Disciplinary No. 07-2016-745) a Formal Reprimand was issued at the Disciplinary Board meeting of March 17, 2017 – pursuant to the Amended Conditional Agreement Admitting the Allegation and Consent to Discipline, adopted by the Supreme Court of New Mexico on January 4, 2017, – for the violation of Rule 16-101, failing to provide competent representation to a client; Rule 16-103, failing to act with reasonable diligence and promptness in representing a client; Rule 16-104(A), failing to keep the client reasonably informed about the status of the matter and failing to comply with reasonably requests of information; Rule 16-104(B), failing to explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the matter; Rule 16-302, failing to make reasonable efforts to expedite litigation; and Rule 16-804(D), engaging in conduct that was prejudicial to the administration of justice. The Formal Reprimand was published in the State *Bar Bulletin* issued April 5, 2017.

Matter of Shannon Robinson, Esq. (Disciplinary No. 09-2016-748) a Formal Reprimand was issued at the Disciplinary Board meeting of March 17, 2017, – pursuant to the Conditional Agreement Not Contesting the Allegation and Consent to Discipline – for the violation of Rule 16-101, failing to provide competent representation to a client; Rule 16-103, failing to represent the client diligently; Rule 16-104(A), Failing to communicate with the client; Rule 16-302, failing to expedite litigation; and Rule 16-804(D), engaging in conduct that was prejudicial to the administration of justice. The Formal Reprimand was published in the State *Bar Bulletin* issued April 5, 2017.

Informal Admonitions

Total number of attorneys admonished 4

An attorney was informally admonished pursuant to a *Conditional Agreement* Admitting the Allegations and Consent to Discipline for failing to promptly disburse funds that the Client was entitled to receive and failing to make reasonable efforts to ensure that the firm had in effect measures that gave reasonable assurance of compliance with Rule 17-204 (filing to maintain records as required) in violation of Rules 16-115(D) and 16-501(A) of the Rules of Professional Conduct.

An attorney was informally admonished pursuant to a *Conditional Agreement* Admitting the Allegations and Consent to Discipline for failing to promptly disburse funds that the Client was entitled to receive and failing to make reasonable efforts to ensure that the firm had in effect measures that gave reasonable assurance of compliance with Rule 17-204 (filing to maintain records as required) in violation of Rules 16-115(D) and 16-501(A) of the Rules of Professional Conduct.

An attorney was informally admonished for failing to provide competent representation; failing to act with reasonable diligence and promptness in representing a client; failing to keep the client reasonably informed about the status of the matter; failing to respond to a lawful demand for information from a disciplinary authority; failing to make reasonable efforts to expedite litigation consistent with the interests of the client; and engaging in conduct prejudicial to the administration of justice in violation of Rules 16-101, 16-103, 16-104, 16-302, and 16-804(D) of the Rules of Professional Conduct.

An attorney was informally admonished for knowingly disobeying an obligation under the rules of a tribunal; engaging in conduct intended to disrupt a tribunal; and engaging in conduct that is prejudicial to the administration of justice in violation of Rules 16-304, 16-305(D), and 16-804(D) of the Rules of Professional Conduct.

Letters of Caution

Total number of attorneys cautioned 13

Attorneys were cautioned for the following conduct: (1) general incompetence; (2) general neglect (three letters of caution issued); (3) withholding client funds; (4) failure to communicate; (5) disruption of a tribunal; (6) bank overdraft; (7) general misrepresentation to the court (2 letters of caution issued); (8) failing to return fee; (9) improper withdrawal; and (10) unauthorized practice of law (by a non-lawyer).

Complaints Received

Allegations	**Number of Complaints**
Trust Account Violations	2
Conflict of Interest	0
Neglect and/or Incompetence	104
Misrepresentation or Fraud	35
Relationship with Client or Court	21
Fees	9
Improper Communications	3
Criminal Activity	1
Personal Behavior	11
Other	12
Total number of complaints received	198

How much do you know about the Bar Foundation?

In the last five years the Bar Foundation provided the following services to our community and members:

For Our Community

- Provided direct legal assistance to approximately **22,500** seniors statewide.
- Sponsored **250** workshops statewide on debt relief/ bankruptcy, divorce, wills, probate, long term care Medicaid and veteran's issues.
- Helped more than **10,000** New Mexicans statewide find an attorney.
- Distributed **$1.716 million** for civil legal service programs throughout New Mexico.
- Introduced more than **800** high school students to the law through the Student Essay Contest.
- Provided more than **33,000** pocket Constitutions and instruction by volunteer attorneys to New Mexico students statewide.

For Our Members

- Lawyer referral programs helped members meet new clients and accumulate pro bono hours with more than **10,000** referrals to the private bar, **1,600** prescreened by staff attorneys.
- Provided more than **100,000** credit hours of affordable continuing legal education.

The **State Bar Foundation** is the charitable arm of the State Bar of New Mexico representing the legal community's commitment to serving the people of New Mexico and the profession. The goals of the Foundation are to:

- *Enhance* access to legal services for underserved populations
- *Promote* innovation in the delivery of legal services
- *Provide* legal education to members and the public

The State Bar Foundation Relies on the *Passion* of Lawyers!

STATE BAR of NEW MEXICO FOUNDATION

To support the Bar Foundation, contact Stephanie Wagner at 505-797-6007 • swagner@nmbar.org

STATE BAR of NEW MEXICO

2017 Annual Meeting– Bench & Bar Conference

Call for Nominations

State Bar of New Mexico 2017 Annual Awards

Nominations are being accepted for the 2017 State Bar of New Mexico Annual Awards to recognize those who have distinguished themselves or who have made exemplary contributions to the State Bar or legal profession in 2016 or 2017. The awards will be presented July 28 during the 2017 Annual Meeting—Bench and Bar Conference at the Inn of the Mountains Gods in Mescalero. All awards are limited to one recipient per year, whether living or deceased. *Previous recipients for the past five years are listed below. To view the full list of previous recipients, visit www.nmbar.org/Awards.*

Distinguished Bar Service Award-Lawyer

Recognizes attorneys who have provided valuable service and contributions to the legal profession and the State Bar of New Mexico over a significant period of time.

Previous recipients: Hannah B. Best, Jeffrey H. Albright, Carol Skiba, Ian Bezpalko, John D. Robb Jr.

Distinguished Bar Service Award–Nonlawyer

Recognizes nonlawyers who have provided valuable service and contributions to the legal profession over a significant period of time.

Previous recipients: Tina L. Kelbe, Kim Posich, Rear Admiral Jon Michael Barr (ret.), Hon. Buddy J. Hall, Sandra Bauman

Justice Pamela B. Minzner* Professionalism Award

Recognizes attorneys or judges who, over long and distinguished legal careers, have by their ethical and personal conduct exemplified for their fellow attorneys the epitome of professionalism.

Previous recipients: Arturo L. Jaramillo, S. Thomas Overstreet, Catherine T. Goldberg, Cas F. Tabor, Henry A. Kelly

*Known for her fervent and unyielding commitment to professionalism, Justice Minzner (1943–2007) served on the New Mexico Supreme Court from 1994–2007.

Outstanding Legal Organization or Program Award

Recognizes outstanding or extraordinary law-related organizations or programs that serve the legal profession and the public.

Previous recipients: Self Help Center at the Third Judicial District Court, Pegasus Legal Services for Children, Corinne Wolfe Children's Law Center, Divorce Options Workshop, United South Broadway Corp. Fair Lending Center

Outstanding Young Lawyer of the Year Award

Awarded to attorneys who have, during the formative stages of their legal careers by their ethical and personal conduct, exemplified for their fellow attorneys the epitome of professionalism; nominee has demonstrated commitment to clients' causes and to public service, enhancing the image of the legal profession in the eyes of the public; nominee must have practiced no more than five years or must be no more than 36 years of age.

Previous recipients: Denise M. Chanez, Tania S. Silva, Marshall J. Ray, Greg L. Gambill, Robert L. Lucero Jr.

Robert H. LaFollette* Pro Bono Award

Presented to an attorney who has made an exemplary contribution of time and effort, without compensation, to provide legal assistance over his or her career to people who could not afford the assistance of an attorney.

Previous recipients: Billy K. Burgett, Robert M. Bristol, Erin A. Olson, Jared G. Kallunki, Alan Wainwright

*Robert LaFollette (1900–1977), director of Legal Aid to the Poor, was a champion of the underprivileged who, through countless volunteer hours and personal generosity and sacrifice, was the consummate humanitarian and philanthropist.

Seth D. Montgomery* Distinguished Judicial Service Award

Recognizes judges who have distinguished themselves through long and exemplary service on the bench and who have significantly advanced the administration of justice or improved the relations between the bench and bar; generally given to judges who have or soon will be retiring.

Previous recipients: Justice Richard C. Bosson (ret.), Hon. Cynthia A. Fry, Hon. Rozier E. Sanchez, Hon. Bruce D. Black, Justice Patricio M. Serna (ret.)

*Justice Montgomery (1937–1998), a brilliant and widely respected attorney and jurist, served on the New Mexico Supreme Court from 1989–1994.

A letter of nomination for each nominee should be sent to Joe Conte, Executive Director, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; fax 505-828-3765; or email jconte@nmbar.org. **Please note that we will be preparing a video on the award recipients which will be presented at the awards reception, so please provide names and contact information for three or four individuals who would be willing to participate in the video project in the nomination letter.**

Deadline for Nominations: May 12

Legal Education

May

10 **Taming New Mexico**
1.0 G
Live Seminar
U.S. District Court, District of New Mexico
info@corazonevents.com

12 **Ethics of Co-Counsel and Referral Relationships**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

17 **Legislative Updates to the Probate Code**
1.0 G
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

18 **Annual Estate Planning Update**
5.0 G, 1.0 EP
Live Seminar, Albuquerque
Wilcox Law Firm
www.wilcoxlawnm.com

19 **The Basics of Trust Accounting: How to Comply with Rule 17-204 NMRA**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

19 **2016 Administrative Law Institute**
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

19 **NM DWI Cases: From the Initial Stop to Sentencing; Evaluating Your Case (2016)**
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

19 **Human Trafficking (2016)**
3.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

19 **Ethics in Discovery Practice**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

23 **Drafting Gun Wills and Trusts—and Preventing Executor Liability**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

25 **The Basics of Trust Accounting: How to Comply with Rule 17-204 NMRA**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

26 **Living with Turmoil in the Oil Patch: What It Means to New Mexico (2016)**
5.8 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

26 **27th Annual Appellate Practice Institute (2016)**
6.4 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

31 **Ethics and Artificial Intelligence in Law Practice Software and Tools**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

June

1–3 **2017 Jackrabbit Bar Conference**
7.8 G
Live Seminar, Santa Fe
State Bar of New Mexico
www.nmbar.org/nmstatebar/JBC.aspx

2 **Drafting Employee Handbooks**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

6 **2017 Ethics in Civil Litigation Update, Part 1**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

7 **2017 Ethics in Civil Litigation Update, Part 2**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Gender and Justice (2016 Annual Meeting)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

9 **The Disciplinary Process (2016 Ethicspalooza)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

16 **Reforming the Criminal Justice System (2017)**
6.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

June

16 **Avoiding Discrimination in the Form I-9 or E-Verify (2017)**
1.5 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

16 **Ethical Issues of Social Media and Technology in the Law (2016)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

16 **The Ethics of Supervising Other Lawyers**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

16 **Representing Victims of Domestic and Sexual Violence in Family Law Cases**
2.0 G
Live Seminar, Albuquerque
Volunteer Attorney Program
505-814-5038

22 **Lawyer Ethics and Credit Cards**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

22 **Decanting and Otherwise Fixing Broken Trusts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

23 **The Basics of Trust Accounting: How to Comply with Rule 17-204 NMRA**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **Copy That! Copyright Topics Across Diverse Fields (2016)**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **2016 Real Property Institute**
4.5 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **DTSA: Protecting Employer Secrets After the New Defend Trade Secrets Act**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

30 **The Basics of Trust Accounting: How to Comply with Rule 17-204 NMRA**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

30 **Best and Worst Practices in Ethics and Mediation (2016)**
3.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

30 **The Rise of 3-D Technology - What Happened to IP? (2016 Annual Meeting)**
1.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

July

18 **Techniques to Restrict Shareholders/LLC Members: The Organizational Opportunity Doctrine, Non-Competes and More**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **Default and Eviction of Commercial Real Estate Tenants**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **Annual Rocky Mountain Mineral Law Institute**
13.0 G, 2.0 EP
Live Seminar, Santa Fe
Rocky Mountain Mineral Law Foundation
www.rmmlf.org

21 **Ethical Issues for Small Law Firms: Technology, Paralegals, Remote Practice and More**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

25 **Commercial Paper: Drafting Short-Term Notes to Finance Company Operations**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **Evidence and Discovery Issues in Employment Law**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

Opinions

As Updated by the Clerk of the New Mexico Court of Appeals

Mark Reynolds, Chief Clerk New Mexico Court of Appeals
PO Box 2008 • Santa Fe, NM 87504-2008 • 505-827-4925

Effective April 28, 2017

PUBLISHED OPINIONS

No. 34576	3rd Jud Dist Dona Ana CV-13-950, A VALERIO v SAN MATEO (affirm)	4/24/2017
No. 34826	2nd Jud Dist Bernalillo CV-13-9848, UNIFIED CONTRACTOR v ABQ HOUSING AUTHORITY (affirm)	4/24/2017
No. 33418	2nd Jud Dist Bernalillo DM-12-4535, G ROSS v S NEGRON-ROSS (reverse and remand)	4/25/2017
No. 33731	3rd Jud Dist Dona Ana CR-13-547, STATE v A FUSCHINI (affirm)	4/25/2017
No. 35194	13th Jud Dist Cibola CR-14-79, STATE v K SIQUEIROS VALENZUELA (affirm)	4/25/2017
No. 34511	13th Jud Dist Cibola JQ-13-5, CYFD v ROSALIA M (affirm)	4/26/2017
No. 34783	2nd Jud Dist Bernalillo CR-13-2512, STATE v J ORTIZ (affirm)	4/27/2017

UNPUBLISHED OPINIONS

No. 34878	3rd Jud Dist Dona Ana CR-13-564, STATE v J FELIX (affirm)	4/24/2017
No. 35847	13th Jud Dist Valencia LR-15-14, STATE v P MARTINEZ (dismiss)	4/24/2017
No. 35728	2nd Jud Dist Bernalillo JQ-15-187, CYFD v KERRY G (affirm)	4/24/2017
No. 34998	13th Jud Dist Sandoval CV-12-2468, H STOWELL v T DANDADE (affirm)	4/25/2017
No. 33603	5th Jud Dist Chaves LR-12-05, STATE v P GUNDERSEN (affirm)	4/25/2017
No. 35833	3rd Jud Dist Dona Ana JR-15-274, STATE v BRYAN S (dismiss)	4/25/2017
No. 35506	2nd Jud Dist Bernalillo LR-15-07, STATE v B PATTERSON (affirm)	4/26/2017
No. 35941	1st Jud Dist Santa Fe CV-16-1691, F VIGIL v R WHITCHURCH (affirm)	4/26/2017
No. 35936	3rd Jud Dist Dona Ana CR-15-51, STATE v C SCHMITT (reverse)	4/26/2017
No. 35682	2nd Jud Dist Bernalillo LR-14-45, STATE v C OTERO-GALLEGOS (affirm)	4/27/2017

Slip Opinions for Published Opinions may be read on the Court's website:
http://coa.nmcourts.gov/documents/index.htm

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From the Clerk of the New Mexico Supreme Court

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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

Effective May 10, 2017

Pending Proposed Rule Changes Open for Comment:

There are no proposed rule changes currently open for comment.

Recently Approved Rule Changes Since Release of 2017 NMRA:

		Effective Date
Rules of Civil Procedure for the District Courts		
1-079	Public inspection and sealing of court records	03/31/2017
1-131	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
Rules of Civil Procedure for the Magistrate Courts		
2-112	Public inspection and sealing of court records	03/31/2017
Rules of Civil Procedure for the Metropolitan Courts		
3-112	Public inspection and sealing of court records	03/31/2017
Civil Forms		
4-940	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
4-941	Petition to restore right to possess or receive a firearm or ammunition	03/31/2017
Rules of Criminal Procedure for the District Courts		
5-123	Public inspection and sealing of court records	03/31/2017
5-615	Notice of federal restriction on right to receive or possess a firearm or ammunition	03/31/2017
Rules of Criminal Procedure for the Magistrate Courts		
6-114	Public inspection and sealing of court records	03/31/2017
6-207	Bench warrants	04/17/2017
6.207.1	Payment of fines, fees, and costs	04/17/2017
Rules of Criminal Procedure for the Metropolitan Courts		
7-113	Public inspection and sealing of court records	03/31/2017
7-207	Bench warrants	04/17/2017
7-207.1	Payment of fines, fees, and costs	04/17/2017
Rules of Procedure for the Municipal Courts		
8-112	Public inspection and sealing of court records	03/31/2017
8-206	Bench warrants	04/17/2017
8-206.1	Payment of fines, fees, and costs	04/17/2017
Criminal Forms		
9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
Children's Court Rules and Forms		
10-166	Public inspection and sealing of court records	03/31/2017
Rules of Appellate Procedure		
12-307.2	Electronic service and filing of papers	07/01/2017*
12-314	Public inspection and sealing of court records	03/31/2017

* Voluntary electronic filing and service in any new or pending case in the Supreme Court may commence on May 1, 2017.

Disciplinary Rules		
17-202	Registration of attorneys	07/01/2017
17-301	Applicability of rules; application of Rules of Civil Procedure and Rules of Appellate Procedure; service.	07/01/2017
Rules Governing Review of Judicial Standards Commission Proceedings		
27-104	Filing and service	07/01/2017

To view all pending proposed rule changes (comment period open or closed), visit the New Mexico Supreme Court's website at http://nmsupremecourt.nmcourts.gov. To view recently approved rule changes, visit the New Mexico Compilation Commission's website at http://www.nmcompcomm.us.

From the New Mexico Supreme Court

Opinion Number: 2017-NMSC-008

No. S-1-SC-34094 (filed December 22, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JADRIAN LUCERO,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF CIBOLA COUNTY
CAMILLE MARTINEZ-OLGUIN, District Judge

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Opinion

Barbara J. Vigil, Justice

{1} Laticia May Lucero (Baby) died on June 9th, 2010, just 47 days after she was born to Mother and Jadrian "Jay" Lucero[1] (Defendant). Baby's autopsy revealed that she died as a result of "devastating brain injuries," the type of injuries one might expect after being ejected from a vehicle in a high-speed collision or falling from a third-story window and landing on one's head. During the investigation into Baby's death, Defendant told law enforcement that Baby was under his care on the afternoon of June 9th, and that he had found her "not breathing" when he went to check on her in her crib. Defendant was indicted on a single count of intentional child abuse resulting in Baby's death, and a jury convicted him of intentional child abuse resulting in the death of a child less than twelve years of age under NMSA 1978, Section 30-6-1(D), (H) (2009). The district court sentenced him to life in prison.

{2} Defendant raises two issues in this direct appeal. First, he contends that the jury instructions improperly defined the intent element for the crime of intentional child abuse by endangerment and, therefore, resulted in fundamental error. Second, Defendant contends that the district court abused its discretion when it refused to hold an evidentiary hearing on Defendant's motion for a new trial. We exercise jurisdiction under Article VI, Section 2 of the New Mexico Constitution and Rule 12-102(A)(1) NMRA. We affirm Defendant's conviction.

I. BACKGROUND

A. Factual History

{3} A few days after giving birth to Baby, Mother, who was fifteen years old at the time, took the newborn home from the hospital to live with Baby's Grandmother. Defendant also moved into Grandmother's house to help Mother. In the weeks that followed, the young parents lived together and shared the responsibility of caring for Baby. Defendant would help feed and bathe Baby, though Mother was the primary caregiver.

{4} After about two weeks, Grandmother asked Defendant to move out because Mother had "adjusted to taking care of the baby" and because Grandmother would be there if Mother needed anything. Defendant complied and moved back to his house, also in Grants, where he had been living before Baby was born. Mother believed that it was important for Baby to have a relationship with Defendant, so she and Defendant agreed that Baby would alternate where she slept every three nights, between Grandmother's and Defendant's houses. When Baby was staying overnight at Defendant's house, he would care for her alone because Mother was under a curfew and was not allowed to spend the night away from home.

{5} During the first month of Baby's life, Mother took her to the doctor's office for several check ups, and everything appeared normal. On June 3, 2010, just six days before Baby's death, Mother took Baby to an appointment to get certified for public assistance. At the appointment, Mother undressed Baby so that the nutritionist could weigh and measure her. The nutritionist later testified at Defendant's trial that Baby's height and weight were normal that day and that she did not observe "any bruising . . . [or] any abnormalities whatsoever."

{6} Around the same time as the June 3rd appointment, Mother and Defendant agreed to let Baby spend the night with Defendant's mother, step-father, and younger brother and sister, who were visiting from Rio Rancho and staying at a Holiday Inn. The next day Mother noticed that Baby had a swollen lip and a bruised eyelid. Mother asked Defendant what had happened, and Defendant responded that "nothing was wrong with her, she looked fine." Mother testified that Baby was fussy and did not eat as much as usual while her lip was swollen.

{7} Baby slept at Grandmother's house from June 6th through June 8th, and she woke up there on June 9th at about 7:00 a.m. Mother noticed that morning that Baby was fussy and was eating less, sleeping more, and requiring diaper changes less frequently than usual. Believing Baby may have been constipated, Mother added corn syrup to her formula and asked Grandmother to feed her so that Mother could get ready for a court appointment. Grandmother testified that Baby did not drink very much but that "[s]he was good that morning" and that "[s]he got her to smile" and to "cuddle."

{8} A short time later, Mother dropped off Baby at Defendant's house on her way to her court appointment, which was

[1]Appellate counsel informed this Court at oral argument that Defendant's name was misspelled throughout the district court proceedings as "Jadrain." We therefore refer to Defendant in this appeal as Jadrian, consistent with appellate counsel's representation.

scheduled to begin at 8:30 a.m. When Mother left Defendant's house, Defendant was holding Baby and watching television, and Defendant's friend, George King, was asleep on the couch. Mother finished with her appointment at approximately 9:00 a.m. She returned to Defendant's house, checked on Baby, who was asleep in her crib, and sat down to watch television.

{9} According to Mother, Baby woke up crying sometime in the early afternoon, and Mother picked her up and made a bottle. Baby ate less than normal and was looking at Mother without moving much. Mother then changed Baby's diaper and laid her back in her crib. Baby was still hungry and awake but Mother thought that everything was okay and went back to the living room to watch television. At around 3:35 or 3:40 p.m., Mother again left Defendant's house to go to a counseling appointment that was scheduled to begin at 4:00 p.m. Before leaving, Mother checked on Baby and found her sleeping. She gave Baby a kiss, heard her breathing, and thought that everything appeared to be okay. Mother arrived early for her appointment and was waiting outside when she received a call from Defendant who told her that Baby was not breathing. Once Mother confirmed that Defendant was serious, she began running back to his house. Around the same time, King called 911.

{10} At 3:50 p.m., Lieutenant Maxine Spidle of the Grants Police Department responded to a report of a child not breathing at Defendant's address. She arrived at Defendant's house about two minutes later and got out of her car, ran past King who was standing outside, and found Defendant inside the house holding Baby limp in his arms. Lieutenant Spidle grabbed Baby and ran outside to give her to Emergency Medical Services (EMS) personnel who had just arrived. Lieutenant Spidle noticed that Baby's lips were discolored and handed her off to an EMS responder who began Cardiopulmonary Resuscitation (CPR). The Emergency Medical Technician truck then left with Baby to take her to the hospital. Mother and Defendant arrived at the hospital as medical personnel were trying to resuscitate Baby. The young parents eventually learned that Baby was going to be flown to the University of New Mexico Hospital (UNMH) because "they couldn't keep her stable." Defendant, Mother, Grandmother, and Grandmother's husband started on their way to Albuquerque to meet the helicopter at UNMH, but about 20 minutes later they were called back to the hospital in Grants and notified that Baby had died. When Mother left the hospital with Defendant she was under the impression that Baby had died from sudden infant death syndrome (SIDS).

{11} About a week later, however, Mother learned that SIDS had not caused Baby's death. Baby's autopsy revealed that her death was the result of "devastating brain injuries" caused by blunt force trauma. The State's two medical experts testified that Baby had a "complex radiating fracture" on the left side of her head with multiple fractures that crossed suture lines and extended to other bones in her skull. Both experts explained that a typical skull fracture for an infant who has been dropped or who has fallen off of a counter is linear and consists of a single crack that does not travel across a suture line to another bone. A complex radiating fracture, by contrast, usually results from "major trauma situations that . . . have a lot of force generated," such as being ejected from a vehicle in a high-speed collision or falling from a third-story window and landing on one's head.

{12} The autopsy revealed extensive injuries to Baby's brain that also were consistent with major trauma, including pooled blood within her brain's protective coverings and tearing of the brain tissue itself. The State's experts testified that these injuries could not have been caused by normal, or even rough, handling of a child, such as dropping her to the floor or allowing her to hit her head on "the edge of something." The State's experts further testified that after receiving her injuries Baby "immediately" would have been "visibly not well": she would not have made eye contact; she would not have been interactive; she might have been unconscious; her breathing might have been impaired; and "her whole body would not have . . . looked normal."

{13} In addition, Baby's autopsy revealed a number of other non-fatal injuries that were in various stages of healing. The infant had several broken bones, including a broken clavicle (collar bone) that showed no signs of healing and two fractured ribs that showed from "a few" to fourteen days of healing. She also had a torn upper frenulum, the small piece of tissue that connects the upper lip to the gum above the teeth, that showed signs of at least one day to possibly a few weeks of healing. The medical investigator testified that a baby with a torn frenulum "could have cried excessively and even refused the bottle" because of the pain caused by puckering the injured area.

{14} Defendant did not testify at trial, but Lieutenant Spidle and Detective Kevin Dobbs of the Grants Police Department recounted their interview of Defendant that had taken place two days after Baby's death. At Mother's request, Defendant had gone to the police station, waived his Miranda rights, and agreed to speak with law enforcement about the events leading up to Baby's death. The officers interviewed Defendant for three-and-a-half to four hours.

{15} Defendant repeatedly told Lieutenant Spidle that Baby was "fine" and "happy" when she and Mother arrived at his house on June 9th at around 8:00 a.m. He recalled that after Mother left for her court appointment that morning, he watched television with Baby for "a bit" and then put her down for a nap. Defendant said that Baby continued to sleep after Mother returned, and that he changed her diaper around noon and gave her a bottle around 2:00 p.m. He also said that throughout the day Baby showed no signs of illness.

{16} Defendant told the officers that when Mother was getting ready to leave for her counseling appointment that afternoon, he saw her go to Baby's crib in the bedroom and bend down and kiss her. Lieutenant Spidle asked if Defendant knew whether Baby was breathing at that time, and Defendant said that he could tell that she was asleep because "she makes a little sound so he knew that she was okay when [Mother] left." Defendant then recalled that, after Mother left, "he went outside for a minute, . . . then went to check on [Baby], [and] found that she was not breathing." According to Detective Dobbs, Defendant said that "he tried to give [Baby] CPR for about five minutes and yelled to [King] to help. Then [King] called 911, [and] went across the street and got help."

{17} The officers also recounted Defendant's explanations for Baby's injuries. According to Lieutenant Spidle, when they first asked Defendant if Baby had ever been bruised or harmed in any way, he replied that "the [B]aby had never fallen, slipped, no one has ever fallen or slipped with the baby, [and she never] rolled off the couch, nothing of that sort." According to Detective Dobbs, Defendant also said that Baby had "gone to the hotel [one] night to stay with his parents, [and that] when she got back he noticed that there was swelling and bruising around her nose and eyes area." Defendant told the officers that "he

believed his brother had kicked her while they were sleeping in the [same] bed."

{18} The officers similarly described Defendant's responses to questions about whether he knew of any injuries to Baby's skull. Defendant denied for the first half of the interview that he knew anything about such an injury, but after approximately two-and-a-half hours of questioning, he recalled that about a week before Baby died she had bumped her head on the side of the bathtub while he was bathing her. Defendant said that Baby had cried for about an hour after she hit her head, until he was able to calm her down. Later in the interview, Defendant also said that "he might have squeezed her."

{19} During Lieutenant Spidle's testimony, the State played a video excerpt of Defendant's interview for the jury. In the video, Defendant denied having hurt Baby, but he told Lieutenant Spidle, "[I] f you charge, don't charge [Mother] and my mom. . . . You can charge me, don't charge them. . . . I didn't do it, but don't charge them. . . . because they didn't do it." The video ended with Defendant saying, "I could have accidentally did something. It's probably my fault."

B. Procedural History

{20} On July 9, 2010, a Cibola County grand jury indicted Defendant on one count of "Child Abuse - Intentional (Resulting in Death)" for allegedly "caus[ing] [Baby], a child under the age of eighteen years, to be tortured, cruelly confined[,] or cruelly punished, to wit: a fractured skull and other injuries, which resulted in [her] death . . . a first degree felony, contrary to Section 30-6-1(D)." At trial, the State alleged that Defendant committed the acts by either slamming Baby's head into something, slamming something into her head, or punching Baby's head with his fist. Defendant's theory was that Baby had already sustained her injuries and "started to crash before she ever got to [his] house" on the morning of June 9th.

{21} At the close of the evidence, the parties and the district court agreed that the jury would be instructed using UJI 14-602 NMRA (2000), the elements instruction that was in effect at the time for intentional child abuse resulting in death.[2] The agreed-upon instruction included two of the three *actus reus* alternatives set forth under Section 30-6-1(D): abuse by torture, cruel confinement, or cruel punishment, and abuse by endangerment.[3] The parties and the district court also agreed, consistent with UJI 14-602, to use UJI 14-610 NMRA (1993) to define the term "intentionally." *See* UJI 14-602 use note 3 ("If this alternative is given, the definition of 'intentionally[,]'[] Instruction 14-610, must also be given.").

{22} When the district court and the parties were reviewing the instructions, the State was careful to remind the district court that UJI 14-602 and -610 had to be modified under *State v. Cabezuela* to omit all references to a "failure to act" because the State was pursuing a conviction based only on a theory of intentional abuse. *See* 2011-NMSC-041, ¶¶ 36-37, 150 N.M. 654, 265 P.3d 705 (holding that a failure to act is inconsistent with a theory of intentional child abuse). Defendant did not object, and all references to a "failure to act" were removed from the instructions.

{23} The jury therefore was given the following elements and definitional instructions:

Instruction No. 10

For you to find [Defendant] guilty of child abuse resulting in death as charged in the indictment, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. [Defendant] caused [Baby] to be placed in a situation which endangered the life or health of [Baby]

OR

2. [Defendant] caused [Baby] to be tortured or cruelly confined or cruelly punished
3. [Defendant] acted intentionally and without justification;
4. [Defendant]'s actions resulted in the death of [Baby];
5. [Baby] was under the age of 12;
6. This happened in New Mexico on or about the 9th day of June, 2010.

Instruction No. 11

A person acts intentionally when the person purposely does an act. Whether [Defendant] acted intentionally may be inferred from all of the surrounding circumstances, such as [Defendant]'s actions[,] conduct[,] and statements.

The jury found Defendant guilty.

{24} About three weeks after Defendant's trial, the district court received an e-mail, purportedly from a juror who claimed to have convicted Defendant of acting negligently rather than intentionally. After the district court distributed the e-mail to the parties, Defendant moved for a new trial, arguing that the e-mail showed that his right to a unanimous guilty verdict had been violated. The district court denied the motion without a hearing, ruling that it was prohibited under Rule 11-606(B) NMRA from inquiring into the allegations of the e-mail. The district court later sentenced Defendant to life in prison, and this appeal followed.

II. DISCUSSION

{25} Defendant's primary contention on appeal is that the jury instructions used at his trial incorrectly defined the criminal intent that is required to support a conviction of intentional child abuse under the State's alternate theory of child endangerment. He also argues that the district court abused its discretion when it denied his request for an evidentiary hearing on his motion for a new trial because of the e-mail the court had received. We disagree with Defendant on both issues and affirm his conviction.

A. Jury Instructions

B.

1. Standard of review

{26} Defendant argues on appeal that the intent element of Instruction No. 10 was incomplete as it related to the State's theory of child abuse by endangerment. When given the opportunity to object to Instruction Nos. 10 and 11 at trial, however, defense counsel agreed that they were appropriate under the evidence presented.[4] Our review, therefore, is limited to fundamental error. *See Cabezuela*, 2011-NMSC-041, ¶ 21

[2]Since Defendant's trial, this Court has withdrawn the instructions used in this case and approved new uniform jury instructions for use in child abuse cases. *See* UJI 14-611 to -625 NMRA. The new instructions were not in effect at the time of Defendant's trial.

[3]The third *actus reus* of child abuse under Section 30-6-1(D), causing or permitting the child to be exposed to inclement weather, was not implicated under the facts of this case. *See also* UJI 14-602.

[4]Defense counsel's only objection to the jury instructions was that they were inconsistent with the indictment, which did not specify that Baby was under twelve years old. The district court overruled the objection, reasoning that Baby's age at the time of her death was known at all times to Defendant, who was her father. Defendant does not challenge this issue on appeal.

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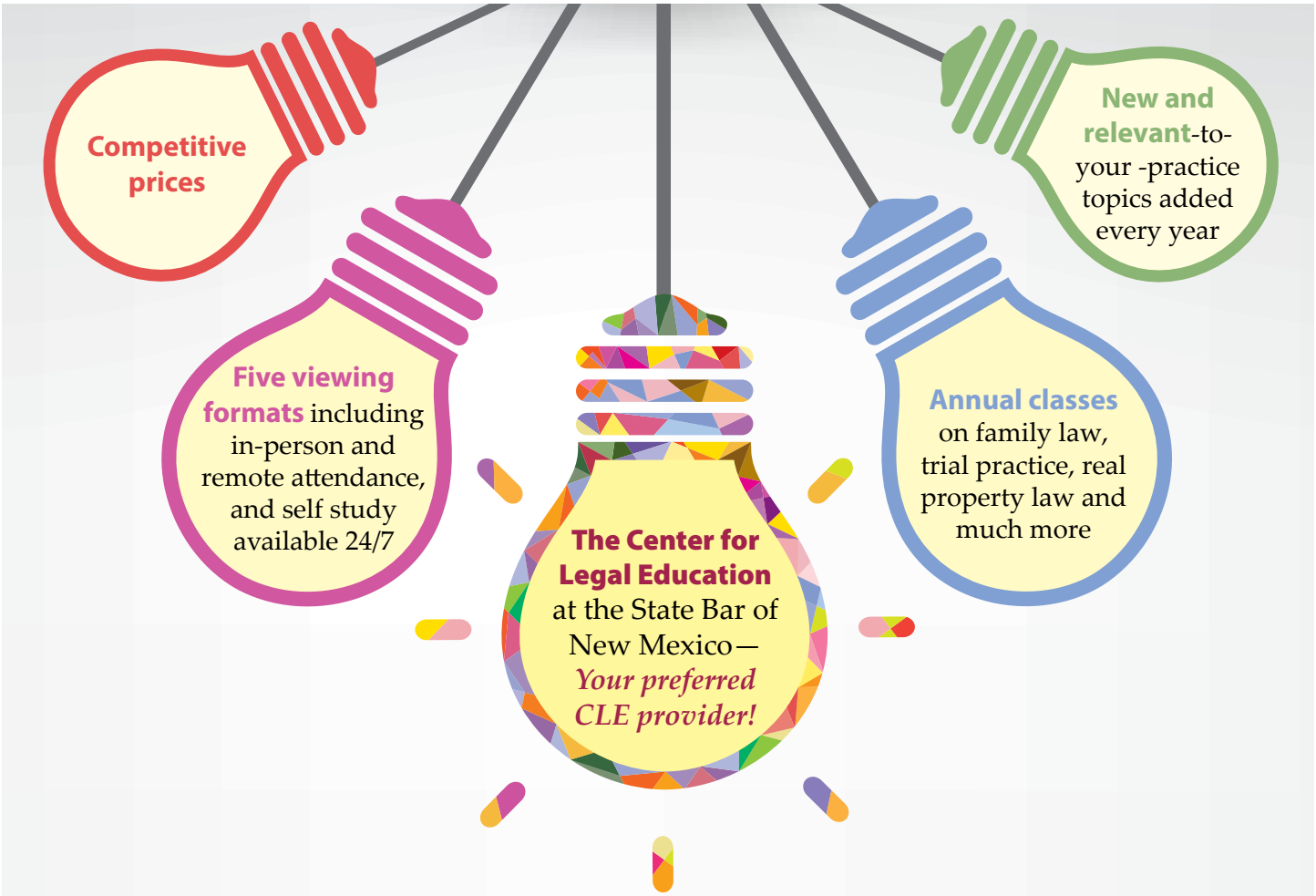

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("The standard of review we apply to jury instructions depends on whether the issue has been preserved. . . . If the issue has not been preserved, we review for fundamental error." (internal quotation marks and citation omitted)).

{27} "The doctrine of fundamental error applies only under exceptional circumstances and only to prevent a miscarriage of justice." *State v. Barber*, 2004-NMSC-019, ¶ 8, 135 N.M. 621, 92 P.3d 633 (quoting *State v. Jett*, 1991-NMSC-011, 111 N.M. 309, ¶ 19, 805 P.2d 78). With regard to jury instructions, "[t]he general rule is that fundamental error occurs when the trial court fails to instruct the jury on an essential element." *State v. Sutphin*, 2007-NMSC-045, ¶ 16, 142 N.M. 191, 164 P.3d 72. This analysis begins with determining "whether a reasonable juror would have been confused or misdirected by the jury instruction." *Barber*, 2004-NMSC-019, ¶ 19. If so, "our obligation is 'to review the entire record, placing the jury instructions in the context of the individual facts and circumstances of the case, to determine whether the [d]efendant's conviction was the result of a plain miscarriage of justice.' " *Id.* (quoting *State v. Benally*, 2001-NMSC-033, ¶ 24, 131 N.M. 258, 34 P.3d 1134 (Baca J., dissenting)); *see also State v. Swick*, 2012-NMSC-018, ¶ 46, 279 P.3d 747 ("[F]undamental error occurs when, because an erroneous instruction was given, a court has no way of knowing whether the conviction was or was not based on the lack of the essential element.").

2. The jury instructions used in this case were consistent with existing law

{28} To find Defendant guilty, Instruction No. 10 required the jury to find that he "acted intentionally," which Instruction No. 11 defined as "when a person purposely does an act." Defendant argues that these instructions were incomplete and should have required the jury to find that he acted intentionally *and with a further intent to abuse or harm a child*. Without the additional intent requirement, Defendant argues that the instructions permitted the jury to find him guilty of intentional child endangerment resulting in death by finding that he did *any* intentional act that eventually led to Baby's death—no matter how innocent or attenuated from her fatal injuries. For example, the jury could have convicted Defendant if it found that he intentionally "undertook [Baby's] care" by "tak[ing] her into his household," even if it believed that she ultimately died at the hands of Defendant's "friends or relations." Such a conviction, according to Defendant, would be inconsistent with the Legislature's intent to punish only the most culpable conduct as intentional child abuse. Defendant therefore argues that his conviction must be overturned because it may have been based on an endangerment theory without proof that he "intended (or even suspected) that harm would befall [Baby]."

{29} We agree with Defendant that a conviction of intentional child endangerment would be suspect if it were based on proof of some intentional act that accidentally (or even recklessly) placed Baby in a dangerous situation. We have held that criminal child abuse requires proof of conduct that is, at a minimum, "morally contemptible," rather than "merely inadvertent." *Santillanes v. State*, 1993-NMSC-012, ¶ 28, 115 N.M. 215, 849 P.2d 358. It follows that the crime of intentional child abuse requires proof of an even greater level of culpability. To permit a conviction premised upon essentially innocent, though intentional, conduct would be to return to the days of treating child abuse as a strict liability crime. *See, e.g.*, *State v. Lucero*, 1982-NMSC-069, ¶ 15, 98 N.M. 204, 647 P.2d 406 ("Since child abuse is a strict liability offense, a defendant's criminal intent is not required to be proven as an element of child abuse."). That era is long behind us. *See, e.g.*, *Santillanes*, 1993-NMSC-012, ¶¶ 12-13 (declining to consider whether child abuse is a strict liability crime because the statute contains *mens rea* elements and holding that negligent child abuse requires proof of criminal negligence); *see also State v. Consaul*, 2014-NMSC-030, ¶ 37, 332 P.3d 850 (holding that a conviction of child abuse must be supported by evidence that the defendant acted at least with reckless disregard).

{30} We are not persuaded, however, that the jury instructions in this case were incomplete or permitted such a result. As we have already explained, Instruction No. 10 allowed the jury to convict Defendant if it found that he either: (1) caused Baby to be placed in a situation that endangered her life or safety; or (2) caused Baby to be tortured, cruelly confined, or cruelly punished. The instructions further required the jury to find that Defendant acted intentionally when he committed either of these acts. The instructions thus tracked UJI 14-602 and the child abuse statute nearly verbatim. *See* UJI 14-602; NMSA 1978, § 30-6-1(D)(1), (2) (defining child abuse as, *inter alia*, "intentionally . . . causing . . . a child to be . . . placed in a situation that may endanger the child's life or health" or "tortured, cruelly confined or cruelly punished"). As such, the instructions given at Defendant's trial were presumptively valid. *See State v. Ortega*, 2014-NMSC-017, ¶ 32, 327 P.3d 1076 ("Uniform jury instructions are presumed to be correct."); *Jackson v. State*, 1983-NMSC-098, ¶ 5, 100 N.M. 487, 672 P.2d 660 ("When a uniform jury instruction is provided for the elements of a crime, generally that instruction must be used without substantive modification."); *see also* UJI—Criminal General Use Note ("[W]hen a uniform instruction is provided for the elements of a crime, . . . the uniform instruction should be used without substantive modification or substitution. . . . If the court determines that a uniform instruction must be altered, the reasons for the alteration must be stated in the record.").

{31} Defendant relies on *State v. Schoonmaker* for his assertion that the intent element in the jury instructions was incomplete and should have been modified to support a theory of intentional child abuse by endangerment. *See* 2005-NMCA-012, ¶ 26, 136 N.M. 749, 105 P.3d 302, *rev'd on other grounds*, 2008-NMSC-010, ¶¶ 1, 54, 143 N.M. 373, 176 P.3d 1105, *and overruled in part by State v. Montoya*, 2015-NMSC-010, ¶ 41, 345 P.3d 1056. We are not persuaded. To start, the defendant in *Schoonmaker* was convicted of *negligent* child abuse. *See* 2005-NMCA-012, ¶ 2. Moreover, *Schoonmaker* is not clear about whether the defendant was convicted of abuse by endangerment or of abuse by torture or cruel punishment. *See id.* ¶ 9 (noting that the defendant was convicted of negligent child abuse after the jury was given separate instructions on alternative theories of abuse by endangerment and abuse by torture or cruel punishment). *Schoonmaker* thus did not squarely address the intent required to prove the crime at issue in this case, *intentional* child abuse by *endangerment*. Instead, *Schoonmaker* considered the validity of the defendant's conviction of negligent child abuse and found it to comport with the law. *See generally* 2005-NMCA-012. Defendant simply reads too much into *Schoonmaker*, a case that presented very different legal and factual issues than his own. *See, e.g.*, *Fernandez v. Farmers Ins. Co. of Ariz.*, 1993-NMSC-035, ¶ 15, 115 N.M. 622, 857 P.2d 22 (" 'The general rule is that cases are not authority for propositions not considered.'

" (quoting *Sangre de Cristo Development Corp. v. City of Santa Fe*, 1972-NMSC-076, ¶ 23, 84 N.M. 343, 503 P.2d 323)).

{32} Further, the Court of Appeals in *Schoonmaker* scrutinized the jury instructions given for negligent child abuse and concluded that they were "legally sufficient." 2005-NMCA-012, ¶ 16. In fact, the Court of Appeals specifically invoked the district court's reliance on UJI 14-602 to conclude that the jury had been properly instructed. *See Schoonmaker*, 2005-NMCA-012, ¶ 16 ("Since the definitions for criminal negligence and reckless disregard were incorporated into the [uniform] instruction, the jury could not have convicted [the defendant] under a lesser civil standard. To the contrary, adding the negligence language would only serve to reintroduce an ambiguity that the *Magby* court expressly wanted to avoid."). *Schoonmaker* therefore reinforced the general rule that applies in Defendant's case that the elements set forth in a UJI—indeed, the very same instruction at issue in this case—are presumptively correct. *See Ortega*, 2014-NMSC-017, ¶ 32 ("Uniform jury instructions are presumed to be correct."). *Schoonmaker* thus did not alter the proof required to support a conviction of intentional child abuse by endangerment. We therefore disagree that the elements instruction for intentional child abuse by endangerment was incomplete or otherwise inconsistent with the law.

3. The jury instructions were not confusing or misleading under the circumstances of this case

{33} We also disagree that the jury instructions were confusing or misleading in this case or resulted in a miscarriage of justice. *See Barber*, 2004-NMSC-019, ¶ 19. To repeat Defendant's argument, he contends that the instructions permitted the jury to find him guilty based on *any* intentional act that led to Baby's injuries, even if the jury believed that her injuries came at the hands of Defendant's "friends or relations." While this argument may have some theoretical force in the abstract, it simply does not square with the case presented at trial. As we explain below, the evidence and arguments of the parties created little if any possibility that the jury could have found Defendant guilty based on some undefined, intentional conduct that inadvertently led to Baby's death.

{34} The State was clear throughout the proceedings against Defendant that it intended to prove that he had inflicted the injuries that resulted in Baby's death. The sole charge in the indictment was that Defendant intentionally had caused Baby "to be tortured, cruelly confined[,] or cruelly punished, to wit: a fractured skull and other injuries, which resulted in [her] death." The State did not deviate from that factual theory at Defendant's trial, as summed up in its opening statement to the jury:

> The blow to [Baby]'s head was so severe that it would have been immediately debilitating to her. She would not have looked fine after receiving that blow. She would not have looked normal. She would not have been moving around. She would not have been looking around, tracking with her eyes. She would not have been able to eat. She would have died very quickly. *The evidence in this case will show that no one but the Defendant . . . could have committed this crime.*

(Emphasis added.) And the State introduced abundant evidence at trial to support that theory, culminating in (1) expert testimony that Baby's injuries were so severe that they could not have resulted from normal or even rough handling of a child; (2) expert testimony that the effects of Baby's injuries would have been "immediate"; and (3) Mother's testimony and Defendant's repeated statements to law enforcement that Baby was "fine" when Mother left Baby in Defendant's care when she left for her counseling appointment.

{35} The State sharpened its theory even further after the close of the evidence in its closing argument to the jury: "Defendant committed the acts. He either slammed [Baby] in the head with his fist, her head into something or something into her head to cause[] those massive injuries and caused her to stop breathing . . . ." And the State relied on the same factual theory—that Defendant had inflicted Baby's fatal injuries—to explain the endangerment portion of the jury instruction:

> [Defendant] caused [Baby] to be placed in a situation which endangered her life or health. In the Defendant's bedroom, in his own words, he placed [Baby] in that crib when she fell asleep that morning when [Mother] was at Drug Court, he placed her there. Then he went in there to take a nap. When [Mother] left [Baby] was perfectly fine. When she left there was nothing on that floor between the crib and door except the fan. Defendant is the cause and the danger which resulted in [Baby]'s death.

Although clumsy, this argument does not suggest that the jury could convict Defendant based on some other intentional, loosely defined conduct that innocently or inadvertently led to Baby's death at the hands of another. To the contrary, the State never flinched from its early decision to prove to the jury that Defendant had intentionally, violently abused Baby, resulting in her death.

{36} Defendant, by contrast, argued that Baby had already sustained her injuries before she arrived at Defendant's house on the morning of June 9th. In doing so, he focused on casting doubt on his identity as the actual abuser. Had the jury credited Defendant's argument, he would have been exonerated even under the State's theory of abuse by endangerment. We therefore see no suggestion in the evidence presented or in the arguments of the parties that the jury could have found Defendant guilty based on conduct other than inflicting Baby's fatal injuries.

{37} Thus, whether denominated as abuse by endangerment or as abuse by torture, cruel confinement, or cruel punishment, the State's case against Defendant was always based on a theory that he intentionally, physically abused Baby, resulting in her death. The State focused on proving that factual theory at trial and argued that the same evidence supported a conviction either of abuse by endangerment or of abuse by torture, cruel confinement, or cruel punishment. *Contra Consaul*, 2014-NMSC-030, ¶¶ 26, 51 (reversing a conviction of child abuse resulting in great bodily harm when the State "changed its theory of the case during trial" and argued that the jury could convict the defendant under a single jury instruction that included two "different and inconsistent" factual theories of how harm occurred).

{38} And significantly, Defendant conceded at oral argument that the evidence against him was sufficient to support a conviction of abuse by torture, cruel confinement, or cruel punishment. Given the State's reliance on the same conduct to support a conviction of abuse by endangerment, Defendant's suggestion that the jury instructions may have permitted a conviction based on some other intentional conduct that led to Baby's death is too theoretical and speculative to support a claim of fundamental error. *Cf. State*

v. Traeger, 2001-NMSC-022, ¶ 19, 130 N.M. 618, 29 P.3d 518 ("[T]he error in the jury instruction in this case amounts to a 'strictly legal' and a highly 'technical' objection that the doctrine of fundamental error will not protect." (quoting *State v. Cunningham*, 2000-NMSC-009, ¶ 12, 128 N.M. 711, 998 P.2d 176)).

{39} As a final matter, we note that this would not have been an appealable issue had the jury not been instructed on child abuse by endangerment. It appears from the record that the State first introduced child endangerment as an alternate basis for conviction when it tendered its jury instructions near the close of the evidence. The addition of child endangerment to the jury instructions created an unnecessary appellate issue when the State had such a strong case of abuse by torture, cruel confinement, or cruel punishment. *See State v. Nichols*, 2016-NMSC-001, ¶ 39 n.3, 363 P.3d 1187 (noting "that Section 30-6-1(D)(2) [abuse by torture, cruel confinement, or cruel punishment] would be a better fit" for the State's theory of the case than child endangerment when the State's primary argument was that the defendant had inflicted the injury that resulted in the child's death); *see also id.* ¶ 47 (describing child abuse under Section 30-6-1(D)(2) as battery); *State v. Pierce*, 1990-NMSC-049, ¶ 42, 110 N.M. 76, 792 P.2d 409 ("In their ordinary senses, these terms [torture and cruelly punish] connote . . . acts of violence."); *State v. Chavez*, 2009-NMSC-035, ¶ 15 ("Child abuse by endangerment, *as opposed to physical abuse of a child*, is a special classification [of child abuse] designed to address situations where an accused's conduct exposes a child to a significant *risk* of harm, even though the child does not suffer a physical injury." (first emphasis added) (internal quotation marks and citation omitted)). The jury instructions were not confusing or misleading under the facts of this case.

B. Evidentiary Hearing on Defendant's Motion for a New Trial

{40} Defendant's second claim of error is that the district court abused its discretion by denying him an evidentiary hearing on his motion for a new trial. We hold that the district court did not abuse its discretion.

1. Procedural background

{41} Approximately three weeks after the jury found Defendant guilty, the district court entered a minute order finding that a juror who had participated in Defendant's trial had attempted to contact the district court by telephone. The order detailed that the district court did not answer or speak to the juror and that the juror then submitted an e-mail through administrative court staff, which was placed in the possession of the court reporter, attached as an exhibit to the minute order, and forwarded to counsel of record in the case. According to the district court, the e-mail in part stated:

> [M]y understanding is that I found him guilty for not taking action in caring for his daughter[']s well being such as neglect but not him actually murdering her[. T]his was my interpretation as well as other jury members, but after I have had time to process this I am wondering if I misunderstood because as you pro[b]ably already know the media is insinuating murder.

{42} Defendant moved for a new trial based on the e-mail, contending that he had been denied his right to a unanimous jury verdict under the United States and New Mexico Constitutions. Defendant argued that he had been charged with intentional child abuse and that "[t]he theory of a possibility of the verdict of guilt by negligence was not charged to the jury and was not raised by the evidence." Based on the juror's email, Defendant argued that the jury's guilty verdict was improper, either because: (1) some of the jurors had convicted him based on a theory of negligent abuse and others had convicted him of intentional abuse; or (2) all of the jurors had convicted him of negligent abuse, a crime which had not been charged or submitted to the jury. Defendant, therefore, asked the district court to conduct a voir dire of the jurors and to grant him a new trial, if one or more testified that they had convicted Defendant of acting negligently.

{43} The district court denied Defendant's motion for a new trial without a hearing. In an order containing detailed findings of fact and conclusions of law, the district court noted that Defendant had been charged only with intentional child abuse and that the jury instructions required the jury to find that he had "acted intentionally and without justification," without mentioning a theory of recklessness, negligence, or a failure to act. The district court further noted that it had offered to poll the jury after it returned its guilty verdict, and that Defendant had declined the district court's offer.

{44} As for the e-mail, the district court found that it could not verify that it had been written by an actual juror. In fact, the district court was careful to explain that it "specifically [did] *not* find that the e-mail which forms the basis for this motion was actually written by a juror." The district court nevertheless concluded that, even had the e-mail been written by a juror, Defendant's motion still would have been denied. The district court reasoned that it could not consider the e-mail under Rule 11-606(B), which prohibits receiving testimony or evidence of a juror's statement during an inquiry into the validity of a verdict unless the statement relates to one of three "narrow exceptions." The district court concluded that, because the contents of the e-mail did not meet one of the rule's exceptions, it did not support Defendant's motion for a new trial. The district court also noted that Defendant had refused its offer to poll the jury, which would have required each juror to confirm the verdict of intentional child abuse, and it concluded that Rule 11-606(B) prohibited the district court from conducting a voir dire of the jurors into the matters raised by the e-mail. The district court thus denied the motion.

2. Standard of review

{45} On appeal, Defendant argues that the district court's denial of a hearing to voir dire the members of the jury was an abuse of discretion. He also contends that the possibility that some of the jurors believed that they were convicting him "only of neglect" violated his right to a unanimous jury verdict and requires a new trial. We review the district court's denial of the motion for a new trial for a "manifest abuse of discretion." *State v. Garcia*, 2005-NMSC-038, ¶ 7, 138 N.M. 659, 125 P.3d 638.

3. The district court did not abuse its discretion

{46} Rule 11-606(B)(1) prohibits receiving testimony or evidence from a juror about "any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment," unless the statement relates to one of three exceptions set forth in the rule:

> (2) **Exceptions.** A juror may testify about whether
>
> (a) extraneous prejudicial information was improperly brought to the jury's attention;
>
> (b) an outside influence was improperly brought to bear on any juror; or

> (c) a mistake was made in entering the verdict on the verdict form.

Rule 11-606(B)(2).[5] Defendant contends on appeal that the e-mail in this case meets the first exception set forth in Rule 11-606(B)(2) because the jury instructions, "which misled the jury about the elements of the crime, constituted 'extraneous' information, that is, information that was contrary to, and therefore beyond the proper limits of, the law."

{47} Defendant's argument fails for several reasons. First, we have already held that the jury instructions in this case properly set forth the elements of the crime of intentional child abuse. We therefore hold that Defendant's argument that the instructions constituted "extraneous" information under Rule 11-606(B)(2)(a) is without merit.

{48} Second, we agree with the State that this argument was not properly preserved. In the district court Defendant relied exclusively on the exception set forth in Rule 11-606(B)(2)(c), that the matters described in the e-mail were evidence of "a mistake in [] entering [the] verdict on the [verdict] form." Indeed, the district court specifically found that Defendant had not made any "suggestion that the jury received extraneous prejudicial information," and it therefore concluded that the exception set forth under Rule 11-606(B)(2)(a) did not apply. As a result, Defendant's argument that the e-mail was admissible under Rule 11-606(B)(2)(a) was not preserved for appellate review. *See* Rule 12-216(A) NMRA ("To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked . . . .").

{49} Last, we agree with the State that the district court's denial of Defendant's motion is supported by *State v. Sena*, in which we affirmed the denial of a motion for a new trial under Rule 11-606(B). *See* 1987-NMSC-038, ¶¶ 7, 9, 105 N.M. 686, 736 P.2d 491. In *Sena*, the defendant introduced the affidavits of a juror and of a spectator present during defendant's trial who claimed to have witnessed juror misconduct. *See id.* ¶ 8. We held that the district court did not abuse its discretion under Rule 11-606(B) because the juror's affidavit "[did] not indicate that extraneous material [had] reached the jury," and the spectator's affidavit offered only a "vague and uncorroborated" allegation of inattention. *Sena*, 1987-NMSC-038, ¶ 9. The e-mail in this case—which the district court could not even verify had been sent by an actual juror—offers less support for ordering a new trial than did the affidavits in *Sena*. The district court did not abuse its discretion when it denied Defendant's motion for a new trial.

III. CONCLUSION

{50} We reject the two issues raised by Defendant in this direct appeal and affirm his conviction.

{51} IT IS SO ORDERED.

BARBARA J. VIGIL, Justice

WE CONCUR:
CHARLES W. DANIELS, Chief Justice
PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
JUDITH K. NAKAMURA, Justice

[5]While Defendant's case was pending in the district court, "Rule 11-606 . . . was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence." Rule 11-606 committee commentary. The amendments were "intended to be stylistic only" and were not intended "to change any result in any ruling on admissibility." *Id.* To avoid confusion, all references in this opinion to Rule 11-606 are to the rule that is currently in effect.

Certiorari Denied, January 24, 2017, No. S-1-SC-36237;
Conditional Cross-Petition Denied, January 24, 2017, No. S-1-SC-36237

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-020

No. 33,709 (filed November 28, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
RAMON HERNANDEZ,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SAN MIGUEL COUNTY
GERALD E. BACA, District Judge

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Opinion

Timothy L. Garcia, Judge

{1} Defendant Ramon Hernandez appeals his convictions for homicide by vehicle, contrary to NMSA 1978, Section 66-8-101(A) (2004, amended 2016), great bodily harm by vehicle, contrary to Section 66-8-101(B), and reckless driving, contrary to NMSA 1978, Section 66-8-113(A) (1987). Defendant asserts that (1) the district court erred in failing to grant a mistrial following improper testimony regarding excluded evidence by New Mexico State Police Officer Mario Vasquez; (2) prosecutorial misconduct bars retrial; (3) the district court erroneously admitted Defendant's conversation with a visitor that was recorded while Defendant was incarcerated; (4) there was insufficient evidence to prove Defendant drove at the time of the accident or that Defendant's conduct was reckless; (5) the district court's findings were insufficient to support its classification of homicide by vehicle as a serious violent offense; (6) cumulative error in the district court's evidentiary rulings deprived Defendant of a fair trial; and (7) Defendant's conviction for reckless driving violates the prohibition against double jeopardy. We hold that the improper testimony regarding the purported confession was extremely prejudicial and warranted a mistrial. We also hold that the prosecutor's conduct did not rise to a level that would bar retrial and that there was sufficient other evidence to support Defendant's convictions. We remand for a new trial. Retrial obviates the need to address Defendant's remaining arguments raised on appeal. Accordingly, we reverse Defendant's three convictions and remand for a new trial.

BACKGROUND

{2} On June 10, 2012, there was a two-car collision on southbound I-25 near Exit 307 in San Miguel County, New Mexico. Defendant and Domingo Gonzales were in one car, a Pontiac sedan. Victims Aileen and Zachary Smith ("the Smiths" collectively or "Female Victim" and "Male Victim" respectively when referred to as individuals) were in the other car, a Suzuki SUV. Male Victim was driving in the right lane when the Pontiac entered the highway at a low rate of speed. Male Victim signaled and moved the Suzuki into the left lane to avoid the slow-moving Pontiac. The Pontiac left its lane and was headed in a horizontal direction toward the left lane where the Suzuki was driving. Male Victim tried to avoid the Pontiac, the two cars collided, nearly perpendicular. The right front of the Suzuki hit the driver's side of the Pontiac, near the front end, and the airbags in the Suzuki deployed.

{3} Shortly after the collision, Jorge Acosta, a passerby, stopped to help. Acosta observed two people emerge from the driver's side window of the Pontiac. The first person, who was later identified as Gonzales, walked away from the scene of the accident. The second person was identified as Defendant. Acosta did not observe who had been driving the Pontiac, but Defendant told him that "the one who had run was the one who had driven." Throughout the investigation and in his conversations with the first responders, Defendant maintained that he was not the driver of the Pontiac. He stated to a first responder that "he did not know" who was driving and told officers that Gonzales was driving at the time of the accident.

{4} Female Victim was seven months pregnant at the time of the accident. Her water broke on scene and she began to have severe contractions. Male Victim called 911. Female Victim was trapped in the car but first responders freed her and took her to the hospital. There, doctors performed an emergency cesarean delivery. A baby boy (Baby) was born alive but was not breathing and soon died from blunt force injuries and prematurity. Female Victim also suffered other significant injuries with permanent effects. The Smiths had one child after the accident, but doctors advised against any more children due to Female Victim's ongoing health risks associated with the accident. Male Victim's injuries were not as serious and healed without lasting consequence.

{5} Ultimately, Defendant was charged with multiple crimes related to the collision, including homicide by vehicle, great bodily harm by vehicle, driving under the influence of intoxicating liquor or drugs, and reckless driving. The State alleged that Defendant was the driver of the Pontiac at the time of the accident.

{6} By the time of trial, Gonzales was not available to testify because he was deceased. No statements from Gonzales were introduced as evidence. Evidence introduced at trial included the following: (1) a recorded conversation between Defendant and a visitor at the jail, with Defendant making remarks the State alleges imply that Defendant was the driver based upon a reference to his location in the vehicle; (2) accident reconstruction testimony; (3) DNA evidence taken from the Pontiac and compared against Defendant and Gonzales; and (4) testimony from witnesses on scene

and investigative officers, including improper testimony from New Mexico State Police Officer Mario Vasquez that Defendant had confessed to another officer about being "behind the wheel" at the time of the accident. Officer Vasquez's "behind the wheel" hearsay testimony was specifically excluded by a pretrial motion in limine, but after failing to adhere to the court's admonishment at trial, it was ultimately excluded again by a curative instruction to the jury to "disregard that statement [by Officer Vasquez] and to not consider it for any purpose."

{7} The jury convicted Defendant of homicide by vehicle (based upon evidence of reckless driving), great bodily harm by vehicle (also based upon evidence of reckless driving), and reckless driving. The jury acquitted Defendant of driving under the influence of intoxicating liquor or drugs.

{8} Defendant appeals, raising numerous issues. We address three of the issues raised: (1) whether the district court should have granted a mistrial following the improper reference by Officer Vasquez to the excluded confession; (2) whether alleged prosecutorial misconduct bars retrial; and (3) whether there was sufficient evidence to support Defendant's convictions and remand for a new trial.

DISCUSSION

I. Mistrial

A. The Purported Confession Testimony

{9} We address whether the district court erred when it failed to grant a mistrial based on Officer Vasquez's improper trial testimony that Defendant allegedly confessed to being "behind the wheel" at the time of the accident. Prior to testifying at trial, Officer Vasquez had been admonished that no such confession was ever made to Agent Gomez and, as a result, this purported confession was excluded from the State's evidence as inadmissible hearsay and was not to be mentioned at trial.

{10} Officer Vasquez previously prepared a written report stating Agent Gomez told him that Defendant admitted to being the driver. However, Agent Gomez specifically refuted the existence of any such purported confession as well as any alleged statement made to Officer Vasquez. Accordingly, the parties agreed and stipulated that Defendant had never admitted to Agent Gomez that he was the driver at the time of the collision. Therefore, the purported statement in Officer Vasquez's report was hearsay, factually incorrect, and prejudicial to Defendant. Prior to trial, Defendant moved in limine to exclude any such testimony regarding the purported confession as both factually incorrect and as prejudicial hearsay. The district court granted Defendant's motion, agreeing that what Officer Vasquez had written in his report about a purported confession constituted inadmissable hearsay. Defense counsel cautioned the district court and the State that any such testimony from Officer Vasquez would be "undoable" and a mistrial issue. The district court then specifically directed the State to confer with Officer Vasquez and stated, "I want it understood by [Officer Vasquez] that he's not to be repeating what [Agent] Gomez told him occurred" and to "make sure that he is clear he's not to testify to any hearsay."

{11} At trial, prior to Officer Vasquez's testimony, the prosecutor reconfirmed and acknowledged the district court's previous directive that it admonish Officer Vasquez not to testify as to anything he was told by Agent Gomez. The district court responded, "I just want to make sure because . . . I don't want to end up with a mistrial at this point in time." After Officer Vasquez was called to testify and improperly testified regarding Defendant being incarcerated, the district court issued another warning and put the State on further notice that "[Officer Vasquez] likes to spit out a lot of information at a time, so be real careful with the questions and be real specific with him." Nonetheless, just moments later the following exchange occurred with Officer Vasquez.

> Prosecutor: We talked about the search of the vehicle and the search warrant for [D]efendant and then you interviewed, well, actually Agent Gomez interviewed [D]efendant.
>
> Officer Vasquez: That is correct.
>
> Prosecutor: Okay, what was your next step after that in your investigation?
>
> Officer Vasquez: In our investigation, uh, like I said, we were outside of the interview room while Agent Gomez said [Defendant] were speaking. Um, Mr. Um, Agent Gomez came out and stated that there was a confession of being behind the wheel.

{12} Following this exchange, the district court immediately recognized the error that had occurred and excused the jurors from the courtroom. Once the jury was removed, the district court began by stating that

> There was a motion in limine with respect to what [Officer Vasquez'] testimony would and would not be with respect to statements being made by [D]efendant to Agent Gomez . . . and specifically the issue with respect to this statement of confession. . . . [I]t was ordered by the court that no such statement would be made and that the [S]tate would admonish and do whatever it needed to do with this witness to make sure that [it] didn't come out. It did come out. There was no [immediate] objection by the defense but I heard it. I know the jury heard it, and it was something that I ordered not to happen. I need to hear from the [S]tate why I shouldn't declare a mistrial at this time.

The prosecutor acknowledged that the court's order was violated but argued that a mistrial was not warranted, asked for a curative instruction, and suggested that the issue be addressed through cross-examination of Officer Vasquez. Defense counsel argued that a curative instruction was not sufficient and asked for a mistrial. The district court orally ruled that there was "[no] manifest necessity" for a mistrial and that "[i]t's unfair to everyone to have to spend the time and effort to come and deal with emotional issues here and [for] the court [to] have to declar[e a] mistrial and have to do it over again." Instead, the district court chose to give the jury a curative instruction.

{13} The parties do not dispute that Officer Vasquez's hearsay testimony regarding the purported confession by Defendant constituted an evidentiary error and violated a specific pre-trial order forbidding such testimony. In addition, the State does not dispute that Defendant could have been unfairly prejudiced by Officer Vasquez's improper testimony.

B. The Curative Instruction

{14} "[The appellate courts] review a [district] court's denial of a motion for mistrial under an abuse of discretion standard." *State v. Fry*, 2006-NMSC-001, ¶ 52, 138 N.M. 700, 126 P.3d 516 (internal quotation marks and citation omitted). The district court abuses its discretion in ruling on a motion for mistrial if it acts in an obviously erroneous, arbitrary, or unwarranted manner, *id.* ¶ 50, or when the decision is "clearly against the logic and effect of the facts and circumstances before the court."

State v. Lucero, 1999-NMCA-102, ¶ 32, 127 N.M. 672, 986 P.2d 468 (internal quotation marks and citation omitted). In determining whether the district court abused its discretion, we must address whether Officer Vasquez's prejudicial testimony about the purported confession could be cured by the instruction that the district court read to the jury.

{15} The State argues that the district court reasonably concluded a curative instruction was sufficient to remedy the single reference to Defendant's purported confession. The State contends that the record reveals several factors that mitigate potential prejudice and show a mistrial was an extreme, unwarranted measure. These factors include that Officer Vasquez's testimony was not elicited by the prosecutor, Officer Vasquez's misstatement occurred early in the trial, and the subsequent testimony of Agent Gomez established Defendant had not admitted to driving during the collision. Additionally, the State argues that Defendant retained the ability to cross-examine Officer Vasquez regarding the erroneous basis for his statement but chose not to do so. We disagree with the State's assertion that certain mitigating factors existed to cure a mistrial and shall address the numerous errors made by the district court when it ruled otherwise.

{16} Numerous evidence-based factors support Defendant's argument that the error could not be cured by the district court's instruction to disregard Officer Vasquez's prejudicial testimony about the purported confession that, in fact, was established to be erroneous prior to trial. First, the issue of who was driving the Pontiac at the time of the accident, Defendant or Gonzales, was the most critical issue in the case and highly disputed by the parties. The State was aware of Defendant's consistent statements that Gonzales was the driver at the time of the accident. During its opening statement, the State made it clear that nobody saw who was driving the vehicle, Defendant said Gonzales was driving, and the State intended to prove Defendant was in fact the driver. Second, Gonzales's inculpatory acts of being the first person to exit the driver side of the Pontiac and immediately flee the scene of the accident supported Defendant's statements that Gonzales was the driver at the time of the accident. Gonzales's subsequent death prior to trial complicated the critical issue of who was driving at the time of the accident. Third, at trial, the State's case exclusively relied on circumstantial and inferential evidence to establish that Defendant, not Gonzales, was driving the Pontiac at the time of the accident. This evidentiary background made the purported confession by Defendant to Agent Gomez uniquely prejudicial, especially under the circumstances where Defendant established prior to trial that no such confession occurred.

{17} Our case law acknowledges that "generally, a prompt admonition . . . to the jury to disregard and not consider inadmissible evidence sufficiently cures any prejudicial effect which might otherwise result." *State v. Armijo*, 2014-NMCA-013, ¶ 9, 316 P.3d 902 (emphasis, alterations, internal quotation marks, and citation omitted) (quoting *State v. Newman*, 1989-NMCA-086, ¶ 19, 109 N.M. 263, 784 P.2d 1006); *see State v. Shoemaker*, 1981-NMCA-151, ¶¶ 7, 9, 11-13, 97 N.M. 253, 638 P.2d 1098 (recognizing that a curative instruction was sufficient to cure any prejudice that occurred when the state attempted to impeach the defendant with a prior indictment that did not result in a conviction). However, one of the exceptions to this general rule arises when "inadmissible testimony [is] intentionally elicited by the prosecution." *State v. Gonzales*, 2000-NMSC-028, ¶ 39, 129 N.M. 556, 11 P.3d 131, *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, ¶ 37 n.6, 275 P.3d 110. In such an instance, the general rule does not apply regardless of whether the district court admonishes the jury to disregard the inadmissible testimony. *Gonzales*, 2000-NMSC-028, ¶ 39. On review, this Court "must determine whether there is a reasonable probability that the improperly admitted evidence could have induced the jury's verdict." *Id.* Therefore, prior to determining whether a curative instruction has cured what otherwise would be error, we must first consider whether the inadmissible testimony was intentionally elicited by the State. *See Armijo*, 2014-NMCA-013, ¶ 10.

C. Officer Vasquez's Testimony Was Not Intentionally Elicited by the State

{18} Some fault can be attributed to the prosecutor in failing to follow the district court's specific instruction to be "careful with the questions [to Officer Vasquez] and be real specific with him." Almost immediately thereafter, the prosecutor asked an open-ended question regarding Agent Gomez's interview of Defendant at the police station and Officer Vasquez's "next step after that[.]" From a strictly sequential perspective, this next step is important to our review. The State was aware of the "next step" taken by Officer Vasquez. This was the moment when Officer Vasquez erroneously claimed in his written report that Agent Gomez came out of the interview room and purportedly told Officer Vasquez that Defendant had confessed to being "behind the wheel."

{19} The issue is whether the prosecutor intentionally disregarded the district court's direct admonishment to "be careful . . . and . . . specific" at this juncture when the prosecutor immediately gave Officer Vasquez the open-ended opportunity to testify about what in fact happen next—Agent Gomez allegedly telling Officer Vasquez about the purported confession. *See State v. Ruiz*, 2003-NMCA-069, ¶¶ 6-9, 133 N.M. 717, 68 P.3d 957 (recognizing that a prosecutor's questioning can be considered intentional when he walked a key witness right into the testimony that had been suppressed by a motion in limine); *see also State v. Saavedra*, 1985-NMSC-077, ¶ 9, 103 N.M. 282, 705 P.2d 1133 (concluding that an improper prosecutorial motive was established when the prosecutor asked an identical question of the same witness at a grand jury hearing and received identical inadmissible answers each time), *abrogated on other grounds by State v. Belanger*, 2009-NMSC-025, 146 N.M. 357, 210 P.3d 783; *State v. Vialpando*, 1979-NMCA-083, ¶ 23, 93 N.M. 289, 599 P.2d 1086 (holding that a curative instruction was only proper because "the witness's response was totally unexpected by the court and the attorneys"). In fact, Officer Vasquez accurately answered the prosecutor's question regarding the "next step" that occurred in the investigation. Just like the prosecutor in *Ruiz*, the prosecutor walked Officer Vasquez right to the key confession testimony that had been suppressed prior to trial and gave him an open-ended question that, once answered correctly, solicited the suppressed evidence. *See* 2003-NMCA-069, ¶ 7. Like *Ruiz*, there is no record on appeal regarding what the prosecutor was expecting as the answer to the question at issue on this appeal. *See id.* However, the district court's curative instruction included specific language stating that Officer Vasquez's testimony was non-responsive. Based upon the district court's curative instruction, this Court can only infer that the prosecutor expected Officer Vasquez to move on to other aspects of the investigation and avoid any violation of the pretrial order and subsequent

admonishments issued by the district court. "Where there is a doubtful or deficient record, every presumption must be indulged by the reviewing court in favor of the correctness and regularity of the [district] court's judgment." *State v. Rojo*, 1999-NMSC-001, ¶ 53, 126 N.M. 438, 971 P.2d 829 (internal quotation marks and citation omitted). This presumption of correctness cannot be disregarded in this instance. Despite walking the witness right to the line of the suppressed testimony, this Court can reasonably rely on the district court's determination and we are sufficiently persuaded that the prosecutor did not intentionally solicit Officer Vasquez's testimony about the purported confession. *See Ruiz*, 2003-NMCA-069, ¶ 7; *see also Gonzales*, 2000-NMSC-028, ¶ 39 (applying "a different analysis to inadmissible testimony intentionally elicited by the prosecution).

D. The Purported Confession Error Was Not Harmless

{20} Next, we address whether Officer Vasquez's testimony about the purported confession can be overcome by the district court's curative instruction or could otherwise be considered harmless error. When a non-constitutional evidentiary error occurs, the harmless error standard of review only requires reversal if there is a "reasonable probability" the inadmissible evidence contributed to Defendant's conviction. *See State v. Leyba*, 2012-NMSC-037, ¶ 24, 289 P.3d 1215 (internal quotation marks and citation omitted). Under this standard of review, a case-by-case analysis is required. *See Tollardo*, 2012-NMSC-008, ¶ 44. Reviewing courts are to evaluate all of the circumstances surrounding the error, including examining the error itself, the source of the error, the emphasis on the error, and whether the error was cumulative or introduced new facts. *Id*. ¶ 43. Evidence of guilt separate from the error may be relevant but may not be the singular focus in determining whether the trier of fact was influenced by the error. *Id*.

{21} In the instant case, the error created by Officer Vasquez's testimony regarding the purported confession was not harmless and was proper grounds for reversal and a new trial. *See State v. McClaugherty*, 2003-NMSC-006, ¶¶ 27, 32-35, 133 N.M. 459, 64 P.3d 486 (recognizing the improperly admitted hearsay statements that went to a critical and highly disputed issue at trial were not harmless and warranted a new trial), *overruled on other grounds by Tollardo*, 2012-NMSC-008, ¶ 37 n.6. This Court has explained that "confessions can prejudice 'the jury's thinking on certain issues which it might otherwise have been able to decide objectively.' " *State v. Hardy*, 2012-NMCA-005, ¶ 10, 268 P.3d 1278 (quoting *Proof of the Corpus Delicti Aliunde the Defendant's Confession*, 103 U. Pa. L. Rev. 638, 677 (1955)). Thus, a confession can be highly prejudicial and warrants a close examination of the circumstances. Here, the confession Officer Vasquez wrongly referenced struck at the crux of the defense offered at trial—Defendant was not the driver at the time of the collision. Officer Vasquez's testimony claiming that a confession occurred, when it never did, not only undermined Defendant's overall credibility but provided erroneous corroboration for the State's circumstantial evidence regarding who it claimed was driving at the time of the accident.

{22} Furthermore, Officer Vasquez's testimony regarding the purported confession occurred on the afternoon of the first day of trial. The fact that a witness made an improper reference to a confession so early in the course of trial can be difficult to overcome. *See State v. Gutierrez*, 2007-NMSC-033, ¶ 23, 142 N.M. 1, 162 P.3d 156 (concluding that a prejudicial comment made in opening statement "particularly at this stage, is inherently difficult to overcome"). In addition, after Officer Vasquez made the inappropriate comment, the district court immediately excused the jury, without providing any sort of instruction, while the attorneys argued for or against a mistrial. According to the record, the jury was excused for approximately nine minutes, which is ample time for the reference to a confession to take root and fester in the jurors' minds. Only after the jury returned was the curative instruction offered in an attempt to remedy the inappropriate testimony about the purported confession.

E. The District Court's Curative Instruction Was Insufficient

{23} The district court's curative instruction was vague and inaccurate. The district court instructed the jury as follows:

> Ladies and gentlemen, there was an unresponsive statement made by [Officer Vasquez] concerning a confession, there was an objection to that statement. I have sustained the objection and will strike that statement from the record and the jury is instructed to disregard that statement and to not consider it for any purpose.

{24} This instruction was not accurate in two respects. First, as discussed above, Officer Vasquez's statement was in fact responsive to the prosecutor's question of what the officer did next. Officer Vasquez accurately answered the prosecutor with the next sequential act in his investigation—meeting Agent Gomez outside the interrogation room and addressing what was obtained during Defendant's interrogation. Secondly, the district court inaccurately referenced an objection that was sustained—a technical error that was procedurally incorrect and factually contrary to what actually occurred on the record. Immediately after Officer Vasquez's confession statement, the district court sua sponte excused the jury prior to any objection or any other statement by defense counsel. Even once the jury was excused, Defendant did not object to the alleged confession testimony but very specifically moved for mistrial, and the motion for mistrial is what the parties argued while the jury was excused. The district court denied the motion for mistrial and decided to use its curative instruction to the jury. Therefore, two substantive inaccuracies were presented to the jury in the language of the court's curative instruction.

{25} Even if this instruction attempted to accurately cure the error made by Officer Vasquez, it was also vague when it informed the jury of its duty to disregard the improper comment. *See State v. Garcia*, 1994-NMCA-147, ¶ 17, 118 N.M. 773, 887 P.2d 767. Telling the jury to disregard the "unresponsive statement made by the officer concerning a confession" does not inform the jury that the reason to disregard the statement concerning a confession was, in fact, because no confession ever occurred. The fact that a confession never occurred was critical information with regard to the prejudice injected into the trial. Although the district court may have deliberately made the curative instruction vague to avoid further emphasis of Officer Vasquez's improper reference to the purported confession, referencing an objection that never occurred and failing to address the fact that no confession ever occurred was also error. *See id.* (stating that "[i]ndeed, the vagueness was probably intentional, because any direct comment on [the error] posed the risk of emphasizing the matter to the jury"); *see also Gutierrez*, 2007-NMSC-033, ¶ 23 (holding that a vague instruction was insufficient to cure prejudice); *State v. Miller*, 1966-NMSC-041, ¶ 32, 76 N.M.

62, 412 P.2d 240 (holding that a statutory curative instruction would not sufficiently remove the improper impression created by a prosecutor's inappropriate comments regarding the defendant's failure to testify). We recognize that the district court was attempting to address a critical and prejudicial error. Should it tell the jury the truth and re-emphasize the serious prejudice that Officer Vasquez had created or should it hide the true nature of the error by misrepresenting the procedural circumstances that required a curative instruction, as well as the true erroneous nature of the purported confession? These unacceptable choices regarding accuracy and vagueness only reinforce why Defendant's motion for a mistrial should have been granted and could not be cured by the district court's efforts to use a curative instruction.

{26} For the foregoing reasons, we are persuaded that there was a reasonable probability the purported confession and insufficient curative instruction severely prejudiced the jury's thinking and contributed to Defendant's conviction. In addition, a reasonable inference can be drawn from the circumstances that Officer Vasquez's testimony was not accidental. Because the resulting curative instruction was vague and inaccurate, we conclude that the instruction was insufficient in this case, and the district court abused its discretion when it failed to grant Defendant's motion for a mistrial.

II. No Prosecutorial Misconduct

{27} We next consider whether prosecutorial misconduct occurred such that double jeopardy bars Defendant's retrial. Prosecutorial misconduct occurs when prosecutorial "improprieties had such a persuasive and prejudicial effect on the jury's verdict that the defendant was deprived of a fair trial." *State v. Duffy*, 1998-NMSC-014, ¶ 46, 126 N.M. 132, 967 P.2d 807, *overruled on other grounds by Tollardo*, 2012-NMSC-008, ¶ 37 n.6. In instances of extreme prosecutorial misconduct, double jeopardy may bar a new trial. *See State v. Breit*, 1996-NMSC-067, ¶ 2, 122 N.M. 655, 930 P.2d 792. Under Article II, Section 15 of the New Mexico Constitution, retrial is barred where (1) the official misconduct is so prejudicial that nothing short of mistrial will cure it; (2) "the official knows that the conduct is improper and prejudicial[;]" and (3) "the official either intends to provoke a mistrial or acts in willful disregard of the resulting mistrial, retrial, or reversal." *Breit*, 1996-NMSC-067, ¶ 32. "When the prosecutor does not intend to provoke a mistrial, the misconduct necessary to bar a retrial must be extraordinary." *State v. Haynes*, 2000-NMCA-060, ¶ 6, 129 N.M. 304, 6 P.3d 1026 (internal quotation marks and citation omitted). Despite walking a witness right to the answer that was the proper basis for mistrial, this Court has previously recognized that remand for a new trial is the appropriate remedy for such an intentional act by a prosecutor. *See Ruiz*, 2003-NMCA-069, ¶¶ 11-12.

{28} Defendant argues that Officer Vasquez is also part of the prosecution team when analyzing prosecutorial misconduct that bars retrial. Defendant points out that the State was twice placed on explicit notice that testimony of a confession risked a mistrial. Although Defendant specifically recognizes that no authority extends the double jeopardy analysis regarding prosecutorial misconduct to testifying members of the prosecution team, he asks this Court to recognize such an extension. The State in response highlights that no double jeopardy authority extends the prosecutorial misconduct analysis to testifying members of the prosecution team. The State argues that Officer Vasquez's testimony was an unsolicited, non-responsive comment that should not be attributed to the prosecutor.

{29} We agree with the State that, for double jeopardy purposes, New Mexico does not extend a prosecutorial misconduct analysis to witnesses. While police officers are members of the prosecution team for the purposes of disclosure of exculpatory evidence, *State v. Wisniewski*, 1985-NMSC-079, ¶ 21, 103 N.M. 430, 708 P.2d 1031, this Court has rejected the concept's extension to an officer's comments on a defendant's constitutional right to remain silent. *See State v. Herrera*, 2014-NMCA-007, ¶ 22, 315 P.3d 343. We are not persuaded by Defendant's arguments to extend the double jeopardy protection against prosecutorial misconduct to the State's witnesses who inject precluded testimony into the trial. In addition, Defendant failed to provide us with an evidentiary basis clearly attributing Officer Vasquez's improper conduct to the intentions of the prosecutor. *See Breit*, 1996-NMSC-067, ¶ 2 (recognizing that inherent in the bar on retrial is the prosecutor's intent to provoke a mistrial); *Haynes*, 2000-NMCA-060, ¶ 6 (recognizing that the misconduct must be extraordinary when the prosecutor does not intend to provoke a mistrial). Here, the prosecutor mistakenly asked Officer Vasquez an open-ended question, "what was your next step after that in your investigation?" Officer Vasquez utilized this opportunity to improperly testify about the purported confession that had been suppressed. As we previously discussed, the presumption of correctness and reasonable inferences that can be drawn from the district court's curative instruction are sufficient to persuade us that the prosecutor did not intentionally elicit testimony about the purported confession that had been suppressed. Absent a sufficient record to establish this intent element for prosecutorial misconduct, double jeopardy does not bar a retrial of Defendant.

III. Sufficiency of the Evidence to Justify Retrial

{30} Finally, we consider whether the State put forth sufficient evidence to convict Defendant of the charges and justify a second trial. *State v. Consaul*, 2014-NMSC-030, ¶ 41, 332 P.3d 850 (noting well-established precedent that "[t]o avoid any double jeopardy concerns, we review the evidence presented at the first trial to determine whether it was sufficient to warrant a second trial"). In reviewing the sufficiency of the evidence, this Court "view[s] 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.

{31} Defendant argues that the State failed to prove beyond a reasonable doubt that Defendant was actually driving the car at the time of the collision, particularly because Gonzales's own conduct implicates him as the driver. Defendant asserts that the remaining evidence only proves the mere possibility that Defendant drove and is thus insufficient to overcome the inference that Gonzales was driving. Additionally, Defendant argues there was insufficient evidence of recklessness. We disagree with Defendant. As this Court must view the evidence in the light most favorable to the State, disregarding contrary evidence and inferences, we conclude that there was sufficient evidence to support Defendant's convictions. *See id.*

{32} A rational jury could have found beyond a reasonable doubt that Defendant was the driver of the Pontiac at the time of the collision. There were two people inside the Pontiac at the time of the collision, Defendant and Gonzales. Nobody directly saw who was driving at the time of the

accident, and Defendant consistently told witnesses and the investigating officers that Gonzales was the driver. The jury thus had to infer, from the evidence, which person inside the Pontiac was driving. Because the jury was free to reject Defendant's version of the facts, the contrary evidence and inferences did provide a sufficient factual basis for the jury to determine that Defendant was the driver at the time of the accident. *See State v. Astorga*, 2015-NMSC-007, ¶ 57, 343 P.3d 1245. This evidence includes inconsistent statements from Defendant as to whether and when Gonzales switched to become the driver. Evidence was also presented showing that Defendant was observed with injuries on the left side of his body, and the State's expert testimony opined that these injuries would be consistent with Defendant being in the driver's seat at the time of the accident. The DNA evidence taken from the vehicle after the accident was negative for Gonzales on the driver's side of the Pontiac and negative for Defendant on the passenger's side of the vehicle. In addition, when Defendant was audio taped while talking to a visitor at the jail, he was heard using the first person to describe his actions during the accident, thus also implying that he was the driver. Viewing all the circumstantial evidence in the light most favorable to the State, sufficient evidence was presented at trial to convict Defendant of the homicide by vehicle and great bodily harm by vehicle charges.

{33} As to the sufficiency of the evidence regarding reckless driving and the element of recklessness, the facts of the collision as well as trial testimony provide sufficient evidence to conclude that the driver of the Pontiac showed a "willful or wanton disregard of the rights or safety of others." Section 66-8-113(A). With another vehicle approaching on a major interstate at highway speeds, the driver of the Pontiac slowly cut across all lanes of travel in a nearly horizontal direction, causing the Pontiac to collide with the Smiths' Suzuki. In addition, a police officer testified that the Pontiac's driver was "reckless" when making this maneuver and used this precise language. Thus, a rational jury could have also found beyond a reasonable doubt that the Pontiac driver was reckless. Based on the foregoing, sufficient evidence was presented to support the recklessness element of Defendant's convictions.

IV. Defendant's Remaining Claims of Error

{34} As a result of our reversal and remand for a new trial, we determine that it is unnecessary for this Court to address any of Defendant's remaining assertions of error. *See State v. Vallejos*, 1994-NMSC-107, ¶ 13, 118 N.M. 572, 883 P.2d 1269.

CONCLUSION

{35} For the reasons stated in this opinion, we reverse Defendant's convictions for homicide by vehicle, great bodily harm by vehicle, and reckless driving. We remand for a new trial consistent with this opinion.

{36} IT IS SO ORDERED.

TIMOTHY L. GARCIA, Judge

WE CONCUR:
JONATHAN B. SUTIN, Judge
M. MONICA ZAMORA, Judge

Classified

Positions

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