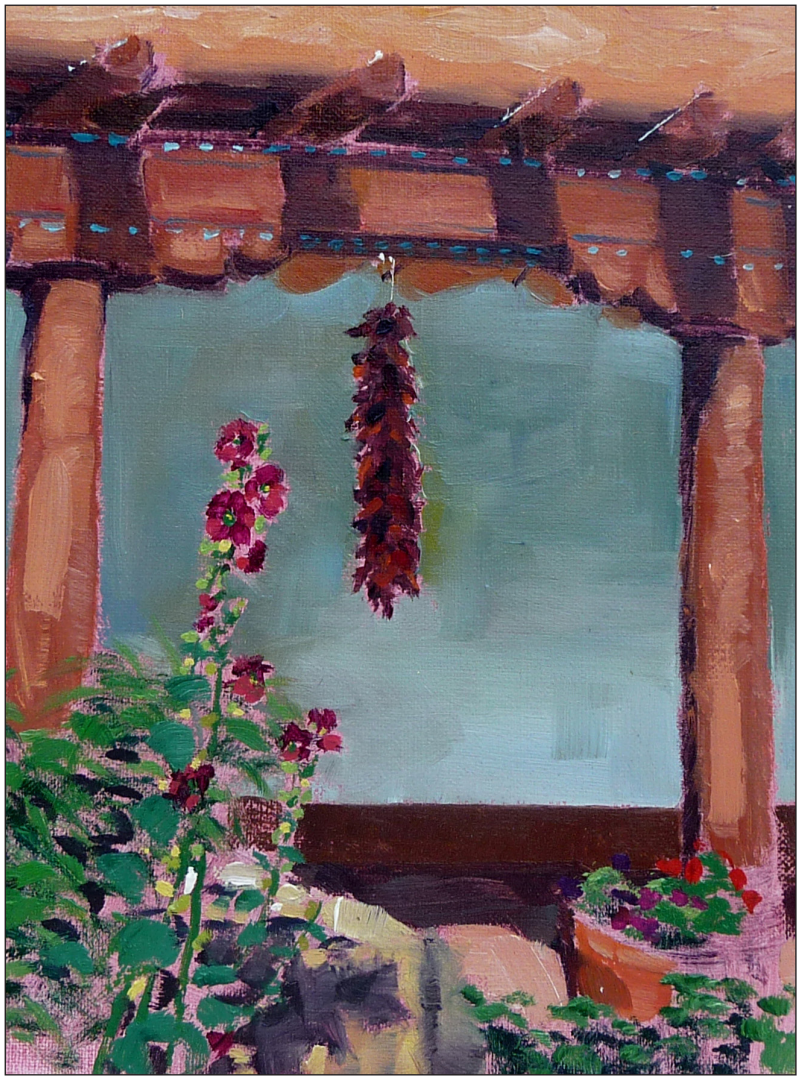
Official Publication of the State Bar of New Mexico

Bar Bulletin

May 30, 2018 • Volume 57, No. 22



SW Arraingment, by Jacob Tarazoff www.jacobtarazoff.com

Inside This Issue

Hold your conference, seminar, training, mediation, reception, networking social or meeting at the State Bar Center.

Your Meeting Destination

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- Board room
- Small to medium conference rooms
- Classrooms
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STATE BAR of NEW MEXICO

www.nmbar.org

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The *Bar Bulletin* (ISSN 1062-6611) is published weekly by the State Bar of New Mexico, 5121 Masthead NE, Albuquerque, NM 87109-4367. Periodicals postage paid at Albuquerque, NM. Postmaster: Send address changes to *Bar Bulletin*, PO Box 92860, Albuquerque, NM 87199-2860.

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6–8 p.m., State Bar Center, Albuquerque, 505-797-6022

6
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7
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10–11:15 a.m., Edgewood Senior Center, Edgewood, 1-800-876-6657

8
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10 a.m.–1 p.m., Bernalillo County Metropolitan Court, Albuquerque, 505-841-9817

About Cover Image and Artist: Jacob Tarazoff is currently focusing on the idea of 'landscape' (living memory) in his work. He aims to present an homage exalting the elemental natural processes that have shaped not only the Earth, but also each person's own biological and sociocultural selves. Tarazoff paints with a limited palette (2 blue, 2 red, 2 yellow, Magenta, Turquoise, and Titanium white), and primarily en plein aire (outside) and alla prima (wet into wet, one sitting/all at once). He received a B.F.A. from the University of New Mexico, 2006, and has had the opportunity to study with many wonderful painters in and around the Western U.S., including a nine-month form painting workshop with Anthony Ryder in 2010. He has had numerous public showings of his work in Santa Fe and throughout New Mexico and his work is represented in private collections around the world. Commissions are available, along with adventure-painting guided trips in the Sangre De Cristo' and throughout Northern New Mexico and other Western U.S. states. For more of Tarazoff's work, visit www.jacobtarazoff.com, Jacob Tarazoff Fine Art on Facebook and @jacobtarazoff on Instagram.

Notices

Court News

New Mexico Supreme Court

The Investiture Ceremony for The Honorable Gary L. Clingman

State Bar members are invited to attend the investiture ceremony for Hon. Gary L. Clingman as associate justice of the Supreme Court of New Mexico on June 15, at 4 p.m., Supreme Courtroom 237 Don Gaspar Ave., Santa Fe, N.M. A reception will immediately following the ceremony in the Supreme Court Law Library.

Second Judicial District Court

Notice of Exhibit Destruction

Pursuant to 1.21.2.617 FRRDS (Functional Records Retention and Disposition Schedules-Exhibits), the Second Judicial District Court will destroy criminal exhibits associated with the following criminal case numbers filed with the Court. Cases on appeal are excluded.

CR-1988-45096; CR-1989-00034; CR-1989-00238; CR-1989-00264; CR-1989-00920; CR-1991-00634; CR-1991-01605; CR-1991-01818; CR-1991-02015; CR-1991-02346; CR-1991-02350; CR-1992-00478; CR-1992-00791; CR-1992-01491; CR-1992-01565; CR-1992-01157; CR-1992-01175; CR-1992-01643; CR-1992-01752; CR-1993-00401; CR-1993-00760; CR-1993-01271; CR-1993-02236; CR-1993-02269; CR-1993-02390; CR-1994-00099; CR-1994-00622; CR-1994-01161; CR-1994-01187; CR-1994-03093; CR-1995-00017; CR-1995-00498; CR-1995-00840; CR-1995-01138; CR-1995-01796; CR-1995-02615; CR-1995-03720; CR-1996-00074; CR-1996-01197; CR-1996-01455; CR-1996-03599; CR-1996-03600; CR-1997-00865; CR-1997-01077; CR-1997-01234; CR-1997-01357; CR-1997-01413; CR-1997-02497; CR-1997-02755; CR-1997-03912; CR-1998-01087; CR-1998-01385; CR-1998-02541; CR-1998-03601; CR-1998-03687; CR-1998-03688; CR-1998-03729; CR-1999-00313; CR-1999-01451; CR-1999-03824; CR-2000-00050; CR-2000-00675; CR-2000-00713; CR-2000-00976; CR-2000-01061; CR-2000-02360; CR-2000-02361; CR-2000-03357; CR-2000-03770; CR-2000-03771; CR-2000-03772; CR-2000-03773; CR-2000-04899; CR-2001-00727; CR-2001-02141; CR-2001-02212; CR-2001-02433; CR-2001-02549; CR-2002-00529; CR-2002-01049; CR-2002-01505; CR-2002-02668; CR-2002-03247; CR-2002-03691; CR-2003-00314; CR-2003-01216; CR-2003-02167; CR-2004-00112; CR-2004-04836; LR-2005-00006; CR-2005-04915; CR-2005-04916; CR-2006-02355; CR-2006-03370; CR-2006-04515; CR-2006-04975; CR-2006-05242; CR-2007-05057; CR-2007-05393; CR-2008-01851; CR-2008-05940; CR-2008-06296

Counsel for parties are advised that exhibits may be retrieved through May -July 6. Should you have questions regarding cases with exhibits, please call to verify exhibit information with the Special Services Division, at 505-841-6717, from 8 a.m.-4:30p.m., Monday-Friday. Plaintiff's exhibits will be released to counsel of record for the plaintiff(s) and defendant's exhibits will be released to counsel of record for defendants(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

New Mexico Judicial Compensation Committee Notice of Public Meeting

The Judicial Compensation Committee will meet on June 12, from 9:30 a.m.-12:30 p.m., in Room 208 of the New Mexico Supreme Court, 237 Don Gaspar, Santa Fe, to discuss fiscal year 2020 recommendations for compensation for judges of the magistrate, metropolitan and district courts, the Court of Appeals, and justices of the Supreme Court. The Commission will thereafter provide its judicial compensation report and recommendation for FY2020 compensation to the legislature prior to the 2019 session. The meeting is open to the public. For an agenda or more information, call Jonni Lu Pool, Administrative Office of the Courts, 505-476-1000.

Professionalism Tip

With respect to opposing parties and their counsel:

I will consult with opposing counsel before scheduling depositions and meetings or before rescheduling hearings.

State Bar News

Attorney Support Groups

- June 4, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)
- June 11, 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#.
- June 18, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, 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#.

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

Animal Law Section

Animal Talk: Audubon Society

2018 is the 100th anniversary of the enactment of the Migratory Bird Treaty Act and the "Year of the Bird" as declared by the Audubon Society. The MBTA prohibits "take" of protected migratory bird species. Until December 2017, the prohibitions on "take" included incidental take. The US Department of Justice prosecuted individuals and businesses for violations of the MBTA take provisions. On Dec. 22, 2017, the U.S. Department of Interior Solicitor issued an opinion redefining "take" to exclude incidental take. What effect will the opinion have on MBTA enforcement? Join Jonathan Hayes, Executive Director New Mexico Audubon Society, at noon on June 29 at the State Bar Center to learn more. R.S.V.P. to Breanna Henley at bhenley@nmbar.org.

Board of Bar Commissioners

Risk Management Advisory Board

The president of the State Bar of New Mexico is required to appoint one attorney to the Risk Management Advisory Board for a four-year term. The appointee is requested to attend the Risk Management Advisory Board meetings. A summary of the duties of the advisory board, pursuant to §15-7-5 NMSA 1978, are to review: specifications for all insurance policies to be purchased by the risk management division; professional service and consulting contracts or agreements to be entered into by the division; insurance companies and agents to submit proposals when insurance is to be purchased by negotiation; rules and regulations to be promulgated by the division; certificates of coverage to be issued by the division; and investments made by the division. Members who want to serve on the board should send a letter of interest and brief résumé by June 1 to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

Rocky Mountain Mineral Law Foundation Board

The president of the State Bar is required to appoint one attorney to the Rocky Mountain Mineral Law Foundation Board for a three-year term. The appointee is expected to attend the Annual Trustees Meeting and the Annual Institute, make annual reports to the appropriate officers of their respective organizations, actively assist the Foundation on its programs and publications and promote the programs, publications and objectives of the Foundation. Members who want to serve on the board should send a letter of interest and brief résumé by July 2 to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

Committee on Women and the Legal Profession

Nominations Open for 2017 Justice Pamela Minzner Award

The Committee on Women seeks nominations of New Mexico attorneys who have distinguished himself or herself during 2017 by providing legal assistance to women who are underrepresented or under deserved, or by advocating for causes that will ultimately benefit and/or further the rights of women. If you know of an attorney who deserves to be added to the award's distinguished list of honorees, submit 1-3 nomination letters describing the work and accomplishments of the nominee that merit recognition to Quiana Salazar-King at Salazar-king@law.unm.edu by June 29. The award ceremony will be held on Aug. 30 at the Albuquerque Country Club. This award is named for Justice Pamela B. Minzner, whose work in the legal profession furthered the causes and rights of women throughout society. Justice Minzner was the first female chief justice of the New Mexico Supreme Court and is remembered for her integrity, strong principals, and compassion. Justice Minzner was a great champion of the Committee and its activities.

Legal Resources for the Ederly Program

Two Upcoming Legal Workshops

The State Bar of New Mexico's Legal Resources for the Elderly Program (LREP) is offering two free legal workshops in Edgewood June 7, 10 a.m.-1 p.m. at Edgewood Senior center and in Socorro June 19, 10 a.m.-1 p.m., at Socorro County Senior Center. Call LREP at 800-876-6657 for more information.

2018 Annual Meeting

Resolutions and Motions

Resolutions and motions will be heard at 1 p.m., Aug. 9, at the opening of the State Bar of New Mexico 2018 Annual Meeting at the Hyatt Regency Tamaya Resort & Spa, Santa Ana Pueblo. To be presented for consideration, resolutions or motions must be submitted in writing by July 9 to Executive Director Richard Spinello, PO Box 92860, Albuquerque, NM 87199; fax to 505-828-3765; or email rspinello@nmbar.org.

Young Lawyers Division

Volunteers Needed for Veterans Civil Legal Clinic

The YLD seeks volunteers to staff the Veterans Civil Legal Clinic from 8:30-10:30 a.m. on June 12, at the N.M. Veteran's Memorial located at 1100 Louisiana Blvd SE in Albuquerque. Volunteers should arrive at 8 a.m. for orientation and complimentary breakfast. The clinics offer veterans a broad range of veteran-specific and non-veteran specific legal services, including family law, consumer rights, worker's comp, bankruptcy, driver's license restoration, landlord/tenant, labor/employment and immigration. To volunteer, visit https://form.jotform.com/71766385703969.

UNM School of Law

Law Library Hours

Summer 2018 Hours
May 12-Aug. 19

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.

UNM Law Scholarship Classic presented by U.S. Eagle

Join the UNMSOL and other members of the law school community at 8 a.m., June 8, at the UNM Championship Golf Course to play a part in sustaining over $50,000 in life-changing scholarships for law students. Don't delay! The tournament sells out every year. Register at https://goto.unm.edu/golf.

Other Bars

New Mexico Defense Lawyers Association

Save the Date - Women in the Courtroom VII CLE Seminar

The New Mexico Defense Lawyers Association proudly presents Part VII of "Women in the Courtroom," a dynamic seminar designed for New Mexico lawyers. Join us Aug. 17, at the Jewish Community Center of Greater Albuquerque for this year's full-day CLE seminar. Registration will be available online at nmdla.org in July. For more information contact nmdefense@nmdla.org.

New Mexico Criminal Defense Lawyers Association

Expert Essentials CLE

Expert testimony is vital but can be difficult to communicate to a jury of laypersons. To decrease such risks, the New Mexico Criminal Defense Lawyers Association has assembled a robust schedule of experts to explore these issues first-hand. Sign up for the Expert Essentials CLE on June 8, in Albuquerque. Special guests include Professor Christopher McKee from the University of Colorado and Professor Shari Berkowitz from California State University. Afterwards, NMCDLA members and their families and friends are invited to our annual membership party and silent auction. Visit www.nmcdla.org to join NMCDLA and register for the seminar today.

Albuquerque Bar Association

Membership Luncheon

Join the Albuquerque Bar Association for its Membership Luncheon on June 5, from 11:30 a.m.-1 p.m. at the Hyatt Regency Albuquerque 330 Tijeras NW, Albuquerque, NM, 87102. The luncheon will feature Mayor Tim Keller. Lunch $30 for members and $40 for non-members with a $5 walk-up fee. Register by 5 p.m. June 1. Registration checks can be mailed to: Albuquerque Bar Association PO Box 40 Albuquerque, NM 87103. Electronic registration details to follow.

Other News

New Mexico Workers' Compensation Administration

Request for Comments

The director of the Workers' Compensation Administration, Darin A. Childers, is considering the reappointment of Judge Anthony "Tony" Couture to a five-year term pursuant to NMSA 1978, Section 52-5-2 (2004). Judge Couture's term expires on Aug. 26. Anyone who wants to submit written comments concerning Judge Couture's performance may do so until 5 p.m. on May 31. All written comments submitted per this notice shall remain confidential. Comments may be addressed to WCA Director Darin A. Childers, PO Box 27198, Albuquerque, New Mexico 87125-7198, or emailed in care of Sabrina Bludworth, Sabrina.Bludworth@state.nm.us.

Welcome TO THE PROFESSION!

Spring Swearing In Ceremony

By Evann Kleinschmidt

Signing the Roll Book

On April 24, more than 60 new attorneys were sworn in at the Santa Fe Convention Center cheered on by family, friends and colleagues. After signing the historic roll book, the new attorneys gathered to receive advice and congratulations from bar leaders and the justices of the New Mexico Supreme Court.

Wesley O. Pool, president of the State Bar of New Mexico asked the new admittees to ponder the definition of a "good lawyer." To him, he mentioned, it means practicing with dignity and kindness. It also means that each practitioner should take responsibility for their own actions and betterment of the profession and their own personal practice. The new admittees heard from many other bar leaders who encouraged them to protect their reputations and to get involved with the State Bar.

President Wesley Pool; Mary Torres, former American Bar Association secretary; and President-Elect Jerry Dixon

Justices of the Supreme Court of New Mexico

Taking the Oath

After the oath was administered, each of the justices present took the opportunity to address their new colleagues. Said Chief Justice Judith K. Nakamura, zealous client representation and civility are not mutually exclusive. She charged each new attorney with the responsibility of ensuring that New Mexicans have confidence in our state's legal system.

Welcome to the Profession!

The State Bar of New Mexico congratulates everyone sworn in as well as their family and friends. For more photos, visit **www.nmbar.org/photos**.

2018 STATE BAR OF NEW MEXICO Annual Awards

Nominations are being accepted for the **2018 State Bar of New Mexico Annual Awards** to recognize those who have distinguished themselves or who have made exemplary contributions to the State Bar or legal profession in 2017 or 2018. The awards will be presented during the 2018 Annual Meeting, Aug. 9-11 at the Hyatt Regency Tamaya Resort, Santa Ana Pueblo. All awards are limited to one recipient per year, whether living or deceased. Previous recipients for the past three years are listed below. To view the full list of previous recipients, visit **www.nmbar.org/Awards**.

Distinguished Bar Service Award–Lawyer

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

Previous recipients: *Scott M. Curtis, Hannah B. Best, Jeffrey H. Albright*

Distinguished Bar Service Award–Nonlawyer

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

Previous recipients: *Cathy Ansheles, Tina L. Kelbe, Kim Posich*

Justice Pamela B. Minzner* Professionalism Award

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

Previous recipients: *Hon. Elizabeth E. Whitefield, Arturo L. Jaramillo, S. Thomas Overstreet*

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

Outstanding Legal Organization or Program Award

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

Previous recipients: *Young Lawyers Division Wills for Heroes Program, Self Help Center at the Third Judicial District Court, Pegasus Legal Services for Children*

{ Outstanding Young Lawyer of the Year Award }

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

Previous recipients: *Spencer L. Edelman, Denise M. Chanez, Tania S. Silva*

{ Robert H. LaFollette* Pro Bono Award }

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

Previous recipients: *Stephen. C. M. Long, Billy K. Burgett, Robert M. Bristol*

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

{ Seth D. Montgomery* Distinguished Judicial Service Award }

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

Previous recipients: *Hon. Michael D. Bustamante, Justice Richard C. Bosson, Hon. Cynthia A. Fry*

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

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

Deadline for Nominations: June 1

For more information or questions, please contact Kris Becker at 505-797-6038.

STATE BAR of NEW MEXICO

Legal Education

May

31 **Professionalism for the Ethical Lawyer**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

June

1 **Choice of Entity for Service Businesses**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

5 **2018 Ethics in Litigation Update, Part 1**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

6 **2018 Ethics in Litigation Update, Part 2**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

8 **Expert Essentials**
5.5 G
Live Seminar, Albuquerque
New Mexico Criminal Defense Lawyers Association
www.nmcdla.org, 505-992-0050, info@nmcdla.org

8 **Text Messages & Litigation: Discovery and Evidentiary Issues**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

12 **Closely Held Company Merger & Acquisitions, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

13 **Closely Held Company Merger & Acquisitions, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

15 **My Client's Commercial Real Estate Mortgage Is Due, Now What?**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

15 **Practice Management Skills for Success**
5.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

19 **Ethics and Email**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **Director and Officer Liability**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

21 **Holding Business Interests in Trusts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

22 **How to Practice Series: Probate and Non-Probate Transfers (2018)**
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

22 **Basic Guide to Appeals for Busy Trial Lawyers (2018)**
3.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

22 **Strategies for Well-Being and Ethical Practice (2017)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

22 **How to Avoid Potential Malpractice Pitfalls in the Cloud**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

25 **The Ethics of Bad Facts and Bad Law**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

22 **Effective Communications with Clients, Colleagues and Staff**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

26 **Ethical Issues and Implications on Lawyers' Use of LinkedIn**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

26 **Classes of Stock: Structuring Voting and Non-voting Trusts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **Roadmap/Basics of Real Estate Finance, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **Roadmap/Basics of Real Estate Finance, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

28 **Social Media as Investigative Research and Evidence**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

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

29 **The Ethics of Social Media Research**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

29 **Fourth Annual Symposium on Diversity and Inclusion – Diversity Issues Ripped from the Headlines, II (2018)**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

29 **Abuse and Neglect Case in Children's Court (2018)**
3.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

July

3 **Employment Investigations: Figuring it Out/Avoiding Liability**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

6 **Baskets and Escrow in Business Transactions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

10 **Selection and Preparation of Expert Witnesses in Litigation**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

11 **Protecting Subtenant Clients in Leasing**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

17 **Roadmap of VC and Angel, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

18 **Roadmap of VC and Angel, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

19 **Ethics for Business Lawyers**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **2018 Family and Medical Leave Update**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

20 **The Duty to Consult with Tribal Governments: Law, Practice and Best Practices (2017)**
2.3 G, 1.0 EP
Live Replay, Albuquerque
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

20 **Exit Row Ethics: What Rude Airline Travel Stories Teach About Attorney Ethics (2017)**
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

24 **Due Diligence in Commercial Real Estate Transaction**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

25 **Estate and Gift Tax Audits**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

26 **Mediating with a Party with a Mental Illness/Disability**
2.0 EP
Live Seminar/ Teleseminar
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

27 **Litigation and Argument Writing in the Smartphone Age (2017)**
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Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

27 **Bankruptcy Fundamentals for the Non-Bankruptcy Attorney (2018)**
3.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

27 **Attorney vs. Judicial Discipline (2017)**
2.0 EP
Live Replay, Albuquerque
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27 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
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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 May 18, 2018

PUBLISHED OPINIONS

A-1-CA-35545	State v. W Stejskal	Affirm	05/15/2018

UNPUBLISHED OPINIONS

A-1-CA-35111	State v. W Martinez	Reverse	05/14/2018
A-1-CA-36809	State v. Alexis A	Affirm	05/14/2018
A-1-CA-36955	B Rostro v. Eddy FCU	Affirm	05/14/2018
A-1-CA-35552	State v. Jacob M	Affirm	05/15/2018
A-1-CA-35957	State v. R Urquidi	Affirm	05/15/2018
A-1-CA-37001	C Diaz v. Law office of E Barela	Dismiss	05/15/2018
A-1-CA-36869	E Acosta v. Dell & Associates	Affirm	05/16/2018
A-1-CA-35386	State v. S James	Affirm	05/17/2018

Slip Opinions for Published Opinions may be read on the Court's website:
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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

CLERK'S CERTIFICATE OF WITHDRAWAL

Effective May 15, 2018:
Douglas Booth
124C La Cueva Road
Glorieta, NM 87535

Effective May 2, 2018:
John Warner Widell
526 Salazar Street
Santa Fe, NM 87501

CLERK'S CERTIFICATE OF ADMISSION

On May 15, 2018:
Michael Brandon
9041 E. Butherus Drive
Scottsdale, AZ 85260
480-710-2552
mbrandon117@gmail.com

On May 15, 2018:
Derik Allen Goatson
Fredericks Peebles & Morgan LLP
1900 Plaza Drive
Louisville, CO 80027
303-673-9600
303-673-9155 (fax)
dgoatson@ndnlaw.com

On May 15, 2018:
Isaiah X Herrera
Doug Newborn Law Firm
1 S. Church Avenue,
Suite 950
Tucson, AZ 85701
520-585-5525
520-585-5524 (fax)
isaiah@dougnewbornlawfirm.com

On May 15, 2018:
Jared J. Pehrson
34000 N. 27th Drive,
Unit 1030
Phoenix, AZ 85085
480-245-3597
jared.pehrson@yahoo.com

On May 15, 2018:
Caleb Mark Redman
Allstate
6565 Americas Parkway, NE,
Suite 820
Albuquerque, NM 87110
405-250-9437
caleb.redman@allstate.com

On May 15, 2018:
Simon Tolbert
Tolbert Law Office, PLLC
2301 Blake Street,
Suite 100
Denver, CO 80205
720-588-8645
stolbert@msenergylaw.com

CLERK'S CERTIFICATE OF REINSTATEMENT TO ACTIVE STATUS

Effective May 10, 2018:
Walter Gilbert Bryan
Fredlund & Bryan Law Office
616 E. Bender Blvd.
Hobbs, NM 88240
575-393-5400
575-393-3300 (fax)
gwbryan007@hotmail.com

Effective May 10, 2018:
Jon Charles Fredlund
Fredlund & Bryan, Attorneys at Law
616 E. Bender Blvd.
Hobbs, NM 88240
575-393-5400
575-393-3300 (fax)
jfredlund@juno.com

CLERK'S CERTIFICATE OF NAME CHANGE

As of May 9, 2018:
Alicia M. McConnell
F/K/A Alicia M. LaPado
Business Law Southwest, LLC
320 Gold Avenue, SW,
Suite 610
Albuquerque, NM 87102
505-848-8581
505-848-8593 (fax)
alicia@businesslawsw.com

CLERK'S CERTIFICATE OF WITHDRAWAL AND CHANGE OF ADDRESS

Effective May 2, 2018:
Peter Gardner Ramey
Office of the Public Defender
215 N. Commercial Street
Bellingham, WA 98225

CLERK'S CERTIFICATE OF CHANGE TO INACTIVE STATUS AND CHANGE OF ADDRESS

Effective April 26, 2018:
Philip Saltz
3306 Chayote Road, NE
Rio Rancho, NM 87144

CLERK'S CERTIFICATE OF ADDRESS AND/OR TELEPHONE CHANGES

Denise M. Abeita
Barnhouse Keegan Solimon & West LLP
7424 Fourth Street, NW
Albuquerque, NM 87107
505-842-6123
505-842-6124 (fax)
dabeita@indiancountrylaw.com

Ian Michael Alden
Law 4 Small Business, PC
317 Commercial Street, NE,
Suite A
Albuquerque, NM 87102
505-715-5700
505-702-8810 (fax)
ian@L4SB.com

M. Victoria Amada
Office of the Attorney General
PO Box 1508
408 Galisteo Street (87501)
Santa Fe, NM 87504
505-717-3532
505-490-4881 (fax)
vamada@nmag.gov

James E. Bristol III
Bristol Family Law, LLC
117 N. Guadalupe Street
Santa Fe, NM 87501
505-992-3456
505-847-4944 (fax)
jeb@bristolfamilylawfirm.com

Melissa A. Brown
Remo E. Gay & Associates, PC
3810 Osuna Road, NE,
Suite 1
Albuquerque, NM 87109
505-842-5715
505-842-5713 (fax)
mbrown@regapc.com

Allegra Carroll Carpenter
Allegra Carpenter Law Firm LLC
9202 San Mateo Blvd., NE
Albuquerque, NM 87113
505-340-6069
505-254-1111 (fax)
allegra@allegracarpenter.com

John Stuart Collins
Sheehy, Ware & Pappas
909 Fannin Street,
Suite 2500
Houston, TX 77010
713-951-1000
jcollins@sheehyware.com

Alessandro B. Cutrona
Amourgis & Associates, LLC
3200 W. Market Street,
Suite 106
Akron, OH 44333
330-436-5210
330-436-5230 (fax)
alessandroc@amourgis.com

Annette N. DeBois
701 Morningside Drive, NE
Albuquerque, NM 87110
505-401-4043
annetteads@gmail.com

Gina V. Downes
Davis Kelin
111 Tulane Drive, SE
Albuquerque, NM 87106
505-242-7200
505-213-3399 (fax)
gdownes@daviskelin.com

Sonya Duke
Thirteenth Judicial District Court
PO Box 600
1500 Idalia Road,
Bldg. A
Bernalillo, NM 87004
505-876-2376
berdskd@nmcourts.gov

Lorie A. Gerkey
Walsh Gallegos Treviño Russo & Kyle PC
500 Marquette Avenue, NW,
Suite 1310
Albuquerque, NM 87102
505-243-6864
505-843-9318 (fax)
lgerkey@wabsa.com

Nicholas Gibson
NLLG
5301 Central Avenue, NE,
Suite 200
Albuquerque, NM 87108
505-930-7003
ngibson@nationlit.com

R. Nathan Gonzales
Gonzales Law Firm
298 S. Ridge Road
Silver City, NM 88061
575-388-8009
844-308-8403 (fax)
nathan@gonzaleslawteam.com

Theresa Hacsi
Law Office of James Wood
423 Sixth Street, NW
Albuquerque, NM 87102
505-340-3134
505-340-3136 (fax)
thacsi@jameswoodlaw.com

Patti G. Hennessy
U.S. Bankruptcy Court
333 Lomas Blvd., NW,
Suite 360
Albuquerque, NM 87102
505-600-4650
patti_hennessy
@nmb.uscourts.gov

Karin L. Henson
N.M. Divorce & Custody Law LLC
2727 San Pedro Drive, NE,
Suite 114
Albuquerque, NM 87110
505-881-2566
klh@nmdivorcecustody.com

Jeffrey William Hodges
1445 N. Loop W.,
Suite 700
Houston, TX 77008
281-888-4601
jeff.hodges@kuiperwheat.com

Joshua Neal Humphreys
Law Offices of the Public Defender
301 N. Guadalupe Street,
Suite 101
Santa Fe, NM 87501
505-395-2842
505-204-7063 (fax)
joshua.humphreys
@lopdnm.us

Danny W. Jarrett
Jackson Lewis PC
800 Lomas Blvd., NW,
Suite 200
Albuquerque, NM 87102
505-878-0515
505-878-0398 (fax)
jarrettd@jacksonlewis.com

Joshua Joe Jimenez
Office of the Second Judicial District Attorney
520 Lomas Blvd., NW
Albuquerque, NM 87102
505-222-1099
joshua.jimenez@da2nd.state.nm.us

August-Drew Syngen Kanassatega
Mille Lacs Band of Ojibwe
1901 Indian Plaza Drive, NE #20
Albuquerque, NM 87106
320-532-7484
syngen.kanassatega@mille-lacsband.com

Vincent L. Knight
7055 Tombstone Road, NW
Albuquerque, NM 87114
505-280-1887
ponca1@aol.com

John W. Lawit
John W. Lawit, LLC
PO Box 166098
Irving, TX 75016
214-609-2242
214-614-4325 (fax)
jwl@lawitlaw.com

Jessica E. Long
Department of Homeland Security
100 Montgomery Street,
Suite 200
San Francisco, CA 94104
415-705-4620
jessica.e.long@ice.dhs.gov

Christopher C. Marlowe
Law Offices of Christopher C. Marlowe, LLC
200 Lomas Blvd., NW,
Suite 850
Albuquerque, NM 87102
505-350-6533
505-242-0790 (fax)
cmarlowelaw@gmail.com

Rebecca Anne Mastel
5754 W. 11th Street,
Suite 100
Greeley, CO 80634
855-267-5572
800-561-3855 (fax)
rmastel@pcfcollects.com

Jennifer C. McCabe
Law Office of Jennifer C. McCabe
1329 Paseo Del Pueblo Sur,
Suite E
Taos, NM 87571
575-758-0220
575-758-0593 (fax)
jennifer@nmagua.com

Mary McCleary
McCleary & Richter-Freund, LLC
1001 Luna Circle, NW
Albuquerque, NM 87102
505-750-4169
505-393-4536 (fax)
mary@mcclearyrichter-freund.com

Richard A. Millisor
Fisher & Phillips
200 Public Square,
Suite 4000
Cleveland, OH 44114
440-838-8800
440-838-8805 (fax)
rmillisor@fisherphillips.com

Victor Patrick Montoya
PO Box 15987
Rio Rancho, NM 87174
505-358-0734
vpmontoya.nm@gmail.com

Alexander Javier Ospino
Guebert Bruckner Gentile PC
PO Box 93880
6801 Jefferson Street, NE,
Suite 400 (87109)
Albuquerque, NM 87199
505-823-2300
505-823-9600 (fax)
aospino@guebertlaw.com

Julie Park
Office of the State Engineer
PO Box 25102
130 South Capitol Street
Santa Fe, NM 87504
505-476-0256
julie.park@state.nm.us

Peter Ramiscal
Immigration Law Office of Ramiscal & Associates
3796 E. Desert Inn Road #B
Las Vegas, NV 89121
702-451-5565
702-450-5569 (fax)
vegascfr@gmail.com

Eric Rhoades
33325 Eighth Avenue S.
Federal Way, WA 98003
253-835-2573
eric.rhoades
@cityoffederalway.com

Leon Richter-Freund
McCleary & Richter-Freund, LLC
1001 Luna Circle, NW
Albuquerque, NM 87102
505-750-4169
505-393-4536 (fax)
leon@mcclearyrichter-freund.com

Andrea K. Robeda
Jackson Lewis PC
800 Lomas Blvd., NW,
Suite 200
Albuquerque, NM 87102
505-878-0515
505-878-0398 (fax)
andrea.robeda
@jacksonlewis.com

Cody R. Rogers
Jarmie & Associates
P.O Box 344
500 N. Church Street (88005)
Las Cruces, NM 88004
575-526-3338
575-526-6791 (fax)
crogers@jarmielaw.com

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

Allison Anne Sipes
310 N. Mesa,
Suite 310
El Paso, TX 79901
915-544-5235
915-351-6460 (fax)
asipes@stanfordalumni.org

Peter F. Staiti
2128 Ridgedale Road
Atlanta, GA 30317
505-238-8535
pstaitillc@gmail.com

Joseph Edward Stowers
10300 Jollyville Road #1230
Austin, TX 78759
713-319-4854
joe_s_nm@yahoo.com

Susan J. Strelitz
7001 Westwind Drive
El Paso, TX 79912
915-248-1730
attorneystrelitz@att.net

Richard Alan Stubbs
United States Navy JAG Corps
3084 Bridges Street
Honolulu, HI 96818
808-473-4653
ricstubbs@hotmail.com

Lance A. Sumrall
Office of the Ninth Judicial District Attorney
417 Gidding Street,
Suite 200
Clovis, NM 88101
806-577-1351
lancesumrall@yahoo.com

Joshua T. Talamante
Office of the Thirteenth Judicial District Attorney
700 E. Roosevelt Avenue,
Suite 30
Grants, NM 87020
505-771-7444
jtalamante@da.state.nm.us

Sherry P. Thompson
Office of the Thirteenth Judicial District Attorney
PO Box 637
700 E. Roosevelt Avenue
Grants, NM 87020
505-285-4627
sthompson@da.state.nm.us

Arthur Van Haselen III
Office of the Third Judicial District Attorney
845 N. Motel Blvd.,
Suite D
Las Cruces, NM 88007
575-524-6370
575-524-6379 (fax)
avanhaselen@da.state.nm.us

Timothy R. Van Valen
Van Valen Law
3644 Vista Grande Drive, NW
Albuquerque, NM 87120
505-280-2982
trvanvalen@gmail.com

Christina Andrea Vigil
Equal Employment Opportunity Commission
505 Marquette Avenue, NW,
Suite 900
Albuquerque, NM 87102
505-248-5231
505-248-5192 (fax)
christina.vigil@eeoc.gov

Joan Maureen Waters
N.M. Department of Public Safety
PO Box 1628
4491 Cerrillos Road (87507)
Santa Fe, NM 87504
505-827-9154
505-827-3387 (fax)
joan.waters2@gmail.com

Jason Benjamin Wheeless
PO Box 171
Albuquerque, NM 87103
505-261-2230
jbwlaw505@gmail.com

Travis J. White
4724 Stafford Place, NW
Albuquerque, NM 87120
505-688-3290
travisjw2002@yahoo.com

Cyrus Joseph Wiseman
Laflin, Pick & Heer, PA
PO Box 3260
8100 Menaul Blvd., NE
(87112)
Albuquerque, NM 87190
505-883-0679
505-244-8731 (fax)
joew@laflin.com

Thomas Adam Biscup
Zebrowski Law
4801 All Saints Road, NW
Albuquerque, NM 87120
505-715-5161
tom@zebrowskilaw.com

Henry J. Castillo
2 N. Central Avenue,
26th Floor
Phoenix, AZ 85004
602-614-8237
602-992-8244 (fax)
hcastillo@alcocklaw.com

Michael Cecil Nelson
1981 Idlywild Road
Prescott, AZ 86305
602-803-3593
928-445-3187 (fax)
michael.nelson1016@live.com

Recent Rule-Making Activity

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

Effective May 30, 2018

Pending Proposed Rule Changes Open for Comment:

Comment Deadline

There are no proposed rule changes currently open for comment.

Recently Approved Rule Changes Since Release of 2018 NMRA:

		Effective Date
Rules of Civil Procedure for the District Courts		
1-088.1	Peremptory excusal of a district judge; recusal; procedure for exercising	03/01/2018
Rules of Criminal Procedure for the District Courts		
5-302A	Grand jury proceedings	04/23/2018

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

Before the Disciplinary Board of the Supreme Court of the State of New Mexico

In the Matter of Jason S. Montclare, Esq.

Disciplinary No. 07-2017-761

An Attorney Licensed to Practice Law Before the Courts of the State of New Mexico

Formal Reprimand

You are being issued this Formal Reprimand pursuant to the Conditional Agreement Not Contesting the Allegations and Consent to Discipline ("Consent Agreement") which was approved by both a Hearing Committee and a Disciplinary Board Panel.

You represented the Mother in a child custody case. On July 5, 2016, the Court held a hearing in which you set forth the terms to which the parties had agreed; the Court ordered you to draft an Order. Within a week, you met with your client to work on the final order. You did not complete the Order.

On August 15, 2016, your client texted to you that she wanted you to complete the Order; you responded by text: "Sure you bet." But you did not do so.

Next, on September 6, 2016, your client texted you asking about the status of the Order. For the first time, you stated that *she* needed to prepare a Parenting Plan, and you emailed to her the Rule 4A-302 form "Custody Plan and Order." You provided no information in the form, and provided no guidance on how to fill it out.

You texted your client three times in September and October asking her for the Parenting Plan; i.e., a completed "Custody Plan and Order." On October 21, 2016, your client texted you that she had not filled out the form as "[t]hings have been hectic." She asked that you withdraw from her case, and stated that she would "figure out when I have time to do the paperwork."

A reasonably competent domestic relations attorney would have already prepared the Order; to the extent that a Parenting Plan was necessary, that attorney would have, at the least, given substantial aid to the client to prepare the Parenting Plan. You failed in both these regards.

On November 16, 2016, you filed an *Expedited Motion to Withdraw*, in which you disclosed your client's October 21, 2016 text and attributed the delay in preparing the Order from the July 5, 2016 hearing to her. The disclosure was a confidential communication, for which no exception to non-disclosure exists.

On November 16, 2016, your former client asked you for an accounting of the fees that she had paid. You failed to provide the accounting. The now-former client filed her disciplinary complaint.

Your response to the disciplinary complaint included a 5-page invoice; you wrote in your response to the disciplinary complaint: "[P]lease find a copy of a detailed itemization of the financial aspects of the case, which I have sent to the client." However, you had constructed the invoice in response to the complaint, and had not sent a copy to the client. Thus, your statement in your response that you had sent the invoice to the client appears to be misleading, even with your deposition testimony that you intended and assumed that disciplinary counsel would provide the invoice to the client.

Because no Order had been entered from the July 5, 2016 hearing, the client had no recourse when the Father kept the child beyond the time to which they had agreed at the July 5, 2016 hearing.

Your conduct violated Rules 16-101, by failing to provide competent representation to a client; 16-103, by failing to represent a client diligently; 16-106(A), by disclosing confidential client information; 16-302, by failing to expedite litigation; and 16-804(D), by engaging in conduct prejudicial to the administration of justice.

You are hereby formally reprimanded for these acts of misconduct pursuant to Rule 17-206(A)(5) of the Rules Governing Discipline. The formal reprimand will be filed with the Supreme Court in accordance with 17-206(D), and will remain part of your permanent records with the Disciplinary Board, where it may be revealed upon any inquiry to the Board concerning any discipline ever imposed against you. In addition, in accordance with Rule 17-206(D), the entire text of this formal reprimand will be published in the State Bar of New Mexico Bar Bulletin. You also must pay costs to the Disciplinary Board in the amount of $551.98.

Dated May 18, 2018
The Disciplinary Board of the
New Mexico Supreme Court

By

Curtis R. Gurley, Esq.
Board Chair

Certiorari Denied, March 16, 2018, No. S-1-SC-36896

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-025

No. A-1-CA-34709 (filed January 23, 2018)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
GAVINO LUNA,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF LUNA COUNTY
Daniel Viramontes, District Judge

HECTOR H. BALDERAS,
Attorney General
Santa Fe, New Mexico
JANE A. BERNSTEIN,
Assistant Attorney General
Albuquerque, New Mexico
for Appellee

BENNETT J. BAUR,
Chief Public Defender
KIMBERLY CHAVEZ COOK,
Assistant Appellate Defender
Santa Fe, New Mexico
for Appellant

Opinion

J. Miles Hanisee, Judge

{1} The formal opinion filed in this case on December 13, 2017, is hereby withdrawn, and this opinion is substituted in its place. **{2}** Defendant Gavino Luna was convicted by a jury of (1) criminal sexual contact of a minor (Child under 13) (CSCM) in the third degree, (2) intimidation of a witness, (3) unlawful exhibition of motion pictures to a minor, and (4) contributing to the delinquency of a minor (CDM) for forcing a minor to "engage in sexual acts and watch pornographic movies[.]" He was sentenced to eleven-and-one-half years' incarceration, less one day, to be followed by parole for five years to life. Defendant appeals his convictions, challenging: (1) his right to be free from double jeopardy, (2) the adequacy of two jury instructions given, (3) the sufficiency of the evidence supporting his convictions, (4) the admission of certain lay testimony, and (5) the admission of specific expert testimony. We affirm in part, reverse in part, and remand for further proceedings.

BACKGROUND

{3} Defendant's convictions stem from events that occurred the afternoon of May 3, 2013, when Defendant was looking after J.C. (Child), a nine-year-old boy, and Child's twelve-year-old sister because Child's mother was hospitalized. Defendant lived with Child's grandmother. According to Child, Defendant showed Child "ugly" movies that showed photographs of women "showing themselves." Child could not recall details of the movie, such as what the women in the movie were doing, but he explained that the women in the movie were wearing "red" clothes "like . . . you wear outside" and that they kept their clothing on. There were no other people in the pictures with the women. Child did not like the movies because he found them "very ugly" because they "showed . . . all of [the] parts . . . of the women." Child did not want to look at the photos and movies and tried to leave the room but was not allowed; Child thought that if he ran, Defendant would get mad.

{4} Child also testified that at one point, Defendant pulled down Defendant's shorts and showed Child his "parts," which Child explained meant Defendant's penis. Child could not recall whether Defendant made Child touch any of Defendant's "parts," but he remembered that Defendant touched Child's penis two times: once with his hand, and once with his mouth. The contact occurred over Child's clothing and was not skin-to-skin. This made Child feel "very bad[]."

{5} Defendant told Child not to tell anyone and that he would take Child far away and leave Child there if Child told anyone. Child was afraid of Defendant and approximately one week after the incident told his mother what happened. Child's mother contacted the Deming, New Mexico Police Department, and Defendant was subsequently charged with and tried for criminal sexual penetration of a minor (CSPM) in the first degree, CSCM, intimidation of a witness, CDM, and unlawful exhibition of motion pictures to a minor. The district court granted Defendant's motion for a directed verdict on the CSPM charge based on a lack of sufficient evidence to support the charge but allowed all other counts to go to the jury. The jury convicted Defendant on all submitted counts, after which the district court entered judgment and sentenced Defendant. This appeal followed.

DISCUSSION

{6} Defendant makes the following challenges on appeal: (1) Defendant's convictions for CSCM, unlawful exhibition, and CDM violate his Fifth Amendment right to be free from double jeopardy; (2) the district court fundamentally erred in instructing the jury as to the elements of unlawful exhibition of motion pictures to a minor and CSCM; (3) there was insufficient evidence to support Defendant's convictions for unlawful exhibition of motion pictures, CDM, and intimidation of a witness; (4) the district court committed plain error in admitting the lay testimony of Detective Sergio Lara, the investigating officer, who testified that he recovered a "pornographic" video from Defendant's house; and (5) the district court committed plain error in admitting the expert testimony of Sylvia Aldaz-Osborn, a forensic interviewer who was allowed to watch and comment on Child's videotaped deposition when it was shown to the jury during trial. We address each issue in turn.

I. Whether Defendant's Convictions for CDM, CSCM, and Unlawful Exhibition of Motion Pictures to a Minor Violate His Right to Be Free From Double Jeopardy

{7} Defendant contends that the sentence imposed by the district court violates his Fifth Amendment right to be free from double jeopardy because the conduct underlying his CDM conviction is identical to that used as the basis for his CSCM and unlawful exhibition of motion pictures

convictions. Defendant argues that the CDM statute is generic and multipurpose, requiring us to analyze his claim using the modified *Blockburger* approach articulated in *State v. Gutierrez*, 2011-NMSC-024, ¶ 58, 150 N.M. 232, 258 P.3d 1024 . Such approach, Defendant argues, leads to the conclusion that the Legislature did not intend to punish separately Defendant's unitary conduct as specifically charged and argued by the State. The State contends that the CDM statute, while broad in scope, is not "unacceptably vague" and, therefore, we need not follow *Gutierrez*'s modified *Blockburger* approach. Thus, the State urges us to apply *Blockburger*'s strict elements test that was used in *State v. Trevino*, 1993-NMSC-067, 116 N.M. 528, 865 P.2d 1172, a pre-*Gutierrez* case holding that there was no double jeopardy violation for CDM and CSCM convictions. The State argues that *Trevino* should continue to control. We disagree. Under the current state of the law, we agree with Defendant that *Gutierrez* is now controlling, and we reverse his CDM conviction.

A. The *Blockburger* Test

{8} The Double Jeopardy Clause of the Fifth Amendment, made applicable to New Mexico by incorporation through the Fourteenth Amendment, "functions in part to protect a criminal defendant against multiple punishments for the same offense." *State v. Swick*, 2012-NMSC-018, ¶ 10, 279 P.3d 747 (internal quotation marks and citation omitted). Cases "where the same conduct results in multiple convictions under different statutes" are known as double description cases. *Id.* In a double description case, we apply the two-part test set forth in *Swafford v. State*, 1991-NMSC-043, ¶ 25, 112 N.M. 3, 810 P.2d 1223. We first ask "whether the conduct underlying the offenses is unitary, i.e., whether the same conduct violates both statutes." *Id.* Here, the State does not dispute that the same conduct—Defendant's sexual contact of and exhibition of "pornographic" movies to Child—formed the basis of his CDM, CSCM, and unlawful exhibition convictions. Thus, we turn to the second part of the *Swafford* test and focus "on the statutes at issue to determine whether the [L]egislature intended to create separately punishable offenses." *Id.*

{9} Our Supreme Court has described legislative intent as "the touchstone of our inquiry" because in this context "[i]t is well established that the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the [L]egislature intended." *Gutierrez*, 2011-NMSC-024, ¶ 50 (internal quotation marks and citations omitted). Unless the Legislature has clearly and expressly authorized multiple punishments for the same conduct, we apply the following test articulated in *Blockburger v. United States*, 284 U.S. 299, 304 (1932), to determine intent: "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one[] is whether each provision requires proof of a fact which the other does not." *Id.* As our Supreme Court explained in *Swafford*:

> The rationale underlying the *Blockburger* test is that if each statute requires an element of proof not required by the other, it may be inferred that the [L]egislature intended to authorize separate application of each statute. Conversely, if proving violation of one statute always proves a violation of another (one statute is a lesser included offense of another, i.e., it shares all of its elements with another), then it would appear the [L]egislature was creating alternative bases for prosecution, but only a single offense.

Swafford, 1991-NMSC-043, ¶ 12. Importantly, *Swafford* explained that "the *Blockburger* test is not a constitutional rule, but merely a canon of construction used to guide courts in deciphering legislative intent." *Id.* It, therefore, follows that the starting point in a *Blockburger* analysis—looking to the statute's language itself—is consistent with the general rule of statutory construction that "[i]n analyzing legislative intent, [courts] first look to the language of the statute itself." *Swick*, 2012-NMSC-018, ¶ 11; *see State v. Suazo*, 2017-NMSC-011, ¶ 16, 390 P.3d 674 (explaining that courts "begin with the plain language of the statute, which is the primary indicator of legislative intent." (alteration, internal quotation marks, and citation omitted)). It also follows that where the plain language of the statute is ambiguous, we engage in further interpretation in order to glean legislative intent. *See State v. Almeida*, 2011-NMCA-050, ¶ 11, 149 N.M. 651, 253 P.3d 941 ("[I]f a statute is vague or ambiguous and cannot be interpreted by a simple consideration of the statutory language, the court must look to other means of statutory interpretation.").

{10} Historically, courts applied the *Blockburger* test by strictly comparing the elements—evidenced by a statute's plain language—of the challenged statutes. *State v. Lee*, 2009-NMCA-075, ¶ 9, 146 N.M. 605, 213 P.3d 509 ("In applying the *Blockburger* test, this Court compares the elements of each crime with the elements of the other."). However, in response to "the increasing volume, complexity, vagueness and overlapping nature of criminal statutes[,]" the United States Supreme Court modified the *Blockburger* analysis to account for the challenges to divining legislative intent presented by multipurpose statutes that could be offended in multiple ways and address various types of wrongs. *Pandelli v. United States*, 635 F.2d 533, 535-39 (6th Cir. 1980) (explaining the evolution of the *Blockburger* test that occurred in *Whalen v. United States*, 445 U.S. 684 (1980), and *Illinois v. Vitale*, 447 U.S. 410 (1980)). Now, in cases involving a criminal statute that is generic, multipurpose, vague, unspecific, ambiguous, and/or written in the alternative, we must engage in "statutory reformulation" by "narrow[ing] the statute to be analyzed until it includes only the alternatives relevant to the case at hand." *Pandelli*, 635 F.2d at 538; *Gutierrez*, 2011-NMSC-024, ¶¶ 58-59. In effect, this modified approach recognizes that comparing in the abstract ambiguous facial statutory elements fails to provide requisite guidance to a court in determining legislative intent. *See State v. Franco*, 2005-NMSC-013, ¶ 14, 137 N.M. 447, 112 P.3d 1104 (explaining that "a statute that serves several purposes and has been written in the alternative may have many meanings and a wide range of deterrent possibilities" and that "[u]nless we focus on the relevant alternatives, we run the risk of misconstruing legislative intent" (internal quotation marks and citation omitted)). As this Court has explained:

> Analyzing statutory elements from the vantage point of the particular case before the court . . . enables a reviewing court to remain faithful to legislative intent to provide alternative means of prosecution against a single category of wrongdoers, and to avoid the confusion and injustice that may arise from looking at statutes in the abstract when each statute contains an element which the other does not.

State v. Rodriguez, 1992-NMCA-035, ¶ 10,

113 N.M. 767, 833 P.2d 244. Thus, in cases involving such statutes, a court considering a double jeopardy challenge must rely on the state's specific legal theory as the basis for establishing the proper elemental comparison in applying the *Blockburger* test. *See State v. Silvas*, 2015-NMSC-006, ¶ 14, 343 P.3d 616; *State v. Gutierrez*, 2012-NMCA-095, ¶ 14, 286 P.3d 608 (explaining that the modified *Blockburger* approach "applies when one of the statutes at issue is written with many alternatives, or is vague or unspecific" and that "a reviewing court should look at the legal theory of the offense that is charged[] instead of looking at the statute in the abstract when comparing elements under *Blockburger*" (internal quotation marks and citation omitted)). Specifically, "we look to the charging documents and jury instructions to identify the specific criminal causes of action for which the defendant was convicted." *State v. Ramirez*, 2016-NMCA-072, ¶ 18, 387 P.3d 266, *cert. denied*, ___-NMCERT-___ (No. S-1-SC-35949, July 20, 2016). Where "[n]either the indictment nor the jury instructions shed any light on the [s]tate's trial theory[,]" and/or to confirm our understanding of the state's theory, we may also look to the state's closing argument for evidence of the specific factual basis supporting its theory. *Id.* ¶¶ 17, 20; *Silvas*, 2015-NMSC-006, ¶¶ 19-21 (explaining that "[o]ur reading of the [jury] instructions is confirmed when we look to how the prosecutor asked the jury to apply [the] instructions" and reviewing the prosecutor's closing argument). By doing this, we may properly identify the appropriate "provisions" for comparison that are at the heart of the *Blockburger* test. *See Blockburger*, 284 U.S. at 304.

{11} If application of either approach to the *Blockburger* test "establishes that one statute is subsumed within the other, the inquiry is over and the statutes are the same for double jeopardy purposes—punishment cannot be had for both." *Swafford*, 1991-NMSC-043, ¶ 30; *see also Gutierrez*, 2011-NMSC-024, ¶ 60 (holding, after applying the modified *Blockburger* approach, that the defendant's armed robbery conviction subsumed his unlawful taking of a motor vehicle conviction and thus vacating his conviction for the lesser-included offense). If not, there is created a presumption that multiple punishment may be had, which presumption "may be overcome by other indicia of legislative intent." *Swafford*, 1991-NMSC-043, ¶ 31. However, we only turn to other means of determining legislative intent if the statutes in question "survive *Blockburger*." *State v. Branch*, 2016-NMCA-071, ¶¶ 24, 28, 387 P.3d 250, *cert. granted*, ___-NMCERT-___ (No. S-1-SC-35951, July 28, 2016).

B. Whether We Should Apply the *Blockburger* Strict Elements Test or Follow *Gutierrez*'s Modified Elements Approach

{12} Because the parties disagree whether the CDM statute falls within the reach of *Gutierrez*, we begin by determining whether the CDM statute is the type of statute—i.e., generic, multipurpose, ambiguous, vague or unspecific, or written in the alternative—to which *Gutierrez* applies.

{13} The CDM statute provides that "[c]ontributing to the delinquency of a minor consists of any person committing any act or omitting the performance of any duty, which act or omission causes or tends to cause or encourage the delinquency of any person under the age of eighteen years." NMSA 1978, § 30-6-3 (1990). Our Supreme Court has explained that where "many forms of conduct can support" a particular statutory element, that statute "is a generic, multipurpose statute that is vague and unspecific, and we must look to the [s]tate's theory of the case to inform what" particular conduct is alleged in that particular case. *Swick*, 2012-NMSC-018, ¶ 25 (internal quotation marks omitted). Likewise, the presence of generic terms—such as "any unlawful act"—that allow for "numerous forms of conduct that could fulfill that requirement" necessarily render that statute subject to application of the modified *Blockburger* approach. *Branch*, 2016-NMCA-071, ¶ 26.

{14} We have little difficulty concluding that the CDM statute qualifies for application of the modified *Blockburger* approach. To begin with, the statute is a quintessentially generic, multipurpose statute, as has long been recognized in New Mexico case law. *See State v. Pitts*, 1986-NMSC-011, ¶ 10, 103 N.M. 778, 714 P.2d 582 (explaining that New Mexico courts have "recognized that the intent of the Legislature in enacting [the CDM statute] was to extend the broadest possible protection to children, who may be led astray in innumerable ways"); *State v. McKinley*, 1949-NMSC-010, ¶ 12, 53 N.M. 106, 202 P.2d 964 ("The ways and means by which the venal mind may corrupt and debauch the youth of our land, both male and female, are so multitudinous that to compel a complete enumeration in any statute designed for protection of the young before giving it validity would be to confess the inability of modern society to cope with the problem of juvenile delinquency."). Additionally, the statute is both vague and unspecific in that it criminalizes "*any* act" or the omission of "*any* duty" when that act or omission results in a child's delinquency. Section 30-6-3 (emphasis added). These generic terms make it possible for numerous forms of conduct to qualify as the requisite actus reus element of the statute. Thus, absent "statutory reformulation" vis-à-vis the State's legal theory in this case, there is no way to engage in the meaningful elemental comparison that is at the heart of the *Blockburger* test. *See Pandelli*, 635 F.2d at 538. In other words, until we identify which of Defendant's specific acts or omissions form the basis for the CDM charge, there is no way to know whether other conduct for which Defendant was criminally charged is separately punishable or if one charge subsumes the other.

C. Applying the Modified *Blockburger* Approach to the CDM Statute

{15} The jury was instructed that in order to convict Defendant of CDM, the State had to prove:

> 1. [D]efendant forced [Child] to engage in sexual acts and watch pornographic movies;
> 2. This caused or encouraged [Child] to conduct himself in a manner injurious to his morals, health or welfare;
> 3. [Child] was under the age of 18;
> 4. This happened in New Mexico on or about the 3rd day of May, 2013.

From this it is apparent that the State's theory of the "any act" element of CDM was Defendant's forcing Child "to engage in sexual acts and watch pornographic movies[.]" *See* UJI 14-601, n.2 NMRA (requiring a description of the act or omission of the defendant as part of the first element). Thus, under its theory as articulated in the jury instruction, the State had to prove that Defendant forced Child to both engage in sexual acts *and* watch pornographic movies in order to convict Defendant of CDM.

{16} While it used different terms in the CDM instruction, the State does not dispute that "sexual acts" refers to the CSCM or that "watch pornographic movies" is the same as unlawful exhibition of motion pictures. Importantly, the State points to no alternative

act or acts that could serve as the basis for proving the "any acts" element of the CDM charge. *See Swick*, 2012-NMSC-018, ¶ 25 (explaining that even where one must draw an inference from arguably vague charging documents and jury instructions, "a prosecutor should not be allowed to defeat the constitutional protections afforded by the double jeopardy clause by clever indictment drafting" (alteration, internal quotation marks, and citation omitted)). The State also proffered no additional testimony or evidence to prove CDM than it did to prove CSCM and unlawful exhibition of motion pictures. *See id.* ¶ 26.

{17} The State's only argument that Defendant's multiple convictions survive a modified *Blockburger* analysis is that the CDM statute contains an element that neither the CSCM nor unlawful exhibition statutes contains—namely that Defendant's acts "caused or encouraged [Child] to conduct himself in a manner injurious to his morals, health or welfare"—meaning that the statutes are not subsumed within each other. However, the State's argument ignores that in order for a statute not to be subsumed within another, *each* statute must require proof of a fact which the other does not. *See Blockburger*, 284 U.S. at 304 (explaining that "the test to be applied to determine whether there are two offenses or only one[] is whether each provision requires proof of a fact which the other does not"). While it is true that the CDM statute requires proof of an additional element, neither the CSCM nor unlawful exhibition statute requires proof of anything more than what is required to prove CDM as charged in this case.[1] *Cf. State v. Ramirez*, 2016-NMCA-072, ¶¶ 18, 23-24, (explaining that the aggravated assault statute, NMSA 1978, § 30-3-1(B) (1963), and the child endangerment statute, NMSA 1978, § 30-6-1(D) (2009), each requires proof of something the other does not, thus concluding that the statutes survived the modified *Blockburger* test), *cert. denied,* ___-NMCERT-___ (No. S-1-SC-35949, July 20, 2016). Because the jury could—and, indeed, did—convict Defendant of CDM based on nothing more than the same evidence used to convict Defendant of CSCM and unlawful exhibition of motion pictures, we hold that Defendant's conviction for CDM as charged in this case violates double jeopardy. We reverse and remand with instructions to vacate Defendant's CDM conviction.

II. Whether the District Court Committed Fundamental Error in Instructing the Jury

{18} Defendant challenges his convictions for (a) unlawful exhibition of motion pictures to a minor and (b) CSCM based on the jury instructions given by the district court. Because Defendant failed to object to the instructions, we review his challenges for fundamental error only. *See State v. Benally*, 2001-NMSC-033, ¶ 12, 131 N.M. 258, 34 P.3d 1134 ("The standard of review we apply to jury instructions depends on whether the issue has been preserved. If the error has been preserved we review the instructions for reversible error. . . . If not, we review for fundamental error." (citation omitted)). "The doctrine of fundamental error applies only under exceptional circumstances and only to prevent a miscarriage of justice." *State v. Barber*, 2004-NMSC-019, ¶ 8, 135 N.M. 621, 92 P.3d 633. "An error is fundamental when it goes to the foundation or basis of a defendant's rights." *State v. Anderson*, 2016-NMCA-007, ¶ 8, 364 P.3d 306 (internal quotation marks and citation omitted), *cert. denied,* 2015-NMCERT-012 (No. A-1-CA-35591, Dec. 7, 2015). "We will not uphold a conviction if an error implicated a fundamental unfairness within the system that would undermine judicial integrity if left unchecked." *Id.* (internal quotation marks and citation omitted).

{19} In instances of claimed instructional error, we seek to determine "whether a reasonable juror would have been confused or misdirected by the jury instruction." *Benally*, 2001-NMSC-033, ¶ 12 (internal quotation marks and citation omitted). "Juror confusion or misdirection may stem from instructions which, through omission or misstatement, fail to provide the juror with an accurate rendition of the relevant law." *Anderson*, 2016-NMCA-007, ¶ 9 (internal quotation marks and citation omitted). "The propriety of jury instructions given . . . is a mixed question of law and fact[,]" which we review de novo. *State v. Lucero*, 2010-NMSC-011, ¶ 11, 147 N.M. 747, 228 P.3d 1167 (internal quotation marks and citation omitted).

A. The Unlawful Exhibition of Motion Pictures to a Minor Jury Instruction Was Deficient

{20} Defendant argues that the district court fundamentally erred by failing to properly instruct the jury regarding what it had to find in order to convict Defendant of unlawful exhibition of motion pictures to a minor. We agree.

{21} NMSA 1978, Section 30-37-3 (1973) provides, "It is unlawful for any person knowingly to exhibit to a minor . . . a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors." Because there is no uniform jury instruction that provides the essential elements of this offense, the district court was required to give an instruction that "substantially follow[s] the language of the statute" in order to be deemed sufficient. *State v. Doe*, 1983-NMSC-096, ¶ 8, 100 N.M. 481, 672 P.2d 654; *State v. Gunzelman*, 1973-NMSC-055, ¶ 28, 85 N.M. 295, 512 P.2d 55 (explaining that "[w]hen the terms of the statute itself define [an element of the crime], then an instruction which follows the words of the statute is sufficient"), *overruled on other grounds by State v. Orosco*, 1992-NMSC-006, ¶ 7, 113 N.M. 780, 833 P.2d 1146. Following the language of Section 30-37-3, we discern the following elements that together constitute the offense of unlawful exhibition: (1) The defendant knowingly exhibited a motion picture, show or other presentation; (2) The exhibition was to a minor; (3) The motion picture, show or other presentation depicts, in whole or in part, nudity, sexual conduct or sado-masochistic abuse; and (4) The motion picture, show or other presentation is harmful to minors. In other words, a person who knowingly exhibits to a minor a motion picture containing nudity cannot be convicted under Section 30-37-3 absent an additional finding that the motion picture was "harmful to minors." Mere depiction of nudity alone is not enough.

{22} Additionally, the Legislature specially defined the terms "nudity" and "harmful to minors" as used in the Sexually Oriented Material Harmful to Minors Act, of which Section 30-37-3 is a part. *See* NMSA 1978, § 30-37-1 (1973) (defining terms "[a]s used in this act"). "[N]udity" is defined as "the showing of the male or female genitals, pubic area or buttocks with less than a full opaque covering, or

[1]Trevino is distinguishable because there our Supreme Court applied the pre-*Gutierrez* strict *Blockburger* test and concluded that the generic CSCM statute requires proof of an additional element—an unlawful sexual touching—that the generic CDM statute does not. *See Trevino*, 1993-NMSC-067, ¶¶ 5-6.

the depiction of covered male genitals in a discernibly turgid state[.]" Section 30-37-1(B).

"[H]armful to minors" is defined as:

> [T]hat quality of any description o[r] representation, in whatever form, of nudity, sexual conduct, sexual excitement or sado-masochistic abuse when it:
>
> (1) predominantly appeals to the prurient, shameful or morbid interest of minors; and
>
> (2) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
>
> (3) is utterly without redeeming social importance for minors[.]

Section 30-37-1(F). Neither definition was provided to the jury in this case. While the failure to give a definitional instruction typically does not rise to the level of fundamental error, in some cases it does. *See State v. Mascareñas*, 2000-NMSC-017, ¶¶ 20-21, 129 N.M. 230, 4 P.3d 1221 (holding that the district court fundamentally erred by failing to include a definition of "reckless disregard" in a case where failure to provide the definitional instruction "had the potential effect of confusing the jury as to the proper standard of negligence to apply"); *Anderson*, 2016-NMCA-007, ¶¶ 8-19 (holding in a case involving a claim of self-defense that there was fundamental error where the district court failed to provide the jury with the "no-retreat" instruction because there was evidence to support the instruction and the jury was "misdirected" by the instructions issued). Importantly, failure to give a definitional instruction when the term being defined "has a legal meaning different from the commonly understood lay interpretation of [the term]" may result in jury confusion that could place the verdict in doubt. *Barber*, 2004-NMSC-019, ¶¶ 21-22. In such instances, "we must place all the facts and circumstances under close scrutiny to see whether the missing instruction caused such confusion that the jury could have convicted [the d]efendant based upon a deficient understanding of the legal meaning of [the term in question] as an essential element of the crime." *Id.* ¶ 25.

{23} The jury in this case was instructed that in order to convict Defendant of this offense, it had to find in pertinent part:

> 1. [D]efendant knowingly showed or exhibited motion pictures to [Child];
>
> 2. The motion pictures depicted nudity and/or sexual conduct which is harmful to minors; [and]
>
> 3. [Child] was under the age of eighteen[.]

The proffered instruction is deficient in at least two respects. First, it fails to identify as a separate element that the motion picture "is harmful to minors" as we have concluded the statute requires. The phrase "which is harmful to minors" contained in the second paragraph of the instruction arguably modifies only "sexual conduct" and, at best, may also modify "nudity." But the requisite finding a jury must make in order to convict is that the exhibition prohibited by the statute, here a motion picture, is harmful to minors. *See* § 30-37-3. Thus, as instructed, the jury could have convicted Defendant for merely exhibiting to Child a motion picture that "depicted nudity" without making an additional finding that the motion picture was "harmful to minors." Second, as previously noted the jury was not provided with the statutory definitions of "nudity" and "harmful to minors." In defining these terms, the Legislature, in effect, established a special standard by which to determine whether a criminal offense—as opposed to an exhibition that, while perhaps inappropriate and ill-advised, is not harmful—has been committed. Where a district court fails to adequately define the applicable standard necessary to support a finding of criminal activity and it cannot be determined whether the jury applied the correct legal standard and "delivered its verdict on a legally adequate basis[,]" fundamental error may exist. *Mascareñas*, 2000-NMSC-017, ¶¶ 8-13, 16, 21. We review the evidence in order to determine whether "under the facts adduced at trial, [an] omitted element was undisputed and indisputable, and no rational jury could have concluded otherwise." *State v. Lopez*, 1996-NMSC-036, ¶ 13, 122 N.M. 63, 920 P.2d 1017 (internal quotation marks and citation omitted). If the evidence does not indisputably establish the missing element or elements, there exists fundamental error, and we must reverse. *See id.*

{24} The only evidence to support Defendant's conviction for unlawful exhibition of motion pictures was Child's testimony regarding what the movie Defendant showed him depicted. Child testified that there were women in the movie wearing "red" clothes "like . . . you wear outside[,]" that the women remained clothed, and that there was no one in the movie with the women. He explained that he did not like the movies "because they were very ugly" because they "showed . . . all of [the] parts . . . of the women." As he said "all of their parts[,]" Child, who was seated, made a circling hand gesture in front of his upper body. Child could not recall what the women in the movie were doing and provided no additional description of the contents of the movie. Critically, the State offered no other evidence establishing what the movie showed. While Detective Lara testified that he recovered a video—which he described as "pornographic" in nature—from Defendant's house and answered "yes" when the prosecutor asked him whether what he saw on the video was "consistent with what [he] had learned and expected to see from [his] investigation," he provided no description of what was contained in the movie.[2] We also note that the State did not seek to show the jury the video Detective Lara recovered. *Cf. State v. Green*, 2015-NMCA-007, ¶¶ 6, 26, 341 P.3d 10 (affirming the defendant's probation revocation for violating the prohibition against pornography and sexually explicit material where images found on the defendant's computer were entered into evidence and which images this Court, like the district court, held to depict "sexual activity and/or physical contact with unclothed female genitals or buttocks").

{25} It was the State's burden to prove beyond a reasonable doubt that Defendant exhibited to Child a motion picture, show or presentation that depicted "the male or female genitals, pubic area or buttocks with less than a full opaque covering" and which motion picture "(1) predominantly appeal[ed] to the prurient, shameful or morbid interest of minors; . . . (2) is patently offensive to prevailing standards in the adult community . . .; and (3) is utterly without redeeming social importance for minors[.]" Sections 30-37-1(B), (F)

[2]Defendant argues separately that it was plain error for the district court to admit Detective Lara's lay opinion as to the pornographic nature of the movie he recovered from Defendant's house based on Detective Lara's failure to provide a description of the video's contents, i.e., because Detective Lara's testimony lacked a proper foundation. Because we reverse Defendant's conviction for unlawful exhibition of motion pictures for improper jury instructions, we do not address this argument.

and 30-37-3. We simply cannot say that Child's testimony—or any other evidence in the record—indisputably establishes either of these elements. *Cf. Barber*, 2004-NMSC-019, ¶¶ 29-30 (explaining that even if the jury instruction was "defectively ambiguous without the definition of possession," the jury instructions as a whole—which required the state to prove that the defendant intended to transfer methamphetamine—cured the ambiguity because the jury could not have convicted the defendant of intent to transfer, which it did, without also finding that he possessed the drugs); *Lopez*, 1996-NMSC-036, ¶¶ 14, 17, 34 (explaining that despite the district court's omission of the mens rea requirement—an essential element—from the felony murder jury instruction, the element was indisputably established by the defendant's own testimony, thus no fundamental error existed); *Orosco*, 1992-NMSC-006, ¶¶ 1, 19-20 (holding that failing to instruct on the essential element of "unlawfulness" in two CSCM cases was not fundamental error because "under the undisputed evidence of unlawfulness in the cases and the facts upon which the juries relied to find that [the] defendants committed the acts, the juries themselves effectively determined the existence of the omitted element").

{26} There exists a distinct possibility that the jury convicted Defendant (1) without finding all the required elements beyond a reasonable doubt—i.e., that the motion picture itself was "harmful to minors"—and (2) based on a misunderstanding of the applicable legal standard—i.e., by applying common understandings of the terms "nudity" and "harmful to minors" rather than their statutory definitions. *See State v. Montoya*, 2013-NMSC-020, ¶ 14, 306 P.3d 426 ("In applying the fundamental error analysis to deficient jury instructions, we are required to reverse when the misinstruction leaves us with no way of knowing whether the conviction was or was not based on the lack of the essential element." (internal quotation marks and citation omitted)); *cf. State v. Reed*, 2005-NMSC-031, ¶¶ 53, 57, 138 N.M. 365, 120 P.3d 447 (explaining that even though the district court failed to give the "reckless disregard" definitional instruction specifically for the child abuse charge, the error was harmless because "[a] definitional instruction is not necessary if, as [a] matter of law, no rational juror could find that a defendant acted with less than criminal negligence"). We thus hold that the district court fundamentally erred in instructing the jury on the charge of unlawful exhibition of motion pictures to a minor and reverse Defendant's conviction on that count.

{27} Whether the State may retry Defendant depends on whether there was sufficient evidence presented at trial to support a conviction under the erroneous instruction given at trial.[3] *See State v. Dowling*, 2011-NMSC-016, ¶ 18, 150 N.M. 110, 257 P.3d 930 ("We review [a d]efendant's [sufficiency of the evidence] claim under the erroneous instruction provided to the jury at trial."). "[O]ur review of the sufficiency of the evidence is analytically independent from the issue of the defect in the jury instruction." *Rosaire*, 1996-NMCA-115, ¶ 20. "We review sufficiency of the evidence on appeal from a highly deferential standpoint." *Dowling*, 2011-NMSC-016, ¶ 20. "The evidence is to be viewed in the light most favorable to the [s]tate, resolving all conflicts and making all permissible inferences in favor of the jury's verdict." *Id.*

{28} As stated previously, the jury in this case was instructed that it had to find, among other elements that Defendant does not challenge, that Defendant exhibited to Child a motion picture that "depicted nudity and/or sexual conduct which is harmful to minors[.]" Child testified that the movie "showed . . . all of [the] parts . . . of the women" and that Child found the images to be "very ugly." Defendant himself concedes that Child's "description of what he viewed suggests . . . that he watched a video in which women exposed themselves fully" and that "lay jurors may consider 'harmful to minors' " material contained in mainstream movies that "contain very real depictions of violence and sexual conduct." Viewed in the light most favorable to the State, we conclude that the jury could infer from Child's testimony both that the movie "depicted nudity" and that the nudity depicted was "harmful to minors." Because there was sufficient evidence to convict Defendant of unlawful exhibition of motion pictures to a minor under the erroneous jury instruction, there is no bar to retrying him on that count. *See id.* ¶ 47.

B. CSCM Jury Instruction

{29} Defendant argues the district court committed fundamental error in instructing the jury regarding CSCM by failing to include as an essential element that Defendant's conduct was unlawful and provide the jury with the corresponding instruction on unlawfulness. The State argues that the "unlawful" element contained in UJI 14-925 NMRA, the uniform jury instruction for CSCM, need only be given "if the evidence raises a genuine issue of the unlawfulness of the defendant's actions." *Id.* Use Note 4. We agree with the State.

{30} Our Supreme Court has held that it is not fundamental error to fail to provide the "unlawful" element of UJI 14-925 in a case where the element of unlawfulness is not "in issue." *Orosco*, 1992-NMSC-006, ¶ 10. To determine whether unlawfulness is "in issue," we consider "whether there was any evidence or suggestion in the facts, however slight, that could have put the element of unlawfulness in issue." *Id.* Where, for example, there is evidence that the touching at issue may have been "innocent behavior such as the touching of the intimate parts of a minor for purposes of providing reasonable medical treatment to a child or nonabusive parental or custodial care[,]" the unlawfulness of the touching is in issue and the jury must be instructed accordingly. *State v. Osborne*, 1991-NMSC-032, ¶¶ 19-20, 31-33, 111 N.M. 654, 808 P.2d 654 (alteration, internal quotation marks, and citation omitted). However, where the state presents evidence that the defendant touched or fondled a child's intimate parts or genitals and there are no facts in evidence "to suggest that the touchings, if they occurred, might have involved the provision of medical care, custodial care or affection, or any other lawful purpose[,]" unlawfulness is not "in issue." *Orosco*, 1992-NMSC-006, ¶¶ 10, 11. That is because implicit in the

[3]Defendant develops no argument that the evidence was insufficient to convict him under the *erroneous* instruction. Rather, Defendant's sufficiency challenge analyzes the evidence in light of a properly given instruction, which has no bearing on our review. *See State v. Rosaire*, 1996-NMCA-115, ¶¶ 20-21, 123 N.M. 250, 939 P.2d 597 (explaining that we review "the evidence in light of the *defective* jury instruction given below" and holding that "where the trial court errs by failing to instruct the jury on an essential element of the crime, retrial following appeal is not barred if the evidence below was sufficient to convict the defendant under the erroneous jury instruction").

jury's determination that the defendant committed a crime is a finding—based on the evidence in the case—that the defendant's conduct was unlawful. *See id.* ¶¶ 11-12.

{31} Here, the jury heard from Child that Defendant (1) showed Child movies with women "showing . . . all of their parts," which movies Child found "ugly," (2) exposed his own penis to Child, *then* (3) touched Child's clothed penis with his hand and mouth. Despite all this evidence, Defendant argues that "[t]here was no context provided" and "no . . . evidence that the scenario was sexual." Critically, he fails to point to anything in the record, even something slight, that might suggest that Defendant's contact of Child's penis was lawful. *Cf. Osborne*, 1991-NMSC-032, ¶¶ 6-7 (describing the evidence of touching in that case and noting that the defendant "did not recall ever touching [the child's] bottom and said that while it was possible he might have touched her bottom at some point, it would not have been in an inappropriate manner or with an inappropriate intent"). Based on both the allegations against Defendant and the evidence adduced at trial, there was no reason for the jury to be instructed that it had to find Defendant's conduct "unlawful" because there was no basis upon which the jury could conclude that the touching was lawful. The jury's verdict thus must have been based upon Defendant's having touched Child as the evidence was presented, which necessarily incorporated a finding of unlawfulness. *Id.* We, therefore, hold that the district court did not fundamentally err by failing to instruct the jury with the "unlawful" element of UJI 14-925.

III. Whether Substantial Evidence Supports Defendant's Convictions

{32} Defendant argues that the State failed to present sufficient evidence to sustain his convictions for CDM, unlawful exhibition of motion pictures to a minor, and intimidation of a witness. Because we have already reversed and remanded Defendant's convictions for CDM and unlawful exhibition of motion pictures to a minor, we address only whether sufficient evidence supports his conviction for intimidation of a witness.

{33} "The test for sufficiency of the evidence is 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. Cabezuela*, 2015-NMSC-016, ¶ 14, 350 P.3d 1145 (internal quotation marks and citation omitted). Our review involves a two-step process in which we first "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. We then "evaluate whether the evidence, so viewed, supports the verdict beyond a reasonable doubt." *State v. Garcia*, 2016-NMSC-034, ¶ 24, 384 P.3d 1076. 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. Our appellate courts "will not invade the jury's province as fact-finder by second-guessing the jury's decision concerning the credibility of witnesses, reweighing the evidence, or substituting its judgment for that of the jury." *State v. Garcia*, 2011-NMSC-003, ¶ 5, 149 N.M. 185, 246 P.3d 1057 (alterations, internal quotation marks, and citation omitted).

{34} The jury in this case was instructed, in pertinent part, that in order to convict Defendant of intimidation of a witness, the State had to prove beyond a reasonable doubt that Defendant "knowingly intimidated and/or threatened [Child] with the intent to keep [Child] from truthfully reporting to a law enforcement officer or any agency that is responsible for enforcing criminal laws information relating to the commission or possible commission of . . . [CSCM.]" Intimidation of a witness may be proven through circumstantial evidence, including the witness's testimony that he or she did not initially report an incident because the defendant had made a veiled threat and was present in the room when the report first could have been made. *In re Gabriel M.*, 2002-NMCA-047, ¶¶ 22, 24-26, 132 N.M. 124, 45 P.3d 64. Particularly in cases involving children, such testimony may be elicited by the use of leading questions. *See State v. Orona*, 1979-NMSC-011, ¶ 28, 92 N.M. 450, 589 P.2d 1041 ("Leading questions are often permissible when a witness is immature, timid[,] or frightened.").

{35} Here, the State relied on the following exchange between the prosecutor and Child to support Defendant's conviction for intimidating a witness:

> Q: Did [Defendant] tell you not to tell anyone [what happened]?
> A: Yes.
> Q: Did [Defendant] tell you he would do anything if you told someone?
> A: I don't recall.
> Q: Do you remember telling the police officer that [Defendant] said he would take you far away and leave you there?
> A: Yes, oh, yes, I do recall.
> Q: Did [Defendant] tell you that?
> A: Yes.
> Q: Were you afraid of [Defendant]?
> A: Yes.

Child also testified that he did not immediately tell his mother about the incident because Defendant was present, but that once Defendant was gone, Child then disclosed to his mother what Defendant did to him.

{36} Defendant contends that the prosecutor "simply spoon-fed [Child] the State's entire factual basis for intimidation of a witness[,]" thus diminishing "the evidentiary value of [Child's] testimony on the subject." Defendant argues that under *Orona*, the prosecutor's leading questions and Child's single-word affirmatory responses fail to provide sufficient evidence to support Defendant's conviction because the facts were contained only in the prosecutor's questions and thus were not evidence. *See Orona*, 1979-NMSC-011, ¶ 21 (explaining that "[d]eveloping testimony by the use of leading questions must be distinguished from substituting the words of the prosecutor for the testimony of the witness"). *Orona* is distinguishable, and Defendant's reliance thereon is misplaced. In *Orona*, defense counsel repeatedly objected to the prosecutor's use of leading questions of the complaining witness. *Id.* ¶¶ 15-18. While the district court initially sustained the objections, it eventually permitted the witness to be led. *Id.* ¶ 19. Thus, on appeal the defendant made an evidentiary—not sufficiency—challenge and argued that the district court had abused its discretion in allowing the prosecutor to lead the witness, an argument with which our Supreme Court agreed under the particular facts of that case. *Id.* ¶ 30.

{37} Here, however, Defendant neither objected to the prosecutor's leading questions nor challenges on appeal the admissibility of the evidence elicited, yet complains that the unobjected-to testimony is insufficient to support his conviction. Defendant fails to cite any authority suggesting that a child-witness's responses to a prosecutor's arguably leading questions, which garnered no objections, must be

disregarded in a sufficiency challenge, and we, therefore, assume none exists. *See State v. Vigil-Giron*, 2014-NMCA-069, ¶ 60, 327 P.3d 1129 ("[A]ppellate courts will not consider an issue if no authority is cited in support of the issue and that, given no cited authority, we assume no such authority exists."). Additionally, to the extent Defendant's argument—that the prosecutor's use of leading questions "diminishes the evidentiary value of [Child's] testimony"—invites us to reweigh the evidence, we decline to do so. *See State v. Trujillo*, 2002-NMSC-005, ¶ 28, 131 N.M. 709, 42 P.3d 814 ("We will not reweigh the evidence or substitute our judgment for that of the jury."). We note that much of Child's testimony was developed through leading questions—likely owing to the fact that Child frequently expressed confusion upon being asked broad, open-ended questions—and that Child often could not "recall" things when initially asked but eventually remembered when the prosecutor posed the question slightly differently. Thus, Child's exchange with the prosecutor regarding the intimidation charge was typical of his testimony throughout and established not only that Child remembered telling police that Defendant threatened Child but more importantly a factual basis upon which the jury could conclude that Defendant, in fact, threatened Child.

{38} We conclude that from the record of Child's testimony, the jury could reasonably infer that Defendant intimidated Child with the intent to keep him from reporting the incident to law enforcement. Thus, we affirm Defendant's conviction for intimidation of a witness.

IV. Whether the District Court Committed Plain Error by Admitting Certain Expert Testimony

{39} At trial, the State's first witness was Sylvia Aldaz-Osborn. Over Defendant's objection, the district court qualified Aldaz-Osborn as an expert in forensic interviewing. Aldaz-Osborn was allowed to watch Child's videotaped deposition as it was played to the jury and was then questioned by the prosecutor. The prosecutor asked Aldaz-Osborn to, based on her training and experience as a forensic interviewer, describe in what sort of ways Aldaz-Osborn has seen children react to trauma. Asking if she could use the video of Child's deposition as an example, Aldaz-Osborn stated, "When you saw [Child] going like this[, biting his lips,] that's sort of like he's nervous to answer. . . . I would see that as getting nervous." The prosecutor then asked, "When children are interviewed, if they're uncomfortable and nervous, do they, in your experience, . . . develop certain coping mechanisms?" Aldaz-Osborn answered, "Yes, ma'am, they do." Asked to describe what sorts of things she has observed and invited to use Child's videotaped deposition as an example, Aldaz-Osborn stated, "Well, I've seen what [Child] did with his mouth in going [(unknown gesture)], or maybe they cry. Sometimes I've even seen them laughing because they're so nervous. Sometimes they won't sit down." The prosecutor then asked, "Do they cope in certain ways, or have you seen them cope in certain ways, when they don't really want to relive what happened to them?" Aldaz-Osborn responded, "Yes, ma'am, I have." When the prosecutor asked, "And what did you observe in the video with [Child]?" Aldaz-Osborn answered, "Him trying to recall incidents and saying he didn't remember."

{40} While Defendant objected to the district court's qualification of Aldaz-Osborn as an expert witness[4] in forensic interviewing, he failed to object to the admissibility of any of her specific testimony. On appeal, Defendant does not argue that the district court abused its discretion in qualifying Aldaz-Osborn as an expert witness but instead contends that the district court erred by admitting Aldaz-Osborn's testimony regarding "the alleged meaning behind [Child's] observable behavior" in Child's videotaped deposition. Conceding that he failed to object to the specific aspects of Aldaz-Osborn's testimony of which he now complains, Defendant acknowledges that we review this part of his challenge for plain error only. *See State v. Montoya*, 2015-NMSC-010, ¶ 46, 345 P.3d 1056 (explaining that where the defendant did not preserve an objection to the admission of expert testimony, courts review "for plain error").

{41} Plain error is an error that "affects a substantial right" of the accused. Rule 11-103(A) NMRA; *Montoya*, 2015-NMSC-010, ¶ 46. "To find plain error, [an appellate court] must be convinced that admission of the testimony constituted an injustice that created grave doubts concerning the validity of the verdict." *Id.* (internal quotation marks and citation omitted). "In determining whether there has been plain error, we must examine the alleged errors in the context of the testimony as a whole." *State v. Dylan J.*, 2009-NMCA-027, ¶ 15, 145 N.M. 719, 204 P.3d 44 (omission, internal quotation marks, and citation omitted). Where there exists "ample evidence outside of [the complained-of expert] testimony to support the jury's finding of guilt[,]" it is not plain error to admit such testimony. *Montoya*, 2015-NMSC-010, ¶ 49.

{42} Defendant primarily complains about Aldaz-Osborn's testimony regarding Child's inability to remember certain details during his deposition, arguing that Aldaz-Osborn's "expert testimony gave the jury an unfounded basis to reach an inference contrary to common sense[,] i.e., that a claimed lack of memory is indicative of a traumatic memory." Defendant points to "at least ten instances where [Child] stated . . . he could not recall something[.]" However, as Defendant acknowledges, the vast majority of those instances related to the details of what the videos Defendant exhibited to Child showed, and we have already held that Defendant's unlawful exhibition conviction must be reversed. With respect to the evidence supporting Defendant's convictions for CSCM and intimidation of a witness, we conclude that Child's testimony alone supports the jury's findings of guilt. While it is true that it is plain error to allow an expert on direct examination to "repeat to the jury [a] complainant's statements, made to the expert during [an] evaluation," because such testimony "amounts to an indirect comment on the alleged victim's credibility[,]" that is not what happened in this case. *State v. Lucero*, 1993-NMSC-064, ¶ 19, 116 N.M. 450, 863 P.2d 1071. Here, the jury heard Child's statements about what happened directly from Child through his videotaped deposition. The jury had the independent opportunity to observe Child's behaviors—including biting his lips—and the full context in which he could not remember certain details. As discussed in the previous section, while Child initially could not recall Defendant's threat to him, he displayed clear and immediate recollection of the

[4]Defendant's two passing references in his briefs to defense counsel's objections at trial and rote recitations of the "abuse of discretion" standard of review for preserved arguments are insufficient to warrant further consideration by this Court. *See State v. Guerra*, 2012-NMSC-014, ¶ 21, 278 P.3d 1031(explaining that appellate courts are under no obligation to review unclear or undeveloped arguments).

threat as soon as the prosecutor asked a follow-up question and then confirmed that Defendant, indeed, had so threatened him. Child also had no difficulty recalling and never hesitated in affirmatively answering questions about whether Defendant had touched Child's penis. The only time Child stated that he could not recall something related to the touching was in response to the prosecutor's question, "Did [Defendant] touch your part over your clothes or under your clothes?"[5] But Child definitively and repeatedly stated that Defendant had touched Child's penis, making Aldaz-Osborn's statement that she saw Child "trying to recall incidents and saying he didn't remember" irrelevant to the jury's determination that Defendant was guilty of CSCM. We thus hold that the admission of Aldaz-Osborn's testimony did not affect a substantial right of Defendant or create grave doubts concerning the validity of the CSCM and intimidation verdicts, and, as a result, no plain error warranting reversal exists.

CONCLUSION

{43} For the foregoing reasons, we affirm Defendant's convictions for CSCM and intimidation of a witness, reverse Defendant's convictions for CDM and unlawful exhibition of motion pictures to a minor, and remand for further proceedings in light of this opinion.

{44} IT IS SO ORDERED.
J. MILES HANISEE, Judge

WE CONCUR:
MICHAEL E. VIGIL, Judge
TIMOTHY L. GARCIA, Judge

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[5]Child's later testimony clarified that the touching occurred "outside" of his clothes and was not skin-to skin. As such, the district court instructed the jury as to CSCM in the third degree rather than CSCM in the second degree as the State had originally charged in order to conform to the evidence elicited at trial. *Compare* NMSA 1978, § 30-9-13(C) (2003, amended 2004) (providing that CSCM in the third degree "consists of *all* criminal sexual contact of a minor" (emphasis added)), *with* § 30-9-13(B) (providing that CSCM "in the second degree consists of all criminal sexual contact of the *unclothed* parts of a minor" (emphasis added)).

Certiorari Denied, March 26, 2018, No. S-1-SC-36909

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-026

No. A-1-CA-35323 (filed February 21, 2018)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
DALLAS HNULIK,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY
Lisa B. Riley, District Judge

HECTOR H. BALDERAS,
Attorney General
Santa Fe, New Mexico
LAURIE P. BLEVINS,
Assistant Attorney General
Albuquerque, New Mexico
for Appellee

BENNETT J. BAUR,
Chief Public Defender
WILLIAM A. O'CONNELL,
Assistant Appellate Defender
Santa Fe, New Mexico
for Appellant

Opinion

Emil J. Kiehne, Judge

{1} Defendant appeals his conviction for second-degree murder arising from the shooting of his girlfriend, Brandy Capps (Victim). Defendant argues that statements made by Victim should not have been admitted at trial because they were inadmissible hearsay, and that his conviction must be reversed. We hold that all but one of the challenged statements were properly admitted under Rule 11-803(3) NMRA. The remaining statement was not admissible under any exception to the rule against hearsay, but its admission was harmless error. Defendant also challenges the admission of evidence about a previous domestic violence dispute between him and Victim. We hold that the domestic dispute evidence was admissible under Rule 11-404(B) NMRA.

BACKGROUND

{2} Defendant was in a romantic relationship with Victim for the two years that preceded her death. The evidence showed that the relationship was rocky and Defendant occasionally became violent with Victim. At the time of Victim's death at the end of July 2010 she lived in Lubbock, Texas, but was visiting Defendant and friends in Artesia, New Mexico, where she used to live. On the day of Victim's death, Defendant was in the driver's seat of Victim's car as the couple set out from Defendant's father's house to run errands. Victim was in the passenger seat. Defendant testified that he reached into the back seat area to get a revolver, and as he brought the gun to the front seat area, it went off. A bullet struck Victim in the face and she died as a result of the gunshot wound.

{3} At trial, the State argued that Defendant intentionally shot Victim to prevent her from testifying against him in a domestic violence case pending against him in Lubbock, and out of anger because she planned to break up with him. Defendant testified that the shooting was an accident and that the gun simply "went off." Defendant claimed that the gun was in a bag of clothing in the back seat of the car. He testified that he did not know the hammer of the gun was cocked, and that as he was bringing the gun over the seat, the gun fired accidentally.

{4} Among the evidence the State presented to prove that the shooting was not an accident, Victim's friends and family testified about statements Victim had made to them. Collectively, they testified that Victim stated that she was anxious to leave Artesia and never return, and that she wanted to break off her relationship with Defendant. The State also presented evidence of a 2009 domestic violence incident in Artesia involving the couple in which the officer who arrested Defendant heard him shout "I'm not going to jail over this shit," and saw him standing over Victim in an aggressive manner.

{5} Defendant challenges the admission of Victim's statements on hearsay grounds, and argues that the domestic violence incident was improper propensity evidence and that it was unfairly prejudicial. For the reasons that follow, we are not persuaded.

DISCUSSION

{6} "We review the admission of evidence under an abuse of discretion standard and will not reverse in the absence of clear abuse." *State v. Sarracino*, 1998-NMSC-022, ¶ 20, 125 N.M. 511, 964 P.2d 72. An abuse of discretion occurs when a trial court "exercises its discretion based on a misunderstanding of the law." *State v. Vigil*, 2014-NMCA-096, ¶ 20, 336 P.3d 380.

I. Two of Victim's statements were relevant to negate Defendant's accident defense

{7} The State introduced statements that Victim made to two witnesses, Brooklyn Edwards, Victim's niece, and Dova Cronian, a former coworker and friend of Victim's. Defendant objected to these statements as hearsay. The Court admitted the statements made to Ms. Edwards as both excited utterances and evidence of Victim's state of mind and future intent, and it admitted the statements made to Ms. Cronian as evidence of Victim's state of mind.

{8} Ms. Edwards was one of Victim's closest friends. Ms. Edwards testified that Victim moved to Lubbock from Artesia because she wanted to start getting her life together, go to school, and leave Defendant. She understood that Victim planned to go to Artesia for the weekend in order to get the rest of her belongings and to talk to Defendant to "get things figured out." Ms. Edwards testified that Victim called her on Friday night, the night before the shooting, and said that she was upset, angry, ready to go home to Lubbock, "tired of everything" and frustrated. Victim also told her that she and Defendant had been fighting. Victim planned to get all of her things, go home to Lubbock, said she was "done with him," and did not want to return to Artesia.

{9} Ms. Cronian testified that Victim called her because Victim had run out of gas in Defendant's mother's driveway. She

stated that Victim sounded anxious and said "please hurry and come over here and bring me gas as fast as you can get here." When Ms. Cronian arrived, Victim said that she "needed [Ms. Cronian] to get the gas as soon as [she] could because [Victim] needed it so she could leave as soon as possible." Victim told Ms. Cronian that she was going back to Lubbock and was never returning to Artesia.

{10} Ms. Cronian invited Victim to go with her to get the gas, but Victim said that she could not, again asking Ms. Cronian to hurry because "she needed to leave as soon as possible," and stated that she would explain later why she could not go with her. After dropping off the gas, Ms. Cronian called Victim and asked her if she would be all right, and Victim replied, "I will be. I will be leaving as soon as I can, and I'm gonna get the fuck out of here, and I'm never fucking coming back." Victim then assured Ms. Cronian that she would call her as soon as she got onto the highway to Lubbock.

{11} "Hearsay is an out-of-court statement offered to prove the truth of the matter asserted." *State v. King*, 2015-NMSC-030, ¶ 24, 357 P.3d 949 (internal quotation marks and citation omitted); s*ee* Rule 11-801(C) NMRA. "Hearsay is not admissible except as provided by [the New Mexico Rules of Evidence] or by other rules adopted by [our] Supreme Court or by statute." Rule 11-802 NMRA. One such exception permitted by the Rules is a hearsay statement showing the declarant's "then-existing mental, emotional, or physical condition." Rule 11-803(3). This includes statements which show the declarant's "motive, intent or plan." *Id.* Our Supreme Court has held that while evidence demonstrating the declarant's state of mind is admissible as an exception to the rule against hearsay, evidence explaining the reasons for the declarant's state of mind is inadmissible. *King*, 2015-NMSC-030, ¶ 27. "Although [Rule 11-803(3)] allows hearsay statements that show the declarant's then existing mental condition, the rule does not permit evidence explaining why the declarant held a particular state of mind." *State v. Leyba*, 2012-NMSC-037, ¶ 13, 289 P.3d 1215 (internal quotation marks and citation omitted); *State v. Baca*, 1995-NMSC-045, ¶ 19, 120 N.M. 383, 902 P.2d 65 (same).

{12} But it is not enough that a declarant's statements fall within the state-of-mind hearsay exception; they must also be relevant to some issue in the case. *See* Rule 11-401 NMRA ("Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence, and . . . the fact is of consequence in determining the action."). *Baca* indicates that in a criminal prosecution, statements within the state-of-mind exception are admissible only if the declarant's state of mind is of consequence to the determination of the declarant's conduct. 1995-NMSC-045, ¶ 20; *see Leyba*, 2012-NMSC-037, ¶ 15 (indicating that statements expressing a declarant's mental state must be relevant). "When the state of mind does not prove or negate action or inaction by the declarant, then admissibility of hearsay state-of-mind evidence must be considered under some other rule." *Baca*, 1995-NMSC-045, ¶ 20.

{13} *Baca* explains that evidence of a crime victim's state of mind is commonly relevant, and properly admissible, to help a jury decide issues of "(1) self defense (rebutted by extrajudicial declarations of the victim's passive state of mind), (2) suicide (rebutted by statements inconsistent with a suicidal bent), and (3) accident (rebutted by [the] victim's fear of placing self in way of such harm)." *Id.* ¶ 21. Such evidence of the victim's state of mind "is a relevant part of the conduct in question[,]" because it "precedes and informs the conduct." *Id.* That sort of properly-admitted evidence "is distinguishable from a state of mind that arises out of the conduct and is relevant not because it itself is of consequence but only because an inference can be drawn therefrom to make the existence of some other fact more or less probable." *Id.* The latter sort of evidence, which is offered after the fact to show "the truth of the underlying facts rather than solely to show state of mind," must be excluded because of the danger that "the jury will consider the victim's statement of fear [as] somehow reflecting on [the] *defendant's* state of mind rather than the victim's[.]" *Id.* ¶ 22 (internal quotation marks and citations omitted).

{14} Under this standard, all of Victim's statements made to Ms. Edwards and Ms. Cronian were properly admitted, except for Victim's statement to Ms. Edwards that she was upset because she and Defendant had been fighting, which we will address below. These statements demonstrated Victim's state of mind and future intent: that she was upset, wished to end her relationship with Defendant, and intended to return home to Lubbock as soon as possible. Evidence of Victim's state of mind was relevant because it "preced[ed] and inform[ed] the conduct" at issue. *Id.* ¶ 21. At trial, Defendant claimed that the shooting was an accident. In support of this claim, defense counsel argued that although Victim and Defendant had arguments, their relationship was generally good, and that there was no tension or argument between them in the hours leading up to the shooting. Victim's statements were relevant because they provided a possible motive for the shooting—Defendant's anger over her plan to break up with him—and rebutted Defendant's claim that he shot Victim by accident. Defendant acknowledged that they had been arguing immediately before the shooting when he said, "I don't even remember what we were arguing about." In closing argument, the State asked the jury to consider Victim's statements as evidence that Defendant had a motive to shoot Victim.

{15} Defendant argues, however, that Victim's statements were irrelevant because his own mental state was the only one at issue. Defendant argues that statements about a victim's state of mind might be admissible to rebut a defense claim that a victim's own conduct caused his or her accidental death, but here there was no claim that Victim fired the gun. Instead, Defendant never disputed that he fired the fatal gunshot, and the only question was whether he intended to shoot Victim, or whether the shooting was an accident. According to Defendant, Victim's plans shed no light on his intent, but statements about her plans were improperly offered to show his motive.

{16} In support of his claim, Defendant relies on our Supreme Court's opinions in *Baca* and *Leyba*, but those opinions are distinguishable. First, neither opinion disapproves of evidence about a victim's state of mind that is relevant to show the existence of a possible motive for the defendant's actions. Second, both opinions involved very different facts that made the state-of-mind statements then at issue inadmissible.

{17} First, *Baca* did not involve a claim of self-defense, accident, or suicide. In *Baca*, the defendant was charged with killing his wife by shooting her, and then running over her and their three-year-old daughter with a car. *See Baca*, 1995-NMSC-045, ¶¶ 1-2. His defense was that another man committed the crimes. *See id.* ¶ 8. The daughter survived, and later nodded her head when a therapist asked if she was afraid of her father. *See id.* ¶ 9. Testimony

about this non-verbal statement was admitted against the defendant at trial. *See id.* ¶ 11. On appeal, our Supreme Court held that this statement was both irrelevant and unfairly prejudicial. *Id.* ¶¶ 20-22. Our Supreme Court explained that state-of-mind evidence is frequently relevant when a criminal defendant raises issues of self-defense, suicide, or accident: "In such cases the state of mind of the victim is a relevant part of the conduct in question[,]" because it "precedes and informs the conduct." *Id.* ¶ 21. That sort of evidence "is distinguishable from a state of mind that arises out of the conduct and is relevant not because it itself is of consequence but only because an inference can be drawn therefrom to make the existence of some other fact more or less probable." *Id. Baca* held that the daughter's after-the-fact fear of her father was inadmissible because it had not been offered solely to show the daughter's state of mind, but was instead offered to prove "that her father attempted to kill her and that he did in fact kill her mother[.]" *Id.* ¶ 22.

{18} Second, the daughter's statement in *Baca* was irrelevant because it said nothing about her state of mind *before* the criminal act occurred, and thus provided no relevant information about the crime itself or the defense. Instead, the daughter's statement arose out of the alleged conduct and was offered for the improper purpose of encouraging the jury to infer that because the daughter was afraid of her father, he must be guilty as charged. Here, by contrast, Victim's statements related to her state of mind before the shooting, and were relevant because they demonstrated the existence of a possible motive for Defendant to shoot her.

{19} Defendant's reliance on *Leyba* is equally unavailing. In that case, the defendant killed his pregnant girlfriend and her father, but claimed that he acted in self-defense. 2012-NMSC-037, ¶¶ 2-4. At trial, the state offered excerpts from the victim's diary in which the victim wrote that her boyfriend (i.e. the defendant) had beat her up, and she expressed fear of the defendant based on those acts. *See id.* ¶¶ 3, 8. Our Supreme Court held that some of the statements were improperly admitted because they did not reflect the victim's state of mind at the time she wrote them. But even those that did were irrelevant because "anxiety or confusion or even her fear proves nothing without the cause of those emotions—[the d]efendant's alleged prior acts—which are not admissible under this hearsay exception." *Id.* ¶ 15. The state did not explain why the victim's fear was relevant, and thus the statements were only offered to show the defendant's state of mind, which was improper. *See id.* ¶¶ 15-16. In other words, the cause of the victim's fear was not properly admitted under the state-of-mind exception, and the victim's fear, by itself, did not rebut the defendant's self-defense claim. Here, by contrast, all of Victim's statements except her statement that she was upset because she and Defendant had been fighting were properly admitted under the state-of-mind exception, and they were relevant because they showed the existence of a possible motive for the shooting.

{20} We are not alone in holding that a victim's statements of intent to break up with or divorce a partner or spouse are properly admitted to show the existence of a motive to commit violence on the part of the partner or spouse. For example, in *State v. Calleia*, 20 A.3d 402, 419 (N.J. 2011), the New Jersey Supreme Court held that a wife's statements of intent to divorce her husband were admissible, along with other evidence of their deteriorating relationship, to show that her husband had a motive to kill her. The court acknowledged general statements in previous case law that evidence of a victim's state of mind should not be used to prove a defendant's motivation or conduct, but clarified that the correct rule is that a "deceased victim's then-existing state of mind cannot directly prove a defendant's motive; the state-of-mind exception to the hearsay rule does not permit imputation of a defendant's state of mind out of no more than a deceased person's feelings about that defendant." *Id.* at 412-13. In other words, "subject to certain exceptions, a fact probative of the victim's state of mind, standing alone, does not tend to prove any material fact about a defendant's conduct or state of mind." *Id.* at 413. But "[w]hen a victim's projected conduct permits an inference that [the] defendant may have been motivated by that conduct to act in the manner alleged by the prosecution, the statement satisfies the threshold for relevance." *Id.* at 415. Other courts have reached similar conclusions. *See, e.g.*, *United States v. Donley*, 878 F.2d 735, 738 (3d Cir. 1989) (stating that the defendant claimed he killed his wife in the heat of passion after finding her with another man; evidence that the victim said she planned to leave the defendant was properly admitted "to persuade the jury to infer from her statements that she had such a plan and, in turn, to infer from that plan and the defendant's awareness of it that he had a motive for murder other than the one he claimed"); *Pierce v. State*, 705 N.E.2d 173, 176 (Ind. 1998) (allowing evidence of the victim's statements indicating a poor relationship with the defendant as relevant "to controvert defense evidence" that the defendant and the victim "were getting along well at the time of the murder"); *Commonwealth v. Tassinari*, 995 N.E.2d 42, 49 (Mass. 2013) (noting that evidence of the victim's request for divorce and her statements indicating a tense relationship with her husband were relevant to the defendant husband's motive to kill her). We hold that Victim's statements were properly admitted under Rule 11-803(3).

II. Admission of Victim's hearsay statement that she and Defendant had been fighting was erroneous but harmless error

{21} Ms. Edwards's testimony that Victim said she was upset because she and Defendant had been fighting was inadmissible as evidence of Victim's state of mind, because New Mexico law is that the state-of-mind exception does not include any statement which explains the cause of the declarant's state of mind. *See King*, 2015-NMSC-030, ¶ 27; *Leyba*, 2012-NMSC-037, ¶ 13 ("Although [Rule 11-803(3)] allows hearsay statements that show the declarant's then-existing mental condition, the rule does not permit evidence explaining why the declarant held a particular state of mind." (alteration, emphasis, internal quotation marks, and citation omitted)); *Baca*, 1995-NMSC-045, ¶ 19 (same).

{22} Neither was the statement admissible as an excited utterance under Rule 11-803(2). Statements which relate to a startling event or condition, and are made while the declarant is "under the stress or excitement" of the "startling event or condition," can be admitted as excited utterances. Rule 11-803(2). The rationale for allowing their admission is that the exciting event or condition causes the declarant to experience such surprise, "shock, or nervous excitement" that he or she temporarily lacks the "capacity for conscious fabrication." *State v. Suazo*, 2017-NMSC-011, ¶ 11, 390 P.3d 674 (internal quotation marks and citation omitted). A court should consider the totality of the circumstances and several factors to determine the amount of "reflection or spontaneity" behind the statement. *Id.* (internal quotation marks and citation

omitted). Such factors include: the amount of "time [that] passed between the startling event and the statement[;]" whether "the declarant had an opportunity for reflection and fabrication; how much pain, confusion, nervousness or emotional strife the declarant was experiencing at the time of the statement; whether the statement was self-serving; and whether the statement was made in response to an inquiry." *Id.* (alteration, internal quotation marks, and citation omitted). There is no specific time frame in which the statement must be made to fall under Rule 11-803(2). *State v. Hernandez*, 1999-NMCA-105, ¶ 15, 127 N.M. 769, 987 P.2d 1156. Rather, the inquiry turns on whether the victim was under the stress and strain of the excitement at the time the statement was made. *State v. Lopez*, 1996-NMCA-101, ¶ 31, 122 N.M. 459, 926 P.2d 784.

{23} At trial, the State argued that the statements made to Ms. Edwards were excited utterances because Ms. Edwards stated that Victim was yelling and on the verge of tears while she was making the statements. On appeal, however, the State does not defend the district court's ruling that this statement was admissible as an excited utterance, and with good reason. The State did not present evidence about the factors used to determine the spontaneity of the statement. The State did not, for example, present evidence about when the argument between Defendant and Victim occurred, so it is not possible to determine the amount of time which passed between the startling event and the statement, or to determine whether Victim had time to reflect or fabricate. Further, no evidence was presented to show whether this argument was of the kind that would cause Victim to experience so much "pain, confusion, nervousness, or emotional strife" that she would have been unable to reflect or fabricate her statements. *Suazo*, 2017-NMSC-011, ¶ 11 (internal quotation marks and citation omitted). Thus, we hold that the statement was not admissible as an excited utterance under Rule 11-803(2).

{24} The State contends that even if this Court were to hold that the testimony at issue on appeal in this case was inadmissible, its admission was harmless error. Defendant does not address the effect the errors he alleges had on the verdict. Improperly admitted evidence is reviewed for non-constitutional harmless error. *See State v. Serna*, 2013-NMSC-033, ¶ 23, 305 P.3d 936. Non-constitutional error is harmless "when there is no reasonable probability [that] the error affected the verdict." *State v. Tollardo*, 2012-NMSC-008, ¶ 36, 275 P.3d 110 (emphasis, internal quotation marks, and citation omitted). Harmless error review "requires a case-by-case analysis." *Id.* ¶ 44.

{25} We hold that the admission of the hearsay statement through Ms. Edwards was harmless error, because there is no reasonable probability that the inadmissible evidence contributed to Defendant's conviction. *See id.* ¶¶ 36, 43. Regardless of the admission of the hearsay statement, there was ample evidence that Defendant was abusive to Victim and that the couple had a tumultuous relationship, and thus the statement was cumulative. Victim's mother testified, without objection, that she started to dislike Defendant "when the abuse began." Ms. Edwards also testified, without objection, that she had heard Defendant threaten Victim before, making statements such as "I'm gonna whoop your ass," and "I'll kill you, bitch." Ms. Edwards also explained her understanding that Victim did not intend to drop the domestic violence charges pending against Defendant in Lubbock. Again, no objection was made to this testimony. Defendant himself testified that he was physical with Victim "a couple times," before retreating and stating that he only hit her one time, which led to his arrest in Lubbock. Ms. Cronian testified that Victim was acting anxiously and strangely on the day of the shooting. Further, there was no objection to the testimony of another witness, Pam Grey, who stated that on the day before the shooting, Victim sent her a text message saying that she wanted to leave Artesia. Evidence was also presented that, shortly following the shooting, Defendant either said "I don't even remember what we were arguing about," or "we weren't even fighting." A reasonable juror could infer from this statement that the couple was arguing, and that Defendant intended to shoot Victim, but upon later reflection realized that his reasons for doing so were inadequate.

{26} Testimony was also presented from an acquaintance of Defendant who was then incarcerated for violation of probation, and had previously been convicted of felonies including forgery. The witness testified that he was working at a car wash in Artesia while Defendant was there, and that they saw a friend of Victim drive by. Defendant gestured rudely at Victim's friend, and explained to the witness that he and Victim were arguing at the time of the shooting, that Victim was yelling at him so he grabbed a gun, and that Victim had spat in Defendant's face. At that point, Defendant told the witness that he shot Victim. Defendant later asked the witness not to say anything. In light of all the evidence presented at trial, we find that the isolated hearsay statement that Victim and Defendant had been arguing was harmless error.

III. Defendant's domestic violence arrest in Artesia was properly admitted under Rules 11-404(B) and 11-403

{27} At trial, the State presented evidence of Defendant's arrests in Lubbock and Artesia, both of which showed that Defendant had physically abused Victim. Defendant does not argue that the admission of evidence of his June 2010 arrest in Lubbock was improper. Rather, he argues that the evidence of his 2009 arrest in Artesia was improper character evidence which should have been excluded under Rule 11-404(B), particularly because it did not result in criminal charges. Defendant further argues that this evidence was more prejudicial than it was probative, and should have been excluded under Rule 11-403.

{28} We note that "Rule 11-404(B) is a rule of inclusion not exclusion, providing for the admission of all evidence of other acts that is relevant to an issue in trial, other than the general propensity to commit the crime charged." *State v. Phillips*, 2000-NMCA-028, ¶ 21, 128 N.M. 777, 999 P.2d 421 (internal quotation marks and citation omitted). Evidence of a prior bad act is admissible "if it bears on a matter in issue, such as intent, in a way that does not merely show propensity." *Sarracino*, 1998-NMSC-022, ¶ 22 (internal quotation marks and citation omitted). "If evidence of prior acts is relevant and admissible for a purpose other than proving a defendant's propensity to commit a crime, the probative value of the evidence must outweigh its prejudicial effect." *State v. Williams*, 1994-NMSC-050, ¶ 17, 117 N.M. 551, 874 P.2d 12, *overruled on other grounds by Tollardo*, 2012-NMSC-008, ¶ 37 n.6; *see State v. Woodward*, 1995-NMSC-074, ¶ 29, 121 N.M. 1, 908 P.2d 231, *abrogated on other grounds as recognized by State v. Montoya*, 2014-NMSC-032, ¶ 15, 333 P.3d 935.

{29} In this case, the State offered evidence of the dispute in Artesia to establish that Defendant had a motive to kill Victim to prevent her from testifying against him in domestic violence cases. Although the event in Artesia did not lead to formal

charges, his statement at the time, "I'm not going to jail over this shit," was still relevant to show that he generally had a strong desire not to go to jail, which supported the State's argument that he was motivated to shoot Victim in part to avoid going to jail for the Lubbock charges, which Victim had not dropped. The evidence was also relevant to rebut Defendant's efforts to portray his relationship with Victim as a loving one and his efforts to minimize the seriousness of their previous disputes. *See Woodward*, 1995-NMSC-074, ¶ 17 (holding that evidence of the defendant's violent behavior toward the victim, his wife, was admissible to show "motive, intent, plan, or knowledge"); *see also State v. Rojo,* 1999-NMSC-001, ¶ 47, 126 N.M. 438, 971 P.2d 829 (admitting evidence of the defendant's prior violent acts towards victim to rebut the defendant's argument that she loved him and had no motive to reject him).

{30} Defendant placed his own intent at issue by claiming that the gun fired by accident. *See State v. Niewiadowski*, 1995-NMCA-083, ¶ 13, 120 N.M. 361, 901 P.2d 779 (noting that the defendant placed his intent at issue by claiming that he acted in self-defense). Thus, evidence of Defendant's prior arrests for violence against Victim was admissible to rebut his claim of accident and to establish that he intended to shoot Victim, either to prevent her from testifying against him, or due to anger at her plan to break up with him, or simply during the course of one of their many arguments.

{31} We also hold that Defendant was not unfairly prejudiced by the introduction of the Artesia arrest, much less that the probative value of that evidence was outweighed by unfair prejudice under Rule 11-403. "Because a determination of unfair prejudice is fact sensitive, much leeway is given trial judges who must fairly weigh probative value against probable dangers." *Woodward*, 1995-NMSC-074, ¶ 19 (internal quotation marks and citation omitted). Defendant does not explain how this evidence would confuse or mislead the jury, and we are unable to identify any such danger. Defendant began informing the jury as early as the voir dire process that he had been accused of domestic violence. In fact, although not evidence, defense counsel questioned potential jurors for approximately twenty minutes about their experiences with, and feelings about, domestic violence. Defendant admitted on the stand that he and Victim argued frequently, that he was physically abusive to Victim "a couple times," and that he hit her on the night he was arrested in Lubbock. The arresting officer for the Lubbock incident was called—without objection—to give his account of the events and testified that Victim was acting nervous and scared when he arrived on scene, and that she had a scratch on her hand and bruising on her eyelids which appeared fresh. Ms. Edwards testified about seeing Victim shortly after the incident in Lubbock. Telephone calls made by Defendant to Victim from jail were played in which the two discussed whether neighbors saw him hitting her. Given this extensive evidence that Defendant abused Victim, it cannot be said that one additional instance of potential domestic violence against Victim was unfairly prejudicial or that any unfair prejudice outweighed its probative value.

CONCLUSION

{32} For the reasons set forth above, we affirm the district court's judgment and sentence.

{33} IT IS SO ORDERED.
EMIL J. KIEHNE, Judge

WE CONCUR:
M. MONICA ZAMORA, Judge
J. MILES HANISEE, Judge

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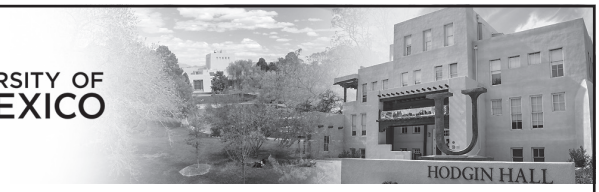

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Paralegal
Team, Talent, Truth, Tenacity, Triumph. These are our values. (Please read below concerning how to apply.) Mission: To work together with the attorneys as a team to provide clients with intelligent, compassionate and determined advocacy, with the goal of maximizing compensation for the harms caused by wrongful actions of others. To give clients and files the attention and organization needed to help bring resolution as effectively and quickly as possible. To make sure that, at the end of the case, the client is satisfied and knows Parnall Law has stood up for, fought for, and given voice and value to his or her harm. Success: Litigation experience (on plaintiff's side) preferred. Organized. Detail-oriented. Meticulous but not to the point of distraction. Independent / self-directed. Able to work on multiple projects. Proactive. Take initiative and ownership. Courage to be imperfect, and have humility. Willing / unafraid to collaborate. Willing to tackle the most unpleasant tasks first. Willing to help where needed. Willing to ask for help. Acknowledging what you don't know. Eager to learn. Integrate 5 values of our team: Teamwork; Tenacity; Truth; Talent; Triumph. Compelled to do outstanding work. Know your cases. Work ethic; producing Monday – Friday, 8 to 5. Barriers to success: Lack of fulfillment in role. Treating this as "just a job." Not enjoying people. Lack of empathy. Thin skinned to constructive criticism. Not admitting what you don't know. Guessing instead of asking. Inability to prioritize and multitask. Falling and staying behind. Not being time-effective. Unwillingness to adapt and train. Waiting to be told what to do. Overly reliant on instruction. If you want to be a part of a growing company with an inspired vision, a unique workplace environment and opportunities for professional growth and competitive compensation, you MUST apply online at www.HurtCallBert.com/jobs. Emailed applications will not be considered.

State Bar General Referral Program Administrative Intake Clerk
New Mexico State Bar Foundation seeks FT or PT administrative Intake Clerk. Successful applicant must have strong customer service focus, effective verbal and written communication skills as well as multitasking skills. Proficiency in Microsoft Word, Excel and Outlook is required. Prior work in legal field and bilingual a plus. Compensation $12-$14 plus benefits DOE. Email cover letter and resume to hr@nmbar.org, EOE.

P/T Legal Assistant
P/T Legal Assistant needed for busy 2 attorney ABQ civil/family firm (Heights). Must be professional, reliable self-starter. Phones, efiling, basic drafting in Word and timekeeping REQUIRED. Send resume and inquiries to abqlaw5218@gmail.com

Positions Wanted

Experienced Paralegal Seeks Employment In Santa Fe
Highly experienced (20+ years) and recommended paralegal wishes part-time or contract employment in Santa Fe only. For resume and references, please e-mail 'santafeparalegal@aol.com'.

Office Space

Downtown Office For Sale/Lease
Three (3) Blocks from the courthouse in revitalizing downtown near Mountain Road. Great visibility and exposure on 5th Street. Excellent office space boasting off street parking. Surrounded by law offices the property is a natural fit for the legal or other service professionals. Approximately 1230 square feet with two offices/bedrooms, one full bath, full kitchen, refinished hardwood floors, reception/living area with fireplace and conference/dining area. Property features CFA, 150sf basement and a single detached garage. Run your practice from here! Sale price is $265,000. Lease option and owner financing offered. Contact Joe Olmi @ 505-620-8864.

Offices For Lease
Offices for lease on Carlisle at Constitution. Great location for small business. Easy access to I-25/I-40. Rent includes utilities, janitorial service and other amenities. Available suites range in size from approximately 170 sq. ft. to 885 sq. ft. Call Joann at 505-363-8208.

2040 4th St., N.W.
Three large professional offices for rent at 4th and I-40, Albuquerque, NM. Lease includes on site tenant and client parking, two (2) conference rooms, security, kitchen and receptionist to greet clients and answer phone. Call or email Gerald Bischoff at 505-243-6721 and gbischof@dcbf.net.

Available To Rent
Available to rent out 1 furnished office, attached small conference room, and secretarial bay in spacious professional building just west of downtown. Phone and internet service included. Access to large volume copier/scanner and use of larger conference room. Walking distance to courts and downtown. $750/mo. Contact Grace at 505-435-9908 if interested.

620 Roma N.W.
The building is located a few blocks from Federal, State and Metropolitan courts. Monthly rent of $550.00 includes utilities (except phones), fax, copiers, internet access, front desk receptionist, and janitorial service. You'll have access to the law library, four conference rooms, a waiting area, off street parking. Several office spaces are available. Call 243-3751 for an appointment.

Office For Rent
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Miscellaneous

Search For Will
Decedent: George Powell Caldwell, Jr.; Place of Residence: Tijeras, Bernalillo County, NM; Date of Death: March 16, 2018; Age: 68; If located, please contact Travis Scott, Attorney, (505) 205-1610.

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