Official Publication of the State Bar of New Mexico

Bar Bulletin

March 7, 2018 • Volume 57, No. 10

Red Brush, by Rachel Rankin

Weyrich Gallery, Albuquerque

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13
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28
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April

4
Divorce Options Workshop
6–8 p.m., State Bar Center, Albuquerque, 505-797-6022

About Cover Image and Artist: Rachel Rankin grew up under the big skies and beautiful mountains in Albuquerque. These influences have been an inspiration all of her life. Rankin's technique utilizes a palette knife to create the layered texture in her plein air paintings. View more of her work at rachelrankinart.com.

Notices

Court News

Judicial Standards Commission

Seeking Commentary on Proposed Amended Rules

The Commission has completed a comprehensive review and revision of its procedural rules. Commentary on the proposed amendments is requested from the bench, bar and public. To be fully considered by the Commission, comments must be received by March 16 and may be sent either by email to rules@nmjsc.org or by mail to Judicial Standards Commission, PO Box 27248, Albuquerque, NM 87125-7248. To download a copy of the proposed amended rules, visit nmjsc.org/recent-news/.

Supreme Court Law Library

Hours and Information

The Supreme Court Law Library is open to any individual in the legal community or public at large seeking legal information or knowledge. The Library's staff of professional librarians is available to assist visitors. The Library provides free access to Westlaw, Lexis, NM OneSource and HeinOnline on public computers. Search the online catalog at https://n10045.eos-intl.net/N10045/OPAC/Index.aspx. Visit the Library at the Supreme Court Building, 237 Don Gaspar, Santa Fe NM 87501. Learn more at lawlibrary.nmcourts.gov or by calling 505-827-4850.

Hours of Operation

Monday–Friday 8 a.m.–5 p.m.

Reference and Circulation

Monday–Friday 8 a.m.–4:45 p.m.

Second Judicial District Court

Destruction of Tapes

Pursuant to the judicial records retention and disposition schedules, the Second Judicial District Court will destroy tapes of proceedings associated with the following civil and criminal cases:

1. d-202-CV-1992-00001 through d-202-CV-1992-11403
2. d-202-CV-1993-00001 through d-202-CV-1993-11714
3. d-202-CV-1994-00001 through d-202-CV-1994-10849
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10. d-202-CR-1986-40951 through d-202-CR-1986-42576

Attorneys who have cases with proceedings on tape and wish to have duplicates made should verify tape information with the Special Services Division 505-841-7401 from 10 a.m.–2 p.m., Monday through Friday. Aforementioned tapes will be destroyed after March 31.

Third Judicial District Court

Notice of Right to Excuse Judge

On Feb. 9, Gov. Susana Martinez appointed Jeanne Quintero to fill the vacant position in Division VIII of the Third Judicial District Court. Effective Feb. 26, all pending domestic relations and domestic violence cases previously assigned to Judge Conrad Perea, District Judge, Division III, shall be reassigned to Judge Jeanne Quintero. Pursuant to Supreme Court Rule 1.088.1, parties who have not yet exercised a peremptory excusal will have 10 days from March 14 to excuse Judge Quintero.

Eleventh Judicial District Court

Mass Reassignment

Effective March 5, the chief judge of the Eleventh Judicial District Court has, pursuant to her authority in Rule 23-109 NMRA, directed a mass reassignment of cases due to the appointment of Judge Sarah V. Weaver to the bench in Division III. With the exception of abuse and neglect cases which are being individually reassigned, all other cases currently assigned to Division III are reassigned to Judge Weaver. Parties who have not yet exercised a peremptory excusal under Rule 1-088.1 or Rule 10-162 NMRA in a case being reassigned in this mass reassignment will have 10 business days from March 21 to excuse Judge Sarah V. Weaver.

Professionalism Tip

With respect to my clients:

I will work to achieve lawful objectives in all other matters, as expeditiously and economically as possible.

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

Proposed Amendments to Local Rules of Criminal Procedure

Proposed amendments to the Local Rules of Criminal Procedure of the U.S. District Court for the District of New Mexico are being considered. The proposed amendments are to D.N.M.LR-Cr. 47.8, Timing and Restrictions on Responses and Replies. A red-lined version (with proposed additions underlined and proposed deletions stricken out) and a clean version of these proposed amendments are posted on the Court's website at www.nmd.uscourts.gov. Members of the bar may submit comments by email to localrules@nmcourt.fed.us or by mail to U.S. District Court, Clerk's Office, Pete V. Domenici U.S. Courthouse, 333 Lomas Blvd. NW, Suite 270, Albuquerque, NM 87102, Attn: Local Rules, no later than March 12.

U.S. Magistrate Judge Vacancy

The Judicial Conference of the U.S. has authorized the appointment of a part-time U.S. Magistrate Judge for the District of New Mexico at Roswell, N.M. This authorization is contingent upon the appointment of incumbent Magistrate Judge Joel Carson as a circuit judge to the U.S. Tenth Circuit Court of Appeals. The current annual salary of the position is $48,195 (potentially increasing to $56,607 on April 1 pending final approval by the Judicial Conference of the U.S.), commensurate with the annual caseload for this position. The term of office is four years. The U.S. Magistrate Judge application form and the full public notice with application instructions are available on the Court's website at www.nmd.uscourts.gov or by calling 575-528-1439. Applications must be submitted no later than April 3.

State Bar News

Attorney Support Groups

- March 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 available. Dial 1-866-640-4044 and enter code 7976003#.
- March 19, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albquerque, King Room in the Law Library (Group meets the third Monday of the month.) Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#.
- April 2, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)

For more information, contact Latisha Frederick at 505-948-5023 or 505-453-9030 or Bill Stratvert at 505-242-6845.

Alternative Methods of Dispute Resolution Committee

Call for Articles for ADR Issue of *New Mexico Lawyer*

The ADR Committee seeks articles relating to the theme of the 2018 ADR Institute: "ADR Across the Spectrum" for publication in the July issue of the *New Mexico Lawyer*, a insert in the *Bar Bulletin* focused on a specific area of law, published four times a year. Abstracts should be at least 300 words and should be submitted to Mary Jo Lujan at maryjo.lujan@state.nm.us by March 9. The Committee will choose the abstracts and contact the authors following the submission deadline. Articles for the *New Mexico Lawyer* are approximately 1,500 words.

Appellate Practice Section

Luncheon with New Appellate Mediator

Join the Appellate Practice Section for a brown bag lunch at noon, March 16, at the State Bar Center with guest Bonnie Stepleton, appellate mediator for the New Mexico Court of Appeals. The lunch is informal and is intended to create an opportunity for appellate practitioners to learn more about the work of the Court. Those attending are encouraged to bring their own "brown bag" lunch. R.S.V.P. to Carmela Starace at cstarace@icloud.com.

Solo and Small Firm Section

Spring Monthly Speaker Series Line-up

On March 20, State Senator Sander Rue will review the 2018 legislative session from the Republican viewpoint and welcome questions and vigorous discussion about the future of New Mexico. The presentation is open to all State Bar Mmembers and will take place from noon-1 p.m. at the State Bar Center. Lunch will be provided. Please R.S.V.P. to Breanna Henley at bhenley@nmbar.org.

Young Lawyers Division

UNMSOL Summer Fellowship Open Now

The YLD offers two $3,000 summer fellowships to UNM School of Law students who are interested in working in public interest law or the government sector. The fellowship awards are intended to provide the opportunity for law students to work for public interest entities or in the government sector in an unpaid position. To be eligible, applicants must be a current law student in good standing. Applications for the fellowship must include: 1) a letter of interest that details the student's interest in public interest law or the government sector; 2) a résumé; and 3) a written offer of employment for an unpaid legal position in public interest law or the government sector for the summer. Applications containing offers of employment that are contingent upon the successful completion of a background check will not be considered unless verification of the successful completion of the background check is also provided. Email applications to Breanna Henley at bhenley@nmbar.org by 5 p.m., March 23 for consideration.

UNM School of Law

Law Library Hours

Through May 12

Building and 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.

Women's Law Caucus

2018 Justice Mary Walters Award Dinner

Join the UNM School of Law Women's Law Caucus for the 2018 Justice Mary Walters Award Dinner honoring Nancy Hollander and Christine Zuni Cruz. The event will be at 5:30 p.m., March 21, at the UNM Student Union Building Ballroom C. To purchase tables or individual seats, visit goto.unm.edu/walters.

Other Bars

New Mexico Chapter of the Federal Bar Association

Pro Bono Survey

Do you practice in the federal district courts of New Mexico? The New Mexico chapter of the Federal Bar Association seeks to support the civil pro bono programs in the U.S. District Courts for the District of New Mexico. Consider taking 10 minutes to complete the following survey https://www.surveymonkey.com/r/QMMZHDD. All answers are voluntary, confidential and anonymous. For more information about the survey, contact the Community Outreach Committee: Veronica C. Gonzales-Zamora at vgonzales-zamora@bhfs.com.

Other News

Center for Civic Values

Pecos High School Seeks Mock Trial Team Coach

Pecos High School is looking for an attorney coach for their Mock Trial team during the 2018-2019 school year. Pecos High School is a small school with a population of less than 200, but with a group of eager and talented students with a passion for competing in the Mock Trial competition. The team has been complimented on their professionalism and natural talent the last couple years at competition. The difference-maker for the team could be having an attorney coach that could help take the team to the next level. Contact teacher coach Spencer Faunt at 503-740-2084 to help lead our team to success in next year's competition.

Legal Education

March

7 **Family Feuds in Trusts: How to Anticipate & Avoid**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

7 **WestLaw Legal Research and Drafting Assistant**
2.0 G
Live Seminar, Santa Fe
New Mexico Office of the Attorney General
505-717-3506

9 **Drafting Professional and Personal Services Agreements**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **33rd Annual Bankruptcy Year in Review Seminar**
6.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

13 **Fiduciary Duties in Closely-held Companies: What Owners Owe the Business & Other Owners**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

14 **Role of LLCs in Trust and Estate Planning**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

16 **Current Immigration Issues for the Criminal Defense Attorney (2017 Immigration Law Institute)**
5.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

16 **Civility and Professionalism (2017 Ethicspalooza)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

16 **New Mexico Liquor Law for 2017 and Beyond (2017)**
3.5 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

22 **2017 Appellate Practice Institute**
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

22 **Where the Rubber Meets the Road: The Intersection of the Rules of Civil Procedure and the Rules of Professional Conduct (2017)**
1.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

22 **2017 Mock Meeting of the Ethics Advisory Committe**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **How to Practice Series: Probate and Non-Probate Transfers**
4.0 G, 2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23-25 **Taking and Defending Depositions (Part 2 of 2)**
31.0 G, 4.5 EP
Live Seminar,
Albuquerque
UNM School of Law
goto.unm.edu/despositions

26 **Trial Know-How! (The Rush to Judgment- 2017 Trial Practice Section Annual Institute)**
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

26 **Legal Malpractice Potpourri (2017)**
1.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

26 **Conflicts of Interest (2017 Ethicspalooza)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

26 **Federal and State Tax Updates (2017 Tax Symposium)**
3.5 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

27 **Lawyer Ethics When Clients Won't Pay Fees**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

28 **Structuring For-Profit/Non-Profit Joint Ventures**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

28 **Cybersleuth: Conducting Effective Internet Research (2017)**
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **The Ethics of Using Lawyer Advertisements Using Social Media (2017)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **Attorney vs. Judicial Discipline (2017)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

28 **Everything You Need to Know About Breastfeeding Law: Rights and Accommodations**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

29 **Convincing the Jury: Trial Presentation Methods and Issue**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

29 **Abuse and Neglect Case in Children's Court**
3.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

30 **What's the Dirtiest Word in Ethics?**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

April

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1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

4 **Drafting Employment Agreements, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

5 **Veterans Disability Law Bootcamp**
4.7 G
Live Seminar, Albuquerque
Vet Defender
www.lawyershelpingwarriors.com

6 **2017 Business Law Institute**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

6 **2017 Health Law Symposium**
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

6 **Uncovering and Navigating Blind Spots Before They Become Land Mines (2017)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

6 **Deposition Practice in Federal Cases (2016)**
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

6 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

10 **Closely Held Stock Options, Restricted Stock, Etc.**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

12 **Domestic Self-Settled Trusts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

17 **Protecting Client Trade Secrets & Know How from Departing Employees**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

18 **Equipment Leases: Drafting & UCC Article 2A Issues**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **Ethically Managing Your Practice (2017 Ethicspalooza)**
1.0 EP
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Center for Legal Education of NMSBF
www.nmbar.org

20 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

24 **Drafting Ground Leases, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

Listings in the Bar Bulletin *CLE Calendar are derived from course provider submissions. All MCLE approved continuing legal education courses can be listed free of charge. Send submissions to notices@nmbar.org. Include course title, credits, location, course provider and registration instructions.*

Board of Bar Commissioners Sworn In

The Board of Bar Commissioners has three new and four re-elected commissioners in 2018! Chief Justice Judith K. Nakamura of the New Mexico Supreme Court swore in five of the commissioners at the first BBC meeting of the year on Feb. 23.

Pictured above are **Sean M. FitzPatrick** (Young Lawyers Division Chair), Chief Justice Nakamura, President Wesley O. Pool, **Robert Lara** (First Bar Commissioner District), **Christina G. Babcock** (Paralegal Division Liaison), **Erinna M. Atkins** (Sixth BCD) and **Aja N. Brooks** (First BCD). Not pictured: **Jared G. Kallunki** (Sixth BCD) who attended the meeting by phone and **Elizabeth J. Travis** (Third BCD) who was not present at the meeting.

At the meeting, the BBC selected **Barry C. Kane** to fill the vacancy in the Third BCD.

President Wesley O. Pool, President-Elect Gerald G. Dixon and Secretary-Treasurer Ernestina R. Cruz make up this year's officers. They were sworn in at the Supreme Court in Santa Fe by the Chief Justice.

To learn more about the Board of Bar Commissioners and to find your representative, visit www.nmbar.org/BBC. More photos of the swearing-in can be found at www.nmbar.org/photos.

Supreme Court of New Mexico

P.O. BOX 848
SANTA FE, NEW MEXICO
87504-0848

An Open Letter to the New Mexico Bench and Bar From the Justices of the New Mexico Supreme Court

Dear Colleagues,

After 15 years of extraordinary service on the New Mexico Supreme Court, Justice Edward L. Chavez has announced his well-deserved retirement as of March 9, 2018. Breaking with tradition for the Court, but not surprising for those who know and respect his avoidance of the limelight, he has been firm in not wanting to participate in or to permit even the most modest of retirement events where people might have an opportunity to publicly acknowledge his service.

But in exercise of our own rights to free speech and to avoid any unjustified implication that we think his departure is not worth our recognition, those of us who have been privileged to work with him on the Court wish to share with the New Mexico legal community the appreciation, respect, and sense of loss we all feel. The three former members of the Court who also served with him, Justices Serna, Bosson, and Kennedy, have been consulted and wholeheartedly join us in these sentiments.

During his long service on the Supreme Court, including over three years as Chief Justice, Justice Chavez has exemplified what all should hope to see when we select a new member of the judiciary and what we should aspire to be when making the personal commitment to serve. He has been impartial, thoughtful, collegial, analytical, unpretentious, respectful of others, and, in the words inscribed behind our bench, "dedicated to the administration of equal justice under law."

Justice Chavez' service as Chief Justice during the Great Recession set the standard for those of us who have followed in his footsteps. His eloquent advocacy on behalf of the Judiciary and its employees kept our courts open to the public and his foresight and vision, in the midst of a financial crisis, resulted in a strategic plan that continues to guide judicial initiatives.

Although he will no longer be a full time member of the Court after this month, we have no doubt that Ed Chavez will continue to serve the law and the New Mexico community in other ways. And that he will do so with the same dedication, commitment, quick wit and mischievous sense of humor that we have appreciated during his time on the Court. His significant past work on the Court will forever be part of the fabric of New Mexico law, both in the important precedential opinions he has authored and in the many opinions authored by others who benefitted from his helpful and principled contributions.

We have been blessed to know him as colleague and friend, and we will miss him greatly.

Judith K. Nakamura Petra Jimenez Maes Charles W. Daniels Barbara J. Vigil

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 February 23, 2018

PUBLISHED OPINIONS

A-1-CA-35323	State v. D Hnulik	Affirm	02/21/2018

UNPUBLISHED OPINIONS

A-1-CA-35091	State v. C Costello	Affirm	02/19/2018
A-1-CA-36179	City of Roswell v. C Noriega	Affirm	02/19/2018
A-1-CA-36566	A Meltzer v. K Kruskal	Affirm	02/19/2018
A-1-CA-36644	State v. A May	Affirm/Remand	02/19/2018
A-1-CA-36744	State v. J Lester III	Reverse	02/19/2018
A-1-CA-36347	State v. A Campbell	Affirm	02/20/2018
A-1-CA-36477	J Davis v. Town of Taos	Dismiss	02/20/2018

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

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

Joey D. Moya, Chief Clerk New Mexico Supreme Court
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

Dated Feb. 22, 2018

CLERK'S CERTIFICATE OF ADDRESS AND/OR TELEPHONE CHANGES

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In the Supreme Court of the State of New Mexico

February 21, 2018

No. 18-8300-003

In the Matter of the Amendment of Rule 1-088.1 NMRA of the Rules of Civil Procedure for the District Courts

Order

WHEREAS, this matter came on for consideration by the Court to amend Rule 1-088.1 NMRA of the Rules of Civil Procedure for the District Courts, and the Court having considered the foregoing and being sufficiently advised, Chief Justice Judith K. Nakamura, Justice Petra Jimenez Maes, Justice Edward L. Chávez, Justice Charles W. Daniels, and Justice Barbara J. Vigil concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments to Rule 1-088.1 NMRA are APPROVED;

IT IS FURTHER ORDERED that the above-referenced amendments shall be **effective March 1, 2018**; and

IT IS FURTHER ORDERED that the Clerk of the Court is authorized and directed to give notice of the above-referenced amendments by posting them on the New Mexico Compilation Commission web site and publishing them in the *Bar Bulletin* and New Mexico Rules Annotated.

IT IS SO ORDERED.

WITNESS, Honorable Judith K. Nakamura, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 21st day of February, 2018.

_____

Joey D. Moya, Chief Clerk of the Supreme Court of the State of New Mexico

District Court Civil

Rule 1-088.1

1-088.1. Peremptory excusal of a district judge; recusal; procedure for exercising.

A. **Limit on excusals or challenges.** No party shall excuse more than one judge. A party may not excuse a judge after the party has attended a hearing or requested that judge to perform any act other than an order for free process or a determination of indigency. For the purpose of peremptory excusals, the term "party" shall include all members of a group of parties when aligned as coplaintiffs or codefendants in any of the following situations:

(1) the parties are represented by the same lawyer or law firm;

(2) the parties have filed joint pleadings;

(3) the parties are related to each other as spouse, parent, child, or sibling;

(4) the parties consist of a business entity or other organization and its owners, parents, subsidiaries, officers, directors, or major shareholders; or

(5) the parties consist of a government agency and its subordinate agencies, commissions, boards, or personnel. If the interests of any parties grouped together as one party under this rule are found to be sufficiently diverse from one another, the assigned judge may grant a motion to allow separate peremptory excusals for the party or parties whose interests are shown to differ.

B. **Mass reassignment.** A mass reassignment occurs when one hundred (100) or more pending cases are reassigned contemporaneously.

C. **Procedure for exercising peremptory excusal of a district judge.** A party may exercise the statutory right to excuse the district judge before whom the case is pending by filing a peremptory excusal as follows:

(1) A plaintiff may file a peremptory excusal within ten (10) days after service of notice of assignment of the first judge in the case. A defendant may file a peremptory excusal within ten (10) days after the defendant files the first pleading or motion pursuant to Rule 1012 NMRA.

(2) Any party may file a peremptory excusal within ten (10) days after the clerk serves notice of reassignment on the parties or completes publication of a notice of a mass reassignment.

(3) In situations involving motions to reopen a case to enforce, modify, or set aside a judgment or order, if the case has been reassigned to a different judge since entry of the judgment or order at issue, the movant may file a peremptory excusal within ten (10) days after filing the motion to reopen and service of the notice of reassignment, and the nonmovant may file a peremptory excusal within ten (10) days after service of the motion to reopen.

(4) [~~Regardless of~~] In addition to the other limits contained in this rule, no peremptory excusal may be filed by any original or lateradded party more than one hundred twenty (120) days after the [~~first judge has been~~] judge sought to be excused was assigned to a case.

D. **Notice of reassignment.** After the filing of the complaint, if the case is reassigned to a different judge, the clerk shall serve notice of the reassignment to all parties. When a mass reassignment occurs, the clerk shall serve notice of the reassignments to all parties by publication in the New Mexico Bar Bulletin for four (4) consecutive weeks. Service of notice by publication is complete on the date printed on the fourth issue of the Bar Bulletin.

E. **Service of excusal.** Any party excusing a judge shall serve notice of such excusal on all parties.

F. **Misuse of peremptory excusal procedure.** Peremptory excusals without cause are intended to allow litigants an expeditious method of avoiding assignment of a judge whom the party has a good faith basis for believing will be unfair to one side or the other, and they are not to be exercised to hinder, delay, or obstruct the administration of justice. If it appears that an attorney or group of attorneys may be using peremptory excusals for improper purposes or with such frequency as to impede the administration of justice, the Chief Judge of the district shall send a written notice to the Chief Justice of the Supreme Court and shall send a copy of the written notice to the attorney or group attorneys believed to be improperly using peremptory excusals. The Chief Justice may

take appropriate action to address any misuse, including issuance of an order providing that the attorney or attorneys or any party they represent may not file peremptory excusals for a specified period of time or until further order of the Chief Justice.

G. **Recusal.** Nothing in this rule precludes the right of any party to move to recuse a judge for cause. No district judge shall sit in any action in which the judge's impartiality may reasonably be questioned under the provisions of the Constitution of New Mexico or the Code of Judicial Conduct, and the judge shall file a recusal in any such action. Upon receipt of notification of recusal from a district judge, the clerk of the court shall give written notice to each party.

H. **Objections to the validity of a peremptory excusal; excused judge to rule.** An objection to the timeliness or validity of a peremptory excusal may be raised by any party or by the court on its own motion. The excused judge shall rule on the timeliness or validity of any such objection. If the excused judge determines that the excusal has met the applicable procedural and legal requirements in this rule, the judge shall proceed no further. If the excused judge determines that the excusal has not met the applicable procedural and legal requirements in this rule, the judge may proceed to preside over the case.

[As amended, effective August 1, 1988; January 1, 1995; as amended by Supreme Court Order No. 07830001, effective March 15, 2007; by Supreme Court Order No. 08830038, effective December 15, 2008; as amended by Supreme Court Order No. 128300031, effective for all cases filed or pending on or after January 7, 2013; as amended by Supreme Court Order No. 158300019, effective for all cases pending or filed on or after December 31, 2015; as amended by Supreme Court Order No. 18-8300-003, effective March 1, 2018.]

Committee commentary. — The March 2018 amendment to Rule 1-088.1(C)((4) NMRA corrects a conflict between two subparagraphs of the rule that resulted in a failure of the rule to accomplish the purposes underlying the two subparagraphs. Amendments in December 2015 added Subparagraph (C)(4) to provide the following: "Regardless of the other limits contained in this rule, no peremptory excusal may be filed by any original party or lateradded party more than one hundred twenty (120) days after the first judge has been assigned to the case."

The commentary to an earlier draft of the new subparagraph published for comment in 2013 to add a time limitation on excusals of judges who had actually been presiding over a case for the prescribed period of time clearly stated the intent of the provision as follows: "[The] time limit on exercise of peremptories requires their exercise at the outset of a case, before the judge has gotten involved in learning about the case and making rulings. If the original parties do not perceive the need at the outset of the case to peremptorily excuse the judge, there is little justification for allowing lateradded parties to review the judge's rulings and remove the judge who has been presiding over the case, especially since the constitutional right to disqualify a judge for cause is always available."

But the wording of various parts of the 2013 proposals were amended for unrelated reasons before their eventual promulgation in 2015, including an amendment that substituted "the first judge has been assigned to the case" for "the case has been at issue before the judge sought to be excused." The result was a clear textual conflict between the intended limitation of the right to excuse a judge who had already been presiding over a case for a period of time, and the intent of the provisions in Subparagraphs (C)(2) and (C)(3) allowing any party to excuse a new judge within ten (10) days of a mass reassignment or a reopening of the case. The March 2018 amendment by its limitation on the excusal of a judge who has been assigned to a case for at least one hundred twenty (120) days clarifies that Subparagraph (C)(4) neither expands nor reduces the right of a party to file an excusal within ten (10) days of reassignment in the situations described in Subparagraphs (C)(2) and (C)(3).

Reassignment of a judge usually occurs in individual cases in which a party has excused the judge or the judge recuses himself or herself. When this happens, the clerk easily can and does serve individual notice of the reassignment to the parties by mail or electronic transmission. Whether served by mail or electronic transmission, recently proposed amendments to Rule 1006 NMRA would give the parties an additional three days to file a peremptory excusal under this rule.

When a judge retires, dies, is disabled, or the judge assumes responsibility for different types of cases (e.g., from a criminal to a civil docket), large numbers of cases are reassigned and parties who have not previously exercised a peremptory excusal may choose to excuse the successor judge. Providing individual notice to every party in each such case is administratively difficult, expensive and time consuming. Clerks sometimes serve notice of reassignment in an alternative manner—usually through publication in the New Mexico *Bar Bulletin*.

The 2008 amendment formally incorporates into Rule 1088.1 NMRA the use of notice by publication in such a situation now identified as a "mass reassignment". The amended rule requires that the specified notice be published in four (4) consecutive issues of the New Mexico Bar Bulletin and provides that a party who has not yet exercised a peremptory excusal may do so within ten (10) days after the fourth and final publication. When a judge's entire caseload is reassigned, the publication notice need not contain the caption of each affected case, but must contain the names of the initially assigned judge and the successor judge.

There may be occasions when many, but not all, of a judge's cases are reassigned; for example when an additional judge is appointed in a judicial district and a portion of other judges' cases are assigned to the new judge. When this occurs, if the number of pending cases collectively reassigned exceeds one hundred (100), the 2008 amendment authorizes notice by publication. To assure that the parties have notice of which cases were reassigned, the court should either make a list available containing the title of the action and file number of each case reassigned, or not reassigned, whichever is less. The court may either publish such a list in the Bar Bulletin or publish a notice in the Bar Bulleting that directs the reader to the court's web site where the such a list will be posted. Substituting publication for individual notice increases the chance that a party will not receive actual notice of a reassignment. Where actual notice is not achieved through publication, the trial court has ample authority to accept a late excusal. *See* Rule 1006(B)(2) NMRA (providing that the court may permit act to be done after deadline has passed if excusable neglect is shown).

As with any other pleading filed in court, a peremptory excusal of a judge must be signed by the party's attorney or, if the party is not represented by counsel, it must be signed by the party. *See* Rule 1011 NMRA. All of the procedures for excusing a judge in Paragraph C are subject to the limitations in Paragraph A.

[Adopted by Supreme Court Order No. 08830038, effective December 15, 2008; as amended by Supreme Court Order No. 128300031, effective for all cases filed or pending on or after January 7, 2013; as amended by Supreme Court Order No. 158300019, effective for all cases pending or filed on or after December 31, 2015; as amended by Supreme Court Order No. 18-8300-003, effective March 1, 2018.]

Certiorari Denied, September 29, 2017, No. S-1-SC-36650

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-006

No. A-1-CA-34855 (filed August 8, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
ANTONIO ALVAREZ,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
FERNANDO R. MACIAS, District Judge

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Opinion

Michael E. Vigil, Judge

{1} Defendant Antonio Alvarez appeals his convictions for aggravated DWI, reckless driving, and possession of an open container of alcohol in a motor vehicle. On appeal, he raises three issues, challenging only his DWI and reckless driving convictions. First, he argues that his DWI conviction is unsupported by the evidence under either the theory of past driving or actual physical control. Second, Defendant argues that his conviction for reckless driving is also unsupported by sufficient evidence. Third, he argues that if this Court finds that there is sufficient evidence to support his conviction for reckless driving, it nevertheless should be vacated because his convictions for both DWI and reckless driving violate double jeopardy. The State concedes that Defendant's conviction for reckless driving is unsupported by sufficient evidence and must be vacated. Accepting the State's concession, we affirm Defendant's conviction for aggravated DWI, reverse Defendant's conviction for reckless driving, and determine that it is unnecessary to address Defendant's double jeopardy arguments.

BACKGROUND

{2} On March 29, 2014, at around 11:30 p.m., Sergeant Thomas Vitale and Patrolman Cesar Duran of the New Mexico State Police both responded to a dispatch call about a pickup truck stuck in the median on Interstate 10 where the driver was trying to back into traffic. Sergeant Vitale arrived at the scene first, around 11:35 p.m. (time stamp on dash cam as Sergeant Vitale pulls in). The vehicle was not in the originally reported location, but was a couple of miles ahead. Sergeant Vitale observed that the vehicle was stuck in the median, the vehicle appeared to be "on," and the hazard lights were on. In Sergeant Vitale's dash cam video, which was played for the jury, it appears that the truck's tires are stuck in the dirt. When Sergeant Vitale exited his patrol unit and began walking towards the vehicle, Defendant opened the driver's side door and exited from the driver's seat. Defendant was the only person in the vehicle. Sergeant Vitale testified that the keys to the vehicle were in the ignition. A check of the vehicle's license plate indicated that it belonged to Defendant.

{3} Sergeant Vitale described Defendant's appearance as "disheveled and messy"; his shirt was untucked, his pants were unzipped, and he looked confused, as though he did not know where he was at that time. As he walked up to Defendant, Sergeant Vitale observed a strong odor of alcohol, which became stronger as Sergeant Vitale walked closer. The odor was "overwhelming" when he stood next to Defendant.

{4} Sergeant Vitale initiated a conversation with Defendant, and testified at trial that it was "kind of hard to understand" Defendant. The following dialogue can be heard in Sergeant Vitale's dash cam video. Initially, Sergeant Vitale asked Defendant how he was doing, and Defendant replied, "Alright." Sergeant Vitale asked Defendant if he had anything to drink, noting that he could smell alcohol on Defendant's breath. Although it is difficult to hear the audio, it appears that Defendant responded, "Yeah." Sergeant Vitale requested that Defendant walk over to the shoulder of the road, again inquiring if Defendant was okay. Defendant somewhat unsteadily walked to the shoulder with Sergeant Vitale.

{5} At that point, Sergeant Vitale asked Defendant, "Where were you coming from; where were you driving from? Do you understand English?" Defendant replied, "A little. Coming from Albuquerque." Sergeant Vitale again asked, "Coming from Albuquerque?"; Defendant replied in the affirmative. Sergeant Vitale then inquired, "Where were you headed to?" Defendant answered, "Going to El Paso." Sergeant Vitale asked Defendant if he had anything to drink, and Defendant answered in the negative. Sergeant Vitale asked Defendant if he would be willing to take field sobriety tests, and although Sergeant Vitale testified that it was difficult for him to understand Defendant, and also difficult for Defendant to understand him, Defendant agreed to take the tests. Based on Defendant's performance on the field sobriety tests, Sergeant Vitale arrested him for DWI. A blood draw was performed, and Defendant's blood alcohol concentration was determined to be 0.25 grams of ethanol per one hundred milliliters of blood.

{6} Patrolman Duran testified that he responded to the same dispatch call as Sergeant Vitale, and that Sergeant Vitale was already speaking with Defendant when he arrived at the scene a few minutes after Sergeant Vitale. Patrolman Duran asked Defendant in Spanish if he could understand or speak English; Defendant

stated that he could understand English, and Patrolman Duran determined that translation to Spanish was not necessary. Patrolman Duran observed Defendant to have slurred speech, odor of alcohol, bloodshot eyes, and to be very unsteady on his feet. Patrolman Duran stood by for safety as Defendant was arrested, and he saw a 25-ounce open can of Budweiser on the passenger floor of the vehicle. Patrolman Duran could not recall if it was full or had spilled, and no fingerprints were taken from the can. He also did not remember if the vehicle's engine was running or if he took the keys from the ignition.

{7} During the State's closing argument, the prosecutor asked the jury to find Defendant guilty of aggravated DWI on the theory of past driving, arguing specifically that the evidence showed that Defendant actually drove because he told Sergeant Vitale that he was coming from Albuquerque and going to El Paso, and his vehicle was stuck in the median on the interstate between those two locations. The prosecutor specifically argued that the State was not asking the jury to find that Defendant was guilty under the actual physical control theory, but only under the theory of past driving. Defendant's closing argument asked the jury to consider the actual physical control alternative.

{8} Ultimately, the jury convicted Defendant by a general verdict of DWI, based on a jury instruction that defined the operation of a motor vehicle as one of two alternatives: either actually driving the motor vehicle (past driving) or being in actual physical control of the vehicle with intent to drive the vehicle. *See* UJI 14-4511 NMRA. Based on the jury instruction setting forth both alternatives, the jury could have relied on either past driving or actual physical control as the basis for its conviction, and the jury was not required to specify which theory it relied upon in reaching its verdict. On appeal, Defendant raises no argument to suggest that one of these bases should not be considered due to the arguments made at trial. *See State v. Fox*, 2017-NMCA-029, ¶ 8, 390 P.3d 230 ("The jury instructions become the law of the case against which the sufficiency of the evidence is to be measured." (internal quotation marks and citation omitted)), *cert. granted*, 2017-NMCERT-___ (No. 36269, Feb. 14, 2017).

DISCUSSION

Aggravated DWI

Past Driving

{9} We turn first to Defendant's argument that insufficient evidence exists to uphold Defendant's conviction for aggravated DWI on the theory that Defendant actually drove the vehicle. Because Defendant does not challenge the element of intoxication, we limit our discussion to the contested question of whether Defendant operated the vehicle.

{10} "The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Montoya*, 2015-NMSC-010, ¶ 52, 345 P.3d 1056 (internal quotation marks and citation omitted). The reviewing 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. We disregard all evidence and inferences that support a different result. *See State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829.

{11} In support of his contention that there was insufficient evidence presented of past driving, Defendant argues that his statement to Sergeant Vitale that he was "coming from Albuquerque" and "going to El Paso" was not an admission that he was driving, but merely a statement of where he was coming from and where he was headed. Defendant further argues that there were no witnesses who personally observed Defendant driving, it was unclear how long the vehicle had been parked on the road, and it was also not known whether another person had been driving the vehicle before police approached.

{12} The State contends that sufficient circumstantial evidence was presented to support an inference that Defendant had actually driven the vehicle. We agree. *See*, *e.g.*, *State v. Mailman*, 2010-NMSC-036, ¶¶ 23, 27-28, 148 N.M. 702, 242 P.3d 269 (observing that direct evidence is not required to support a conviction for past DWI; rather, circumstantial evidence may be relied upon to establish that the accused actually drove while intoxicated).

{13} In the present case, Sergeant Vitale reached Defendant's vehicle about five minutes after receiving a dispatch call alerting him that there was a pickup truck stuck in the median that was trying to back into traffic. Sergeant Vitale confirmed that the truck was actually stuck in the median. Sergeant Vitale observed that the vehicle was stuck in the median, the vehicle appeared to be on, and the hazard lights were on. Defendant was alone, and Sergeant Vitale witnessed Defendant exit from the driver's seat. No evidence was presented that there was any other occupant in the vehicle. Although Defendant argues that his statements to Sergeant Vitale that he was coming from Albuquerque should not be interpreted as an admission to driving, we disagree. Sergeant Vitale asked Defendant where he was coming from in two Defendant phrased ways: "Where were you coming from; where were you driving from?" Defendant replied that he was coming from Albuquerque, and he never suggested that Sergeant Vitale's assumption that he was driving was incorrect.

{14} We conclude, based on our case law, that this constitutes sufficient circumstantial evidence to uphold a conviction based on past driving. *See Mailman*, 2010-NMSC-036, ¶¶ 2-4, 23-24 (observing that there was sufficient circumstantial evidence to support a DWI conviction under a theory of past driving, based on the defendant's presence behind the wheel of a vehicle parked by itself in a dark area of a convenience store parking lot, along with admissions to having driven to the convenience store and having consumed alcohol while driving); *cf. State v. Owelicio*, 2011-NMCA-091, ¶ 33, 150 N.M. 528, 263 P.3d 305 (concluding that sufficient evidence was presented to support a finding that the defendant operated a vehicle as part of her DWI conviction based on the defendant's admission that she was driving, the fact that the defendant and a third party who denied driving were the only persons at the scene, and a videotape showing the defendant approaching the passenger side of the vehicle).

{15} We acknowledge Defendant's efforts to analogize the facts of this case to those in *State v. Cotton*, 2011-NMCA-096, 150 N.M. 583, 263 P.3d 925. In *Cotton*, this Court held that there was insufficient evidence to support a conviction where there was nothing from which the jury could infer that the defendant had driven after he had consumed alcohol and after his ability to drive had become impaired. *Id.* ¶¶ 14-15. In that case, police responded to a call about a possible domestic incident in a van parked on the side of the road; the van was not running; the keys were not in the ignition; and the defendant admitted to drinking one hour prior to contact with police. *Id.* ¶¶ 4-6. The determinative factor in *Cotton*, however, was the lack of evidence presented as to timing of the

driving. This Court held that although it would have been reasonable for the jury to conclude that the defendant drove to the place where he was arrested, there was insufficient evidence for the jury to conclude that the defendant had been impaired by alcohol prior to doing so. *Id.* ¶ 14-15.

{16} The facts of the present case are distinguishable from *Cotton*. Notably, the dispatch call reported that someone observed the truck stuck in the median trying to pull back into traffic, and only five minutes later, Sergeant Vitale arrived at the scene. The jury could reasonably have inferred that a five-minute lapse was not enough time for Defendant to have consumed enough alcohol to result in impairment. Additionally, unlike the vehicle in *Cotton*, Defendant's truck was stuck in the median, with the hazard lights on, suggesting that he did not intentionally park the vehicle there; taken together with the fact that a dispatch call was made about the truck, the jury could have reasonably inferred that Defendant recently drove the truck into the median. *See State v. Garcia*, 2005-NMSC-017, ¶ 20, 138 N.M. 1, 116 P.3d 72 (permitting a jury to draw reasonable inferences from the evidence to reach a verdict). We therefore conclude that the State presented sufficient evidence to support a conviction for DWI based on past driving.

Actual Physical Control

{17} Because we have concluded that there was sufficient evidence presented to uphold Defendant's DWI conviction based on past driving, we need not consider whether the State presented sufficient evidence to uphold his conviction under the theory of actual physical control. *See State v. Olguin*, 1995-NMSC-077, ¶ 2, 120 N.M. 740, 906 P.2d 731 (holding that due process does not require a general verdict of guilt to be set aside if one of the two alternative bases for conviction is supported by sufficient evidence and the other basis is not legally inadequate); *see also Mailman*, 2010-NMSC-036, ¶ 28 ("Actual physical control is not necessary to prove DWI unless there are no witnesses to the vehicle's motion and insufficient circumstantial evidence to infer that the accused actually drove while intoxicated. Such evidence may include the accused's own admissions, the location of the vehicle next to the highway, or any other similar evidence that tends to prove that the accused drove while intoxicated."). Nevertheless, we proceed to address Defendant's arguments regarding the sufficiency of the evidence under the theory of actual physical control.

{18} Under a theory of actual physical control, the State must prove "(1) the defendant was actually, not just potentially, exercising control over the vehicle, and (2) the defendant had the general intent to drive so as to pose a real danger to himself, herself, or the public." *State v. Sims*, 2010-NMSC-027, ¶ 4, 148 N.M. 330, 236 P.3d 642. *Sims* addressed a situation wherein a defendant was found passed out or asleep behind the wheel of his car parked in a commercial parking lot. *Id.* ¶ 1. Our Supreme Court explained in *Sims* that "we do not believe that the Legislature intended to forbid intoxicated individuals from merely entering their vehicles as passive occupants or using their vehicles for temporary shelter." *Id.* ¶ 3. Ultimately, our Supreme Court concluded that "the [s]tate failed to prove that [the d]efendant used the vehicle other than as a passive occupant[, and i]t was pure speculation whether [the d]efendant would rouse himself and drive the vehicle." *Id.* ¶ 4.

{19} There are fourteen factors for the jury to consider when determining whether a defendant is in actual physical control of a vehicle: whether the vehicle was running; whether the ignition was on; where the ignition key was located; where and in what position the driver was found in the vehicle; whether the person was awake or asleep; whether the vehicle's headlights were on; where the vehicle was stopped; whether the driver had voluntarily pulled off the road; time of day; weather conditions; whether the heater or air conditioner was on; whether the windows were up or down; whether the vehicle was operable; and any explanation of the circumstances shown by the evidence. UJI 14-4512 NMRA; *see Sims*, 2010-NMSC-027, ¶ 33; *Mailman*, 2010-NMSC-036, ¶ 20.

{20} Applying these factors, we conclude that sufficient evidence was presented to establish actual physical control under *Sims* and *Mailman*. Defendant was in the driver's seat of the truck, which was stuck in the median on the interstate with the hazard lights on, suggesting that Defendant knew that the car should not have been there, and that he drove into the median inadvertently. It was around 11:30 p.m., and the weather was clear and warm. Neither officer who testified could recall specifically whether the truck's engine was running, but Sergeant Vitale testified that the vehicle appeared to be "on," indicating the ignition was turned on. Sergeant Vitale also testified that the key was in the ignition. While Defendant argues that his disheveled appearance suggests that he was asleep in the vehicle, the State argues that the fact that he opened the driver's door and exited as soon as Sergeant Vitale approached suggests that Defendant was awake. We agree with the State that the jury could have inferred that Defendant's rapid exit from the vehicle suggested that he was awake. *See Cunningham*, 2000-NMSC-009, ¶ 26 (explaining that our standard of review

requires us to indulge all inferences in favor of the guilty verdict).

{21} Defendant argues that he could not have been in actual physical control of the vehicle because his truck was stuck in the dirt. Although the evidence was that the vehicle's tires were stuck in the median, it was not apparent that the vehicle was entirely inoperable, and it could reasonably be inferred that Defendant could have moved the vehicle out of the median, either by himself or with assistance; he expressed an intent to go somewhere, as he told Sergeant Vitale that he was "going to El Paso." This distinguishes the present case from *Mailman*, wherein the defendant told the police officer who stopped him that his car had broken down and asked the officer to arrange for a tow truck. 2010-NMSC-036, ¶ 5. The officer in *Mailman* looked for but could not find the keys to the car, and was unable to start the car without a key, leading him to conclude that the vehicle was inoperable. *Id.* Our Supreme Court held that on its own, evidence that a defendant "was in a non-moving, inoperable vehicle attempting to make a phone call[,]" that he told the officer that his car broke down, and that he asked the officer to help him arrange a tow, was insufficient as a matter of law to prove actual physical control. *Id.* ¶ 21. In so holding, our Supreme Court explained that "[w]hile the operability of the vehicle may be highly relevant to [the] determination [of actual physical control], it is not necessarilydispositive." *Id.* ¶ 19. Unlike the situation in *Mailman*, there was no evidence in this case to suggest that Defendant's truck could not have been moved from the median.

{22} In sum, considering the totality of the evidence, we conclude that Defendant was more than a passive occupant of the truck, and that sufficient evidence was presented to support the conviction under the theory of actual physical control. Having concluded that there was sufficient

evidence to establish that Defendant operated the vehicle either under the theory of past driving or actual physical control, we affirm Defendant's conviction for aggravated DWI.

Reckless Driving

{23} Finally, we turn to Defendant's contention that his reckless driving conviction must be vacated. The State concedes this issue, acknowledging that "there was admittedly no evidence of reckless driving beyond [Defendant's] intoxication." The State further notes that "[w]hile the jury could reasonably infer that [Defendant] had driven off the highway into the median, this in itself does not establish reckless driving, because without witness testimony or an admission from [Defendant], the jury could only speculate as to why he did so."

{24} While we are not bound to accept the State's concession, *see State v. Tapia*, 2015-NMCA-048, ¶ 18, 347 P.3D 738 (stating appellate courts are not bound by the state's concessions), we agree that the reckless driving conviction should be vacated. *See State v. Sandoval*, 1975-NMCA-096, ¶ 2, 88 N.M. 267, 539 P.2d 1029 ("The rule in criminal cases in New Mexico is that evidence of intoxication is but a circumstance to be considered by the jury in deciding the issue of reckless driving.").

{25} Because we reverse Defendant's conviction for reckless driving, we do not address Defendant's argument that his convictions for both aggravated DWI and reckless driving violate double jeopardy. *See State v. Trujillo*, 2012-NMCA-112, ¶ 44, 289 P.3d 238 ("Because we reverse the kidnapping conviction, there is no need to address [the d]efendant's double jeopardy arguments regarding kidnapping.").

CONCLUSION

{26} For the foregoing reasons, we affirm Defendant's conviction for aggravated DWI and reverse his conviction for reckless driving. We therefore remand to the district court to vacate Defendant's conviction for reckless driving and resentence Defendant accordingly.

{27} IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

J. MILES HANISEE, Judge

STEPHEN G. FRENCH, Judge

Certiorari Denied, October 24, 2017, No. S-1-SC-36688

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-007

No. A-1-CA-34737 (filed September 5, 2017)

NEW MEXICO CORRECTIONS DEPARTMENT,
Appellant-Petitioner,
v.
AMERICAN FEDERATION OF STATE,
COUNTY, AND MUNICIPAL EMPLOYEES,
COUNCIL 18, AFL-CIO,
Appellee-Respondent

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
DAVID K. THOMSON, District Judge

SHANE YOUTZ
STEPHEN CURTICE
JAMES A. MONTALBANO
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Department
Santa Fe, New Mexico
for Appellant

Opinion

J. Miles Hanisee, Judge

{1} The State of New Mexico Corrections Department (the Department) appeals the district court's denial of the Department's motion for reconsideration following the district court's on-record affirmance and adoption of the Public Employee Labor Relations Board's (PELRB) September 2009 order and the PELRB hearing examiner's July 2009 order, both of which found the Department to have committed a prohibited practice in violation of NMSA 1978, Section 10-7E-19(A) (2003) of the Public Employee Bargaining Act (PEBA). We affirm.

BACKGROUND

{2} On February 10, 2009, Respondent filed a prohibited practices complaint (PPC) with the PELRB against the Department, alleging that the Department had violated Section 10-17E-19 by discriminating against two of the Department's employees, Frank Blair and Gabe Molina. The basis of the PPC was that Blair and Molina, who are also union members and officials of the American Federation of State, County, and Municipal Employees (AFSCME) Local 3422 (Corrections Officers), had requested and were denied use of a state vehicle to travel to and from a policy review meeting with Department management on January 26, 2009. Blair and Molina were attending the meeting in their capacity as state employee union officials (employee officials). Employee officials are union officials or stewards who are also state employees. Per the parties' 2005 collective bargaining agreement (CBA), employee officials are "on paid status" when they attend "meetings agreed to by the parties for purposes of administration of [the CBA]." Other Department employees attending the same meeting in their capacity as management were allowed to use a state vehicle to travel to and from the meeting, the purpose of which was to discuss various labor-management issues. A hearing on the merits was held before PELRB Director Juan Montoya (the hearing examiner) on July 1, 2009, during which the following facts were elicited.

{3} The purpose of labor-management meetings is to provide the Department and the union an opportunity to resolve issues that arise in the workplace in order to promote a cooperative relationship between the parties and enhance the orderly operation and functioning of the Department's facilities. Policy review meetings, such as the one held on January 26, 2009, are a type of labor-management meeting that is convened when the Department proposes policy changes affecting the CBA. Such meetings are typically convened by the Department's Human Resources Bureau Chief Elona Cruz, who is the Department's administrator of the CBA. When convened, representatives of both Department management and employee officials are required to attend per the CBA.

{4} Cruz used a state vehicle to attend such meetings, including the meeting on January 26, 2009. On approximately a dozen occasions from 2005 through 2008, Cruz granted employee officials permission to do the same. In January 2009 Cruz issued a directive to the Department, disallowing use of state vehicles by employee officials. Cruz's directive was in response to direction she received from the State Personnel Office (SPO), which had received a legal opinion (the opinion) in December 2008 from the General Services Department's (GSD) general counsel that concluded that state law prohibits the use of state vehicles by union officials and stewards, including employee officials. The opinion responded to a general inquiry from SPO Director Sandra Perez regarding an issue that had arisen during negotiations between the state and different unions, including AFSCME, and did not address the specific factual scenario presented in this case.

{5} According to GSD Secretary Arturo Jaramillo, GSD is the only state agency with the authority to own, lease, and insure state vehicles. GSD is also the only state agency with the authority to establish rules and regulations for the use of state vehicles. Secretary Jaramillo explained that under the New Mexico Administrative Code, the general eligibility requirements for using a state vehicle are: (1) status as a state employee, (2) possession of a valid driver's license, (3) completion of a defensive driving course, and (4) the use must be "in furtherance of official state business." He also testified that the term "official state business" is not defined by statute or regulation, and determinations of whether use of a vehicle is in furtherance of official state business are made on a case-by-case basis, taking into consideration "the whole complex" of facts, not just one particular fact. When asked whether, in general, there are instances where a union official's use of a vehicle would be in furtherance of official state business, Secretary Jaramillo

responded, "I could envision that, where the interests of the state and the union relat[e] to resolution of a matter of common interest, I would argue that is in furtherance of state business." He offered grievance meetings as an example of a type of labor-management meeting that would qualify for use of state vehicles by employee officials because such meetings are "in furtherance of official state business because it would be in the state's interests to resolve grievances." As an example of what he would not consider an appropriate use of a state vehicle by an employee official, he stated that a meeting relating to a "matter of pure internal administration by the union" is not something he would consider to be in furtherance of official state business. Secretary Jaramillo emphasized that determinations must be made based on all of the facts—not any particular fact, such as how an employee's time is coded—and that the ultimate question to answer in deciding whether use of a state vehicle is authorized is whether such use is in furtherance of official state business.

{6} The hearing examiner concluded that "[a] state employee who is also a union official of a state bargaining unit is on official state business while attending labor-management relations meetings, grievance meetings[,] and other meetings necessary for the administration of the [CBA]." As such, he determined that the Department had committed a prohibited practice in violation of Section 10-7E-19(A) by treating Blair and Molina differently than management employees regarding the use of state vehicles to attend the January 2009 policy review meeting and ordered the Department to "cease and desist" from such practice. The PELRB affirmed the hearing examiner's decision and order.

{7} The Department appealed the PELRB's decision to district court, arguing that the decision was not in accordance with law. Specifically, the Department argued that the decision conflicts with myriad statutes—including Section 10-7E-19(A); NMSA 1978, Section 10-7E-6 (2003); and New Mexico's Transportation Services Act (TSA), NMSA 1978, §§ 15-8-1 to -11 (1994, as amended through 2013)—as well as the New Mexico Constitution's Anti-Donation Clause, N.M. Const. art. IX, § 14. The district court affirmed the PELRB's order and adopted the findings and conclusions of the hearing examiner. In its motion for reconsideration, the Department reiterated its previous arguments and also argued that the decision overlooked and is in conflict with various provisions of the New Mexico Tort Claims Act, NMSA 1978, §§ 41-4-1 to -30 (1976, as amended through 2015). The district court denied the Department's motion, and the Department timely filed for a writ of certiorari under Rule 12-505 NMRA, which this Court granted.

DISCUSSION

{8} The ultimate question we must answer in this case is whether the PELRB erred in concluding that the Department committed a prohibited practice by not allowing employee officials to use a state vehicle to attend a policy review meeting called by the Department when management employees were allowed to use a state vehicle to attend the same meeting.

Standard of Review

{9} "Upon a grant of a petition for writ of certiorari under Rule 12-505, this Court conducts the same review of an administrative order as the district court sitting in its appellate capacity, while at the same time determining whether the district court erred in the first appeal." *City of Albuquerque v. AFSCME Council 18 ex rel. Puccini*, 2011-NMCA-021, ¶ 8, 149 N.M. 379, 249 P.3d 510 (alteration, internal quotation marks, and citation omitted). "In reviewing an administrative decision, we apply a whole-record standard of review." *Town & Country Food Stores, Inc. v. N.M. Reg. & Licensing Dep't*, 2012-NMCA-046, ¶ 8, 277 P.3d 490 (internal quotation marks and citation omitted). "We independently review the entire record of the administrative hearing to determine whether the [PELRB]'s decision was arbitrary and capricious, not supported by substantial evidence, or otherwise not in accordance with law." *Puccini*, 2011-NMCA-021, ¶ 8 (internal quotation marks and citation omitted). "When reviewing an administrative agency's conclusions of law, we review de novo." *Id.* We "apply a de novo standard of review to [administrative] rulings regarding statutory construction." *Albuquerque Bernalillo Cty. Water Util. Auth. v. N.M. Pub. Reg. Comm'n* (*ABCWUA*), 2010-NMSC-013, ¶ 50, 148 N.M. 21, 229 P.3d 494. We "will generally defer to an agency's reasonable interpretation of its own ambiguous regulations, especially where the subject of the regulation implicates agency expertise[.]" *Id.* ¶ 51 (internal quotation marks and citation omitted). However, we are "not bound by the agency's interpretation," and we may substitute our own "independent judgment for that of the agency if the agency's interpretation is unreasonable or unlawful." *Id.* (omission, internal quotation marks, and citation omitted).

The PEBA: Intent and Prohibited Practices

{10} The Legislature declared the purpose of the PEBA as being "[(1)] to guarantee public employees the right to organize and bargain collectively with their employers[;] [(2)] to promote harmonious and cooperative relationships between public employers and public employees[;] and [(3)] to protect the public interest by ensuring, at all times, the orderly operation and functioning of the state and its political subdivisions." NMSA 1978, § 10-7E-2 (2003). Consistent with the second and third stated purposes, the Legislature provided that it shall be a prohibited practice for a public employer to "discriminate against a public employee with regard to terms and conditions of employment because of the employee's membership in a labor organization[.]" Section 10-7E-19(A). Treating two similarly situated persons differently on the basis of an identifiable characteristic is the hallmark of discrimination. *Cf.* NMSA 1978, § 28-1-7 (2004) (describing an "unlawful discriminatory practice" under the New Mexico Human Rights Act as being where an employer takes an employment action "because of" a particular trait, such as race, age, religion, or sex); *Griego v. Oliver*, 2014-NMSC-003, ¶ 27, 316 P.3d 865 (explaining that under equal protection analysis, the first question to ask in determining the constitutionality of a discriminatory state law is "whether the legislation creates a class of similarly situated individuals and treats them differently"); *Burch v. Foy*, 1957-NMSC-017, ¶ 10, 62 N.M. 219, 308 P.2d 199 (discussing "the requirements of legal and constitutional classification, i.e., equal protection of the law[,]" explaining that in order to be legal, a classification "must be founded upon real differences of situation or condition, which bear a just and proper relation to the attempted classification, and reasonably justify a different rule[,]" and concluding that "[i]f persons under the same circumstances and conditions are treated differently, there is arbitrary discrimination, and not classification"). Under Section 10-7E-19(A), union membership is the identifiable characteristic that may not serve as the basis for treating an otherwise similarly situated public employee differently with respect to the terms and conditions of his or her employment.

{11} Here, the uncontroverted facts are that the Department treated state employees who were members of the union (Blair and Molina) differently than a state employee who was not (Cruz) by allowing the non-union employee to use a state vehicle to attend the same Department-called meeting for which the union employees' request to use a state vehicle had been denied. The Department has never argued that it did not treat Blair and Molina differently based on their union status but instead offers a variety of possible reasons why its conduct does not violate Section 10-7E-19(A). We consider each proffered basis in turn.

1. Whether Anti-Union Animus I Required to Establish Discrimintory Treatment Under Section 10-7E 19(A) of the PEBA

{12} The Department first argues that we should interpret Section 10-7E-19(A) in accordance with how federal cases interpret a similar—but not identical—provision of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(3) (2015). According to the Department, this approach leads to the conclusion that there cannot be discriminatory treatment with regard to terms and conditions of employment absent evidence of anti-union animus or a retaliatory motive for taking a particular action. AFSCME points out that the federal cases cited by the Department relate to a provision in the NLRA that tracks Section 10-7E-19(D) of the PEBA, not Subsection A, and that our Legislature adopted Subsection A as an additional protection against discrimination even where there is no evidence of anti-union animus or retaliation against employees who engage in union activities. We agree with AFSCME.

{13} By its plain language, Section 10-7E-19(A) requires only that the discriminatory treatment be "because of the employee's membership in a labor organization" in order for such treatment to constitute a prohibited practice. We decline to read into the statute a requirement that there be evidence that anti-union animus was the underlying motivation for a public employer's discriminatory treatment of a public employee in order to constitute a violation of Section 10-7E-19(A). *See Starko, Inc. v. N.M. Human Servs. Dep't*, 2014-NMSC-033, ¶ 46, 333 P.3d 947 ("New Mexico courts have long honored [the] statutory command [that the text of a statute or rule is the primary, essential source of its meaning] through application of the plain meaning rule, recognizing that when a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." (alteration, internal quotation marks, and citation omitted)). The simple fact that the decision discriminates against an employee because of his or her union status is sufficient to constitute discrimination—and a prohibited practice—under Section 10-7E-19(A). *See id.*; *Northern N.M. Fed. of Educ. Emps. v. Northern N.M. College*, 2016-NMCA-036, ¶ 18, 369 P.3d 22 (explaining that the question presented by the prohibited practices complaint was whether the employment-related decisions "were motivated by discriminatory *or* retaliatory reasons" (emphasis added)). Thus, AFSCME was not required to prove that the Department's action was retaliatory or motivated by anti-union animus in order for the hearing examiner to conclude that the Department had engaged in a prohibited practice.

2. Whether the 2005 CBA's Silence Regarding Use of a State Vehicle by Employee Officials Is Dispositive as to Whether Section 10-7E-19(A) Was Violated

{14} The Department also relies on the absence of a provision in the CBA establishing an express right of employee officials to use state vehicles to attend labor-management meetings to defend its actions. The Department argues that "[t]he use of state vehicles does not follow from the bargained-for right to be paid for certain [union] activities, precisely because the 2005 CBA does not also confer the right to use state vehicles." But whether the CBA provides a *right* to use state vehicles is simply the beginning of the inquiry, not the end because while parties may agree to supplement statutory rights under a contract, the public policy of freedom to contract yields when a contract's terms contravene existing law. *See Acacia Mut. Life Ins. Co. v. Am. Gen. Life Ins. Co.*, 1990-NMSC-107, ¶ 1, 111 N.M. 106, 802 P.2d 11 ("The right to contract is jealously guarded by [New Mexico courts], but if a contractual clause clearly contravenes a positive rule of law, it cannot be enforced[.]"). In other words, the absence of a CBA provision allowing use of a state vehicle is merely evidence that the parties did not reach a bargained-for agreement to allow such use by right and establishes nothing more than the Department did not breach the terms of the CBA. It does not somehow either waive the general protections of the PEBA or establish that the Department did not violate its statutory obligations under Section 10-7E-19(A).

3. Whether Employee Officials Attening a Policy Review Meeting With the Department Are Acting In Furtherance of Official State Business

{15} The Department primarily defends its disparate treatment of Blair and Molina by arguing that their attendance at the policy review meeting was not "in furtherance of official state business" but was rather for the purpose of furthering the "union's agenda" and "union business." The Department relies on state statutory and regulatory law—specifically the TSA, and its companion regulations, 1.5.3 NMAC (10/28/1985, as amended through 7/30/2015)—to support its contention that it was prohibited from allowing Blair and Molina to use a state vehicle to attend the policy review meeting. In effect, the Department's argument, if correct, would establish that the Department treated Blair and Molina differently not "because of" their union status (a prohibited reason for discriminating against them) but because of their ineligibility to drive a state vehicle (a non-prohibited reason). We consider whether the TSA or 1.5.3.7 NMAC provides a sufficient basis justifying the Department's actions.

New Mexico Statutory and Regulatory Law Regarding Use of State Vehicles

{16} The TSA defines "state vehicle" as "an automobile, van, sport-utility truck, pickup truck or other vehicle . . . used by a state agency to transport passengers or property[.]" Section 15-8-3(G). With respect to use of state vehicles, the TSA provides that the Transportation Services Division of the GSD "shall adopt rules governing the use of vehicles used by state agencies or by other persons . . . , including driver requirements and responsibilities, [and] under what circumstances someone can be assigned a state vehicle on a permanent or semi-permanent basis." Section 15-8-6(A). By GSD-promulgated regulation, in order to be an "authorized driver" of a state vehicle, one must meet four general criteria: (1) be a state employee, (2) hold a valid driver's license, (3) have completed a defensive driving course, and (4) be using the vehicle "in furtherance of official state business[.]" 1.5.3.7(F)(1) NMAC.

{17} Neither the TSA nor regulations promulgated thereunder defines or provides further guidance regarding what is meant by the phrase "in furtherance of official state business." Secretary Jaramillo acknowledged that there is "no official definition" of what is considered "official state business" and explained that GSD considers whether a proposed use of a state vehicle is "in furtherance of official state business" on a case-by-case basis and that the determination is heavily fact-driven. He did not categorically reject the possibility of use of a state vehicle by employee officials, explaining that whether use of a vehicle is appropriate depends on the type of meeting and the facts of each case. Secretary Jaramillo did include meetings to discuss "matter[s] of common interest" among those that are "in furtherance of official state business" but did not affirmatively opine that the January 2009 policy review meeting was a qualifying meeting. The Department fails to argue how the phrase should be construed, instead summarily concluding—without explanation or citation to authority—that "union business" can never be "in furtherance of official state business" because "union business" and "state business" are inherently mutually exclusive. Because resolution of this case turns on whether Blair and Molina were eligible to use a state vehicle depending on whether they were acting "in furtherance of official state business," we must first discern what is meant by that phrase. *See Fitzhugh v. N.M. Dep't of Labor*, 1996-NMSC-044, ¶ 22, 122 N.M. 173, 922 P.2d 555 (explaining that an appellate court "may always substitute its interpretation of the law for that of the agency's because it is the function of the courts to interpret the law" (internal quotation marks and citation omitted)).

{18} When a phrase in a regulation is ambiguous and not further defined, we "turn to the dictionary to ascertain its common and ordinary meaning." *ABCWUA*, 2010-NMSC-013, ¶ 82. The term "furtherance" means "[t]he act or process of facilitating the progress of something or of making it more likely to occur; promotion or advancement." *Black's Law Dictionary* 790 (10th ed. 2014). The term "official" means "[a]uthorized or approved by a proper authority." *Id.* 1259. The term "business" means "that with which one is principally and seriously concerned[.]" *The Random House Dictionary of the English Language* 201 (unabridged ed. 1971). Thus, one is acting "in furtherance of official state business" when one is facilitating the progress of or advancing a matter—authorized or approved by the state—with which the state is principally and seriously concerned. We emphasize that we examine the facts under this test on a case-by-case basis.

Analysis

{19} The Department effectively concedes that the January 2009 policy review meeting involved "official state business" as evidenced by its decision to allow Cruz to drive a state vehicle to the meeting. It argues, however, that "[union] representatives who attend a meeting on behalf of [the union] are not on state business in the same sense as [Department] employees who attend the meeting on behalf of [the Department] as the managerial employer." The Department contends that employee officials "have different status and purposes in attending the meeting even if there is a shared desire to reach agreement." According to the Department, employee officials' purpose in attending labor-management meetings is to "advocat[e] for the union's position." We find the Department's arguments unavailing for two reasons: first, the record contradicts the Department's contentions that employee officials attend policy review meetings only "on behalf of the union" and are merely "advocating for the union's position" at those meetings; and second, the Department's summary conclusion that "[u]nion business is not state business, and vice versa" rests on a false dichotomy.

{20} The Department's contention that corrections officer and AFSCME Local 3422 statewide president Lee Ortega "testified that he attends [policy review] meetings on behalf of AFSCME[] on 'union time' " is cherry-picked evidence that not only violates our appellate rules, *see* Rule 12-318(A)(3) NMRA (requiring that a party challenging the sufficiency of evidence "include[] the substance of the evidence bearing on the proposition"), but improperly characterizes Ortega's testimony. Ortega, in fact, resisted adopting the Department's conclusory labeling scheme that attempted to pigeonhole the parties' interests as evidenced by the following exchange:

> Q: As state president [of Local 3422], when you are working with management is it not true that you're wearing your AFSCME hat?
>
> A: I'm wearing my—I'm trying to help other people. I mean, it's not an 'AFSCME' thing, it's not—. You know, if you can settle it with the Department before it gets to be an issue, it's, you know—
>
> Q: As president [of AFSCME Local 3422], are you not furthering the agenda of AFSCME?
>
> A: I'm furthering the agenda of the corrections officers.
>
> . . . .
>
> Q: You just testified that you're representing the correctional officers. You're representing them under the guise of AFSCME, though, correct?
>
> A: Yeah, I guess, yeah.
>
> . . . .
>
> Q: When you go to management meetings or policy reviews, isn't it true you're on union time?
>
> A: Yes.
>
> Q: You're not on state time. You're not on regular work hour time, you're on union time, correct?
>
> A: Well, we're getting paid by the state, but they call it 'union time' for tracking purposes.

The Department relies heavily on both this testimony and that of Cruz and Perez, which summarily concluded that employee officials who are on "union time" are "conducting union business" and, thus, cannot be furthering official state business. However, the Department fails to cite any authority to support its argument that any activity that is administratively coded as "union time" is categorically not "in furtherance of official state business." *See In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 (explaining that where a party cites no authority to support an argument, the appellate courts may assume no such authority exists). Furthermore, the testimony and labels on which the Department relies fail to address the ultimate question in this case: whether Blair and Molina's attendance at the meeting and participation in the discussion regarding proposed policy changes advanced or facilitated the progress (i.e., was in furtherance) of the Department implementing its proposed policy changes (official state business). It is to that question that we now turn.

{21} We begin by noting that the type of meeting for which state vehicle use was requested in this case was a policy review meeting that was held at a state facility, convened by management, and attended only by state employees. Cruz acknowledged that under the CBA, such meetings

are required to be held when management proposes changes to policies affecting the Department's facilities in order to "allow the union the opportunity to comment on [the proposed changes]." Representatives of both management and the union are required to attend per the CBA. And because proposed changes affect the Department's facilities around the state—in Santa Fe, Las Cruces, Los Lunas, Springer, Grants, and Roswell—an employee official from each facility is required to attend and provide input. Importantly, until such time that the parties either agree to the proposed policy changes or bargain to impasse, the Department cannot implement the proposed changes. Additionally, Ortega testified that policy review meetings promote cooperative relationships between labor and management, that the parties "g[e]t a lot of stuff settled" at such meetings, and that the meetings enhance the orderly operation and good functioning of the Department's facilities. Thus, the record indicates that policy review meetings benefit the Department in that they, at the very least, allow the Department to comply with the requirements of the CBA in order to be able to implement proposed policy changes and, perhaps more significantly, promote the harmonious and cooperative relationship between employer and employees contemplated by the PEBA.

{22} Because a meeting between management and employee officials is a required step in the process of implementing operational changes at the Department's facilities, and because the Department cannot implement its proposed changes without first conferring with employee officials, it follows that employee officials who attend policy review meetings are integral in facilitating the progress of matters affecting and of principal concern to the State of New Mexico, i.e., they are acting in furtherance of official state business. Even assuming one of the outcomes of such meetings is that the parties agree to modify a proposed policy based on the input of employee officials and that the modification "benefits" the corrections officers that the employee officials are representing, that does not change the fact that the meeting has resulted in the furtherance of official state business. In essence, the Department's position is that any discussion with employee officials involving matters that may promote the union's "agenda" or that may result in a benefit to the union or its members can never be in furtherance of official state business. Such a position is simply at odds with Section 10-7E-2 of the PEBA, which expressly contemplates and encourages the promotion of "cooperative relationships between public employers and public employees," i.e., relationships wherein there exists the possibility—even the preference—of mutual benefits to both parties. We conclude that the PELRB's determination that Blair and Molina were acting in furtherance of official state business by attending the January 2009 policy review meeting is in accordance with law, supported by substantial evidence, and was not arbitrary, capricious, or an abuse of discretion. We further conclude that the PELRB's concomitant conclusion that the Department committed a prohibited practice in violation of Section 10-7E-19(A) is in accordance with law.

CONCLUSION

{23} For the foregoing reasons, we affirm the district court's affirmance of the PELRB's order.

{24} IT IS SO ORDERED.

J. MILES HANISEE, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

STEPHEN G. FRENCH, Judge

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-008

No. A-1-CA-34058 (filed September 14, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JUAN URIBE-VIDAL,
Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY
GARY L. CLINGMAN, District Judge

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Opinion

Stephen G. French, Judge

{1} This appeal stems from a jury verdict convicting Defendant Juan Uribe-Vidal of eleven counts of aggravated assault upon a peace officer (deadly weapon), contrary to NMSA 1978, Section 30-22-22(A)(1) (1971), and one count of aggravated battery upon a peace officer (deadly weapon), contrary to NMSA 1978, Section 30-22-25(C) (1971). Defendant raises four issues on appeal: (1) the State presented insufficient evidence to sustain the convictions, (2) the convictions violate Defendant's right to be free from double jeopardy, (3) defense counsel's failure to present evidence proving Defendant's innocence violated Defendant's right to effective assistance of counsel, and (4) Defendant's sentence constitutes cruel and unusual punishment. We affirm.

BACKGROUND

{2} On November 23, 2012, officers from the Lea County Sheriff's Office and the Hobbs Police Department attempted to execute a search of Defendant's residence pursuant to a warrant. The officers were organized into two SWAT teams, one for a camper on the property and one for a mobile home on the property. The officers arrived at Defendant's property in an armored patrol carrier and, upon exiting the vehicle, one SWAT team began walking toward the camper and the other began walking toward the mobile home. Officer Tovar was part of the SWAT team tasked with entering the camper. When that team was close to the front door of the camper, another officer gave the command for Officer Tovar to deploy a distractionary device, which would emit smoke and conceal their movement. Immediately after Officer Tovar deployed the distractionary device, the officers—including Officer Tovar—heard and saw gunfire coming from the camper. As soon as the officers heard the shots, they tried to take cover behind a nearby tree and another vehicle parked on Defendant's property. When Officer Tovar took cover behind the vehicle, he discovered that he had been shot in his right arm. He remained behind the vehicle until the firefight was over, which lasted about twenty-one seconds and included the exchange of rounds fired from the camper and several rounds fired by one of the officers in front of the camper. Once the gunfire ceased, two officers helped get Officer Tovar back to the armed patrol carrier, and the individuals inside the camper were ordered to come out. Defendant and six others were arrested outside the camper.

{3} Law enforcement seized from the camper various firearms, a grenade, a gas mask, a bulletproof vest, and an explosive device. They also discovered a video surveillance system inside the camper, which displayed the area in front of the camper where the SWAT teams had assembled. All of the officers said they could not see who was firing at them from inside the camper, but the gunfire appeared to come from the window and the doorway of the camper.

{4} Defendant was charged with thirteen counts of aggravated assault on a peace officer (deadly weapon), one charge for each of the officers present that day, and one count of aggravated battery on a peace officer (deadly weapon), for Officer Tovar, the officer who was shot in the arm. Two counts of aggravated assault were dismissed by directed verdict by the district court before being submitted to the jury. In addition to its substantive instructions, the jury was also instructed on accessory liability. The jury found Defendant guilty of eleven counts of aggravated assault on a peace officer and one count of aggravated battery on a peace officer. Defendant was sentenced to a total of twenty years imprisonment, minus 492 days credit for time served. Defendant appeals his convictions based on the sufficiency of the evidence, double jeopardy, ineffective assistance of counsel, and cruel and unusual punishment.

DISCUSSION

Sufficiency of the Evidence

{5} Defendant asserts that there was insufficient evidence to support all of his convictions because the testimony at trial only established that while Defendant owned the property and was present in the camper during the firefight, he was on the floor, not near the window or door from which the shots were fired. Defendant emphasizes the absence of evidence proving that he possessed a gun during the firefight and notes that the DNA evidence from one of the guns only established that Defendant handled the gun at some point in time. Defendant argues it is therefore not reasonable to infer that he shot at the officers outside. Defendant also notes the absence of ballistics tests that could have proven which rounds were fired by the gun that Defendant allegedly handled during the firefight, and argues the State made no effort to determine which of the guns caused Officer Tovar's injury. Therefore, Defendant argues the jury could only have speculated that Defendant participated in the firefight based upon his presence in the camper.

{6} "The sufficiency of the evidence is reviewed pursuant to a substantial evidence standard." *State v. Treadway*, 2006-NMSC-008, ¶ 7, 139 N.M. 167, 130 P.3d 746. When reviewing a challenge to the sufficiency of the evidence, we determine

"whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Sutphin*, 1988-NMSC-031, ¶ 21, 107 N.M. 126, 753 P.2d 1314. "[W]e must view 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. "In our determination of the sufficiency of the evidence, we are required to ensure that a rational jury *could* have found beyond a reasonable doubt the essential facts required for a conviction." *State v. Duran*, 2006-NMSC-035, ¶ 5, 140 N.M. 94, 140 P.3d 515 (internal quotation marks and citation omitted). "Contrary evidence supporting acquittal does not provide a basis for reversal because the jury is free to reject [the d]efendant's version of the facts." *State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829.

{7} The State argues it presented evidence sufficient to support Defendant's convictions because it proceeded on a theory of accessory liability and the evidence determined that Defendant "watched, waited, encouraged, and caused" the criminal conduct. We agree. *See State v. King*, 2015-NMSC-030, ¶ 21, 357 P.3d 949 (noting that "New Mexico long ago abolished the distinction between accessory and principal liability" and "[t]he charge against [the d]efendant as a principal include[s] a corresponding accessory charge, assuming the evidence at trial supported the charge" (internal quotation marks omitted)). Where the State's theory of the case includes accomplice liability, the jury is accordingly instructed and "[t]he sufficiency of the evidence is assessed against the jury instructions because they become the law of the case." *State v. Quiñones*, 2011-NMCA-018, ¶ 38, 149 N.M. 294, 248 P.3d 336.

{8} Specifically, the State presented evidence showing that Defendant owned and was inside the camper at the time of the firefight. The State also called as a witness the forensics expert who ran various tests—cartridge casing comparison tests, bullet comparison tests, and function tests—on the cartridge casings and firearms found inside the camper. Of the thirteen firearms found within the camper and provided to the forensics expert for testing, he was able to identify cartridge casings with the .45 caliber colt, the AR-15 caliber rifle, the .40 caliber glock, and the .40 caliber beretta pistol. The bullets that hit Officer Tovar matched the .40 caliber beretta pistol found inside the camper. The State also presented the results of DNA tests performed on several of the firearms. Defendant was not eliminated as a contributor to the DNA found on the beretta pistol. The other six individuals inside the camper were eliminated as contributors to the DNA mixture found on the magazine of the beretta pistol, but there was no conclusion about Defendant being "a possible contributor." Defendant was also found to be a "major contributor" on another firearm, while everyone else in the camper was eliminated, and Defendant was found to be "the source of the major DNA profile" on another one of the many firearms found inside the camper.

{9} From this, it was reasonable for the jury to infer that Defendant either shot at the officers himself, or, given the presence of the surveillance system and the availability of firearms and ammunition inside his camper, Defendant encouraged, helped, or caused others to shoot at the officers. Despite the difficulty in proving which of the seven individuals inside the camper actually shot the three guns, there was evidence sufficient to convict Defendant as an agent of the crimes. *See State v. Bahney*, 2012-NMCA-039, ¶ 26, 274 P.3d 134 (noting that "we need only find sufficient evidence under one of the theories presented to uphold [the d]efendant's convictions," and choosing "to address each of the . . . crimes under the [s]tate's theory of accessory liability"). Given all the evidence presented and the alternative manner used to charge Defendant, as well as prove the State's case at trial, we conclude that sufficient evidence supports each of Defendant's convictions.

Double Jeopardy

{10} Defendant argues that the jury's separate guilty verdicts for one count of aggravated assault and one count of aggravated battery, both involving Officer Tovar as the victim, violated the Double Jeopardy Clause. Whether separate convictions violate double jeopardy is "a question of law, which we review de novo." *State v. Saiz*, 2008-NMSC-048, ¶ 22, 144 N.M. 663, 191 P.3d 521, *abrogated on other grounds by State v. Belanger*, 2009-NMSC-025, ¶ 36 n.1, 146 N.M. 357, 210 P.3d 783. The Double Jeopardy Clause prohibits the imposition of multiple punishments for the same offense. *Swafford v. State*, 1991-NMSC-043, ¶ 6, 112 N.M. 3, 810 P.2d 1223. "There are two types of multiple punishment cases: (1) unit of prosecution cases, in which an individual is convicted of multiple violations of the same criminal statute; and (2) double[]description cases, in which a single act results in multiple convictions under different statutes." *State v. Branch*, 2016-NMCA-071, ¶ 20, 387 P.3d 250, *cert. granted*, 2016-NMCERT-_____, _____ P.3d _____ (No. A-1-CA- 35,951, July 28, 2016). Defendant's argument involves separate statutes, raising a double description issue.

{11} Our courts have established a two-part test for determining whether convictions under different criminal statutes violate the Double Jeopardy Clause. *Swafford*, 1991-NMSC-043, ¶¶ 25-26. First, we determine "whether the conduct underlying the offense[] is unitary, *i.e.*, whether the same conduct violates both statutes." *Id.* ¶ 25. "Whether conduct is unitary depends upon whether the two events are sufficiently separated by either time or space as well as the quality and nature of the acts or the objects and results involved." *State v. Meadors*, 1995-NMSC-073, ¶ 36, 121 N.M. 38, 908 P.2d 731 (omission, internal quotation marks, and citation omitted). "[I]f the conduct is separate and distinct, [the] inquiry is at an end." *Swafford*, 1991-NMSC-043, ¶ 28. If the conduct is unitary, we must then consider "whether the [L]egislature intended to create only alternative means of prosecution or separately punishable offenses." *State v. Cowden*, 1996-NMCA-051, ¶ 6, 121 N.M. 703, 917 P.2d 972.

{12} Defendant maintains that the conduct resulting in harm to Officer Tovar was unitary because there was "no temporal distinction between the gun shots resulting in the alleged assaults experienced by the officers, and the shot that hit Officer Tovar's arm[,]" and "[t]he only physical distinction was that Officer Tovar was touched while none of the other officers were." Defendant relies on *State v. Montoya*, 2013-NMSC-020, ¶ 54, 306 P.3d 426, concluding that the same shots, fired at the same time, establish both charges, and "where both convictions were premised on the unitary act of shooting [the victim,]" one must be vacated. *Id.* ¶ 54.

{13} The State argues that Defendant's conduct was not unitary because the State's case was based on a theory of accessory liability, which involved multiple perpetrators. Defendant's convictions for aggravated assault and aggravated battery against Officer Tovar could be based on

Defendant's commission of the crimes, or it could have been based on accessory liability for having assisted the individual inside the camper who did in fact fire the shot that struck Officer Tovar.

{14} We conclude that the conduct is unitary. We examine four cases where our courts have concluded one perpetrator shooting one firearm constitutes unitary conduct. In *Branch*, the defendant pointed a firearm at two people who were standing directly next to one another and fired a single shot, striking only one of the two victims. 2016-NMCA-071, ¶ 7. The jury convicted him of aggravated battery with a deadly weapon (for the victim who was shot) and aggravated assault with a deadly weapon (for the victim who was not shot but reasonably believed the defendant would batter her as well). *Id.* ¶¶ 1-2. We concluded that the firing of a single shot was unitary conduct. *Id.* ¶ 22.

{15} In *Cowden*, the defendant was one of several defendants involved in "an incident in which [the d]efendant and others shot at Santa Fe police officers," and only one officer was shot. 1996-NMCA-051, ¶ 2. The defendant was crouched behind the victim's van, pointed his gun at the victim, and upon seeing one another, discharged one shot. *Id.* ¶ 3. The state conceded the conduct was unitary and we agreed. *Id.* ¶ 5. This Court cited to *State v. Gonzales*, 1992-NMSC-003, 113 N.M. 221, 824 P.2d 1023, *overruled on other grounds by State v. Montoya*, 2013-NMSC-020, 306 P.3d 426, in support of our conclusion. *Cowden*, 1996-NMCA-051, ¶ 5.

{16} In *Gonzales*, the defendant was convicted of shooting into an occupied motor vehicle and first degree murder. 1992-NMSC-003, ¶ 1. The victim was a passenger in a truck and was killed by shots fired into the truck while the driver drove past the residence of the defendant. *Id.* ¶ 2. Our Supreme Court concluded the conduct was unitary: "the facts presented at trial established that [the] defendant fired multiple gun shots into [the] truck in rapid succession. Because the shots were not separated by either time or space, [our Supreme Court agreed] with the trial court that [the] defendant committed one criminal act." *Id.* ¶ 8 (internal quotation marks omitted).

{17} In *Montoya*, our Supreme Court was asked to determine whether the defendant could be punished for both voluntary manslaughter and shooting at a motor vehicle resulting in great bodily harm. 2013-NMSC-020, ¶ 28. The defendant shot at a vehicle driving by his residence, and the driver of the vehicle died of multiple gunshot wounds. *Id.* ¶ 7. As in *Gonzales*, the state conceded that "[the d]efendant's act of shooting the driver of the [vehicle] was the common factual basis for both the shooting into the motor vehicle and the voluntary manslaughter convictions, and his culpable conduct was therefore 'unitary.' " *Montoya*, 2013-NMSC-020, ¶ 30. Our Supreme Court agreed that the conduct was unitary, citing *Gonzales* for the proposition that "the firing of multiple gun shots into the victim's vehicle in rapid succession constituted unitary criminal conduct[.]" *Montoya*, 2013-NMSC-020, ¶ 30 (alteration, internal quotation marks, and citation omitted).

{18} In summary, in *Branch* and *Cowden*, one perpetrator shot at more than one person only one time. This conduct was unitary. In *Gonzales* and *Montoya*, one perpetrator shot at more than one person, but did so many times. This conduct was also deemed unitary. Here, as in *Gonzales* and *Montoya*, Defendant shot at or, under a theory of accessory liability, encouraged others to shoot at more than one person many times. Based on this Court and our Supreme Court precedent, we conclude that Defendant's conduct was unitary, "[b]ut because this is a double[]description case, where the same conduct results in multiple convictions under different statutes, we must go further before our analysis is complete." *Montoya*, 2013-NMSC-020, ¶ 30 (internal quotation marks and citation omitted).

{19} We turn to the legal question, "whether the [L]egislature intended to create separately punishable offenses." *Swafford*, 1991-NMSC-043, ¶ 25. "Determinations of legislative intent, like double jeopardy, present issues of law that are reviewed de novo, with the ultimate goal of such review to be facilitating and promoting the [L]egislature's accomplishment of its purpose." *Montoya*, 2013-NMSC-020, ¶ 29 (alterations, internal quotation marks, and citation omitted). "When . . . the statutes themselves do not expressly provide for multiple punishments, we begin by applying the rule of statutory construction from *Blockburger v. United States*, 284 U.S. 299 . . . (1932), to determine whether each provision requires proof of a fact that the other does not." *Branch*, 2016-NMCA-071, ¶ 22.

{20} For double jeopardy claims involving statutes that are vague and unspecific or written with many alternatives, we do not "apply a strict elements test in the abstract; rather, we look to the state's trial theory to identify the specific criminal cause of action for which the defendant was convicted," and we examine the charging documents and the jury instructions presented. *Id.* ¶ 23. "If the statutes survive *Blockburger*, we examine other indicia of legislative intent[,]" and "we must identify the particular evil sought to be addressed by each offense." *Branch*, 2016-NMCA-071, ¶ 24 (internal quotation marks and citations omitted). "Statutes directed toward protecting different social norms and achieving different policies can be viewed as separate and amenable to multiple punishments." *Swafford*, 1991-NMSC-043, ¶ 32.

{21} Defendant provides no argument about the legislative-intent prong. The State argues that the statutory elements of the two crimes are different and address two different social evils: the assault charge required proof of the threat of harm to Officer Tovar; the battery charge required proof that Officer Tovar was injured. Furthermore, the State points out that the assault statute addresses the victim's fear and mental anguish, while the battery statute addresses the ensuing physical harm to the victim, two distinct social evils.

{22} We are guided on this issue by our recent opinion in *Branch*. There, we concluded that the crimes of aggravated assault and aggravated battery address societal harms separate and distinct from one another—placing another in fear versus physically injuring another—and therefore survive *Blockburger*. We consider the conclusion reached in *Branch*—that multiple harms can arise from a single gunshot—may also be applied in a case where multiple shots were fired that ultimately produced two distinct harms to a single officer, an assault and a battery. Here, the charging document specifically identified Subsection (1) of Section 30-22-22(A), the subsection prohibiting any unlawful assaulting or striking of a peace officer with a deadly weapon. The jury instruction required the jury to find, among other things, that "[D]efendant's conduct threatened the safety of [Officer] Tovar[,]" and "[D]efendant acted in a rude, insolent or angry manner[.]" It appears that the State proceeded under the "threat" prong of the aggravated assault statute. The State also charged Defendant under Section 30-22-25(C), the section of our aggravated battery statute that makes its commission against a peace officer a third degree felony if it is committed with a deadly weapon such that great bodily harm or death may

be inflicted. While some of the elements of the two crimes overlap, each crime requires proof of at least one element that the other does not—assault requires threatening or menacing conduct; battery requires physical injury to the victim. One offense is not subsumed within the other, and *Blockburger* alone does not preclude the possibility of punishment under both the aggravated assault statute and the aggravated battery statute. *See Branch*, 2016-NMCA-071, ¶ 27.

{23} Next, we look to the history, language, and subject of the statutes, and identify the particular evil addressed by each statute. *See Montoya*, 2013-NMSC-020, ¶ 32. "[T]he social evils proscribed by different statutes must be construed narrowly[.]" *Swafford*, 1991-NMSC-043, ¶ 32. We have previously determined that aggravated assault under NMSA, 1978, Section 30-3-1(B) (1963) and aggravated battery under NMSA, 1978, Section 30-3-5(A) (1969), address different social evils, albeit in a situation where the victim was not a peace officer. *See Branch*, 2016-NMCA-071, ¶ 28 (explaining that the aggravated battery statute, Section 30-3-5(A), "protects against the social evil that occurs when one person intentionally physically attacks and injures another[,]" but "[t]he culpable act under Section 30-3-1(B), on the other hand, is one that causes apprehension or fear" (internal quotation marks and citation omitted)). Though we now analyze Sections 30-22-22 and 30-22-25, the analysis is the same because the State pursued Defendant's aggravated assault charges based upon Officer Tovar's separate fear of harm during this firefight where multiple shots were fired. Again, here, "the harm related to assault is mental harm; assaults put persons in fear. The harm related to battery is physical harm; batteries actually injure persons." *Branch*, 2016-NMCA-071, ¶ 28 (alteration, internal quotation marks, and citation omitted). In *Branch*, we upheld convictions for aggravated assault and aggravated battery under a double jeopardy analysis, where the defendant pointed a gun at two victims and fired one shot, striking only one of the victims. *Id.* ¶¶ 1, 64. We affirm Defendant's convictions for aggravated assault and aggravated battery upon one police officer because both distinct social harms arose when multiple shots were fired at the officers and caused them all to hide behind a tree and a vehicle in fear of being hit by a bullet, including Officer Tovar who was both fearful of being struck and then actually struck by one of the bullets. As a result, we conclude that Defendant's convictions for aggravated assault and aggravated battery against Officer Tovar do not violate Defendant's right to be free from double jeopardy. *See id.* ¶ 29.

Ineffective Assistance of Counsel

{24} Defendant argues defense counsel failed to introduce evidence establishing his innocence, thereby violating his constitutional right to effective assistance of counsel. Specifically, Defendant argues trial counsel "erred by failing to present any defense, and by failing to adequately investigate and challenge evidence presented, particularly the evidence that no gun shot residue test was performed on [Defendant]."

{25} "We review claims of ineffective assistance of counsel de novo." *Bahney*, 2012-NMCA-039, ¶ 48. In order to establish a prima facie case of ineffective assistance of counsel on appeal, Defendant "must demonstrate that his counsel's performance fell below that of a reasonably competent attorney and that he was prejudiced by his counsel's deficient performance." *State v. Perez*, 2002-NMCA-040, ¶ 36, 132 N.M. 84, 44 P.3d 530.

{26} Defendant makes no citation to the record or the trial proceedings showing counsel's failure to investigate and challenge evidence presented. Contrary to Defendant's assertion, the record reflects that defense counsel questioned technicians about the State's failure to perform the gun shot residue tests during trial, specifically inquiring about why the case agent chose not to perform gun shot residue tests on Defendant's palms after the incident and asking questions that made it clear gun shot residue tests, unlike DNA tests, are conclusive evidence of a person firing a firearm. Defense counsel also highlighted the absence of gun shot residue tests during closing argument. We cannot conclude that defense counsel's performance fell below that of a reasonably competent attorney. *See Lytle v. Jordan*, 2001-NMSC-016, ¶ 50, 130 N.M. 198, 22 P.3d 666 ("[J]udicial review of the effectiveness of counsel's performance must be highly deferential, and courts should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." (internal quotation marks and citation omitted)); *see also State v. Roybal*, 2002-NMSC-027, ¶ 21, 132 N.M. 657, 54 P.3d 61 (stating that an appellate court presumes that counsel's performance "fell within a wide range of reasonable professional assistance" (internal quotation marks and citation omitted)).

{27} Defendant has failed to establish a prima facie case of ineffective assistance of counsel. However, Defendant may bring an ineffective assistance of counsel claim in a habeas proceeding. *See Saiz*, 2008-NMSC-048, ¶ 65 (noting that a defendant "may pursue habeas corpus proceedings on [the ineffective assistance of counsel] issue in the future if he is ever able to provide evidence to support his claims"); *see also State v. Martinez*, 1996-NMCA-109, ¶ 25, 122 N.M. 476, 927 P.2d 31 (stating that if the record does not establish a prima facie case of ineffective assistance of counsel, the defendant must pursue the claim in a habeas corpus proceeding).

Cruel and Unusual Punishment

{28} Defendant maintains that it was cruel and unusual punishment to sentence him to twenty years imprisonment where there exists no direct evidence of his participation in the firefight. To the extent that Defendant's argument can be construed as a challenge to the sufficiency of the evidence supporting his convictions based on the lack of direct evidence that Defendant himself shot a firearm, we have previously addressed this issue and held that the State presented evidence sufficient to support Defendant's convictions. We also note that Defendant did not preserve his cruel and unusual punishment claim at sentencing. *See State v. Chavarria*, 2009-NMSC-020, ¶ 14, 146 N.M. 251, 208 P.3d 896 ("[A] sentence authorized by statute, but claimed to be cruel and unusual punishment under the state and federal constitutions, does not implicate the jurisdiction of the sentencing court and, therefore, may not be raised for the first time on appeal."). Furthermore, Defendant does not dispute that his sentence is within the range allowed by statute. *See State v. Gardner*, 2003-NMCA-107, ¶ 42, 134 N.M. 294, 76 P.3d 47 ("Regardless of what mitigating evidence [the d]efendant presented, the statutory scheme does not require the trial court to depart from the basic sentence."). Since Defendant's sentence in this case "was authorized by statute, [his] cruel and unusual punishment claim may not be raised for the first time on appeal." *Chavarria*, 2009-NMSC-020, ¶ 14. We conclude there is no fundamental error necessitating reversal of Defendant's convictions and sentence, and therefore, we do not reach the merits of Defendant's cruel and unusual punishment claim.

CONCLUSION

{29} We affirm all of Defendant's convictions.

{30} IT IS SO ORDERED.

STEPHEN G. FRENCH, Judge

WE CONCUR:

LINDA M. VANZI, Chief Judge

TIMOTHY L. GARCIA, Judge

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RFP No. 18-30
On-Call Professional Legal Services

The New Mexico Department of Transportation (NMDOT) requests proposals from lawyers and law firms to provide on-call professional legal services including litigation support. The services will include, but are not limited to, the following areas of law: matters involving real property law with an emphasis on title and right-of-way issues; land use law, eminent domain and inverse condemnation; Highway Beautification Act and outdoor advertising; employment and labor law; construction law; procurement and contract law; administrative law including rulemaking and/or hearing officer services; Inspection of Public Records Act; Fraud against Taxpayers Act and Whistleblower Protection Act; Open Meetings Act; tort law; complex bond and public finance; federal grant programs; collections; constitutional law, first amendment matters; environmental and water law; state, federal and tribal taxation; Indian law; information technology systems procurement and security; and appellate work, including administrative and civil law. Proposals shall be valid for one hundred twenty (120) days subject to all action by the New Mexico Department of Transportation. NMDOT reserves the right to reject any or all proposals in part or in whole. Proposals shall be submitted in a sealed container or envelope indicating the proposal title and number along with the Offeror's name and address clearly marked on the outside of the container or envelope. All proposals must be received and recorded by the Procurement and Facilities Management Division, NMDOT, 1120 Cerrillos Rd., Rm. #103, Santa Fe, NM 87504, no later than 2:00 P.M. (Mountain Daylight Time) on Tuesday, March 20, 2018. EQUAL OPPORTUNITY EMPLOYMENT: All qualified Offerors will receive consideration of contract(s) without regard to race, color, religion, sex or national origin. Proponents of this work shall be required to comply with the President's Executive Order No. 11246 as amended. Request for Proposals will be available by contacting VanessaA.Sanchez by telephone at (505) 827-5492, or by email at VanessaA.Sanchez@state.nm.us or by accessing NMDOT's website at http://dot.state.nm.us/content/nmdot/en/RFP_Listings.html. ANY PROPOSAL SUBMITTED AFTER THE DATE AND TIME SPECIFIED ABOVE WILL BE DEEMED NON-RESPONSIVE AND WILL NOT BE ACCEPTED.

Deputy District Attorney

Immediate opening for HIDTA- Deputy District Attorney in Deming. Salary Depends on Experience. Please send resume to Francesca Estevez, District Attorney; FMartinez-Estevez@da.state.nm.us; Or call 575-388-1941

Legal Secretary/Assistant

Well established civil litigation firm seeking Legal Secretary/Assistant with minimum 3- 5 years' experience, including knowledge of local court rules and filing procedures. Excellent clerical, organizational, computer & word processing skills required. Fast-paced, friendly environment. Benefits. If you are highly skilled, pay attention to detail & enjoy working with a team, email resume to: e_info@abrfirm.com

Business Opportunities

Office Share and Potential Partnership

Newly admitted attorney seeking others newly admitted and early career interested in office share and potential future partnership. Please send brief introduction to NMSel33@mailfence.com.

Office Space

Office Space

4 rooms plus large reception/secretarial area and kitchenette. Hard wood flooring, fireplace, free parking in private lot and street side. Located in converted casa on Lomas. Walking distance to Courthouses. $1500/mo. Ken Downes 238-0324

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3104 Monte Vista Blvd. NE. 1,200 sf sweet remodel a block off Central. Two private offices, large staff area, waiting room, full kitchen, 3/4 bath, hardwood floors, 500 sf partial finished basement, tree-shaded yard, 6 off-street parking spaces. $1,400 per month with one-year lease. Call or email Beth Mason at 505-379-3220, bethmason56@gmail.com

500 Tijeras NW

Three beautiful furnished, and spacious downtown offices available with reserved on-site tenant and client parking. Walking distance to court-houses. Two conference rooms, security, kitchen, gated patios and a receptionist to greet and take calls. Please email esteffany500tijerasllc@gmail.com or call 505-843-1905.

Miscellaneous

Legal Services Corporation
Notice of Availability of Grant Funds for Calendar Year 2019

The Legal Services Corporation (LSC) announces the availability of grant funds to provide civil legal services to eligible clients during calendar year 2019. The Request for Proposals (RFP), which includes instructions for preparing the grant proposal will be available from http://www.grants.lsc.gov/grants-grantee-resources during the week of April 9, 2018. In accordance with LSC's multiyear funding policy, grants are available for only specified service areas. On or around the week of March 12, 2018, LSC will publish the list of service areas for which grants are available and the service area descriptions at https://www.lsc.gov/grants-grantee-resources/our-grant-programs/basic-field-grant/lsc-service-areas. Applicants must file a Notice of Intent to Compete (NIC) and the grant proposal through LSC's online application system in order to participate in the grants process. The online application system will be available at https://lscgrants.lsc.gov/EasyGrants_Web_LSC/Implementation/Modules/Login/LoginModuleContent.aspx?Config=LoginModuleConfig&Page=Login during the week of April 9, 2018. Please visit http://www.grants.lsc.gov/grants-grantee-resources for filing dates, applicant eligibility, submission requirements, and updates regarding the LSC grants process. Please email inquiries pertaining to the LSC grants process to LSCGrants@lsc.gov.

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