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Bar Bulletin

November 7, 2018 • Volume 57, No. 45

No Parking At Petra, Michael Rizzo Jr. by (see page 3)

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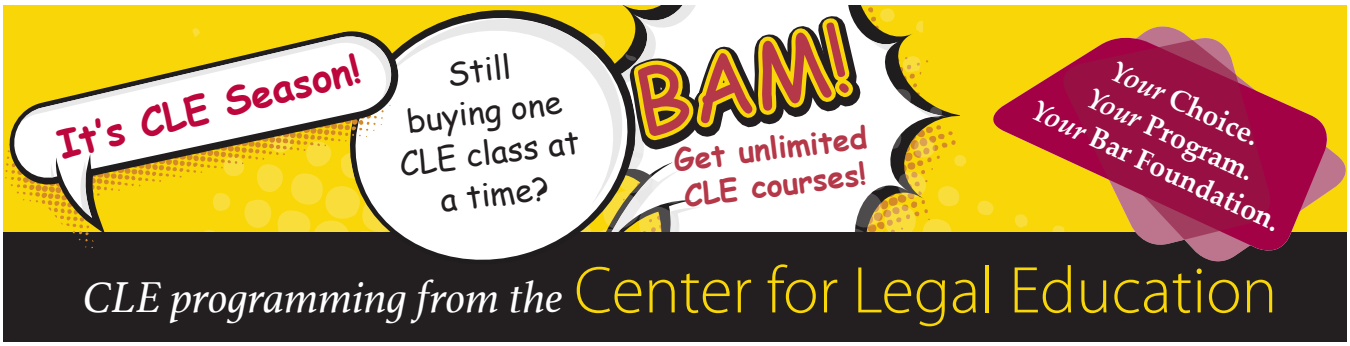

CLE programming from the Center for Legal Education

2018 Business Law Institute

Wednesday, Nov. 14, 2018
8:50 a.m.–4:30 p.m.
5.0 G | 1.0 EP
Live at the State Bar Center
Also available via Live Webcast!

$99 Non-member not seeking CLE credit
$251 Business Law Section members, government and legal services attorneys, Young Lawyers and Paralegal division members
$279 Standard Fee/Webcast Fee

2018 Probate Institute

Thursday, Nov. 15, 2018
8:30 a.m.–5:15 p.m.
6.5 G | 1.0 EP
Live at the State Bar Center
Also available via Live Webcast!

$99 Non-member not seeking CLE credit
$292 Real Property, Trust and Estate Section members, government and legal services attorneys, Young Lawyers Division and Paralegal Division members
$325 Standard/Webcast Fee

November 10 and 2 Opportunities

Just want to get those CLE credits and call it a year? Here are a variety combinations that can help get your 10.0 G and 2.0 EP all in one week!

10.0 G | 2.0 EP

Combo A

Live Credit In-Person CLEs—*For those who prefer to attend at the State Bar Center*

Nov. 8 **2018 Employment and Labor Law Institute (Replay)** 5.0 G, 1.0 EP
Nov. 9 **Speaking to Win: The Art of Effective Speaking for Lawyers (2018 Replay)** 5.0 G, 1.0 EP

Combo C

Live Credit In-Person CLEs—*For those who prefer to attend at the State Bar Center*

Nov. 27 **29th Annual Appellate Practice Institute (2018 Replay)** 5.5 G, 1.0 EP
Nov. 28 **Litigation and Argument Writing in the Smartphone Age (2017 Replay)** 5.0 G, 1.0 EP

Registration and payment for the programs must be received prior to the program date. A $20 late fee will be incurred when registering the day of the program. This fee does not apply to live webcast attendance.

Family Combo

Remote Access CLEs—*Get your credits at the office, home and via telephone*

Nov. 20 **Ethics of Beginning and Ending Client Relationships Teleseminar** 1.0 EP
Nov. 27 **2018 Family Law Institute: Hot Topics in Family Law Day 1 (Replay Webcast)** 5.0 G, 1.5 EP
Nov. 28 **2018 Family law Institute: Hot Topics in Family Law Day 2 (Replay Webcast)** 6.0 G

Writing and Ethics Combo

Live Credit In-Person CLEs—*For those who prefer to attend at the State Bar Center*

Nov. 27 **Zen Under Fire: Mindfulness for the Busy Trial Lawyer (2018 Replay)** 1.0 EP
Nov. 27 **Add a Little Fiction to Your Legal Writing (2017 Replay)** 2.0 G
Nov. 27 **Exit Row Ethics: What Rude Airline Travel Stories Teach About Attorney Ethics (2017 Replay)** 1.0 EP
Nov. 28 **Litigation and Argument Writing in the Smartphone Age (2017 Replay)** 5.0 G, 1.0 EP

New Mexico State Bar Foundation
Center for Legal Education

LinkedIn
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About Cover Image and Artist: Michael Rizzo Jr. works in several mediums. He started out in film photography and now works digitally and enjoys the freedom of Photoshop. He also creates serigraphs using some of those digital images and finds the rich colors of screen printing exciting to experiment with. For more information, contact Rizzo at rizzo_art@hotmail.com

Notices

Court News

New Mexico Supreme Court

Supreme Court Law Library

The Supreme Court Law Library is open to the legal community and public at large. The Library has a comprehensive legal research collection of print and online resources, and law librarians are available to assist. The Law Library is located in the Supreme Court Building at 237 Don Gaspar in Santa Fe.

Building Hours:
Mon.-Fri. 8: a.m.-5 p.m.
Reference & Circulation Hours:
Mon.-Fri. 8 a.m.-4:45 p.m.
For more information:
Call 505-827-4850
Visit https://lawlibrary.nmcourts.gov
Email libref@nmcourts.gov

Second Judicial District Court

Announcement of Vacancy

The Second Judicial District Court announces the retirement of the Hon. Judge Alan M. Malott effective Oct. 31. Inquiries regarding more specific details of this judicial vacancy should be directed to the chief judge or the administrator of the court. Dean Sergio Pareja of the UNM School of Law, designated by the New Mexico Constitution to chair the District Court Nominating Committee, solicits applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14 of the New Mexico Constitution. Applications, as well as information related to qualifications for the position, may be obtained from the Judicial Selection website: http://lawschool.unm.edu/judsel/application.php, or by email by contacting Beverly Akin at 505-277-4700. The deadline for applications has been set for 5 p.m., Nov. 14. Applications received after that date will not be considered. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. The Judicial Nominating Committee will meet at 9 a.m. on Nov. 27, at the Second Judicial District Court located at 400 Lomas Blvd NW, Albuquerque to evaluate the applicants for this position. The committee meeting is open to the public and members of the public who wish to be heard about any of the candidates will have an opportunity to be heard.

Professionalism Tip

With respect to the public and to other persons involved in the legal system:

I will strive to set a high standard of professional conduct for others to follow

Destruction of Tapes

In accordance with 1.17.230.502 NMAC, taped proceedings on domestic matters cases in the range of cases filed in 1972 through 1998 will be destroyed. To review a comprehensive list of case numbers and party names or attorneys who have cases with proceedings on tape and wish to have duplicates made should verify tape information with the Special Services Division 505-841-6717 from 8 a.m.-5 p.m. Mon.- Fri. The aforementioned tapes will be destroyed after Dec. 15.

Notice to Attorneys and Public

Effective Nov. 1, the Second Judicial District Court clerk's office will no longer accept cash bills larger than $20. The Second Judicial District Court will continue to accept cashier checks and money orders. The Second Judicial District Court does not accept personal checks, credit cards or debit cards at this time.

Fourth Judicial District Court

Mass Reassignment

On Oct. 4, pursuant to the authority of Article VI, Sections 35 and 36 of the Constitution of the State of New Mexico, Chief Justice Nakamura appointed Flora Gallegos to fill the vacant position in Division III of the Fourth Judicial District Court. Effective Oct. 26, all cases previously assigned to Division III shall be assigned to Judge Flora Gallegos. Pursuant to Rules 1-088.1, 5-106, and 10-162 NMRA, parties who have not yet exercised a peremptory excusal will have 10 business days from Nov. 21, to excuse Judge Flora Gallegos.

Bernalillo County Metropolitan Court

Announcement of Vacancy

A vacancy on the Bernalillo County Metropolitan Court will exist as of Jan. 1, 2019, due to the retirement of the Hon. Judge Sharon Walton, effective Dec. 31. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the administrator of the court. Sergio Pareja, chair of the Bernalillo County Metropolitan Court Judicial Nominating Commission, invites applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 28 of the New Mexico Constitution. Applications may be obtained from the Judicial Selection website: http://lawschool.unm.edu/judsel/application.php. The deadline for applications has been set for 5 p.m., Dec. 13. Applications received after that time will not be considered. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. The Bernalillo County Metropolitan Court Nominating Commission will meet beginning at 9 a.m. on Jan. 18, 2019, to interview applicants for the position at the Metropolitan Courthouse, located at 401 Lomas NE, Albuquerque. The Commission meeting is open to the public, and anyone who wishes to be heard about any of the candidates will have an opportunity to be heard.

State Bar News

2019 Budget Disclosure

Deadline to Challenge Expenditures

The State Bar of New Mexico Board of Bar Commissioners has completed its budgeting process and finalized the 2019 Budget Disclosure, pursuant to the State Bar Bylaws, Article VII, Section 7.2, Budget Procedures. The budget disclosure is available in its entirety on the State Bar website at www.nmbar.org on the financial information page under the "About Us" tab. The deadline for submitting a budget challenge is on or before noon, Nov. 30, and the form is provided on the last page of the disclosure document. The BBC will consider any challenges received by the deadline at its Dec. 13, 2018, meeting.

Appellate Practice Section

Luncheon with Justice Charles W. Daniels

Join the Appellate Practice Section for a brown bag luncheon at noon, Nov. 16, at the State Bar Center with guest Justice Charles W. Daniels of the New Mexico Supreme Court. Justice Daniels will reflect on his time on the bench as he prepares to retire in January 2019. The lunch is informal and is intended to create an opportunity for appellate practitioners to learn more about the work of

the Court. Those attending are encouraged to bring their own "brown bag" lunch. R.S.V.P. to Carmela Starace at cstarace@icloud.com.

Board of Editors

Seeking Applications for Open Positions

The Board of Editors of the State Bar of New Mexico will have open positions beginning Jan. 1, 2019. Both lawyer and non-lawyer positions are open. The Board of Editors meets at least four times a year (in person and by teleconference), reviewing articles submitted to the *Bar Bulletin* and the quarterly *New Mexico Lawyer*. This volunteer board reviews submissions for suitability, edits for legal content and works with authors as needed to develop topics or address other concerns. The Board's primary responsibility is for the *New Mexico Lawyer*, which is generally written by members of a State Bar committee, section or division about a specific area of the law. The State Bar president, with the approval of the Board of Bar Commissioners, appoints members of the Board of Editors, often on the recommendation of the current Board. Those interested in being considered for a two-year term should send a letter of interest and résumé to Evann Kleinschmidt at ekleinschmidt@nmbar.org. Apply by Nov. 30.

Business Law Section

2018 Business Lawyer of the Year

The Business Law Section has opened nominations for its annual Business Lawyer of the Year Award, to be presented on Nov. 14 after the Section's Business Law Institute CLE. Nominees should demonstrate professionalism and integrity, superior legal service, exemplary service to the Section or to business law in general, and service to the public. Self-nominations are welcome. A complete description of the award and selection criteria are available at www.nmbar.org/BusinessLaw. The deadline for nominations is Nov. 2. Send nominations to Breanna Henley at bhenley@nmbar.org. Recent recipients include Jay D. Rosenblum, David Buchholz, Leonard Sanchez, John Salazar and Dylan O'Reilly.

Board of Bar Commissioners

Client Protection Fund Commission

The Board of Bar Commissioners will make two appointments to the Client Protection Fund Commission for three-year terms. Active status attorneys in New Mexico who would like to serve on the Commission should send a letter of interest and brief résumé by Nov. 26 to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

New Mexico Access to Justice Commission

The Board of Bar Commissioners will make one appointment to the N.M. Access to Justice Commission for a three-year term. The Commission is dedicated to expanding and improving civil legal assistance by increasing pro bono and other support to indigent people in New Mexico. Active status attorneys in New Mexico who would like to serve on the Commission should send a letter of interest and brief resume by Nov. 26 to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

Cannabis Law Section

Board of Directors Meeting Open to Membership

On Aug. 9, the Board of Bar Commissioners approved a membership petition to form a State Bar of New Mexico Cannabis Law Section. The Section's Board of Directors will meet from noon-1 p.m., Nov. 30, at the State Bar Center and the general State Bar membership is invited to attend, share ideas and enroll in the Section. R.S.V.P. to Breanna Henley bhenley@nmbar.org. Visit www.nmbar.org/sections to join the Section.

Historical Committee

Rio Arriba Raid: Lonesome Dave and the Tiger of the North

Join the Historical Committee for its annual historical presentation from noon-1 p.m., Nov. 14, at the State Bar Center. Deputy State Historian Rob Martinez will present "Lonesome Dave and the Tiger of the North," an intriguing account of the professional and public relationship between then Governor of New Mexico Dave Cargo and land activist Reies Lopez Tijerina who went on to defend himself in trial. At the heart of the dynamic interaction was the dramatic 1967 Courthouse Raid at Tierra Amarilla. Those nostalgic, curious and with personal memories are encouraged to attend. Lunch will be provided. R.S.VP. to Breanna Henley at bhenley@nmbar.org.

New Mexico Judges and Lawyers Assistance Program

Attorney Support Groups

- Nov. 19, 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#.
- Dec. 3, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (The group normally meets the first Monday of the month.)
- Dec. 10, 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#.

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

JLAP Committee End of the Year Celebration

Members of the Judges and Lawyers Assistance Program committee are invited to attend the annual end of year celebration scheduled from 6–9 p.m., on Dec. 8, at Mykonos Café and Taverna. Committee members and one guest each are welcome to attend. R.S.V.P. to Erica at ecandelaria@nmbar.org or 505-797-6093 no later than Nov. 21. JLAP looks forward to sharing an evening of good food, good conversation and appreciation for volunteers' time and energy to the New Mexico Judges and Lawyers Assistance Program.

Natural Resources, Energy and Environmental Law Section

Nominations Open for 2018 Lawyer of the Year Award

The NREEL Section will recognize an NREEL Lawyer of the Year during its annual meeting of membership, which will be held in conjunction with the Section's CLE on Dec. 21. The award will recognize an attorney who, within his or her practice and location, is the model of a New Mexico natural resources, energy or environmental lawyer. More detailed criteria and nomination instructions are available at www.nmbar.org/NREEL. Nominations are due by Nov. 16 to Breanna Henley, bhenley@nmbar.org.

Senior Lawyers Division

Attorney Memorial Scholarship Reception

Three UNM School of Law third-year students will be awarded a $2,500 scholarship in memory of New Mexico attorneys who have passed away over the last year. The deceased attorneys and their families will be recognized during the presentation. The reception will be held from 5:30-7:30 p.m., Nov. 13, at the State Bar Center. All State Bar members, UNM School of Law faculty, staff and students and family and colleagues of the deceased are welcome to attend. A list of attorneys being honored can be found at www.nmbar.org/SLD under "Attorney Memorial Scholarship." Contact Breanna Henley at bhenley@nmbar.org to notify the SLD of a member's passing and to provide current contact information for surviving family members and colleagues.

Annual Meeting of Membership

The Senior Lawyers Division invites Division members to its annual meeting of membership to be held at 4:30 p.m., Nov. 13, at the State Bar Center. Members of the SLD include members of the State Bar of New Mexico in good standing who are 55 years of age or older and who have practiced law for twenty-five years or more. During the annual meeting of membership, members will have the opportunity to meet with members of the SLD Board of Directors and learn more about the activities of the Division. The meeting will last an hour and attendees are welcome to stay for the Attorney Memorial Scholarship Reception following the annual meeting.

Solo and Small Firm Section

Fall Speaker Features Robert Huelskamp

Robert Huelskamp will share his insights from almost 40 years working with nuclear weaponry, non-proliferation and counter terrorism in "Russia, Iran and North Korea: What Could Possibly Go Wrong?" from noon-1 p.m. on Nov. 20 at the State Bar Center in Albuquerque. The presentation is open to all State Bar members and lunch will be provided free by the section to those who R.S.V.P. to Breanna Henley at bhenley@nmbar.org.

UNM School of Law

Law Library

Fall 2018 Hours

Mon., Aug. 20– Sat., Dec. 15

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.
Saturday & Sunday	No reference

The UNM School of Law Natural Resources and Environmental Law Program and the Utton Center

Colorado's Experience Using State Regulations to Cut Air Pollution from the Oil and Gas Sector

The UNM School of Law Natural Resources and Environmental Law Program and the Utton Center in cooperation with the Natural Resources, Energy and Environment Section of the N.M. Bar will host: A CLE Lecture and Panel Discussion "Colorado's Experience Using State Regulations to Cut Air Pollution from the Oil and Gas Sector" at 1:30–3:45 p.m., Nov 16, at Auditorium of UNM Continuing Ed (North Building), 1634 University Blvd. NE, Albuquerque. The CLE has been approved for 2.0 G, MCLE credit. There is no fee and no registration required. Free parking is available at UNM Continuing Ed parking lot behind the building at 1634 University Blvd. NE, Albuquerque. For more information, call Laura at 505-277-3253.

Other Bars

New Mexico Black Lawyers Association

Cyber Security, Social Media and Cell Phones: How to Use Technology in Business and Practice

The New Mexico Black Lawyers Association invites members of the legal community to attend its annual CLE, "Cyber Security, Social Media and Cell Phones: How to Use Technology in Business and Practice." (5.0 G, 1.0 EP pending) from 8 a.m.-4:30 p.m. on Nov. 16, at the State Bar of New Mexico, 5121 Masthead NE, Albuquerque. Registration is $199 and the deadline to request a refund is Nov. 9. For more information, or to register online, visit www.newmexicoblacklawyersassociation.org.

New Mexico Women's Bar Association

Nominations for New Mexico Women's Bar Association Board of Directors

The New Mexico Women's Bar Association Board of Directors has openings on its board for two terms beginning January 2019. Elections for board members will be held on Nov. 16. The Board invites interested members to apply by sending a short letter of interest and a resume to nmwba1990@gmail.com. Board members are expected to attend an overnight retreat Jan. 26-27, 2019, to attend bi-monthly meetings, in person or by phone, to actively participate on one or more committees, and to support events sponsored by the Women's Bar Association. The New Mexico Women's Bar does not discriminate on the basis of sex or gender and encourages all licensed attorneys to become members and apply to be on the board. For more information about the Women's Bar Association, or to become a member, visit www.nmwba.org.

Other News

Gene Franchini High School Mock Trial Competition

Judges Needed for the Qualifier Rounds

The Gene Franchini New Mexico High School Mock Trial Competition needs judges for the qualifier rounds. The qualifier competition will be held Feb. 8-9, 2019. It will be hosted by the Bernalillo County Metropolitan Court. Mock trial is an innovative, hands-on experience in the law for high school students of all ages and abilities. Sign up at http://www.civicvalues.org/index.php by Jan. 20, 2019. If you have any questions, contact Kristen at the Center for Civic Values at 764-9417 or Kristen@civicvalues.org.

Board of Bar Commissioners Election 2018

Voting begins online Nov. 9.

Voting in the 2018 election for the State Bar of New Mexico Board of Bar Commissioners will begin Nov. 9 and close at noon on Nov. 30. Four candidates submitted nomination petitions for the three open positions in the **First Bar Commissioner District (Bernalillo County)**, so there will be an election in that district. Voting will be conducted electronically. For voting procedures, see page 9.

With regard to the remaining positions, one nomination petition was submitted for the open position in the **Second Bar Commissioner District (Cibola, McKinley, San Juan and Valencia counties)** from Joseph F. Sawyer, so he will be elected by acclamation; one nomination petition was submitted for the open position in the **Third Bar Commissioner District (Los Alamos, Rio Arriba, Sandoval and Santa Fe counties)** from Constance G. Tatham, so she will be elected by acclamation; and no nomination petitions were submitted for the open position in the **Sixth Bar Commissioner District**, so the Board will appoint someone from that district to fill the vacancy at their February meeting.

First Bar Commissioner District Candidates

Hon. Kevin L. Fitzwater (ret.)

Biography

Hon. Kevin L. Fitzwater (ret.) is a retired Metropolitan Court judge. On the bench for 18 years hearing criminal and civil cases, he also served as Chief Judge. He founded the first Mental Health Court in New Mexico. Previously, he served as a deputy district attorney in charge of the Metropolitan Court division, handling a broad range of cases from misdemeanors to violent crimes. Fitzwater came to the DA's office after leaving active military service. He served in the United States Marine Corps as a combat arms officer, having graduated from UNM in 1981, and was one of four selected to attend law school, coming home to attend UNM law school. He returned to active duty as a criminal defense attorney, and in appellate law. He retired after 30 years as a colonel. Since 2015, he has served as a member of the State Bar Board of Bar Commissioners.

1. Give your perspective on any important issues that you believe the profession and the State Bar should be addressing.

The State Bar should be addressing issues such as professionalism, technology and community service. There should be a greater interest in reaching rural areas and providing services to smaller communities. Overseeing the progress of technology in the profession is an on-going challenge, and the State Bar must take a leadership role to ensure all members of the Bar are served well. The relationship with the different sections must be one of supporting and advising to maintain the mission and goals each are committed to achieving. Also, the State Bar must be a vehicle for uniting the profession and a model of serving it.

2. How well do you think the State Bar is fulfilling its mission and objectives?

The State Bar is doing a good job of addressing the needs of the profession. In areas such as pro bono work, energizing young lawyers and being at the forefront of aiding the bar in adapting to changes and challenges, the State Bar is doing an admirable job. There is always room for improvement, and areas such as e-filing, electronic access to court documents, equal access to justice in all areas of the state and mentoring young lawyers remain an on-going challenge. Having served as one of your commissioners for the past three years, I know how hard the State Bar staff and leadership have worked on these objectives, and I have confidence in the innovation they have shown in tackling these issues.

3. What has been your involvement in the State Bar and/or other law-related organizations, such as national, local and voluntary bars?

I have served on the State Bar Board of Bar Commissioners since 2015. I have had memberships in several law sections of the bar and memberships in such diverse organizations such as military and related international bar associations. As a judge, I served on the Judges Leadership Initiative of the Counsel of State Governments and mentoring for Mental Health Courts across the country.

BBC election information is continued on the next page.

Clara Moran

Biography

I am currently the Deputy Attorney General at the New Mexico Office of the Attorney General, overseeing the Special Prosecutions Division and the Medicaid Fraud Control Division. Currently, I oversee the prosecution of public corruption cases, as well as several cases involving abuse of vulnerable populations. I am a UNM School of Law graduate, Class of 2005, and have been exclusively a prosecutor since passing the bar exam. Previously, I worked as a district attorney at the 2nd Judicial District Attorney's Office, prosecuting child abuse cases, gang crimes, and domestic violence. I have two children, and my husband is also a practicing attorney.

1. Give your perspective on any important issues that you believe the profession and the State Bar should be addressing.

An important issue to me is providing legal services to victims of crime. While victims of crime have statutory rights, very few of these victims exercise those rights. In my experience, many of these victims simply are not aware of their rights, and prosecutors are limited in how they can advocate on their behalf. Our profession has done an outstanding job in providing access to resources for pro se litigants in the context of civil matters. I would like to see our profession expand this access to include survivors of crime, so that they can better understand and exercise their rights to restitution, to participate, and to be informed.

2. How well do you think the State Bar is fulfilling its mission and objectives?

As a current Bar Commissioner, I have seen firsthand how active and devoted my colleagues on the Commission are in responding to issues that impact our profession. For instance, the Commission has been active in assisting the judiciary in making it easier for lawyers and the public to access court records and pleadings via the SOPA application. Additionally, the Commission has expanded its outreach to the public, providing opportunities for pro se litigants to receive advice and direction. The Commission has embraced technology, such that more lawyers are now satisfying their CLE credits through webcasts over the internet. I feel that the State Bar is an asset to our profession.

3. What has been your involvement in the State Bar and/or other law-related organizations, such as national, local and voluntary bars?

I am a current Bar Commissioner, having been elected in 2015. In this capacity, I serve on the SOPA Committee, the Rules Committee, the Awards Committee, and as the State Bar liaison to the Rules of Criminal Procedure Committee. Prior to this, I was a member and Vice Chair for the Young Lawyer's Division and chair of the Prosecutors Section of the State Bar. I have served on a number of Judicial Nominating Committees, and I have been a member of the Supreme Court's Committee on Uniform Jury Instructions (Criminal).

Ben Sherman

Biography

Ben Sherman is the founder of Ben Sherman Law, where he enjoys representing injured individuals in workers' compensation cases. Prior to starting his own firm in 2012, he served the public as a prosecutor with the 2nd Judicial District Attorney's Office and as an assistant city attorney with the City of Albuquerque. Sherman is a proud 2008 graduate of the University of New Mexico School of Law and has been fortunate to practice law in New Mexico for the past ten years. A fluent Spanish-speaker, he enjoys representing people from all communities and appreciates New Mexico's unique diversity and rich traditions. Sherman is a past chair of the State Bar of New Mexico Young Lawyers Division and currently serves on the University of New Mexico School of Law Alumni Board. In his free time, he enjoys volunteering, playing soccer, kayaking, hiking, music, reading, and spending time with family and friends.

1. Give your perspective on any important issues that you believe the profession and the State Bar should be addressing.

The State Bar will soon decide whether it will continue the Legal Specialization Program after it is ended by the New Mexico Supreme Court. It is crucial that this program continues, not only for attorneys currently recognized as specialists, but for attorneys wishing to be recognized in the future. The public also benefits from this program, as it serves to improve the quality of legal services available. Despite recent improvements, judicial salaries in our state remain too low. The salaries of New Mexico's judges continue to lag behind the rest of the country. In order to attract and maintain quality decision-makers in our profession, it is imperative that we strive and advocate for fair judicial compensation. Finally, the State Bar needs to improve its website!

2. How well do you think the State Bar is fulfilling its mission and objectives?

The State Bar has been criticized for collecting members' dues and not providing any obvious benefit besides the weekly *Bar Bulletin*. Many attorneys do not realize the many programs managed by the State Bar and the number of services available to our members. I believe the State Bar has been successfully meeting the new and ongoing challenges that come with managing IOLTA, MCLE, the Client Protection Fund, and the Bridge-the-Gap Mentorship Program. At the same time, the

State Bar has continued to offer member services such as free legal research (Fastcase), the *Bar Bulletin*, the N.M. Lawyers and Judges Assistance Program, and the member directory. However, it is crucial that we continue to listen to our members and stay accountable to them and their needs.

3. What has been your involvement in the State Bar and/or other law-related organizations, such as national, local and voluntary bars?

I have been privileged to serve the New Mexico legal community as a Commissioner on the Board of Bar Commissioners since 2015. Prior to being elected to the BBC, I served on the Board of the State Bar of New Mexico Young Lawyers Division (YLD) from 2010-2015, serving as chair in 2014. During my time on the YLD Board, I helped implement a successful mentorship program at the University of New Mexico School of Law, organized mock interviews for law students, volunteered for Wills for Heroes, participated in Constitution Day, and created networking events for young attorneys. I currently sit on the Alumni Board of the University of New Mexico School of Law and I serve on the Board of the NM Hispanic Bar Association.

Lucy Sinkular

Biography

Lucy Sinkular practices family law at Atkinson & Kelsey, P.A. She earned her B.A. in English from the University of Nebraska and her J.D. from the University of Kansas. Lucy was admitted to the New Mexico Bar in 1994, working in insurance defense then for Atkinson & Kelsey, P.A. for two years during the 1990s. Lucy moved with her husband Scott to his military assignments around the world while maintaining a solo-practice in civil litigation and family law. The Sinkular family includes their daughter attending Colorado State University and son at New Mexico State University, as well as two Labs Paddy and Marzen, and Queenie the cat. Lucy is an avid runner, biker and hiker. Volunteer work has long been a staple of Lucy's life, including participation with the Boy Scouts, Girl Scouts, PTAs, military service organizations and St. Mark's Episcopal Church, where she serves on the finance committee.

1. Give your perspective on any important issues that you believe the profession and the State Bar should be addressing.

The needs of solo and small firm attorneys are an important issue: solo practitioners were the largest group of respondents (26%) in the 2017 Economics of Law Practice in New Mexico study. Through outreach, we should ensure all members know the range of benefits the State Bar offers—resources such as Fastcase research, continuing legal education and networking through section and committee membership. We should work to increase opportunities for collaboration and mentorship between experienced and new attorneys. Stronger and more successful solo and small firm practitioners will create the ripple effect of increased access to legal services. In turn, the State Bar needs to elevate the level of civility and competence among all our members.

2. How well do you think the State Bar is fulfilling its mission and objectives?

I think the State Bar does a very good job of fulfilling its mission. The Bylaws list nine separate purposes for our organization. These varied purposes relate to individual attorney members, members of the public and to the State Bar's participation in the legislative, executive and judicial processes. New Mexico's bar is a vibrant and healthy entity with broad ranging and diverse participation. I pledge to continue these efforts. The State Bar should explore ways to increase participation in Bar activities across the state and across practice areas. The more people who work to support the State Bar, the more effective we will be.

3. What has been your involvement in the State Bar and/or other law-related organizations, such as national, local and voluntary bars?

I was admitted to practice in New Mexico in 1994. My bar activities and law-related involvement include:

- N.M. Women's Bar Association, Board of Directors member and Compliance Officer;
- N.M. State Bar Family Law Section, Board of Directors member;
- Military Spouses J.D. Network (national organization that supports military spouses in the legal profession by advocating for licensing accommodations for military spouse attorneys), member;
- American Bar Association, ABA Family Law Section Custody Committee, member.

Electronic Voting Procedures

A link to the electronic ballot and instructions will be emailed on Nov. 9 to all active members in the First Bar Commissioner District using email addresses on file with the State Bar. Active status members who reside outside the State of New Mexico shall vote in the district where the State Bar office is located. To provide an email address if one is not currently on file or to request a mailed ballot, contact Pam Zimmer at pzimmer@nmbar.org.

The election will close at noon on Nov. 30, at which time the election results will be certified.

Legal Education

November

6 **Releasing Employees & Drafting Separation Agreements**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

8 **2018 Employment and Labor Law Institute**
5.0 G, 1.0 EP
Webcast/Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

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

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

8 **What Starbucks Teaches Us about Attracting Clients the Ethical Way (2018 Annual Meeting)**
1.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

9 **An Overview of Music Copyright Law Using the Beatles as a Case Study**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

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

9 **Legal Malpractice Potpourri (2018 Annual Meeting)**
1.0 EP
Webcast/Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

9 **Speaking to Win: The Art of Effective Speaking for Lawyers (2018)**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

9 **The Cyborgs are Coming! The Cyborgs are Coming! The Latest Ethical Concerns with the Latest Technology Disruptions (2017)**
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

9 **Ethics and Changing Law Firm Affiliation**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **The Defender's Role in Trial Advocacy**
5.0 G,1.0 EP
Live Seminar, Roswell
New Mexico Criminal Defense Lawyers Association
www.nmcdla.org

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

9 **Mindfulness Based Stress Reduction for Lawyers**
2.0 EP
Live Seminar, Roswell
New Mexico Defense Lawyers Association
nmdefense@nmdla.org

13 **Estate Planning for MDs, JDs, CPAs & Other Professionals, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

14 **Estate Planning for MDs, JDs, CPAs & Other Professionals, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

14 **2018 Business Law Institute**
5.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

15 **2018 Probate Institute**
6.5 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

20 **Ethics of Beginning and Ending Client Relationships**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

21 **Discover Hidden and Undocumented Google Search Secrets**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

26 **Secured Transactions Practice: Security Agreements to Foreclosures, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **Secured Transactions Practice: Security Agreements to Foreclosures, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **2018 Family Law Institute: Hot Topics in Family Law Day 1**
5.0 G, 1.5 EP
Webcast/Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

27 **29th Annual Appellate Practice Institute (2018)**
5.5 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

27 **Zen Under Fire: Mindfulness for the Busy Trial Lawyer (2018 Annual Meeting)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

27 **Add a Little Fiction to Your Legal Writing (2017)**
2.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

27 **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

28 **Ethics and Dishonest Clients**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

28 **2018 Family Law Institute: Hot Topics in Family Law Day 2**
6.0 G
Webcast/Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **Litigation and Argument Writing in the Smartphone Age (2017)**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **2018 Animal Law Institute: Updates, Causes of Action, and Litigation**
6.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

30 **Law Practice Potpourri for Lawyers and Paralegals**
5.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

December

5 **Business Divorce, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

5 **2018 Real Property Institute**
5.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

6 **Business Divorce, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

6 **Attorney Orientation and the Ethics of Pro Bono**
2.0 EP
Live Seminar, Albuquerque
New Mexico Legal Aid
505-814-6719

6 **Intellectual Property in Tech Transfer, Estate and Business Opportunities**
5.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

7 **2018 Ethics and Social Media Update**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

10 **A Practical Approach to Indian Law: Legal Writing, 2018 Update and the Ethics of Practicing Indian Law**
2.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

10 **Cutting Edge Ethics Threat: The Dangers with Frictionless Computing**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

11 **Guarantees in Real Estate Transactions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

11 **2018 Ethicspalooza (Full Day)**
6.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

12 **Employee v. Independent Contractor: Tax and Employment Law Considerations**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

12 **Advanced Mediation Skills Workshop**
3.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

12 **Criminal Rules Hot Topics**
2.5 G, 0.5 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

13 **Drafting Client Letters in Trust and Estate Planning**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

14 **Ethics and Virtual Law Offices**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

14 **Trial Know-How! Presentation and Expertise**
5.2 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

17 **Trust and Estate Planning for Pets**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

18 **Rights of First Offer, First Refusal in Real Estate**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

19 **Ethical Puzzles: The Wrongful Death Act, Negligent Settlement Claims, and the Search for the Silver Bullets**
3.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **Gain the Edge! Negotiation Strategies for Lawyers**
5.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

21 **Ethics, Satisfied Clients & Successful Representations**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

21 **Recent Developments in New Mexico Natural Resource Law**
5.2 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

27 **Find it Fast and Free (and Ethically) with Google, Fastcase 7, and Social Media Sites**
4.0 G, 2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **How to Practice Series: Demystifying Civil Litigation Pt 1 (2018)**
6.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **Fall Elder Law Institute: Navigating Changes to the Adult Guardianship and Conservatorship Statutes and Rules (2018)**
5.5 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **Immigration Law: U-Visa Training (2018)**
1.0 G, 0.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **Immigration Law: Assisting Human Trafficking Survivors (2018)**
1.0 G, 0.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

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

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 October 26, 2018

PUBLISHED OPINIONS

A-1-CA-35424	State v. E Ruffin	Affirm/Reverse/Remand	10/22/2018
A-1-CA-35621	NMMI v. NMMI Alumni Assoc	Affirm	10/22/2018
A-1-CA-36336	State v. A Verret	Reverse/Remand	10/23/2018
A-1-CA-36906	State v. Bristol-Myers Squibb	Affirm	10/24/2018
A-1-CA-35203	C Lujan v. Acequia Mesa Del	Reverse/Remand	10/25/2018

UNPUBLISHED OPINIONS

A-1-CA-35494	B Peavy v. Skilled Healthcare	Affirm	10/22/2018
A-1-CA-37290	A Archuleta v. Taos County Board	Dismiss	10/22/2018
A-1-CA-37091	N Urias v. K Nieto	Reverse/Remand	10/23/2018
A-1-CA-35123	State v. E. Jackson	Affirm	10/24/2018
A-1-CA-35626	State v. C Pennington	Affirm	10/24/2018
A-1-CA-36917	State v. C Banghart-Portillo	Affirm/Reverse	10/24/2018
A-1-CA-35515	State v. D Wilson	Affirm	10/25/2018

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

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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

CLERK'S CERTIFICATE OF ADMISSION

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CLERK'S CERTIFICATE OF WITHDRAWAL

Effective October 19, 2018:
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CLERK'S CERTIFICATE OF LIMITED ADMISSION

On October 15, 2018:
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CLERK'S CERTIFICATE OF NAME AND ADDRESS CHANGE

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CLERK'S CERTIFICATE OF NAME AND ADDRESS CHANGE

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The Supreme Court of New Mexico Announces 2018 Year-End Rule Amendments

Under Rule 23-106.1 NMRA, the Supreme Court adopts most rule changes once per year in the fall. Because of the large number of year-end rule amendments for 2018, the actual text of the rule amendments will not be published in the Bar Bulletin due to space constraints. Instead, what follows is a summary of the new rule amendments that the Court recently approved, which go into effect on December 31, 2018, unless otherwise noted in the history note at the end of each approved rule. Please note that the summary below does not include amendments approved by the Court out-of-cycle this year before November 1. The full text of the new rule amendments can be viewed on the New Mexico Compilation Commission's website at **www.nmcompcomm.us/nmrules/NMRuleSets.aspx**

Children's Court Rules and Forms

Identification of Parties When Service by Publication is Permitted
[Rule 10-103 NMRA and Form 10-515 NMRA]

The Supreme Court has approved the recommendation of the Children's Court Rules and Forms Committee to amend Rule 10-103 NMRA and Form 10-515 NMRA. The amendments protect confidential identification information when service by publication is permitted in an abuse and neglect proceeding. The amended rule and form clarify that, except for the respondent being served by publication, all parties must be identified only by the initials of their first and last names.

Probation Order and Agreement Form for Delinquency Proceedings
[Rule 10-261 NMRA and New Form 10-719 NMRA]

The Supreme Court has approved the recommendation of the Children's Court Rules and Forms Committee to amend Rule 10-261 NMRA and to approve new Form 10-719 NMRA. The amended rule and new form provide a uniform probation order and agreement that must be used in delinquency proceedings throughout the state.

Tribal Representative Access to Abuse and Neglect Proceedings
[Rule 10-324 NMRA]

The Supreme Court has approved the recommendation of the Children's Court Rules and Forms Committee to amend Rule 10-324 NMRA. The amended rule clarifies that a representative from an Indian Child's tribe shall be permitted to attend all hearings in an abuse and neglect proceeding in which the Indian Child Welfare Act may apply. The amended committee commentary further explains that a tribe should not be required to formally intervene in the proceeding unless the tribe seeks affirmative relief from the court.

Tribal Court Order Form for Involuntary Commitment
[New Form 10-605 NMRA]

The Supreme Court has approved the recommendation of the Ad Hoc Committee on Rules for Mental Health Proceedings to approve new Form 10-605 NMRA. The new form provides a model order that may be used by tribal courts to order involuntary placement for treatment or habilitation of a child not to exceed sixty (60) days under NMSA 1978, Sections 32A-6A-22 and 32A-6A-29.

Civil Forms

Tribal Court Order Form for Involuntary Commitments to State Facilities
[New Form 4-950 NMRA]

The Supreme Court has approved the recommendation of the Ad Hoc Committee on Rules for Mental Health Proceedings to approve new Form 4-950 NMRA. The new form provides a model order that may be used by tribal courts to order involuntary commitment of an adult for mental health evaluation and treatment not to exceed thirty (30) days under NMSA 1978, Section 43-1-11.

Probate Court Rules and Forms

Rules and Forms to Govern Procedures in Probate Courts
[New Rule Set 1B, Rules 1B-101 to 1B-701 NMRA; New and Amended and Recompiled
Rule Set 4B, Forms 4B-101 to 4B-1001 NMRA; and Withdrawn Forms 4B-302, 4B-503, and 4B-504 NMRA]

The Supreme Court has approved a recommendation from the Probate Court Rules Committee to adopt a comprehensive set of new rules to govern proceedings in probate courts, and to adopt new forms and recompile and amend existing forms for use in the probate courts. The new rules and the new, amended, and recompiled forms provide guidance and uniformity for judges and practitioners in New Mexico's probate courts regarding how to take a probate matter from beginning to end in a probate court, including circumstances to consider and steps to take when a probate court no longer has jurisdiction over a probate matter that must be transferred to the district court.

Rules and Forms Related to the Privacy of Juror Questionnaires

[Rules 1-047, 2-603, 3-603, 5-606, 6-605, and 7-605 NMRA; and New Forms 4-602D and 9-513D NMRA]

The Supreme Court has approved amendments to Rules 1-047, 2-603, 3-603, 5-606, 6-605, and 7-605 NMRA, and new Forms 4-602D and 9-513D, to promote the protection of juror privacy through rule and form amendments that provide for the confidentiality of juror qualification and questionnaire forms and that set deadlines for their destruction. The amended rules and new forms require all attorneys and parties in possession of juror qualification and questionnaire forms to certify under oath, on or before the destruction deadline, that they have complied with the confidentiality provisions and destruction deadlines set forth in the rules. The rules also provide deadlines and procedures for the destruction of juror qualification and questionnaire forms in the possession of the courts.

Rules for Minimum Continuing Legal Education

Minimum Continuing Legal Education Board
[Rule 18-102 NMRA]

The Supreme Court has approved amendments to Rule 18-102 NMRA to codify the transfer of minimum continuing legal education board functions to the Board of Bar Commissioners that took place earlier this year. The Board of Bar Commissioners may carry out the functions of the MCLE Board itself or may appoint active attorneys licensed in New Mexico from among its membership to serve in that capacity.

Rules Governing Admission to the Bar

Public Access to Bar Admission Proceedings Filed in Supreme Court
[Rule 15-401 NMRA]

The Supreme Court has approved a recommendation from the Board of Bar Examiners to amend Rule 15-401(D) NMRA to provide that bar admission proceedings filed in the Supreme Court are a matter of public record and may only be sealed by order of the Supreme Court on motion of a party to the proceeding or the Court's own motion in accordance with applicable procedures and standards in Rule 12-314 NMRA. The amendments apply to appeals from decisions of the Board of Bar Examiners, motions for conditional admission, and proceedings filed in the Supreme Court to suspend or revoke an admission previously granted by the Court. The amendments do not change existing provisions in the rule that provide for the confidentiality of records maintained by the Board of Bar Examiners regarding applications for admission and reinstatement to the bar.

Rules Governing Discipline

Reinstatement Procedure for Attorney Suspended for Delinquent Child Support Payments
[Rule 17-203 NMRA]

The Supreme Court has approved a recommendation from the Disciplinary Board to amend Rule 17-203 NMRA to address reinstatement procedures for attorneys who are suspended from the practice of law because of delinquent child support payments. The amendments are intended to ensure that attorneys suspended for six (6) months or longer demonstrate fitness to return to the practice of law, in addition to compliance with child support obligations, as conditions to reinstatement.

Formal Diversion Program for Minor Ethics Violations
[Rule 17-206 NMRA]

The Supreme Court has approved a recommendation from the Disciplinary Board to amend Rule 17-206 NMRA to create a formal diversion program for minor violations of the Rules of Professional Conduct. The diversion program focuses on "education to compliance" initiatives that allow an attorney to improve the attorney's practice through meaningful remedial measures designed and monitored by the Office of Disciplinary Counsel.

Reinstatement Following Reciprocal Discipline
[Rule 17-210 NMRA]

The Supreme Court has approved a recommendation from the Disciplinary Board to amend Rule 17-210 NMRA to clarify the procedure that an attorney must follow when seeking reinstatement after the imposition of reciprocal discipline.

Reinstatement to Non-Probationary Status [Rule 17-214 NMRA]

The Supreme Court has approved a recommendation from the Disciplinary Board to amend Rule 17-214 NMRA to clarify the procedure that an attorney who is placed on deferred suspension or probation must follow when seeking reinstatement to non-probationary status.

Deadline for Disciplinary Decisions
[Rules 17-313 and 17-315 NMRA]

The Supreme Court has approved a recommendation from the Disciplinary Board to amend Rules 17-313 and 17-315 NMRA to confirm that the deadline for the hearing committee to submit findings of fact and conclusions of law, and the deadline for the Disciplinary Board or board panel to render a decision following a hearing, are non-jurisdictional deadlines.

Rules of Appellate Procedure

Calculating Notice of Appeal Filing Deadlines
[Rules 12-201 and 12-601 NMRA]

The Supreme Court has approved a recommendation from the Appellate Rules Committee to amend Rules 12-201 and 12-601 NMRA to clarify that the three (3)-day period set forth in Rule 12-308(B) NMRA applies to certain kinds of service other than mailing and is not added in calculating the time to file a notice of appeal under Rules 12-201 and 12-601.

Consolidated Briefing
[Rule 12-318 NMRA]

The Supreme Court has approved a recommendation from the Appellate Rules Committee to amend Rule 12-318 NMRA to clarify that consolidated answer briefs and consolidated reply briefs are permitted and encouraged when responding to multiple briefs in chief or multiple answer briefs filed by multiple parties. In addition to the amendments recommended by the committee, the Court also added a new Paragraph J to Rule 12-318, which states that briefs that fail to comply with the rule may be returned for correction or rejected by the appellate court, in addition to other sanctions provided in Rule 12-312(D) NMRA.

Attachments to Rule 12-505 NMRA Petitions for Writs of Certiorari
[Rule 12-505 NMRA]

The Supreme Court has approved a recommendation from the Appellate Rules Committee to amend Rule 12-505 NMRA to encourage the attachment of documentary matters of record, in addition to the attachments already required under the rule, to assist the Court of Appeals in exercising its discretion under the rule.

Rules of Legal Specialization

Withdrawal of Rules Governing Legal Specialization
[Rules 19-101 to 19-312 NMRA]

The Supreme Court has approved the withdrawal of the Rules of Legal Specialization to implement the Court's decision to discontinue the legal specialization program that was operated

by the Board of Legal Specialization, which will be dissolved. The Court has approved a related amendment to the Rules of Professional Conduct (see below) to permit the State Bar of New Mexico to develop its own legal specialization program and to assume the oversight of New Mexico attorneys currently holding legal specialization certifications issued under the now withdrawn Rules of Legal Specialization until those certifications expire or a new certification program is offered by the State Bar.

Rules of Professional Conduct

Intervention Requirements When Lawyer is Severely Impaired
[Rule 16-501 NMRA]

The Supreme Court has approved a recommendation from the Code of Professional Conduct Committee to amend Rule 16-501 NMRA to require lawyers with managerial or direct supervisory authority to take action when there is a concern that a lawyer under their managerial or supervisory authority is exhibiting signs of severe impairment of the lawyer's cognitive function. Intervention measures could include speaking directly with the lawyer to encourage him or her to seek assistance or making confidential reports to the New Mexico Judges and Lawyers Assistance Program or Office of Disciplinary Counsel.

Legal Specialization Programs Operated by the State Bar of New Mexico
[Rule 16-704 NMRA]

The Supreme Court has approved an amendment to Rule 16-704 NMRA that permits attorneys to hold themselves out as legal specialists when certified as a specialist by the State Bar of New Mexico. The amendment recognizes the authority of the State Bar, in its discretion, to develop a new legal specialization program for attorneys licensed in New Mexico now that the Rules of Legal Specialization (see above) will be withdrawn. The Supreme Court order approving the rule changes regarding legal specialization in New Mexico also permits the State Bar to assume the oversight of attorneys currently holding legal specialization certifications until such time that those certifications expire by their own terms or the State Bar offers a new legal specialization program for such attorneys, whichever comes first, provided that such attorneys meet all requirements established by the State Bar for continued certification as a legal specialist in their chosen area of law.

Statewide Alimony Guidelines

Changes to Alimony Guidelines in light of Federal Tax Law Changes
[Alimony Guideline Worksheet]

The Supreme Court has approved a recommendation from the Domestic Relations Rules Committee and its Statewide Alimony Guidelines Subcommittee to revise the current Alimony Guideline Worksheet in light of changes to the federal tax law treatment of alimony under the Tax Cut and Jobs Act of 2017. The revised worksheet and report of the subcommittee will be published and distributed for use in New Mexico and is available for viewing on the New Mexico Judiciary website. The revised worksheet takes effect on January 1, 2019.

Uniform Jury Instructions - Civil

Contracts and UCC Sales
[Chapter 8 Introduction and UJIs 13-807, 13-808, 13-812, 13- 817, 13-824, 13-826,13-827, 13-828, 13-831, 13-832, 13-840, 13-843, 13-843A, and 13-860 NMRA; and Withdrawn UJIs 13-809, 13-844, 13-845, 13-846, 13-847, 13-848, and 13-849 NMRA]

The Supreme Court has approved a recommendation from the UJI-Civil Committee to amend the Chapter 8 Introduction, and UJIs 13-807, -808, -812, -817, -824, -826, -827, -828, -831, -832, -840, -843, -843A, and -860 NMRA; and to withdraw UJI 13-809, -844, -845, -846, -847, -848, and -849 NMRA.

The Supreme Court approved the recommendation of the UJI-Civil Committee to amend Chapter 8 of the Civil Uniform Jury Instructions, which currently encompasses common law contracts cases and UCC sales cases. To address inconsistencies, inaccuracies, and confusing omissions relating to contracts for the sale of goods under the Uniform Commercial Code, all provisions in Chapter 8 related to UCC sales have been eliminated. Many of the provisions in Chapter 8 also are in need of revision to correct inconsistencies, inaccuracies, and omissions related to common law contracts actions. At this time, however, the amendments to Chapter 8 have been limited to removing all provisions in Chapter 8 intended for use in UCC sales cases. As the committee completes its work on Chapter 8 as it relates to common law contract actions, the committee anticipates submitting additional recommendations to the Supreme Court to publish for public comment.

Uniform Jury Instructions - Criminal

References to "The Lazy Lawyer's Guide"
[UJIs 14-141 and 14-301 NMRA]

The Supreme Court has approved the UJI-Criminal Committee's recommendation to update to the committee commentary to UJIs 14-141 NMRA and 14-301 NMRA. The amendments remove outdated references to "The Lazy Lawyer's Guide to Criminal Intent in New Mexico," which is no longer part of the New Mexico Rules Annotated.

Mens Rea for Second-Degree Murder
[UJIs 14-210 and 14-211 NMRA]

The Supreme Court has approved the UJI-Criminal Committee's recommendation to update to the committee commentary to UJIs 14-210 NMRA and 14-211 NMRA. The amendments discuss *State v. Suazo*, 2017-NMSC-011, ¶¶ 22-25, 390 P.3d 674, which clarified that an objective "should have known" *mens rea* is inadequate to support a second-degree murder conviction.

Essential Elements for Child Abandonment
[UJIs 14-606, 14-607, and 14-623 NMRA; and New UJI 14-626 NMRA]

The Supreme Court has approved the UJI-Criminal Committee's recommendation to amend UJIs 14-606 and 14-607 NMRA. The amendments respond to *State v. Stephenson*, 2017-NMSC-002, & 16, 389 P.3d 272, which held that NMSA 1978, Section 30-6-1 (2009), criminalizes the intentional leaving or abandoning of a child under circumstances where the child was exposed to a risk

of harm. The Court also approved the Committee's recommendation to adopt a new UJI 14-626 NMRA to capture the definition of Aintentionally@ adopted by the Court of Appeals in *State v. Granillo*, 2016-NMCA-094, & 17, 384 P.3d 1121, which held Athat the *mens rea* for intentional child abuse by endangerment requires a conscious objective to achieve a result Cendanger the child.@ Finally, the Court approved amendments to Use Note 3 in UJI 14-623 NMRA, which require use of the new definition in UJI 14-626 instead of the general intent instruction in UJI 14-141 NMRA.

Essential Elements for Criminal Sexual Contact
[UJIs 14-902 to 14-915 NMRA and UJIs 14-921 to 14-936 NMRA]

The Supreme Court has approved the UJI-Criminal Committee's recommendation to amend to UJIs 14-902 to -915 NMRA and UJIs 14-921 to -936 NMRA to avoid conflating criminal sexual contact offenses with criminal sexual penetration offenses as cautioned in *State v. Tapia*, 2015-NMCA-048, && 21, 25, 347 P.3d 738. To ensure that there is a clear distinction between criminal sexual contact and the greater offense of criminal sexual penetration, the word Avagina@ has been removed from the list of body parts provided for criminal sexual contact offenses. *See id*. & 27.

Position of Authority Element for CSCM or CSPM Offenses
[UJIs 14-926 and 14-945 NMRA]

The Supreme Court has approved the UJI-Criminal Committee's recommendation to amend UJIs 14-926 and 14-945 NMRA to clarify the burden for proving a position of authority for criminal sexual contact of a minor and criminal sexual penetration of minor offenses in light of *State v. Erwin*, 2016-NMCA-032, 367 P.3d 905.

Avoiding Improper Comment on the Evidence
[UJIs 14-1673, 14-5022, 14-5028, 14-5034, 14-5035, 14-5132, 14-5160, 14-5161, 14-5180, 14-5183, 14-5184, 14-5185, and 14-5186 NMRA]

The Supreme Court has approved the UJI-Criminal Committee's recommendation to amend UJIs 14-1673, 14-5022, 14-5028, 14-5034, 14-5035, 14-5132, 14-5160, 14-5161, 14-5180, 14-5183, 14-5184, 14-5185, and 14-5186 NMRA. The amendments remove the language "evidence has been presented" from the instructions to avoid any improper comment on the evidence by the court. In some of these instructions, the Court has also approved the Committee's recommendation to update to the Use Notes and Committee Commentary.

Multiple Conspiracies
[UJI 14-2810 NMRA and New UJIs 14-2810A, 14-2810B, and 14-6019B NMRA]

The Supreme Court has approved the UJI-Criminal Committee's recommendation to amend UJI 14-2810 NMRA and to adopt new UJIs 14-2810A, 14-2810B, and 14-6019B NMRA, which provide comprehensive instructions for the crime of conspiracy. The amendments and new instructions respond to *State v. Gallegos*, 2011-NMSC-027, ¶ 55, 149 N.M. 704, 254 P.3d 655, which held that "the Legislature established . . . a rebuttable presumption that multiple crimes are the object of only one, overarching, conspiratorial agreement subject to one, severe punishment set at the highest crime conspired to be committed." The instructions address single conspiracies with single or multiple objectives, as well as cases involving multiple distinct conspiracies. In particular, UJI 14-2810B provides guidance to the jury in deciding whether separately charged conspiracies constitute separate agreements or only one overarching conspiracy.

Essential Elements for Possession of Drug Paraphernalia
[New UJI 14-3107 NMRA]

The Supreme Court has approved the UJI-Criminal Committee's recommendation to adopt a new UJI 14-3107 NMRA to offer courts and practitioners a uniform instruction for possession of drug paraphernalia, a misdemeanor offense that is frequently instructed alongside trafficking offenses or as a lesser-included offense of drug possession. The new instruction tracks the statutory language in NMSA 1978, Section 30-31-25.1, and also relies on the existing definitional instruction for possession itself in UJI 14-130 NMRA. New committee commentary seeks to address common issues arising in drug paraphernalia cases.

Defense of Self or Another Using Nondeadly Force Resulting in Death
[UJIs 14-5181 and 14-5182 NMRA]

The Supreme Court has approved the UJI-Criminal Committee's recommendation to amend UJIs 14-5181 and 14-5182 NMRA, consistent with the holding in *State v. Romero*, 2005-NMCA-060, & 13, 137 N.M. 456, 112 P.3d 1113. *Romero* recognizes that a nondeadly self-defense or defense of another instruction would be appropriate in a homicide case where the force used by the defendant ordinarily would not create a substantial risk of death or great bodily harm but where death nevertheless results. Additionally, the language "evidence has been presented" has been removed from these instructions to avoid any improper comment on the evidence by the court.

Self Defense; Duty to Retreat
[UJI 14-5190 NMRA]

The Supreme Court has approved the UJI-Criminal Committee's recommendation to amend UJI 14-5190 NMRA in response to *State v. Anderson*, 2016-NMCA-007, & 13, 364 P.3d 30, which held that the instruction was critical to a jury's ability to understand the objective Areasonable person@ prong of self defense and akin to an elements instruction. Accordingly, a proposed new use note recognizes that use of the instruction is mandatory in cases where it is in issue. The proposed amendments to UJI 14-5190 also facilitate its use in cases involving defense of another or defense of property.

The full text of the new rule amendments summarized above can be viewed on the New Mexico Compilation Commission's website at: **www.nmcompcomm.us/nmrules/NMRuleSets.aspx**

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-059

No. A-1-CA-34742 (filed July 17, 2018)

CHRISTINA J. GONZALES,
Petitioner-Appellee,
v.
RICHARD S. SHAW,
Respondent-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Gerard J. Lavelle, District Judge

MONICA D. BACA
Albuquerque, New Mexico
for Appellee

DONNA S. TRUJILLO DODD
Trujillo Dodd, Torres, O'Brien, Sanchez, L.L.C.
Albuquerque, New Mexico
for Appellant

Opinion

Michael E. Vigil, Judge

{1} Respondent Richard Shaw appeals the district court's order setting child support for his adult disabled son, Blake (Son), and memorandum order and judgment awarding Petitioner Christina Gonzales attorney fees and costs. Respondent raises four arguments on appeal: (1) the evidence was insufficient to find Son is a disabled adult in need of continuing child support; (2) the district court erred in relying on the report and testimony from clinical neuropsychologist, Dr. Jonathan R. Kurtyka, Ph.D., in its determination on the issue of continued child support for Son; (3) the district court erred in its treatment of the proceeds Son receives as a result of his disabilities from Social Security as part of the child support calculation; and (4) the district court erred in its award of attorney fees and costs to Petitioner. We affirm.

BACKGROUND

{2} Petitioner filed a motion to establish child support for Son—nineteen years old at the time—pursuant to *Cohn v. Cohn*, 1997-NMCA-011, ¶ 5, 123 N.M. 85, 934 P.2d 279 (establishing the possibility of child support persisting beyond a child's eighteenth birthday in certain circumstances of disability.) After an evidentiary hearing that took place over the course of two days, the district court concluded, under *Cohn*, that Petitioner and Respondent have a continuing obligation to financially support Son. The district court determined that Respondent's child support obligation to Son is $582 per month.

{3} In its memorandum order and judgment, the district court explained that "[t]he testimony of Dr. Jonathan Kurtyka was helpful and compelling in terms of the decision to award child support. Both parties had the opportunity to interview Dr. Kurtyka prior to his testimony in Court and, therefore, had access to Dr. Kurtyka's information before the two trial dates that were eventually needed to resolve the issues herein. In addition to Dr. Kurtyka's testimony, Respondent's own witnesses, who were subpoenaed to come to Court, testified that [Son] is disabled." The district court further ordered that Petitioner shall be awarded attorney fees, gross receipts tax, and costs related to Dr. Kurtyka's testimony. Respondent appeals.

DISCUSSION

I. Sufficiency of the Evidence That Son Is a Disabled Adult Entitled to Continuing Child Support

{4} Respondent claims that "[i]t is clear that New Mexico adopts the notion that parents shall continue to support their disabled or incapacitated children. However, the facts of this case do not rise to the level of a[n] incapacitated adult child, despite his defined disabilities." Respondent therefore contends that the evidence was insufficient to determine Son is a disabled adult in need of continuing child support.

{5} "Child support determinations are made at the discretion of the district court and are reviewed for abuse of discretion." *Jury v. Jury*, 2017-NMCA-036, ¶ 26, 392 P.3d 242. "A district court abuses its discretion if it applies an incorrect standard, incorrect substantive law, or its discretionary decision is premised on a misapprehension of the law." *Id.* (internal quotation marks and citation omitted). To the extent that Respondent argues that there was an insufficient basis to support the district court's findings concerning the extent of Son's disability, "we review the evidence in the light most favorable to support the district court's findings, resolving all conflicts and indulging all permissible inferences in favor of the decision below." *Gabriele v. Gabriele*, No. A-1-CA-34523, 2018 WL 797270, ___-NMCA-___, ¶ 18,___ P.3d ___ (Jan. 31, 2018) (alteration, internal quotation marks, and citation omitted). However, insofar as Respondent challenges the district court's legal conclusion concerning whether Son qualified as an adult in need of continued child support under *Cohn*, our review is de novo. *See Gabriele*, ___-NMCA-___, ¶ 18.

{6} We held in *Cohn* that under the common law, "if a child is disabled at the time of reaching majority, . . . the parental duty to provide support continues indefinitely, until the disability is removed." 1997-NMCA-011, ¶¶ 5-6 (internal quotation marks and citation omitted). In *Cohn*, the father appealed the district court's order requiring him to pay child support for his thirty-seven-year-old son, George, who had been "severely mentally and physically handicapped since birth." *Id.* ¶¶ 1-2. At the time the district court entered its order, George had been and continued to be cared for by his mother. *Id.* ¶ 2. The district court found that George had the mind of a three-year-old child and was incompetent, suffered from frequent epileptic seizures, had to be helped in bathing and dressing, and needed constant supervision. *Id.* On appeal and based on the district court's findings concerning George's condition, we concluded that George was "severely

disabled" before reaching the age of majority and therefore the district court did not err in ordering the father to pay support for his disabled adult son. *Id.* ¶ 6.

{7} The evidence presented in the hearing of this case overwhelmingly demonstrates that Son was severely disabled before reaching the age of majority as contemplated by *Cohn*.

{8} Son was born with the genetic disorder, Chromosome 14, Trisomy Mosaic, identified aspects of Fragile X syndrome (which presents with growth delays, psychomotor delays, and mental retardation), and a clubbed foot. As a high school student, Son "received academic instruction in a full-time special education classroom." Son's IQ at the time of Dr. Kurtyka's neuropsychological evaluation was 65—in the severely impaired range. Son's performance in all academic core skills were at least three grade levels below the expectation for a child his age, including performing at a first-grade level in math and at a fourth-and fifth-grade level in reading and spelling, respectively. Dr. Kurtyka testified that it was unlikely that Son's skills could be improved with additional education. Son also tested in the mildly to moderately impaired level in learning and memory skills, language functioning, visual, and motor skills. Son's behavioral testing indicated significant difficulty with behavioral, emotional, attentional, and executive functioning. Son was limited in all adaptive functioning areas, which include motor skills, social communication, personal living skills, and community living skills. Dr. Kurtyka testified that based on his testing, he diagnosed Son with Mild Retardation, Attention Deficit/Hyperactivity Disorder, and Combined Type.

{9} Dr. Kurtyka's report and testimony also indicated that given Son's significant impairment in adaptive behavioral skills, he expected that Son would also have difficulties in independent functioning in the future. He further testified that individuals with Son's level of functioning would likely be unable to live on their own without support, fill out job a application without assistance, rent an apartment on their own, drive a car, or budget their money. When Dr. Kurtyka's report was prepared, he recommended that Petitioner consider obtaining a durable power of attorney for Son or explore the possibility of legal guardianship once Son turned eighteen. Given Son's diagnoses, Dr. Kurtyka did not expect Son's condition to have changed significantly since his evaluation.

{10} Petitioner testified that shortly after Son's birth, it was clear that he was not normal and that during his infancy and early childhood, she recognized that Son was not meeting his developmental milestones and required multiple surgeries, including to address his clubbed foot, to conduct an ear tube procedure, and to remove a thyroglossal duct cyst. She also testified that Son was diagnosed with Chromosome 14, Trisomy Mosaic, and Fragile X syndrome at age 5. Petitioner testified that Son had been in full-time special education classes since kindergarten and lived with her full-time. Petitioner also testified that Son has difficulty thoroughly brushing his teeth, determining what clothing is appropriate, and managing his overall hygiene. Petitioner also testified that Son is unable to cook or plan meals for himself, has little understanding of the concept of money, how to budget, or how to pay correct amounts for items without assistance, does not have a concept of or ability to tell time, and has impulse control problems stemming from his disabilities.

{11} Respondent called four witnesses on his behalf, all of whom were special education teachers that had experience with Son in the high school environment, and each one testified that Son was disabled. Respondent disagreed with his own witnesses and all the other evidence demonstrating that Son is disabled.

{12} Viewing the evidence in the light most favorable to support the district court's

findings, resolving all conflicts and indulging all permissible inferences in favor of the district court decision, we conclude that substantial evidence supports the district court's findings and conclusion that Son was disabled upon reaching majority and is an adult entitled to continuing child support.

II. The District Court's Reliance Upon Dr. Kurtyka's Report and Testimony

{13} Respondent next asserts that the district court erred in relying upon Dr. Kurtyka's neuropsychological evaluation of Son because "it was aged and not relevant to the child support issue." Respondent argues that the evaluation was conducted to evaluate Son's medical history and cognitive emotional functioning at age sixteen with the purpose of supporting Son's developmental disability waiver application—not for a legal hearing on child support issues. Further, Respondent contends that it was arbitrary and capricious for the district court to allow him one week to determine whether he wanted Dr. Kurtyka to conduct a follow-up evaluation of Son. Petitioner responds that Respondent failed to preserve these arguments for appeal. We agree.

{14} In order to preserve an issue for review, a party "must have made a timely and specific objection that apprised the district court of the nature of the claimed error and that allows the district court to make an intelligent ruling thereon." *Sandoval v. Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶ 56, 146 N.M. 853, 215 P.3d 791; *see* Rule 12-321(A) NMRA ("To preserve an issue for review, it must appear that a ruling or decision by the trial court was fairly invoked."); *McCauley v. Ray*, 1968-NMSC-194, ¶ 9, 80 N.M. 171, 453 P.2d 192 ("Failure to object to the admission of evidence constitutes a waiver of objection, and in such case the objection cannot be raised for the first time on appeal."). "The primary purposes for the preservation rule are: (1) to specifically alert the district court to a claim of error so that any mistake can be corrected at that time, (2) to allow the opposing party a fair opportunity to respond to the claim of error and to show why the court should rule against that claim, and (3) to create a record sufficient to allow this Court to make an informed decision regarding the contested issue." *Sandoval*, 2009-NMCA-095, ¶ 56.

{15} Prior to the presentation of evidence at the hearing, Respondent stipulated that Dr. Kurtyka is an expert in neuropsychology and to the admission of Dr. Kurtyka's report. After hearing Dr. Kurtyka's testimony and recognizing that the neuropsychological evaluation of Son that formed the basis of Dr. Kurtyka's testimony was three years old at the time of the hearing, the district court advised the parties that if either wanted an updated evaluation of Son, they could obtain one with the cost being split in half between them, subject to reallocation if appropriate. The court further advised the parties that it believed that the case was a "*Cohn* situation—that [Son] is not capable of living independently." The district court then asked the parties whether they wanted an updated evaluation—Petitioner indicated that she did not. Counsel for Respondent asked for "a week" to decide. The district court granted the request, which was reflected in a minute order filed after the first setting of the hearing. Respondent neither objected to this process nor did he opt to obtain an updated evaluation.

{16} Under these circumstances, we conclude Respondent failed to preserve his objection to the district court's reliance upon Dr. Kurtyka's report and testimony. *See Peay v. Ortega*, 1984-NMSC-071, ¶ 4, 101 N.M. 564, 686 P.2d 254 (stating that "[c]ourts generally honor stipulations between the parties and uphold such agreements concerning trial of a cause or conduct of litigation if the stipulations are not unreasonable, not against good moral standards or sound public policy, and are within the general sense of the pleadings"); *Quintana v. Vigil*, 1942-NMSC-018, ¶ 24, 46 N.M. 200, 125 P.2d 711 (determining that the defendants waived any objection to the introduction of exhibit where the defendants expressly consented to its introduction), *overruled on other grounds by Evans Fin. Corp. v. Strasser*, 1983-NMSC-053, ¶ 11, 99 N.M. 788, 664 P.2d 986; *Malczewski v. McReynolds Constr. Co.*, 1981-NMCA-046, ¶ 13, 96 N.M. 333, 630 P.2d 285 (determining that expert witness's testimony was admissible where the defendant made no objection to its admission).

III. The District Court's Treatment of Son's Social Security Disability Funds in Its Child Support Calculation

{17} Relying generally on *Mask v. Mask*, 1980-NMSC-134, 95 N.M. 229, 620 P.2d 883 and *Romero v. Romero*, 1984-NMCA-049, 101 N.M. 345, 682 P.2d 201, Respondent next argues that the district erred in failing to include Son's social security disability funds in making its child support calculation. Specifically, Respondent contends that under these cases, equitable considerations dictate that Respondent receive a credit against his support obligation for the social security payments Son receives. We disagree.

{18} In *Mask*, upon the retirement of her father, the child of divorced parents began receiving monthly social security payments deriving from her father's contributions to the social security fund. 1980-NMSC-134, ¶ 2. The father was in default on his child support obligations before and during the child's receipt of social security payments. *Id.* The district court allowed the father an offset against his total arrearages in an amount equal to the social security payments received by the child. *Id.* ¶ 3. Our Supreme Court held that when a child's monthly receipt of social security funds coincides with a parent's default on child support payments, the arrearages may be offset by the social security payments up to the amount, but not exceeding the parent's monthly child support obligation. *Id.* ¶ 6.

{19} In *Romero*, the father of two children was ordered to pay child support. 1984-NMCA-049, ¶ 1. The mother subsequently filed a motion to modify child support. *Id.* "At the time of the hearing on this motion, the father's income was from social security and workmen's compensation." *Id.* At the hearing, the district court found that the father was in default on his child support payments. *Id.* In so concluding, the district court also ruled that the father was entitled to an offset against his child support arrearages for the lump-sum social security payment received by the children derived from his contributions into social security, but that the offset only applied to the father's obligation for the month in which the lump-sum payment was received by the children. *Id.* ¶ 4. On appeal, we reversed on grounds that "*Mask* court's prohibition of 'carry-back' " offsets of a parent's child support obligations only referred to offsets "in the amount the social security checks exceed the support obligation to cancel arrearages accrued before payment of social security." *Id.* ¶ 6. We therefore concluded that the father was entitled to a child support offset "in the amount of the child support payments owed for the months the lump sum covered." *Id.* ¶¶ 4, 7.

{20} These cases are not authority for Respondent's assertion that the district court erred as a matter of law in not deducting Son's receipt of social security disability in making the child support calculation. *Mask*, which we extended in *Romero*, as Petitioner points out in her brief, merely "stands for the proposition that a disabled parent may receive a full or partial credit against his child support obligation for sums received by the child in social security benefits." In denying Respondent's request for a credit, the district court ruled that if a child is receiving social security benefits through a parent, then the parent may receive a credit. "But that's not the situation here. That is [Son's] benefit and so it doesn't come from either parent. So I am not going to bring that into the child support calculation." This ruling is contained in the district court's written order.

{21} "The setting of child support is left to the sound discretion of the trial court as long as that discretion is exercised in accordance with the child support guidelines." *Thompson v. Dehne*, 2009-NMCA-120, ¶ 8, 147 N.M. 283, 220 P.3d 1132 (internal quotation marks and citation omitted). "In New Mexico, there is a strong tradition of protecting a child's best interests in a variety of circumstances. It is well-settled law that when the case involves children, the trial court has broad authority to fashion its rulings in 'best interests of the children.' " *Sanders v. Rosenberg*, 1997-NMSC-002, ¶ 10, 122 N.M. 692, 930 P.2d 1144 (internal quotation marks and citations omitted).

{22} In the absence of any argument or evidence presented by Respondent that Son is not in need of both child support and his social security disability benefits, argument that the district court deviated from the child support guidelines in its child support calculation, citation to any other authority in support of his claim for a child support offset based on the social security funds received by Son as a result of Son's personal disability, and no attempt to distinguish or argue for an extension of *Mask* and *Romero*, Respondent presents no basis for this Court to find that the district court abused its discretion in its child support calculation or ruled in a manner not in Son's best interest.

IV. Attorney Fees and Dr. Kurtyka's Fee

{23} Respondent's final argument is that the district court erred in awarding Petitioner attorney fees and costs associated with Dr. Kurtyka's testimony.

{24} NMSA 1978, Section 40-4-7(A) (1997) authorizes the district court to award attorney fees and costs related to the preparation and presentation of a domestic relations case, providing that:

> In any proceeding for the dissolution of marriage, division of property, disposition of children or spousal support, the court may make and enforce by attachment or otherwise an order to restrain the use or disposition of the property of either party or for the control of the children or to provide for the support of either party during the pendency of the proceeding, as in its discretion may seem just and proper. The court may make an order, relative to the expenses of the proceeding, as will ensure either party an efficient preparation and presentation of his case.

See Monsanto v. Monsanto, 1995-NMCA-048, ¶¶ 7-8, 119 N.M. 678, 894 P.2d 1034. "In awarding fees, the court shall consider relevant factors presented by the parties, including but not limited to: A. disparity of the parties' resources, including assets and

incomes; B. prior settlement offers; C. the total amount of fees and costs expended by each party, the amount paid from community property funds, any balances due and any interim advance of funds ordered by the court; and D. success on the merits." Rule 1-127 NMRA.

{25} The determination of whether to award fees and costs in a domestic relations case "is within the discretion of the trial court and will be reviewed only to determine whether there has been an abuse of discretion." *Monsanto*, 1995-NMCA-048, ¶ 9. "[T]he trial court's discretion must be exercised with the purpose of insuring each party efficient case preparation and presentation." *Id.*

{26} Petitioner responds that the district court did not abuse its discretion in its award of attorney fees and costs with the following: (1) "[Petitioner] was the prevailing party in this case and unnecessarily incurred the cost of calling Dr. Kurtyka to testify because [Respondent] did not contact Dr. Kurtyka to find out what his testimony would be" prior to the hearing; (2) "[e]ven after Dr. Kurtyka's testimony and after encouragement from the court to settle the case" after the January 8, 2014 setting of the child support hearing, "[Respondent] persisted and caused [Petitioner] to incur additional and unnecessary attorney fees on March 24, 2015"; and (3) "[Respondent] ignored Dr. Kurtyka's report and findings and refused to accept the fact that not only is [Son] a disabled adult, but that [Respondent] has an obligation to financially support him." Under these circumstances, we conclude that the district court's decision to award Petitioner attorney fees and costs was a proper exercise of its discretion in accordance with Rule 1-127, the purpose of insuring each party efficient case preparation and presentation, and therefore not an abuse of discretion.

CONCLUSION

{27} The orders of the district court are affirmed.

{28} IT IS SO ORDERED.
MICHAEL E. VIGIL, Judge

WE CONCUR:
J. MILES HANISEE, Judge
EMIL J. KIEHNE, Judge

Certiorari Granted, September 24, 2018, No. S-1-SC-37210

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-060

No. A-1-CA-35135 (filed July 19, 2018)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
SEAN VEST,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
Marci E. Beyer, District Judge

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Opinion

Linda M. Vanzi, Chief Judge

{1} Defendant Sean Vest appeals his conviction for aggravated fleeing a law enforcement officer, contrary to NMSA 1978, Section 30-22-1.1 (2003). On appeal, Defendant contends that under his interpretation of the aggravated fleeing statute, the evidence was insufficient to prove that he endangered the life of another person and, therefore, insufficient to support his conviction.[1] Defendant further contends that he was entitled to an instruction on the lesser included misdemeanor offense of resisting, evading, or obstructing an officer, which he did not receive. Because we are persuaded that a conviction under the aggravated fleeing statute requires a finding of actual endangerment and the direct and circumstantial evidence at trial was insufficient to support such a finding, we need not address whether Defendant was entitled to a lesser included instruction. Accordingly, we reverse Defendant's conviction for aggravated fleeing.

BACKGROUND

{2} On September 19, 2014, shortly before 3:00 a.m., Officer Capraro was patrolling an area of Las Cruces, New Mexico when he saw a Pontiac Vibe parked nearby and observed a man get out of the driver's side of the car. The man spotted Officer Capraro's police cruiser, ran over to it, and told Officer Capraro that someone had threatened him with a knife and forced him out of his vehicle. Officer Capraro engaged his lights and siren and pursued the vehicle. The car sped away, made a right turn, and the officer lost sight of it. Officer Capraro drove over seventy miles per hour in his attempt to catch up with the vehicle. The roads were wet from a recent rain storm. Officer Capraro subsequently found the vehicle crashed and abandoned in a residential area. The car was determined to have gone onto the sidewalk and hit a sign before coming to a stop. Defendant was ultimately apprehended by a police canine unit.

{3} Defendant was indicted on one count of armed robbery and one count of aggravated fleeing a law enforcement officer. After a jury trial, Defendant was acquitted of armed robbery, but convicted of aggravated fleeing, a fourth degree felony. This appeal followed.

DISCUSSION

{4} Defendant makes two arguments on appeal. First, Defendant contends that the evidence was not sufficient to sustain his conviction for aggravated fleeing because the State failed to establish that he drove in a manner that endangered the life of any individual. Second, he argues that he was entitled to an instruction on the lesser included misdemeanor offense of resisting, evading, or obstructing an officer. Because we reverse on the first issue, we need not reach Defendant's second argument.

{5} In order to determine whether there is sufficient evidence to support Defendant's conviction for aggravated fleeing, we must first address the contrasting interpretations of the aggravated fleeing statute presented by the parties. Defendant contends that "[t]he statute and jury instructions in this case required the State to establish that [Defendant] actually endangered the life of another person during the pursuit." Defendant contends that an interpretation other than one that requires actual endangerment "would transform virtually all fleeing into aggravated fleeing" and would "fail to give effect to the statutory language requiring that the fleeing be both careless and 'in a manner that endangers the life of another person.' " Conversely, the State argues that the fleeing statute is intended to protect the public from the danger of high speed chases, and a defendant's culpability should be based on the decision to flee "and to do so by driving carelessly and dangerously." The State contends that "the Legislature intended that willful, careless driving 'in a manner that endangers the life of another' means careless driving that could result in harm to another person"

[1]This Court previously addressed the issue of whether actual endangerment is necessary to support aggravated fleeing in an opinion that was later vacated by the New Mexico Supreme Court upon a motion to abate the proceedings following the death of the defendant. *State v. Chavez*, 2016-NMCA-016, 365 P.3d 61, *vacated by* N.M. Sup. Ct. Order No. S-1-SC-35614 (Aug. 24, 2016). We note that we have borrowed heavily from the analysis and language of that vacated opinion in rendering our decision herein.

and that actual endangerment is not required. According to the State, to interpret the statute as Defendant suggests would be to "assign culpability based on serendipity[,]" rather than a defendant's conduct and state of mind.

Principles of Statutory Construction

{6} Our goal when interpreting statutes is to ascertain and effectuate legislative intent. *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 11, 309 P.3d 1047. We first look to the statute's plain language, which is "the primary indicator of legislative intent." *State v. Young*, 2004-NMSC-015, ¶ 5, 135 N.M. 458, 90 P.3d 477 (internal quotation marks and citation omitted). "If the language of the statute is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." *State v. Wilson*, 2010-NMCA-018, ¶ 9, 147 N.M. 706, 228 P.3d 490 (internal quotation marks and citation omitted). Appellate courts "will not read into a statute any words that are not there, particularly when the statute is complete and makes sense as written." *State v. Trujillo*, 2009-NMSC-012, ¶ 11, 146 N.M. 14, 206 P.3d 125. To ensure that our application of the plain meaning rule indicates the true legislative intent, we may look to the history and purpose of the statute to aid our statutory construction analysis. *See State v. Rivera*, 2004-NMSC-001, ¶ 13, 134 N.M. 768, 82 P.3d 939 ("In performing our task of statutory interpretation, not only do we look to the language of the statute at hand, we also consider the history and background of the statute."). In doing so, we examine the language in the context of the statutory scheme, legislative objectives, and other statutes in pari materia in order to determine legislative intent. *See State v. Cleve*, 1999-NMSC-017, ¶ 8, 127 N.M. 240, 980 P.2d 23. "Finally, while we would be exceeding the bounds of our role as an appellate court by second-guessing the clear policy of the Legislature, when the statute is ambiguous, we may nonetheless consider the policy implications of the various constructions of the statute." *Rivera*, 2004-NMSC-001, ¶ 14 (citation omitted).

The Aggravated Fleeing Statute

{7} The aggravated fleeing statute reads, in pertinent part, that a person commits aggravated fleeing by "willfully and carelessly driving [a] vehicle *in a manner that endangers the life of another person* after being given a visual or audible signal to stop . . . by a uniformed law enforcement officer in an appropriately marked law enforcement vehicle." Section 30-22-1.1(A) (emphasis added). A violation of Section 30-22-1.1(A) is a fourth degree felony. Section 30-22-1.1(B). Driving in a manner that endangers another person is an essential element of the aggravated fleeing statute. *See* UJI 14-2217 NMRA ("[T]he state must prove to your satisfaction beyond a reasonable doubt . . . [that t] he defendant drove willfully and carelessly in a manner that endangered the life of another person[.]").

{8} We view the aggravated fleeing statute as evincing legislative intent to more severely punish people who jeopardize the safety of others while fleeing from law enforcement officers. Historically, conduct intended to thwart the efforts of an arresting officer constituted the misdemeanor crime of resisting, evading, or obstructing an officer. *See* NMSA 1978, § 30-22-1 (1981). As noted by our Supreme Court, "[t]he legislative decision to create the crime of aggravated fleeing suggests a hierarchy of criminal liability based on the aggravated nature of a defendant's conduct." *State v. Padilla* (*Padilla II*), 2008-NMSC-006, ¶ 14, 143 N.M. 310, 176 P.3d 299. This aggravated nature exists specifically "when the person flees in a manner that endangers the lives of others[.]" *Id.* Importantly, the Legislature chose not to repeal any portion of Section 30-22-1 upon the enactment of 30-22-1.1. Instead, the resisting, evading, or obstructing an officer statute remains in effect and criminalizes conduct related to vehicular flight from law enforcement. *See* § 30-22-1(C) ("Resisting, evading or obstructing an officer consists of . . . willfully refusing to bring a vehicle to a stop when given a visual or audible signal to stop, whether by hand, voice, emergency light, flashing light, siren or other signal, by a uniformed officer in an appropriately marked police vehicle[.] . . . Whoever commits resisting, evading or obstructing an officer is guilty of a misdemeanor."). The logical inference to be drawn from the Legislature's decision not to repeal any portion of Section 30-22-1 is that an individual may flee from law enforcement, even in a vehicle, without triggering prosecution under the aggravated fleeing statute, so long as the fleeing individual does not endanger others in the process. *See generally State v. Smith*, 2004-NMSC-032, ¶ 10, 136 N.M. 372, 98 P.3d 1022 ("We examine the overall structure of the statute and its function in the comprehensive legislative scheme.").

{9} Neither the aggravated fleeing statute, nor the corresponding uniform jury instruction defines the term "endangers" as used in the statute. *See* § 30-22-1.1; UJI 14-2217. "When a term is not defined in a statute, we must construe it, giving those words their ordinary meaning absent clear and express legislative intention to the contrary." *State v. Tsosie*, 2011-NMCA-115, ¶ 19, 150 N.M. 754, 266 P.3d 34 (internal quotation marks and citation omitted). Our courts often use dictionary definitions to ascertain the ordinary meaning of words that form the basis of statutory construction inquiries. *State v. Boyse*, 2013-NMSC-024, ¶ 9, 303 P.3d 830. "Endangerment" is defined as "[t]he act or an instance of putting someone or something in danger; exposure to peril or harm." *Black's Law Dictionary* 644 (10th ed. 2014). Non-legal dictionaries offer similar definitions of both "endanger" and "endangerment." *See 5 The American Heritage Dictionary of the English Language* 588 (5th ed. 2011) ("To expose to harm or danger; imperil."); *The Oxford English Dictionary* 225 (2d ed. 1991) ("The action of putting in danger; the condition of being in danger."). Each of these definitions indicates that the exposure to the peril or harm is an actual or current condition facing the impacted person. None of these definitions indicates a potential or future condition. Since the plain language of the statute does not contemplate potential or future harm in its use of the word "endanger," and the statute "makes sense"—with respect to who is subject to prosecution—as written, *see Trujillo*, 2009-NMSC-012, ¶ 11, we will not read the statute to include potential harm absent direction from the Legislature. *Clark v. Lovelace Health Sys., Inc.*, 2004-NMCA-119, ¶ 14, 136 N.M. 411, 99 P.3d 232 ("When language in a statute enacted by the [L]egislature is unambiguous, we apply it as written, and any alteration of that language is a matter for the [L] egislature, not for this Court."), *overruled on other grounds by Estate of Brice v. Toyota Motor Corp.*, 2016-NMSC-018, ¶ 42, 373 P.3d 977.

Sufficiency of the Evidence

{10} Having determined that the aggravated fleeing statute requires that the State prove actual endangerment to another person, we now turn to Defendant's argument that the evidence presented at trial was insufficient to support his conviction. We focus solely on the element of endangerment, as this appears to be the only element of his conviction for aggravated fleeing Defendant challenges on appeal.

{11} "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. Duran*, 2006-NMSC-035, ¶ 5, 140 N.M. 94, 140 P.3d 515 (internal quotation marks and citation omitted). "[W]e must view the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *Id.* (internal quotation marks and citation omitted). "Contrary evidence supporting acquittal does not provide a basis for reversal because the jury is free to reject [the d]efendant's version of the facts." *Id.* (internal quotation marks and citation omitted). The function of an appellate court with respect to challenges to the sufficiency of the evidence is to "ensure that a rational jury *could* have found beyond a reasonable doubt the essential facts required for a conviction." *Id.* (internal quotation marks and citation omitted). We apply these principles to determine if Defendant's conviction for aggravated fleeing is supported by sufficient evidence.

{12} As a threshold matter, we note that, as the State points out, drawing inferences from the previous published opinions of our courts related to aggravated fleeing is not entirely useful given that, in those cases, passengers were present in the vehicles while the drivers were fleeing from law enforcement. *See Padilla II*, 2008-NMSC-006, ¶ 4 ("[T]here were two passengers in the car."); *State v. Coleman*, 2011-NMCA-087, ¶ 22, 150 N.M. 622, 264 P.3d 523 (having "little trouble concluding" that the defendant endangered the lives of his passengers and the deputy sheriff during the chase); *State v. Ross*, 2007-NMCA-126, ¶ 2, 142 N.M. 597, 168 P.3d 169 ("There were four passengers still in the vehicle."). In the present case, Defendant was operating a vehicle without a passenger. Because of this distinction, comparison between the willful and careless behavior exhibited by the drivers/defendants in our previous cases—including speeding, running through stop signs, crossing the center line, and crashing into curbs or other stationary objects—and the alleged willful and careless conduct exhibited by Defendant in the present case are of limited value. *See, e.g.*, *Padilla II*, 2008-NMSC-006, ¶ 3; *Coleman*, 2011-NMCA-087, ¶ 4; *Ross*, 2007-NMCA-126, ¶ 2. Within these cases, however, there are descriptions of conduct that demonstrate endangerment of other motorists who encountered defendants on the roadways. *See State v. Padilla* (*Padilla I*), 2006-NMCA-107, ¶ 5, 140 N.M. 333, 142 P.3d 921 ("[The d]efendant barely missed colliding with another motorist."), *rev'd on other grounds*, *Padilla II*, 2008-NMSC-006, ¶ 34; *Ross*, 2007-NMCA-126, ¶ 2 ("Another vehicle had to abruptly stop in order to avoid colliding with [the d]efendant."). It is to this conduct that we look to determine whether Defendant endangered another person within the meaning of the aggravated fleeing statute.

{13} Even when viewing the evidence in the light most favorable to the guilty verdict, we conclude that the State has not presented sufficient evidence to prove that Defendant endangered another person as required by the statute. The State did not present any evidence that Defendant's flight from police actually endangered another person. Rather, the State contends that Defendant's "driving at least [seventy] miles per hour through a residential area, on a wet and slippery road, with at least one curve in it[;] . . . crash[ing] the car into a traffic sign[;] rendering the car inoperable[;] and [getting] out of the car and [leaving] it in the middle of the roadway" were dangerous actions that "created a potential for harm to the public." There was not, however, any evidence presented that Defendant encountered any other motorists on the roadway. As such, no reasonable jury could have found beyond a reasonable doubt that Defendant endangered another person within the meaning of the aggravated fleeing statute. *See* § 30-22-1.1.

{14} Moreover, to the extent the State contends Officer Capraro was placed in danger through his pursuit of Defendant, we again conclude that there was insufficient evidence presented for a reasonable jury to have found actual endangerment of the officer as a result of Defendant's driving. The evidence presented established that Officer Capraro lost sight of Defendant shortly after engaging his emergency equipment and later found the car Defendant had been driving crashed and abandoned. While the State asserts that the officer's pursuit of Defendant at seventy miles per hour on rain-slicked roads supports Defendant's conviction for aggravated fleeing, the State's argument is just another means of asserting that potential danger is sufficient. However, it is not.

{15} This is not to say that endangerment requires that a fleeing motorist pass within inches of another vehicle or that an accident is avoided only through extraordinary evasive maneuvering by another driver. When a jury returns a verdict based on evidence indicating actual endangerment, that verdict should not be disturbed. However, when, as here, the record is completely devoid of evidence of actual endangerment to passengers or other motorists, the verdict cannot stand.

CONCLUSION

{16} For the foregoing reasons, we reverse Defendant's conviction for aggravated fleeing a law enforcement officer, contrary to Section 30-22-1.1. As a result, we do not reach Defendant's argument that he was entitled to a jury instruction on the lesser included misdemeanor offense of resisting, evading, or obstructing an officer.

{17} IT IS SO ORDERED.
LINDA M. VANZI, Chief Judge

WE CONCUR:
JULIE J. VARGAS, Judge
STEPHEN G. FRENCH, Judge

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-061

No. A-1-CA-34675 (filed July 23, 2018)

FRANK DART,
Plaintiff-Appellee,
v.
CHIEF KYLE WESTALL,
CITY OF FARMINGTON POLICE DEPARTMENT, and
CITY OF FARMINGTON,
Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY
Louis E. DePauli Jr., District Judge

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Opinion

Michael E. Vigil, Judge

{1} The City of Farmington, Farmington Police Department (FPD), and FPD Chief Kyle Westall (collectively, Defendants), appeal from a jury verdict awarding damages to Plaintiff Frank Dart, an FPD detective, under New Mexico's Whistleblower Protection Act (the WPA), NMSA 1978, §§ 10-16C-1 to -6 (2010). Plaintiff's WPA claim stemmed from his communication to Defendants that he believed Defendants were in violation of NMSA 1978, Section 32A-4-3 (2005)[1] by failing to promptly and immediately investigate reports of child abuse and neglect referred to FPD from the New Mexico Children, Youth and Families Department (CYFD). Defendants raise four issues on appeal: (1) whether the district court erred in denying their pretrial motion for summary judgment; (2) whether the jury's verdict in favor of Plaintiff was supported by substantial evidence; (3) whether the district court abused its discretion in denying admission of internal FPD memoranda that Defendants contend were crucial to their defense; and (4) whether a comment made by Plaintiff's counsel during a bench conference, which may have been heard by the jury, prejudiced Defendants and tainted the jury's verdict. We affirm.

BACKGROUND

{2} As an FPD detective, Plaintiff was assigned to investigate crimes against children, including CYFD referrals. He was later assigned to serve simultaneously on an FBI-FPD Cyber Crime Task Force (CCTF) aimed at investigating and apprehending high-technology criminals. At the time of the communications underlying Plaintiff's WPA claims, Plaintiff's direct supervisor was Sergeant Robert Perez. Plaintiff's complaint alleged multiple violations of the WPA. Defendants' motion for summary judgment was granted on all the claimed violations except one. The district court determined that there were disputed issues of material fact about whether Plaintiff made communications to FPD concerning the department's failure to fulfill its statutory duties under Section 32A-4-3 and whether those communications were protected under the WPA, and

[1]Section 32A-4-3 states in pertinent part:

A. Every person, including a licensed physician; a resident or an intern examining, attending or treating a child; a law enforcement office; a judge presiding during a proceeding; a registered nurse; a visiting nurse; a schoolteacher; a school official; a social worker acting in an official capacity; or a member of the clergy who has information that is not privileged as a matter of law, who knows or has a reasonable suspicion that a child is an abused or neglected child shall report the matter immediately to:

(1) a local law enforcement agency;

(2) the department; or

(3) a tribal law enforcement or social services agency for any Indian child residing in Indian country.

B. A law enforcement agency receiving the report shall immediately transmit the facts of the report and the name, address and phone number of the reporter by telephone to the department and shall transmit the same information in writing within forty-eight hours. The department shall immediately transmit the facts of the report and the name, address and phone number of the reporter by telephone to a local law enforcement agency and shall transmit the same information in writing within forty-eight hours. . . .

C. The recipient of a report under Subsection A of this section shall take immediate steps to ensure prompt investigation of the report. The investigation shall ensure that immediate steps are taken to protect the health or welfare of the alleged abused or neglected child, as well as that of any other child under the same care who may be in danger of abuse or neglect. A local law enforcement officer trained in the investigation of child abuse and neglect is responsible for investigating reports of alleged child abuse or neglect at schools, daycare facilities or child care facilities.

F. A person who violates the provisions of Subsection A of this section is guilty of a misdemeanor.

permitted this claim to proceed to trial.

{3} Following trial, the jury awarded Plaintiff $4,000 in economic damages and awarded $200,000 damages for emotional pain and suffering. Defendants filed two post-trial motions. The first sought judgment as a matter of law, arguing that Plaintiff failed to present sufficient evidence to support the verdict. The second sought remittitur of the award for pain and suffering, or in the alternative, a new trial, arguing that the jury's award was not supported by the evidence, and the district court erred in excluding evidence that Defendants argued was crucial to their defense, and that Defendants were prejudiced by statements made by Plaintiff's counsel during a bench conference that may have been heard by the jury. The district court denied the post-trial motions, and Defendants appeal.

DISCUSSION

I. The District Court's Partial Denial of Defendants' Motion for Summary Judgment

{4} We begin by addressing Defendants' claim that the district court erred in denying their motion for summary judgment. Because it did so only on the basis of its finding that Plaintiff had raised genuine issues of material fact existed as to whether Plaintiff engaged in communications protected under the WPA, this argument is not reviewable. *See Green v. Gen. Accident Ins. Co. of Am.*, 1987-NMSC-111, ¶ 19, 106 N.M. 523, 746 P.2d 152 (holding that "denial of a motion for summary judgment is not reviewable after final judgment on the merits[, and i]f a summary judgment motion is improperly denied, the error is not reversible for the result becomes merged in the subsequent trial"); *Gallegos v. State Bd. of Educ.*, 1997-NMCA-040, ¶¶ 7-12, 123 N.M. 362, 940 P.2d 468 (stating that a narrow exception to the general rule stated in *Green* applies to permit post-trial appeal of denial of summary judgment, but only if "(1) the facts are not in dispute; (2) the only basis of the ruling is a matter of law which does not depend to any degree on facts to be addressed at trial; (3) there is a denial of the motion; and (4) there is an entry of a final judgment with an appeal therefrom"). The *Green* exception does not apply because as already discussed, the facts in the summary judgment record were disputed. Moreover, those disputes were resolved by the jury in Plaintiff's favor after hearing both sides.

II. Sufficiency of the Evidence Establishing Plaintiff's WPA Claim

{5} The focus of Defendants' appeal is that insufficient evidence was presented to support the jury's verdict in favor of Plaintiff under the WPA. Specifically, Defendants challenge the sufficiency of the evidence to establish that (1) "Plaintiff engaged in protected activity by communicating to his superiors his belief that [Defendants] were violating state law by failing [their] duty required by state law"; and (2) "Plaintiff had a good faith belief that . . . Defendants were in violation of state law[.]"

A. Standard of Review

{6} "In reviewing a sufficiency of the evidence claim, this Court views the evidence in a light most favorable to the prevailing party and disregards any inferences and evidence to the contrary." *Littell v. Allstate Ins. Co.*, 2008-NMCA-012, ¶ 13, 143 N.M. 506, 177 P.3d 1080 (alteration, internal quotation marks, and citation omitted). "We defer to the jury's determination regarding the credibility of witnesses and the reconciliation of inconsistent or contradictory evidence." *Id.* "We simply review the evidence to determine whether there is evidence that a reasonable mind would find adequate to support a conclusion." *Id.* (internal quotation marks and citation omitted). "Jury instructions become the law of the case against which the sufficiency of the evidence is to be measured." *Atler v. Murphy Enters. Inc.*, 2005-NMCA-006, ¶ 13, 136 N.M. 701, 104 P.3d 1092 (internal quotation marks and citation omitted); *see also Littell*, 2008-NMCA-012, ¶ 33 (stating that in reviewing the jury's verdict in favor of the plaintiff as to his hostile work environment claim for substantial evidence, "[w]e evaluate the evidence with reference to the language of the jury instructions given, which constitute the law of the case").

B. The Jury Instructions

{7} There were no objections to any of the jury instructions we discuss below. The jury was instructed, in pertinent part:

> The Plaintiff . . . seeks compensation from . . . Defendants . . . for damages that Plaintiff says were caused by retaliatory actions in violation of the [WPA.]
>
> More specifically, Plaintiff asserts the following:
>
> 1. While Plaintiff was a detective, he communicated to his superiors his good faith belief that the Defendants were violating state law by failing in [their] duties regarding the handling of child abuse cases.
>
> 2. Based upon his communications to his superiors that . . . Defendants . . . were violating the law, Plaintiff's superiors engaged in retaliatory action against the Plaintiff.
>
> 3. Plaintiff suffered economic and emotional damage because of the adverse employment action taken against him.
>
> 4. Plaintiff claims he is entitled to damages he suffered because Defendants' actions violated the [WPA].

The jury was further instructed that Plaintiff had the burden of proving the following essential elements "by the greater weight of the evidence":

> 1. Plaintiff engaged in protected activity by communicating to his superiors his belief that . . . [] Defendants[] were violating state law by failing [their] duty required by state law;
>
> 2. Plaintiff had a good faith belief that . . . Defendants were in violation of state law;
>
> 3. Plaintiff suffered a retaliatory action by Defendants;
>
> 4. Plaintiff's protected activity was a cause of the retaliatory action;
>
> 5. . . . Plaintiff suffered damages because of the retaliatory actions.
>
> "The jury was instructed that [t]o prove by the greater weight of the evidence means to establish that something is more likely true than not true." A "fact[,]" the jury was also instructed, "may be proved by circumstantial evidence. Circumstantial evidence consists of proof of facts or circumstances which give rise to a reasonable inference of the truth of the fact sought to be proved."

C. Analysis

1. Sufficient Evidence Was Presented to Establish That Plaintiff Engaged in Communications That Constituted a "Protected Activity"

{8} Regarding the first element of Plaintiff's WPA claim, the jury was instructed that "[a] public employer violates the [WPA] if it takes a 'retaliatory action' against a public employee because the public employee communicates to the public employer, or to a third party, information about an action or a failure to act that the public employee believes in good faith constitutes an unlawful or improper act." This kind of communication constitutes

a "protected activity." After deliberations, the jury answered "Yes" in response to a special interrogatory asking whether "Plaintiff engage[d] in protected activity by communicating to his superiors his belief that Defendants were violating state law by failing its duty required by state law[.]"

{9} The evidence at trial established that Plaintiff communicated to his supervisors and chain of command between 2002 and 2011 his belief that FPD was not timely investigating CYFD referrals. Plaintiff first voiced this belief in 2002 to his supervisor at the time, Sergeant Kim Walker, who responded by telling Plaintiff that "he didn't have time to deal with it, that he knew that there were a lot of" CYFD referrals, and that Plaintiff just needed to do the best he could with them. Plaintiff later voiced his belief that CYFD referrals were not being timely investigated, that it was "impossible" for him to handle his caseload, and that he needed more help and resources, to Defendant Westall both when Defendant Westall served as lieutenant and captain of the FPD Detective Division. Plaintiff testified that Defendant Westall responded that he could not give Plaintiff any additional resources.

{10} Similarly, in 2009 and 2010, Plaintiff requested additional resources from Sergeant Perez to investigate CYFD referrals, which he did not receive When Plaintiff was assigned several new CYFD referrals to review in March 2011 by Sergeant Perez, Plaintiff told Sergeant Perez that FPD could not "just read them. They actually have to be Plaintiff followed up on this interaction by sending a memorandum to Sergeant Perez and others in his chain of command dated March 10, 2011, in which Plaintiff characterized FPD's failure to timely investigate or provide him with the resources to investigate CYFD referrals as "potential negligence" on the part of FPD.

{11} Viewing the evidence in the light most favorable to Plaintiff and indulging all reasonable inferences in favor of the verdict, we conclude sufficient evidence supported the jury's finding on the first element of Plaintiff's WPA claim.

2. Sufficient Evidence Was Presented to Establish That Plaintiff Had a Good Faith Belief That Defendants Were in Violation of State Law

{12} On the second element of Plaintiff's WPA claim, the jury was instructed that "[a] public employee believes in 'good faith' that an action or failure to act is an unlawful or improper act when a reasonable basis exists in fact as evidenced by the facts available to the public employee." An " 'unlawful or improper act' " was defined as a "proposed or actual practice, procedure, action or failure to act on the part of a public employer[,]" which "violates or may violate a federal law, a federal regulation, a state law, a state administrative rule or a law of any political subidivision of the state."

{13} Additionally, as set forth above, Section 32A-4-3(C) provides that recipients of CYFD referrals "shall take immediate steps to ensure prompt investigation of the report. The investigation shall ensure that immediate steps are taken to protect the health or welfare of the alleged abused or neglected child, as well as that of any other child under the same care who may be in danger of abuse or neglect." A copy of Section 32A-4-3 was admitted into evidence. The jury answered "Yes" in response to a special interrogatory on the special verdict form asking whether "Plaintiff's communication [constituting a protected activity was] made in good faith[.]"

{14} In light of the jury's receipt of a copy of Section 32A-4-3 and the evidence presented at trial, a reasonable juror could conclude Plaintiff in "good faith" believed that Defendants were in violation of state law in failing to immediately and promptly investigate CYFD referrals. Evidence supporting Plaintiff's "reasonable basis" for this belief stemmed from the evidence that between 2001 and 2004 or 2005, Plaintiff was the only detective investigating CYFD child abuse and neglect referrals to FPD; it was routine for Plaintiff to have a caseload of sixty pending cases with "literally hundreds of CYFD reports that were coming in"; and Plaintiff was aware that he could not investigate all of the cases involving crimes against children and CYFD referrals that came across his desk, requiring him to balance his investigatory responsibilities through a "triage" process in which he would prioritize cases where a child was "more in danger than in another case, and I would have to focus my attention on that case. . . . And in . . . the other cases, I simply could not investigate them by myself."

{15} Additionally, as already described, Plaintiff testified that he repeatedly voiced his belief that there was a lack of resources provided to him by FPD to investigate CYFD referrals amounting to "potential negligence" on the part of FPD, but that his supervisors repeatedly failed to act to remedy the problem.

{16} Viewing the evidence in the light most favorable to Plaintiff and indulging all reasonable inferences in favor of the verdict, we conclude sufficient evidence supported the jury's finding on the second element of Plaintiff's WPA claim.

{17} In so concluding, we reject Defendants' argument that Plaintiff failed to establish that he had a "good faith" basis for believing Defendants were in violation of state law in failing to promptly and immediately investigate CYFD referrals because the only criminal penalty imposed under Section 32A-4-3 applies to the mandatory reporting requirement established under Subsections A and F. Plaintiff, under the instructions given to the jury, was not required to establish that he had a "good faith" belief that Defendants were committing a crime in their handling of CYFD referrals, but only that Defendants' handling of these cases was improper or in violation of law. Plaintiff satisfied this burden.

3. Sufficient Evidence Was Presented to Establish That: Plaintiff Suffered Retaliatory Actions by Defendants; Plaintiff's Protected Activity Was a Cause of the Retaliatory Action; and That Plaintiff Suffered Damages Because of the Retaliatory Action

{18} Although Defendants do not specifically challenge the jury's findings regarding elements three through five of Plaintiff's WPA claim, we briefly address the supportive evidence that underpins these determinations given the interrelationship of each of the elements within a claim brought under the WPA.

{19} The jury was instructed that a "[r]etaliatory action" is "taking any discriminatory or adverse employment action against a public employee in the terms and conditions of public employment." "In determining whether Plaintiff was retaliated against because he engaged in protected activity, you must determine whether that conduct was a motivating factor in the retaliatory conduct against Plaintiff."

{20} Further, the jury was instructed, a "motivating factor" is "a factor that plays a role in the decision to retaliate against Plaintiff. It need not be the only reason, nor the last or latest reason, for the retaliatory actions of . . . Defendants." The jury was instructed as well, that "[a]n act is a cause of injury or harm if it contributes to bringing about the injury or harm. It need not be the only explanation for the injury or harm, nor the reason that is nearest in time or place. It is sufficient if it occurs in combination with some other cause to produce the result." Lastly, the jury was

instructed that in order to be a " 'cause,' the act, nonetheless, must be reasonably connected as a significant link to the injury or harm."

{21} The jury answered "Yes" to special interrogatories asking: (1) "Did the Plaintiff suffer a retaliatory action by any of . . . Defendants?"; (2) "Was the Plaintiff's protected activity a cause of the retaliatory action?"; and (3) "Did Defendants' conduct cause economic harm . . . and emotional pain and suffering to Plaintiff?"

{22} Evidence was presented that between 2004 and 2010, Plaintiff consistently received positive performance evaluations for his work and was recognized for his dedication in investigating crimes against children. However, in response to his March 10, 2011 memorandum, Plaintiff testified that he was reprimanded by Sergeant Perez and retaliated against by FPD.

{23} Evidence of Defendants' retaliatory action was presented by testimony that Defendants removed Plaintiff from the CCTF, created a hostile work environment, made humiliating comments about him to his colleagues, issued him a substandard work vehicle, and required him to surrender his key to the forensic lab and cease investigating his caseload of crimes against children.

{24} Further, the jury was provided Plaintiff's March 10, 2011 memorandum voicing his belief that Defendants' handling of CYFD referrals constituted "potential negligence" and was a "motivating factor" in Defendants' retaliation against him given that Defendants' reprimand and retaliatory actions were undertaken only after Plaintiff's chain of command's receipt of the memorandum.

{25} Finally, Plaintiff testified that he suffered depression, rage, and fear that he would be terminated before he reached eligibility for retirement that caused him to seek counseling, as well as the loss of detective and CCTF overtime pay resulting from transferring back to the patrol division.

III. The District Court's Denial of Admission of Sergeant Perez's Memorandum

{26} Defendants assert that the district court erred in denying admission of the memorandum drafted by Sergeant Robert Perez, which documented the reprimand of Plaintiff that occurred after Plaintiff's chain of command received Plaintiff's March 10, 2011 memorandum, under the business records exception to the rule against hearsay, *see* Rule 11-802 NMRA; Rule 11-803(6) NMRA. Even if we assume that the memorandum was admissible, we conclude that any error in excluding it was harmless. *See Cumming v. Nielson's, Inc.*, 1988-NMCA-095, ¶ 28, 108 N.M. 198, 769 P.2d 732 ("We review the admission and exclusion of evidence under an abuse of discretion standard. In addition, the complaining party on appeal must show the erroneous admission and exclusion of evidence was prejudicial in order to obtain a reversal." (citation omitted)); *see also Gallegos v. Citizens Ins. Agency*, 1989-NMSC-055, ¶¶ 36-37, 108 N.M. 722, 779 P.2d 99 (determining that erroneously admitted hearsay does not automatically warrant reversal; there must be a showing that the admission was prejudicial under Rule 1-061 NMRA). Rule 1-061 provides:

> No error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

{27} In support of their claim of prejudice resulting from the district court's exclusion of Sergeant Perez's memorandum, Defendants argue that "[w]ritten confirmation that no one in [Plaintiff's] chain of command ever reported that [Plaintiff] was claiming a violation of Section 32A-4-3, and that what was conveyed was the admitted failure to obey a direct order and [Plaintiff's] own representations that he could not do his job and be on the CCTF, was vital to [Defendants'] defense." "Without these documents," Defendants contend, they "had only post-lawsuit testimony, rather than contemporaneously prepared documents, to prove that it had not understood that [Plaintiff] was attempting to complain of a illegality or unlawfulness."

{28} However, as Defendants concede, the content of Sergeant Perez's memoranda was cumulative of other testimony that Plaintiff's chain of command's understanding of Plaintiff's complaints was that FPD was defrauding the FBI based on Plaintiff's misreading of the FBI-FPD's Memorandum of Understanding establishing the CCTF; that Plaintiff was unable to balance his work duties; and not that FPD was in violation of Section 32A-4-3. *See Cisneros v. Molycorp, Inc.*, 1988-NMCA-080, ¶¶ 27-28, 107 N.M. 788, 765 P.2d 761 (holding that any error in denying admission of medical records regarding a hearing examination that a workers' compensation claimant underwent in 1971 because they were not authenticated was harmless where the records were cumulative of the claimant's testimony that he noticed hearing loss in 1971); *Lujan v. Circle K Corp.*, 1980-NMCA-107, ¶ 21, 94 N.M. 719, 616 P.2d 432 (concluding that the exclusion of exhibits that were cumulative of testimony provided at trial was not error).

{29} Therefore, we conclude that the district court's exclusion of the memoranda did not affect the substantial rights of Defendants, and as a result, any potential error in excluding it from evidence was harmless. *See Hammond v. Reeves*, 1976-NMCA-069, ¶¶ 13-14, 89 N.M. 389, 552 P.2d 1237 (holding that although the borrower proffered at trial polygraph tests that were relevant and admissible to his usury claim against his lender, the district court's error in excluding these tests was harmless under Rule 1-061 where exclusion did not affect any substantial rights of the borrower).

IV. Plaintiff's Counsel's Bench Conference Statement Concerning Defendants' Reason for Failing to Call Sergeant Perez to Testify

{30} Defendants' final claim raised in their post-trial motion for remittitur, or in the alternative a new trial, is that they were unfairly prejudiced by the statement made by Plaintiff's counsel during a bench conference, which may have been heard by the jury, that Defendants refused to call Sergeant Perez to testify because he was suing FPD. In support of this claim, Defendants filed the affidavit of a paralegal for the law firm representing Defendants. The paralegal stated that although she did not hear Plaintiff's counsel's statement, Defendant Westall and Deputy Chief Keith McPheeters (who were sitting at defense counsel's table at the time) heard the statement. She also stated that after trial, she spoke with one of the jurors who told her that "she had not personally heard the statement[,] . . . but that other jurors had heard it and it was discussed during breaks."

{31} Defendants contend that Plaintiff's counsel's statement was "clearly intended" to be heard by the jury and to prejudice Defendants by permitting them "to wander

onto the path of speculation, to wonder what Perez might have said about [Plaintiff's] case, why [FPD] would not have wanted the jury to hear him, whether this lack of candor extended to other aspects of the case, and whether [FPD] had mistreated Perez." And "[b]ecause information outside the evidence was brought to the attention of the jury[,]" Defendants argue that their "right to a fair trial was violated." We disagree.

{32} We review the district court's denial of a motion for a new trial or remittitur for an abuse of discretion. *Morga v. FedEx Ground Package Sys., Inc.*, 2018-NMCA-039, ¶ 8, 420 P.3d 586, *cert. granted* (No. S-1-SC-36918, June 4, 2018). "The [district] court abuses its discretion when its decision is contrary to logic and reason." *Id.* (alteration, internal quotation marks, and citation omitted). Additionally, "[i]t is for the [district] court to determine whether . . . prejudicial misconduct requir[es] a mistrial." *Christopherson v. St. Vincent Hosp.*, 2016-NMCA-097, ¶ 36, 384 P.3d 1098 (internal quotation marks and citation omitted). "A new trial based on counsel misconduct is warranted if the conduct was improper, and it was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case." *Id.* ¶ 37 (internal quotation marks and citation omitted). "The burden is upon [the] party claiming error to demonstrate that his rights were prejudiced by the claimed error." *Id.* (internal quotation marks and citation omitted).

{33} The issue arose in the following context. At trial, through the testimony of former FPD Lieutenant Ronald Hardy, Defense counsel sought to introduce as a record of regularly conducted activity FPD Sergeant Perez's memorandum documenting the verbal counseling and coaching Plaintiff received for unsatisfactory performance and insubordination and intemperate behavior in response to his March 10, 2011 memorandum. Plaintiff objected to the admission of Sergeant Perez's memorandum on hearsay grounds.

{34} During the ensuing bench conference, in support of her objection, Plaintiff's counsel argued that Sergeant Perez's memorandum was being "offered for the truth
of [the] matter asserted, and they have to call in Perez to lay the foundation for it. They haven't established any exception to the hearsay rule. And they're trying to get around having to call Perez because he sued [FPD]." Defense counsel responded, "I think . . . the jury heard that. I think that is—I'm shocked that she would say that in open court. I think the jury might have heard that. . . . I'm very upset, Your Honor." The district court ruled, without further argument, that the memorandum was inadmissible hearsay without the testimony of Sergeant Perez.

{35} During the lunch recess, the district court revisited the issue with counsel. When asked by the district court how she thought the statement "impact[ed] this case[,]" defense counsel said, "Well it's not evidence. It is not evidence in the case and I'm concerned that the jury is going to get—you know, what they might speculate to about that. I mean, I don't know that there's a cure for that. I'm discussing it with my clients."

{36} The district court asked whether Defendants wanted a curative instruction to be given to the jury. Defense counsel replied, "Well, obviously we don't want it repeated," but that she did not know how to cure it. Plaintiff's counsel stated that she did not believe that the jury heard it, and that she "certainly didn't intend to say it loud enough for the jury to hear it." The last word was from defense counsel, who stated "I just . . . think counsel needs . . . to be more careful." The district court thereafter ruled that reference to Perez suing FPD could not be made to the jury by either party. Additionally, in denying Defendants' post-trial motion for remittitur or in the alternative a new trial, the district court concluded that the "evidence presented by . . . Defendants to establish that the jury was so prejudiced by the statement of Plaintiff's counsel" regarding Sergeant Perez suing FPD, "that a new trial is required, is insufficient[.]"

{37} Under these facts, we conclude that the district court did not abuse its discretion in denying Defendants' motion for remittitur or in the alternative a new trial. Despite Defendants' failure to move for a mistrial, the district court took reasonable measures to minimize any prejudice to Defendants as a result of the comment. Specifically, the district court offered to give the jury a curative instruction to disregard the comment, which Defendants declined, and ruled that neither party was permitted to comment to the jury or elicit evidence concerning Sergeant Perez's absence and lawsuit against FPD. *See Norwest Bank of N.M., N.A. v. Chrysler Corp.*, 1999-NMCA-070, ¶ 51, 127 N.M. 397, 981 P.2d 1215 (determining that the district court did not abuse its discretion in a minivan crashworthiness case after certain cross-examination by manufacturer and automobile dealership erroneously implied that the driver and passengers had pursued other lawsuits against those defendants, where the plaintiffs did not move for a mistrial and the district court gave an official admonishment to defense counsel and curative instruction to the jury). Accordingly, we conclude that the district court's denial of Defendants' post-trial motion was not contrary to logic and reason and that Defendants are not entitled to remittitur or a new trial.

CONCLUSION

{38} The jury's verdict and district court's post-trial rulings are affirmed.

{39} IT IS SO ORDERED.
MICHAEL E. VIGIL, Judge

WE CONCUR:
LINDA M. VANZI, Chief Judge
J. MILES HANISEE, Judge

Certiorari Granted, September 28, 2018, No. S-1-SC-37217 consolidated with No. S-1-SC-27316

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-062

No. A-1-CA-35330 (filed July 24, 2018)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
ANTHONY BLAS YEPEZ,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Mary L. Marlowe, District Judge

HECTOR H. BALDERAS,
Attorney General
MARIS VEIDEMANIS,
Assistant Attorney General
Santa Fe, New Mexico
for Appellee

L. HELEN BENNETT
L. HELEN BENNETT, P.C.
Albuquerque, New Mexico
for Appellant

Opinion

Daniel J. Gallegos, Judge

{1} Defendant Anthony Blas Yepez was convicted by a jury for second-degree murder, contrary to NMSA 1978, Section 30-2-1(B) (1994); tampering with evidence, contrary to NMSA 1978, Section 30-22-5 (2003); and unlawful taking of a motor vehicle, contrary to NMSA 1978, Section 30-16D-1(A) (2009). On appeal, Defendant maintains that the district court improperly excluded expert opinion testimony related to his ability to form deliberate intent and as a result, his conviction for second-degree murder should be reversed and remanded for a new trial. We conclude that the district court erred in excluding the expert testimony, but that such error was harmless. We therefore affirm Defendant's second-degree murder conviction.

FACTUAL BACKGROUND

{2} Jeannie "Anna" Sandoval was raised by George Ortiz (Victim), her adoptive mother's boyfriend. In 2012, Sandoval and her boyfriend, Defendant, were living with Victim. According to Sandoval's testimony at trial, Victim was often angry and would fight with her. The tension between Sandoval and Victim would escalate when they were drinking alcohol, and although the anger was mostly verbal, Victim had previously pushed her, pulled her hair, and slapped her a few times.

{3} On October 29, 2012, Victim, Sandoval, and Defendant were alone in Victim's apartment. Defendant was reading to Sandoval, and all three were drinking alcohol. Sandoval starting arguing with Victim and the argument escalated until Victim pushed Sandoval and hit her in the face. Defendant became upset and stopped reading. Between one and ten minutes later, Defendant went to Victim and they began to struggle. Sandoval testified that Victim and Defendant "tussled" and fell into the hallway, and that Victim's recliner "ended up going with them." Defendant restrained Victim with a hand and arm across his neck and chest area. Sandoval ran to her room. She testified that Victim "hit pretty hard when he landed[,]" and that she did not see Defendant hit Victim.

{4} Defendant called to Sandoval, and when she came out of her room, there was blood on the floor. Sandoval believed Victim was dead. He was motionless, his eyes were open, and he was not breathing. Defendant tried to calm Sandoval down and told her they "had to get rid of the evidence and the body." Defendant went to the kitchen, returned with a bottle of cooking oil, and handed it to Sandoval. She took the bottle and dumped the oil around Victim's body. Sandoval saw Defendant light a piece of paper with a lighter but did not see him set fire to Victim's body. Sandoval took Victim's car keys and left with Defendant.

{5} Rachel Piatt, Sandoval's cousin, testified that Sandoval and Defendant came to her home. According to Rachel, Sandoval and Defendant were intoxicated and did not "seem themselves." Rachel testified that Sandoval told her, "My dad's dead." Rachel asked if Sandoval was sure, and Sandoval responded, "Yes, he's dead." Rachel asked how she knew and she testified that Sandoval said, "Because [we] burned him." The next day, after going to Victim's apartment and looking inside, Rachel called 911. Sandoval and Defendant were taken into custody later that day.

{6} An autopsy concluded that the cause of Victim's death was "homicidal violence" and "thermal injuries," and the manner of death was "homicide." Consequently, Defendant was charged[1] with first-degree murder, conspiracy, tampering, and unlawful taking of a motor vehicle.

PROCEDURAL BACKGROUND

{7} As the case proceeded toward trial, Defendant filed a motion in limine that requested either judicial notice of the admissibility of proposed expert testimony with respect to the results of a neuropsychological evaluation by Dr. James Walker or a hearing on the admissibility of the expert testimony. Specifically, Defendant's motion explained that his proposed experts would testify that he had "the low[-]activity [monoamine oxidase A (MAOA)] gene" and that such condition is "statistically associated with the occurrence of maladaptive, or violent, behavior in individuals who have experienced maltreatment in childhood." This expert testimony, Defendant asserted, would "serve as almost the entire basis of [his] defense in his capital trial on charges of

[1]Sandoval was also charged, and she pleaded guilty to second-degree murder.

first-degree murder, among others." Soon thereafter, Defendant filed a "[n]otice of [i]ncapacity to [f]orm [s]pecific [i]ntent" indicating that he intended to present expert testimony about whether he was capable of forming the specific intent for the crime.

{8} In turn, the State filed a motion in limine to exclude Defendant's proposed expert testimony pursuant to Rule 11-702 NMRA, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *State v. Alberico*, 1993-NMSC-047, 116 N.M. 156, 861 P.2d 192. The State argued that the evidence was not reliable, not relevant, and so complicated it would confuse and mislead the jury. While the State did not contest the experts' qualifications, it maintained that current literature does not establish a "direct[] link[]" between a low-activity MAOA variant and increased violent behavior. The State additionally argued that the studies had not been reliably reproduced, the "maltreatment" factor was not sufficiently identifiable, and Defendant's reports of childhood maltreatment were suspect.

A. The January 29, 2015 *Daubert/Alberico* Hearing

{9} The district court held a *Daubert/Alberico* hearing on January 29, 2015. At the hearing, Dr. Adrian Raine testified that approximately 50 percent of variations in human antisocial and aggressive behavior are due to genetic influences and 50 percent to environment. A wide array of biological risk factors are associated with increased violent behaviors, including poor frontal brain functioning, birth complications, poor nutrition, low resting heart rate, and low IQ. Dr. Raine testified that the scientific research demonstrates that individuals with a genotype that confers low levels of MAOA, combined with a history of child abuse, are more likely to be antisocial and aggressive in adulthood. This research includes several studies that were attached to Defendant's motion in limine, including a study titled Avshalom Caspi, et al., *Role of Genotype in the Cycle of Violence in Maltreated Children*, Science, Aug. 2, 2002, 297 at 851. The *Caspi* study refers to connections between the low-activity MAOA gene and aggressive and antisocial behaviors.

{10} According to Dr. Raine, 30 percent of humans have a low-functioning MAOA gene. Dr. Raine testified that this relationship between low-activity MAOA and a history of child abuse has been validated, scientists in the field concur that this is a replicable finding, and the relationship has statistical significance.

{11} Dr. Raine further explained that the low-activity MAOA condition "can" also contribute to poor impulse control and "doing things without thinking about them ahead of time." He concluded that the gene-environment interaction produces reliable conclusions and also noted that "a number of people think it's especially with respect to impulsive behavior."

{12} Dr. Walker, a forensic neuropsychologist, also testified at the hearing. Dr. Walker performed a forensic neuropsychological evaluation of Defendant in order to identify any relevant neuropsychological information. As part of the evaluation, Dr. Walker reviewed police reports, educational records, witness statements, autopsy reports, and crime scene reports. He also interviewed Defendant, administered neuropsychological tests, and made behavioral observations. According to Dr. Walker, Defendant described having a "pretty horrific childhood." Defendant demonstrated a low-average IQ, no signs of brain injury, and adequate problem-solving skills.

{13} In the course of his evaluation, Dr. Walker requested that Dr. David Lightfoot perform genotyping on Defendant to determine whether he had a low- or high-activity MAOA gene. Dr. Walker testified that the results of Dr. Lightfoot's testing demonstrated that Defendant exhibited "extremely low function of the gene," which would make him "particularly more likely than the average person to do violent things." When the district court asked what Dr. Walker's opinion would be at trial, he stated, "the fact that [Defendant] has a history of childhood abuse [and] a low MAOA activity gene [that] made him exceptionally predisposed to committing violent behavior."

{14} On cross-examination, Dr. Walker confirmed that he is not a medical doctor or a molecular biologist, he does not do genetics research or genotyping on his own, and he does not conduct independent research on the issue. Dr. Walker also testified that even if Defendant were prone to violence because of the low-activity MAOA gene, Defendant could still have had sufficient presence of mind to know what he was doing. According to Dr. Walker, it was possible that Defendant could have intended to take Victim's life and such intent would have been "perfectly consistent" with the low-activity MAOA variant.

{15} At the conclusion of the hearing, the district court determined that Dr. Walker's opinion that Defendant "has a history of child abuse [and] a low MAOA activity gene [that] made him exceptionally predisposed to committing violent behavior" sufficiently satisfied the *Daubert-Alberico* factors. Nevertheless, the district court noted that Dr. Walker could not testify about Dr. Lightfoot's genetic testing and did not testify that Dr. Lightfoot's report meant that Defendant had the low MAOA variant. Because no witness interpreted the genetic study to show that Defendant actually had the low MAOA variant, the district court could not determine whether Dr. Walker's conclusions were supported. And as a result, the district court found that Dr. Walker's testimony would not assist the trier of fact and excluded the testimony under Rule 11-702.

B. Motion to Reconsider

{16} Defendant filed a motion to reconsider and provided additional affidavit evidence from Drs. Bernet, Lightfoot, Walker, and Raine. All of the doctors characterized Defendant's MAOA gene as "low activity." Dr. Walker's affidavit stated that Dr. Lightfoot's conclusion with respect to Defendant's low-activity MAOA gene

> formed a necessary basis for [Dr. Walker's] further opinion that, to a reasonable degree of scientific certainty that [Defendant], due to his genetic characteristics and childhood maltreatment, is predisposed to acts of impulsive violence and is substantially more likely to engage in acts of impulsive violence than the ordinary person.

The district court subsequently entered an order on the pleadings, again denying Defendant's motion to admit the testimony of Dr. Walker. The district court ruled that the *Daubert-Alberico* test was satisfied for studies related to persons with a low-functioning MAOA gene and a history of child abuse, who are predisposed or inclined toward "antisocial and aggressive behaviors," including violent acts. However, the district court viewed Dr. Walker's affidavit as a change in his opinion from a conclusion that Defendant was predisposed to "violent behavior" to a later conclusion that he was prone to "impulsive violence." The district court considered Dr. Walker's new opinion to be inconsistent with the prior studies on low-activity MAOA, including the *Caspi* study, which referred to violent, rather than impulsive, actions. The district court attached to its

order a table from a meta-study submitted by Defendant (compiling and analyzing twenty-seven studies) that listed "antisocial behaviors" associated with low-activity MAOA. That list of antisocial behaviors did not include impulsivity.

{17} The district court determined that Dr. Walker's opinion with respect to impulsivity exceeded the district court's understanding of the scientific literature as presented by both sides. As a result, the district court was not satisfied that Defendant demonstrated that Dr. Walker's opinion related to impulsivity had been tested, subjected to peer review or publication, had potential for error, or was grounded in scientific principles. Consequently, the district court concluded that Dr. Walker's opinion was a "misstatement of the results of the studies [he] relie[d] upon for his opinion."

{18} The district court also determined that Dr. Walker's testimony would not assist the jury with deciding the issue of deliberate intent. That is, the district court reasoned that any predisposition or inclination toward antisocial or aggressive behavior on Defendant's part would not explain whether Defendant deliberated prior to engaging with Victim or whether Defendant acted impulsively.

C. Trial and Appeal

{19} At trial, the district court instructed the jury on first-degree murder, which required the jury to find that Defendant killed Victim "with the deliberate intention to take" his life. The jury was also instructed on second-degree murder, voluntary manslaughter, and involuntary manslaughter. The jury ultimately found Defendant guilty of second-degree murder, tampering with evidence, and the unlawful taking of a motor vehicle. Defendant appeals his conviction for second-degree murder and argues that the district court erred in refusing to admit the expert testimony about the low-activity MAOA gene.

DISCUSSION

{20} Defendant argues on appeal that the district court improperly assessed the credibility of his proposed experts, the expert testimony would have provided "an important framework" for Defendant's actions, and as a result of the exclusion of Dr. Walker's testimony, Defendant was denied "a likely defense." The State maintains that the proposed expert testimony did not comport with the underlying studies and science related to the low-activity MAOA expression. Further, the State asserts that a genetic predisposition toward impulsivity or aggression is not a defense to second-degree murder—the crime for which the jury convicted Defendant.

A. Admission of Expert Opinion Testimony under Rule 11-702

{21} Rule 11-702 governs the admissibility of expert testimony and permits a

> witness who is qualified as an expert by knowledge, skill, experience, training, or education [to] testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

Thus, for evidence to be admissible under Rule 11-702, the following prerequisites must be met: "(1) [the] experts must be qualified; (2) their testimony must assist the trier of fact; and (3) their testimony must be limited to the area of scientific, technical, or other specialized knowledge in which they are qualified." *State v. Torres*, 1999-NMSC-010, ¶ 23, 127 N.M. 20, 976 P.2d 20. With respect to the second prerequisite, "the relevant inquiry is *on this subject* can a jury from *this person* receive appreciable help." *Alberico*, 1993-NMSC-047, ¶ 44 (alteration, internal quotation marks, and citation omitted). With respect to the third prerequisite, "evidentiary reliability is the hallmark for the admissibility of scientific knowledge." *Torres*, 1999-NMSC-010, ¶ 26. Hence, the party offering expert testimony based on scientific knowledge must establish that such knowledge is not only relevant, but reliable. *See Alberico*, 1993-NMSC-047, ¶ 24.

{22} In order to determine the reliability of the evidence, the district court should consider the following factors:

> (1) whether a theory or technique 'can be (and has been) tested'; (2) 'whether the theory or technique has been subjected to peer review and publication'; (3) 'the known [or] potential rate of error' in using a particular scientific technique 'and the existence and maintenance of standards controlling the technique's operation'; and (4) whether the theory or technique has been generally accepted in the particular scientific field.

State v. Anderson, 1994-NMSC-089, ¶15, 118 N.M. 284, 881 P.2d 29. In addition to these four *Daubert* factors, New Mexico courts rely upon a fifth factor: "whether the scientific technique . . . is capable of supporting opinions based upon reasonable probability rather than conjecture." *Alberico*, 1993-NMSC-047, ¶ 47.

{23} This Court reviews the admission of expert testimony for abuse of discretion. *Torres*, 1999-NMSC-010, ¶ 27.

> An abuse of discretion in a case involving scientific evidence can be found when the trial judge's action was obviously erroneous, arbitrary, or unwarranted. . . . It is not tantamount to rubber-stamping the trial judge's decision. It should not prevent an appellate court from conducting a meaningful analysis of the admission of scientific testimony to ensure that the trial judge's decision was in accordance with the Rules of Evidence and the evidence in the case.

Id. (alterations omitted) (quoting *Alberico*, 1993-NMSC-047, ¶ 63). "An appellate court should be wary of substituting its judgment for that of the trial court." *Alberico*, 1993-NMSC-047, ¶ 63.

B. The Qualification of the Expert Witnesses is Undisputed and the District Court's Conclusion That the Underlying Scientific Knowledge Satisfied the *Daubert-Alberico* Factors is Uncontested on Appeal

{24} In this case, there was no dispute as to the qualification of the expert witnesses. Further, the district court did not reject the science underlying the proposed expert testimony. Instead, the district court considered the *Daubert-Alberico* factors and found the studies demonstrating a correlation between low MAOA expression, a history of childhood maltreatment, and a predisposition toward antisocial and aggressive behaviors to be reliable. No party challenges this finding on appeal, and we therefore do not address whether the witnesses were properly qualified as experts or whether the science underlying the proposed expert testimony actually satisfies the *Daubert-Alberico* factors.

C. The District Court Abused its Discretion in Concluding That the Proffered Expert Opinion Testimony Failed to Satisfy the Rule 11-702 Requirement That the Opinion Assist the Trier of Fact

{25} Two of the Rule 11-702 prerequisites having been satisfied, this appeal turns primarily on whether the proffered expert opinion testimony satisfied the remaining

Rule 11-702 prerequisite that the opinion assist the trier of fact. The district court determined that the opinion testimony would not assist the trier of fact in this case for two reasons: (1) the expert opinion testimony as to Defendant's predisposition toward impulsive violence is unsupported by the scientific studies presented to the district court; and (2) the expert opinion testimony with respect to Defendant's predisposition toward aggression, antisocial behavior, and violence is not relevant to the question of whether he deliberately intended to kill Victim. For the reasons described below, we conclude that the district court abused its discretion in excluding the opinion testimony regarding Defendant's impulsivity, which would have been relevant to the question of deliberate intent.

{26} First of all, we observe that the district court was not satisfied that Dr. Walker's affidavit testimony about Defendant's impulsivity was based on reliable science. That is, the district court reviewed the testimony, affidavits, and the journal articles submitted by both parties and concluded that Dr. Walker's opinion with respect to the correlation between low-functioning MAOA and impulsive behavior was not supported by the research that it had determined to be valid and reliable. In particular, the district court pointed out that neither the *Caspi* study nor the meta-study referenced impulsive violence.

{27} On appeal, Defendant contends that the scientific evidence met the *Daubert-Alberico* factors and argues that the district court "excluded the evidence based on a credibility assessment." We note that it does not appear that the district court focused on the fact that Dr. Walker altered his opinion from "exceptionally predisposed to violent acts" to "substantially more likely to engage in acts of impulsive violence." Rather, the district court appears to have focused on the failure of Defendant's experts to establish that the correlation explained in the literature between low-activity MAOA, childhood maltreatment, and predisposition to violent acts also extended to impulsive behaviors or impulsive violence.

{28} In essence, the district court determined that there was an analytical gap between the reliable scientific knowledge presented, including the *Caspi* study and the meta-study, and Dr. Walker's affidavit testimony that Defendant is "predisposed to acts of impulsive violence and is substantially more likely to engage in acts of impulsive violence than the ordinary person." While this line of reasoning makes some sense conceptually, our Supreme Court, in *Acosta v. Shell Western Exploration & Production, Inc.*, 2016-NMSC-012, ¶ 27, 370 P.3d 761, declined to adopt the ruling of the United States Supreme Court in *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997), which allows a judge to "reject expert testimony where the 'analytical gap' between the underlying evidence and the expert's conclusion[] is 'too great[.]' " *Acosta*, 2016-NMSC-012, ¶ 27. In declining to adopt the *Joiner* rule, *Acosta* determined that the rule was inconsistent with the policy of our courts to leave credibility determinations and weighing of evidence to the trier of fact. *Acosta*, 2016-NMSC-012, ¶ 28. This is consistent with *Daubert*'s statement that the focus of the inquiry under Rule 11-702 to determine evidentiary relevance and reliability "must be solely on principles and methodology, not on the conclusions that they generate." 509 U.S. at 595.

{29} Consequently, although the district court believed that Dr. Walker's testimony with respect to Defendant's impulsivity went beyond the underlying science, *Acosta* counsels that the weight to be given to such testimony is for the jury to decide. 2016-NMSC-012, ¶ 28. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Id*. (internal quotation marks and citation omitted).

{30} In terms of assistance to the trier of fact, Dr. Walker's conclusion that Defendant is "predisposed to acts of impulsive violence and is substantially more likely to engage in acts of impulsive violence than the ordinary person" would have been relevant to whether Defendant had the specific intent necessary for first-degree murder. *See State v. Balderama*, 2004-NMSC-008, ¶¶ 14, 27, 135 N.M. 329 (recognizing that a neuropsychologist's testimony that the defendant's acts were "mere unconsidered and rash impulse" would have tended "to some degree, to refute the element of deliberation necessary for first-degree murder").

{31} Under these circumstances, where the district court found the underlying science to be reliable—and where we assume, but do not decide, the same—we conclude that the district court abused its discretion by excluding Dr. Walker's testimony. *See Alberico*,1993-NMSC-047, ¶ 53 ("Reliability and relevancy and are inextricably linked; once the technique is shown to be reliable it is relevant to prove what it purports to prove." (internal quotation marks and citation omitted)).

D. Any Error in Excluding the Evidence Was Harmless

{32} Before trial, Defendant asserted that the low-activity MAOA expert testimony constituted his defense to the first-degree murder charge. Additionally, Defendant filed a "[n]otice of [i]ncapacity to [f]orm [s]pecific [i]ntent" indicating that he intended to present expert testimony about whether he was capable of forming the specific intent for the crime. Thus, it appears that Defendant offered the expert testimony as a way to negate the specific intent element of first-degree murder. *See* § 30-2-1(A)(1) (stating that first-degree murder requires the State to prove that the death was caused by "willful, deliberate and premeditated killing"); *see also Alberico*, 1993-NMSC-047, ¶ 71 (stating that "the proper initial inquiry for the admissibility of expert opinion testimony, or any evidence for that matter, is the purpose for which it is being offered").

{33} Although Defendant's proposed expert testimony was excluded from use at trial, the jury acquitted him for first-degree murder. Instead, the jury convicted Defendant for second-degree murder, which requires a showing that the defendant knew his acts created a strong probability of death or bodily harm. *See State v. Suazo*, 2017-NMSC-011, ¶ 16, 390 P.3d 674 (citing Section 30-2-1(B) and UJI 14-210 NMRA). Second-degree murder includes killings that, even though intentional, are "rash and impulsive" and not deliberate. *State v. Garcia*, 1992-NMSC-048, ¶ 23, 114 N.M. 269, 837 P.2d 862.

{34} Given that Defendant's purpose in offering the excluded evidence was to establish an impulsiveness on his part in order to defend against the first-degree murder charge, we are not persuaded that Defendant was prejudiced where he was ultimately convicted of second-degree murder. *Cf. Balderama*, 2004-NMSC-008, ¶ 41 ("Error in the exclusion of evidence in a criminal trial is prejudicial and not harmless if there is a reasonable possibility that the excluded evidence might have affected the jury's verdict.").

{35} We acknowledge that Defendant now argues on appeal that the proposed expert testimony would have constituted a defense to the lesser charges of second-degree murder, voluntary manslaughter,

and involuntary manslaughter. We are not convinced. Each of these offenses are general intent crimes. *See State v. Jernigan*, 2006-NMSC-003, ¶ 18, 139 N.M. 1, 127 P.3d 537 (holding voluntary manslaughter is a usually a general intent crime); *State v. Campos*, 1996-NMSC-043, ¶¶ 31-32, 38, 122 N.M. 148, 921 P.2d 1266 (noting "second-degree murder is a general-intent crime"); *State v. Hunt*, A-1-CA-28753, 2009-WL 6690310 mem. op. at *3 (N.M. Ct. App. April 22, 2009) (non-precedential) (explaining that the diminished capacity defense does not apply to general intent crimes like involuntary manslaughter). The MAOA evidence would therefore not have supported a *Balderama*-type of defense for any of the remaining charged crimes. *See Balderama*, 2004-NMSC-008, ¶¶ 14, 27, (recognizing that a neuropsychologist's testimony that the defendant's acts were "mere unconsidered and rash impulse" would have tended "to some degree, to refute the element of deliberation necessary for first-degree murder"). Therefore, we are not convinced that Defendant was denied his right to present a defense.

{36} In summary, the jury's verdict acquitting Defendant of first-degree murder demonstrates that it rejected that he had a deliberate intention to kill Victim even without the assistance of expert testimony. The proposed expert testimony had no relevance to the remaining charged offenses of second-degree murder, voluntary manslaughter, and involuntary manslaughter and there is not a reasonable possibility that the evidence might have affected the jury's verdict. Any error, therefore, in excluding the evidence was not prejudicial and does not require a new trial. *See id.* ¶ 41.

CONCLUSION

{37} The district court erred in excluding Defendant's proposed expert opinion testimony, but the error was harmless. Therefore, we affirm.

DANIEL J. GALLEGOS, Judge

I CONCUR:
LINDA M. VANZI, Chief Judge

KIEHNE, Judge (specially concurring)

KIEHNE, Judge (specially concurring).

{38} I concur in the majority's decision to affirm Defendant's convictions, but I do not join its ruling that the district court improperly excluded the expert testimony that Defendant proffered at trial, because a decision on that issue is not necessary to resolve this case.

{39} In the district court, Defendant offered the expert testimony in question solely to support his defense to the first-degree murder charge. The jury, however, acquitted Defendant on that charge. Thus, it is not necessary for us to decide whether the district court improperly excluded evidence that would have supported a defense to first-degree murder.

{40} Defendant now argues that the expert testimony was also relevant to support his defense to the second-degree murder, voluntary manslaughter, and involuntary manslaughter charges. Although Defendant appears not to have preserved this claim in the district court, the State does not argue that we should deem this claim waived. Thus, I believe it is appropriate for this Court to decide it. But the majority's ruling that the proffered expert testimony could not have supported a defense to those charges as a matter of law fully (and correctly) disposes of this claim. The majority's lengthy analysis of the district court's decision to exclude the expert testimony is therefore unnecessary.

{41} Because this case can be fully disposed of on other grounds, "the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more—counsels us to go no further." *PDK Labs. Inc. v. U.S. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment). And because the Court's ruling that the district court abused its discretion is unnecessary to resolve this case, it is non-binding dicta. *See Ruggles v. Ruggles*, 1993-NMSC-043, ¶ 22 n. 8, 116 N.M. 52, 860 P.2d 182 (stating that language that is "unnecessary to decision of the issue before the [c]ourt" is dicta, "no matter how deliberately or emphatically phrased"). I believe that resolution of the important issues concerning the admission of expert testimony that Defendant raises here should await a case where it is necessary to decide them.

EMIL J. KIEHNE, Judge

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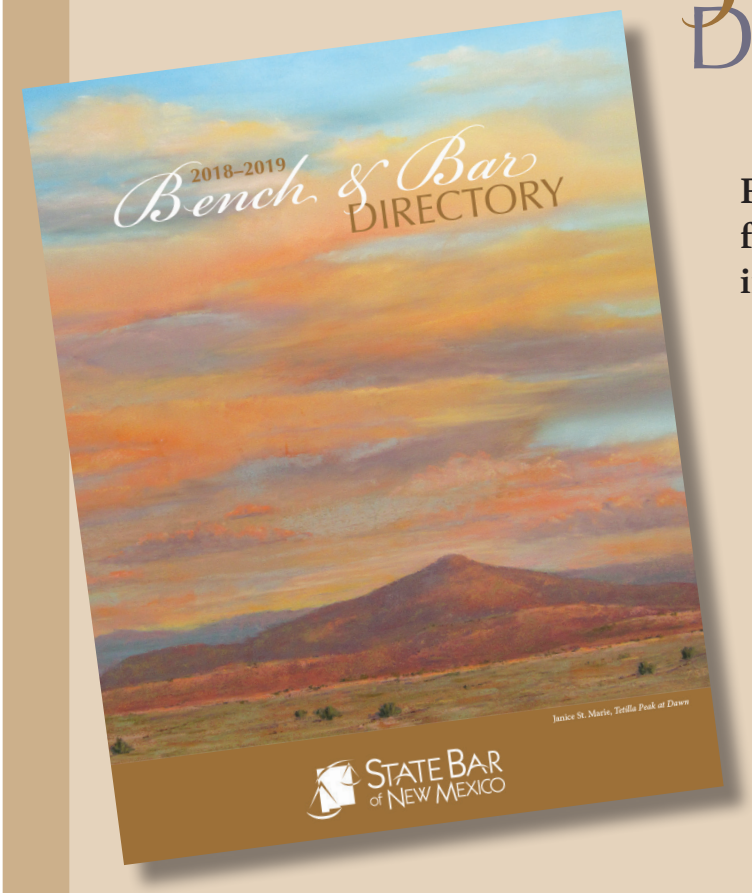

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