IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

Vs. **No. 29,978**

MARIO CHAVEZ,

Defendant-Appellant.

On Appeal From the Second Judicial District Court
Bernalillo County, New Mexico
District Court Case # CR-2004-03558
District Court Judge Richard J. Knowles

DEFENDANT-APPELLANT'S BRIEF IN CHIEF

Kathleen McGarry
McGarry Law Office
P.O. Box 310
Glorieta, New Mexico 87535
(505) 757-3989
kate@kmcgarrylaw.com

Counsel for Appellant Mario Chavez

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STATEMENT OF COMPLIANCE PURSUANT TONEW MEXICO RULE OF APPELLATE PROCEDURE 12-213(F) & (G)

Pursuant to New Mexico Rule of Appellate Procedure 12-213(G), I certified that this brief is proportionally spaced and contains 7,307 words. I relied on my word processor, Microsoft Word 2007, to obtain the count. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

By: _____
Kathleen McGarry
Counsel for Appellant

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Nature of the Case and The Course of Proceedings and Disposition in the Court Below

Mario Chavez was charged with one count of first degree murder in the death of Garland Taylor. He was also charged with one count of armed robbery and five counts of tampering with evidence. He was tried before a jury and found guilty of all charges.

This is a direct appeal from Mr. Chavez' conviction and sentence.

Summary of the Facts

On August 16, 2004, at around 9:45am, Jane and Bill Kellerman noticed that Garland Taylor was at the house at 11107 Pino Avenue, a house that he had listed as a Realtor. (Vol. 12, pp. 72, 103) The Kellerman's lived next door to the vacant house, and the Kellerman's had noticed his car previously when he was showing the house. (Id., at 72) About 10-15 minutes later, another car drove up and an individual got out, retrieved a black bag from his car and walked over to Mr. Taylor and shook hands, they then went into the house. (Vol. 12, pp 72, 104) The car was a light colored sedan, 4 doors with Arizona license plates. (Id., p. 73, 105)

The individual was about 5'10'', medium build, short dark hair, nicely dressed, Hispanic. (Id.)

The Kellerman's went about their business. Mrs. Kellerman next noticed that Mr. Taylor's car was still there at 12:30pm., which she thought was odd, because usually he showed the house and left right away. (Id., at p. 110) She did more errands, and was gone for several hours, and when she returned, she noticed the front door was open about a foot. (Id., at p. 111) At 6:30pm, Mrs. Kellerman came out to water and noticed the car was still there, she called Mr. Taylor's wife. (Id., at 112)

Mrs. Taylor had been trying to reach him since noon. (Id.) Mrs. Taylor came to the vacant house and went in the front door. (Vol. 12, p. 68) She saw a pool of blood and her husband's glasses and noticed a trail of blood. (Id.) Mrs. Kellerman came over and found Mrs. Taylor in the living room, she told Mrs. Kellerman she thought he had been hit in the head. (Id., at p. 113) Mrs. Taylor had found Garland in the closet of a bedroom in the house. (Vol. 12, p. 68)

The women stepped out of the house and Mrs. Kellerman called 911, while Mrs. Taylor contacted some friends. (Vol. 12, p. 114) Mrs. Taylor did not know who he had an appointment with that morning. (Vol. 12, p. 113)

Scott Clark lived two doors down from the vacant house. (Vol. 12, p. 134) About 10:10am, Mr. Clark pulled out of his driveway with his daughter in the car.

(Vol. 12, p. 135) He saw Mr. Taylor's car in the driveway of the vacant house, and they had previously talked on the telephone and Mr. Taylor had invited him to stop over and introduce himself if he ever saw his car there. (Vol. 12, pp. 134, 136) He pulled in the driveway, and he and his daughter got out and went to enter the vacant house. (Id)

Mr. Clark noticed that Mr. Taylor's car was there, and a light blue or silver sedan was parked on the west side of the property. (Id., p. 138) As they approached the door, Mario Chavez came out of the house, rather briskly, and asked if he was a realtor. (Id., p. 140) When Mr. Clark told him he was, and that he was there to introduce himself to Mr. Taylor, Mr. Chavez told him he and his wife and his realtor were in negotiations with Mr. Taylor to purchase the house. (Id.)

A conversation was had between Mr. Chavez and Mr. Clark. At one point, Clark's daughter was headed towards the house and Mr. Chavez ran towards the house and shut the door and told her she could not go in there. (Id., p. 144) When Mr. Chavez came out of the house, Mr. Clark thought he heard footsteps like someone going up or down stairs. (Id., p. 154)

In August of 2004, Abel Sedillo had an ad in the newspaper for a Ruger .22 automatic Mark II gun. He sold the gun to Mario Chavez on August 4, 2004. (Vol. 12, p. 190)

After the 911 call was made by Mrs. Kellerman, law enforcement arrived at the scene and started their investigation. Deputy Aaron Hagel was first on scene and found a .22 caliber shell casing in the hallway. (Vol. 12, p. 171)

Police officers obtained a phone number from the caller ID display at the Taylor home which was identified as a payphone in front of the Smith's grocery store on the northeast corner of Wyoming and Paseo del Norte. (Vol. 15, p. 215) The call had come into the Taylor house at 8:44am on August 16, 2004. (Id.)

Police were eventually led to Eloy Montano and Mario Chavez as the persons involved in the murder of Garland Taylor.[1] Eloy Montano went to the police station and over a couple of days gave three different statements concerning what transpired on August 16, 2004. Mario was arrested and charged with the murder of Garland Taylor. Eloy did not testify at Mario's trial and the trial came down to Eloy pointing the finger at Mario and Mario pointing the finger at Eloy. Mario testified during his trial. (Vol. 19, pp114-157; Vol. 20, pp 139-214; Vol. 21, pp. 3-144)

After Mr. Taylor was murdered, Eloy and Mario left Mario's car in the parking lot at Wyoming and Paseo del Norte. (Vol. 20, pp.192) Eloy later removed the license plate. (Id., p. 197-198) The murder weapon and items

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[1] Eloy Montano told his wife a story and his wife told a friend and the friend called crime stoppers with the information. (S. Tr. P. 24)

belonging to the victim were found in a field on Tramway. (Vol. 14, 137, 139, 204) The victim's wallet was found at a Jewish Community Center in Arizona. (Vol. 12, p. 69) No One knew how it got there.

Mario and Eloy had known each other since they were in 9th. or 10th. grade. (Vol. 19, p. 118) While they were in high school, they both became interested in the Mafia and organized crime. The watched The Godfather, and other similar movies that were out at that time. (Vol 19, p. 125-126)

Mario eventually married and moved to Arizona, but remained friends with Eloy. While Mario was in Arizona, Eloy came out and stayed with him, he had some problems of his own and mentioned the idea to Mario of taking a person hostage and taking money from them or blackmailing them for money. (Vol. 19, p. 153)

Mario ran into some business problems in July 2004. (Vol. 19, p. 147) He came back to Albuquerque and he and Eloy spent time together. Mario was planning on moving to New York City and starting over. (Vol. 15, p. 79) While he was in Albuquerque, he contacted two persons about purchasing their Porsches. (Vol. 13, p. 51-57, p. 74-89)

Eloy and Mario were also involved in a project at Victoria Chavez's house, Mario's grandmother, that looked like the model of a toy gun. (Vol. 15, p. 105)

Eloy would come by with his black case and tools. (Id.) It turned out to be a gun silencer.

During the course of the investigation, computers and laptops belonging to Eloy and Mario were confiscated. Computer forensics determined that Mario had searched for guns on e-bay and had also searched things like jobs in NYC, apartments in NYC, how to build a silencer, googled the word hitman, viewed www.hitman.com, and how to dispose of a body. (Vol. 16, pp. 201-226). Eloy had downloaded the book "Hitman" in 2003 and also searched for silencers, rifles, conversion kits, espionage, Mafia games. (Vol. 16, pp. 234-243).

The State seized on the Mafia and hitman fascination and used it as their theme during the trial. Pursuant to Eloy's statements, Mario killed Mr. Taylor and dragged Eloy into the crime scene and Mario forced him to get rid of evidence and travel with him in the evening and day following the murder to Texas and back.

Mario testified that he was looking for houses in the Albuquerque area and Eloy snuck in the house and shot Taylor after he (Mario) left the house. He came back to the house and they went about getting rid of evidence and traveled to Texas together until Mario could convince Eloy to come back to New Mexico and turn himself in.

Prior to trial, Mario took a polygraph test administered by Peter Pierangeli which showed a truthful result on the question of whether Mario shot Garland

Taylor and inconclusive on other questions. (Vol. 20, p. 50, 92) The tester used the probable lie protocol. Based on the test results, the defense and the prosecution entered into an agreement to have Mario take one additional polygraph. This test was administered by Charles Honts, using the direct lie testing procedure. (Vol. 17, p. 91) This test showed Mario to be deceptive. (Vol. 17, p. 79) There was a disagreement among the examiners as to the effect of changing from the probable lie to direct lie method. Both examiners testified at trial.

Mario was convicted for the murder of Garland Taylor, as well as one count of armed robbery and five counts of tampering with evidence.

All other facts pertinent to the issues presented will be discussed in the issues below.

ARGUMENT

ISSUE ONE: The Introduction Of A Plethora Of Irrelevant And Prejudicial Evidence Denied Mario Chavez A Fair And Reliable Trial.

Facts Supporting Argument

Prior to trial, defense counsel filed a motion in *limine* to exclude an array of evidence that was either irrelevant, or extremely prejudicial. (RP 229) The

hearing was held on January 24, 2006, just prior to the start of trial.[2] Other motions to preclude evidence were heard during the course of the trial. Defense counsel sought to exclude the following evidence:

Testimony of Chris Meyer (Vol. 14, pp. 122-132)

Meyer testified that he was a real estate agent in Scottsdale, Arizona. He met Mario Chaves in December of 2003 and Mario identified himself as Mario Gambino but that he also went by Mario Chavez. Mario told Meyer he was looking for a home in the five million to ten million dollar range. Mario also let it be known that he was in a relationship with the Gambino family. The second or third time that Meyer met with Mario, Mario had a bodyguard with him. Meyer went out about 8-9 times looking at houses in a month and a half period of time. Mario drove a BMW and they socialized. One time they went to a club, and the club refused to let Mario in with his Gambino identification because they said it was a fake. Mario often had his girlfriend, Lisa Miguel, with him.[3] Mario sometimes wore a bulletproof vest. Mario offered Meyer a job in Las Vegas, with a house and a salary of $750,000. The relationship between them ended in January

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[2] This transcript was not originally part of the record in the Court. Appellant's counsel asked the court to supplement the record with this transcript, and the court granted the motion. The supplemental transcript was filed April 9, 2009. References to this Supplement to the transcript will be "S. Tr., p. ___".

[3] Mario testified that he later found out that Chris Meyer was friends with Lisa Miguel's estranged husband. (Vol. 19, p. 138)

of 2004 when Meyer found out that Mario could not purchase the real estate they were looking at, that he would not qualify to purchase the home.

At first the State indicated they were not going to call Meyer in their case-in-chief, (S.Tr, p. 85) but did call him as a witness. Defense counsel asked his testimony to be excluded in a motion in limine (R.P. 230) and the again prior to his testimony (Vol. 12, pp. 4-14) The trial court denied the motion to exclude his testimony. (Vol. 12, p. 14)

Testimony of Rod Miller (Vol. 13, pp 12-20)

Miller testified that he is a realtor in Albuquerque. On August 16, 2004, at 8:38 in the morning he was working on his truck when he got a call from a person identifying himself as an attorney in Phoenix. The caller indicated he would be in Albuquerque for a couple of days and wanted to look at some properties. He was interested in large lots, up to $850,000 and would like to see some homes. The caller identified himself as Martin Cordova. The caller indicated he wanted a vacant house, he had come to town with his family, and wanted to be able to get into the home right away. Miller entered the name in his day planner, and the page was submitted as Exhibit A-6. He obtained a phone number from caller identification, but when Miller asked for a cell phone number, the caller indicated he did not have one. Miller then asked the caller to meet him at his office at 10:00, or call him at 10:00. Miller went to the office, but never received another call and

no one stopped in and by 11:30 he figured he had been stood up. On cross examination, Miller admitted he did not know who it was that called him.

Defense counsel objected to the admission of the testimony (Vol. 13, p. 7) The trial court denied the request.

Avy Drum (Vol. 13, pp. 58-74)

Drum was a realtor in the Albuquerque area. She had telephone contact with Mario Chavez in the summer of 2004. On July 29, she set up an appointment to show Mario a house she had listed in the north Albuquerque area for $1,195,000. He indicated that he had just moved to Albuquerque and was under pressure to get into a home soon. He told her he was a litigator from Scottsdale, Arizona. He gave her his phone number and she entered it into her palm pilot. Mario later called and cancelled the appointment. They exchanged phone messages and other appointments were scheduled and later cancelled. She had an appointment to meet with him on August 16, 2004 at 10:30, but she went to the house and he never showed up. She never met Mario Chavez.

Nicholas Woo (Vol. 13, pp. 74-108)

Woo testified that in the summer of 2004 he was trying to sell a 2001 Porsche 911. He was asking $80,000 since it was a limited production car. He advertised the car on the internet and was contacted by Mario Chavez concerning

the car. Woo met Mario at the Cherry Hills library on August 12 or 13, 2004 at approximately 10:30-11:00am. They took the car on a test drive and Mario was very attentive and took notes. While Mario was in the car with him, his cell phone rang once or twice, but Mario never answered it. Mario did not want to drive the car, but inquired about maintenance. Woo gave Mario the name of the person who did work on the car, and later found out Mario contacted them to ask about the service history of the car. Mario contacted him on Friday night and said he wanted to meet at the Wells Fargo on August 16 at 10:00-10:30am. Mario never showed up.

Steven Coe (Vol. 13, pp. 51-57)

Coe is a real estate broker that had a 2001 Porsche 911 for sale in August 2004. He was asking $60,000. On August 13, 2004 at around 10:00am he got a call from someone interested in buying the car. The caller said his name was Mario and he had a phone number with a 602 area code. The caller said he was down the road at Academy and Wyoming. Coe told him to come over to his house and look at it. Coe gave him directions and he came right over. He was very knowledgeable about sports cars. They took it for a test drive, Coe drove first and Mario drove it back. Mario said he was a corporate attorney and going through a messy divorce. Mario told him he was planning on driving the car to New York, which Coe thought out because people do not usually drive cars like that for long

distances. Mario was driving an 80's model, light blue Nissan with Arizona license plates. He said he had won the car in Las Vegas and did not need it so was going to give it to his nephew. Mario had a small notepad with him. Mario said he had another car to look at and later called him back and said he was going with the other car.

Defense counsel moved to exclude evidence pertaining to the sale of autos. (R.P. 230, S. Tr. Pp. 78)

Woo Script (S. Tr. P. 65, Vol. 15, p. 7-8)

A piece of paper was found in a briefcase in Eloy's truck and it appeared to be a script in which the person would be extorting money from Mr. Woo. The writing was not Mario Chavez's according to the State's handwriting expert, but was written by Eloy Montano.

The defense requested that it be excluded, (S.Tr. p. 65) but the trial court denied the request. (Id., at p. 107)

Alexandra Dort Urmann (Vol. 18, pp. 37-57)

Ms. Dort-Urmann is a policewoman in Germany. She met Mario on the internet and they communicated about a month in January 2003. She then traveled to New York City and met him and returned to Arizona with him in February, 2003, and stayed with him until June, 2003, when she returned to Germany. They

moved to two different apartments while they were living together in Arizona. Mario asked her to marry him and gave her a ring. He worked for Verizon wireless. On weekends they looked at cars and houses including Porshes, BMW's Hummers and expensive homes. She ended up selling two rings because they ran out of money. Mario asked her about her job in law enforcement and how people were caught if they commit crimes. They also talked about different professions that had large sums of cash, such as realtors, car dealers and defense lawyers. He talked to her about a plan a friend of his had to kidnap someone for ransom. He had discussions with her about kidnapping a person and if you did that you would need to kill them so there were no witnesses. She had plans to meet with Mario in August 2004 because he wanted to give her money he owed her. He never asked her how to kill someone.

The defense moved to exclude her testimony in the motion in limine, and later before her testimony at trial. (R.P. 230, S.Tr. p. 91, Vol. 18, pp. 9-26) The trial court denied the motion. (S. Tr. P. 108, Vol. 18, pp. 23-24)

Gambino, Mafia, Hitman Evidence

Whenever possible, the State inserted evidence concerning the fact that Mario was fascinated with the life of a hitman and also that he presented himself as being tied into the Gambino family and the mafia. He identified himself as Mario Gambino to Chris Meyer (Vol. 14, p. 125) and let it be known that he was in a

relationship with the Gambino family. Detective Hix testified that in a suitcase identified as Mario's with a tag from Las Vegas to Albuquerque, he had several items with the name Gambino on it. (Vol. 16, pp. 52-53)

Evidence relating to Eloy's fascination with Mafia kinds of things and hitmen were admitted. (Vol. 13, p. 175)

Jane Bales testified that she had done a forensics exam of the computers seized and there were searches on www.hitman .com and that Eloy downloaded a Hitman book. (Vol. 16, p. 202, 244)

Defense counsel moved to exclude the evidence prior to trial (S. Tr. . 81-84), the trial court denied the motion. (Id., at p. 108)

Standard of Review

The standard of review for evidentiary issues is well established. "On review we defer to the trial judge's decision to admit or exclude evidence and we will not reverse absent a clear abuse of discretion. An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the trial court abused its discretion by its ruling unless we can characterize it as clearly untenable or not justified by reason." *State* v. *Apodaca*, 118 N.M. 762, 770, 887 P.2d 756, 764 (1994), *State* v. *Woodward*, 121 N.M. 14, 908 P.2d 231 (NMSC 1995).

Argument

In addressing an issue regarding an evidentiary ruling, the first question is whether the evidence sought to be admitted, is relevant to the case being tried. Evidence which is not relevant is not admissible. Rule 11-402 NMRA (2007).

Even if the State can somehow show relevance ("The proponent of the evidence bears the burden of affirmatively demonstrating its relevance. *See State v. Lucero,* 1992 NMCA 106, 114 N.M. 489, 492, 840 P.2d 1255, 1258."), the evidence would still have to be admissible under Rules 11-403 and 11-404(B).

Is the Evidence Relevant?

The State's answer or argument every time the Defense objected to the admission of evidence was that it goes to motive and intent. (S. Tr. P. 67) They also argued that it was tied up in a scheme and plan, that Mario had a fascination with the Mafia and hitmen. (Id., at 68)

Rule 11-403 NMRA and Rule 11-404(B)

The evidence rules, Rule 11-403 and 11-404(B) are often analyzed together. This is so because both discuss when evidence should be excluded. Even if the evidence is found to be relevant, it can still be excluded "if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury ..." Rule 11-403 NMRA.

Under Rule 11-404(B):

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

"In order to admit evidence under Rule 11-404(b), the court must find that the evidence is *relevant to a disputed issue* other than the defendant's character, and it must determine that the prejudicial effect of the evidence does not outweigh its probative value, as set out by N.M.R.Evid. 403, N.M.S.A. 1978. *United States* v. *Figueroa*, 618 F.2d 934 (2d Cir. 1980)." *State* v. *Beachum*, 96 N.M. 566, 568, 632 P.2d 1204, 1206 (NMCA 1981)

In *Beachum*, the defendant was on trial for criminal sexual contact and the State introduced a confession made by the defendant seven years prior the incident for which he was on trial, allegedly to prove intent and identity. In finding that the evidence was inadmissible and reversing the conviction, the court of appeals stated:

> A person, put on trial for an offense, is to be convicted, if at all, on evidence showing he is guilty of that offense. The defendant is not to be convicted because, generally, he is a bad man, or has committed other crimes. Evidence of other offenses tends to prejudice the jury against the accused and predispose the jury to a belief in defendant's guilt. * * *" *State v. Ross*, 88 N.M. 1, 536 P.2d 265 (Ct.App. 1975), quoting from *State v. Garcia*, 83 N.M. 51, 53,487 P.2d 1356, 1358 (Ct.App. 1971).

Likewise, this Court, in *State* v. *Gallegos,* 2007 NMSC 7, 141 NM 185, 191-192 (NMSC 2007) stated:

> The nearly universal view is that other-acts evidence, although logically relevant to show that the defendant committed the crime by acting consistently with his or her past conduct, is inadmissible because "the risk that a jury will convict for crimes other than those charged -- or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment --creates a prejudicial effect." *Old Chief v. United States,* 519 U.S. 172,181,117 S. Ct. 644,136 L. Ed. 2d 574 (1997) (quoted authority omitted); ... We clarify our view that, although logically relevant, evidence of how a person acted on a particular occasion is not legally relevant when it solely shows propensity and should be automatically excluded under Rule 11-404(B) because it is unfairly prejudicial as a matter of law.

In this case, there was no probative use of the evidence that is not based on the proposition that a bad person is more likely to commit crime. The evidence listed above, was so overwhelming that it created an image that the jury was hard to ignore. In this case it would have been hard to separate the evidence concerning the murder of Garland Taylor from this web of evidence that Mario was not a totally honest person and tended to live in a fantasy world. This “fantasy world” evidence seemed to consume more of the testimony in this case than did the actual

evidence relating to the murder, and most likely forced Mario into a position of testifying to explain the evidence and why he acted as he did.

The testimony of Chris Meyer involved a time period of at least seven months before the murder of Garland Taylor. They had socialized together during a 6 week period. In the process, Meyer related some of Mario's actions which would certainly seem strange, but created a lot of ancillary issues irrelevant to the question of who murdered Garland Taylor, which was the issue that the jury had to determine. This side issue concerning wearing a bullet-proof vest, or having a body guard and his use of the name Gambino as well as the job offer and the viewing of expensive homes certainly had a grave risk of confusing and misleading the jury. Further, it is not a crime to look at expensive homes. If indeed a real estate agent is willing to show a prospective buyer a home without checking into that buyers ability to afford such a home, then the realtor's time is wasted, but it is not a criminal activity.

Likewise the testimony of Rod Miller and Avy Drum. Neither were able to identify Mario Chaves, because they never met Mario Chaves.

Similarly the testimony of Steven Coe and Nicholas Woo. While they could identify Mario as the person who looked at their respective Porsche, their testimony was not relevant to the murder of Garland Taylor. Mario had told Mr. Coe he would not be purchasing his vehicle and Mario had made arrangements to

meet Mr. Woo at a Wells Fargo Bank for the transaction, although it never occurred.

The Woo script was not written by Mario according to the State's handwriting expert and the fact that it may have had a finger print on it does not make it relevant to the Taylor murder. If Eloy wrote it, as the expert opined, Mario could have read and given it back to Eloy as being silly. Again the risk of the jury being mislead and confused increases.

Alexandra Dort Urmann's testimony related to events occurring a year and a half prior to the murder of garland Taylor. His questioning of her regarding her work could have been purely fascination with police work. Certainly the public is fascinated with police work, which explains the number of crime dramas enjoying success on television.

Finally the evidence regarding the Mafia, hit men and the use of the Gambino name was prejudicial far beyond any probative value they added to the issues in the case.

Pursuant to this Court's decision in *Gallegos*, the evidence should have been excluded. Its admission violated Mario's right to a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and the Article II, Section 18 of the New Mexico Constitution.

ISSUE TWO: Did the trial court err in admitting the hearsay testimony of Dawn Pollaro concerning statements made her husband, the co-defendant in the case.

Facts Supporting Argument

Eloy Montano was a co-defendant in the case. Eloy did not testify, he chose to exercise his Fifth Amendment rights. (Vol. 20, pp. 6-7) Dawn Pollaro was Eloy's wife. (V. 13, p. 108) The State sought to introduce her testimony which would include statements that Eloy made to her the day of the murder. (V. 13, p. 109-110) Defense Counsel objected, arguing that the statements were hearsay. (V. 13, p. 115)

The Court voir dired the witness. (V.13 pp 121-142) The statements the State sought to admit included the following:

(1) When she returned home from her sister's house, Eloy was pacing and his eyes were real red, and he was shaking real bad. He kept saying "He set me up, he set me up, that F'er set me up." (V. 13, p. 123)

(2) A conversation in the upstairs bedroom after she put the baby in his crib concerning what had happened that day and that Mario had shot an innocent man. (V. 13, p. 123)

(3) A cell phone call received by Eloy, Eloy says "That's Mario" and Ms. Pollaro hears the person on the phone say "you're in this with me now. Your fingerprints are all over my car."…"You have to go out on the lam with me." And Eloy said "I can't, I have a family, I can't do that." (V. 13, p. 125)

The Court allowed statement (1) set forth above to come in an excited utterance and statement (3) to come in as a present sense impression. (V. 13, p. 154-157) Statement (2) was excluded.

Ms. Pollaro's testified:

> Well, as soon as I walked in the front door, Eloy was on the far side of the room. He was standing by the bookshelf and he was pacing, pacing, pacing. His hands were shaking, and he kept saying, "He set me up, he set me up, that fucker set me up." And, you know, I was - - I was asking him, "who? What are you talking, Mario?" "He set me up."
>
> (V. 13, p. 167)

She later testified that while they were in the bedroom, Eloy's cell phone kept ringing. He told her it was Mario. (V. 13, p. 168) She could hear the conversation coming from the phone:

> I heard the person on the other line saying that "you're in this with me now, you're in just as much trouble as I am. Your fingerprints are all on my car. You need to go out on a lam with me."
>
> (Vol. 13, p. 169)

Standard of Review

The Court reviews the trial court's determination of whether testimony is within exceptions to the hearsay rule for an abuse of discretion. *See State* v. *Ross,*

1996 NMSC 31, 122 N.M. 15, 20, 919 P.2d 1080, 1085, *State* v. *Salgado, 126* N.M. 691, 1999 NMSC 8, 974 P.2d 661.

Argument

The testimony offered by Dawn Pollaro was hearsay and the trial court erred in admitting these statements as evidence.

Excited Utterance

As the statement of facts sets forth, Garland Taylor was killed sometime between 9:00am and 10:00am on August 16, 2004. Dawn testified that she received the call from Eloy to come home while she was at her sister's house and that she remembered eating lunch, so it was sometime around noon. At least two to three hours after the murder.

Eloy had enough time to separate from Mario Chavez and go home. We do not know how long he was home, before he called his wife and asked her to come home. The argument that this is an excited utterance would be persuasive, if immediately upon Dawn answering the phone he had blurted out that Mario had set him up. But that is not what happened. Instead he was at home, and then called his wife, and it took about 15-30 minutes for her to get home (Vo. 13, p. 189, 204) and then when she came in he told her that Mario had set him up. There was

certainly time for reflection between the time he and Mario parted and the time Dawn came home for him to reflect on what he would say to her when she arrived.

An "excited utterance" is defined by Rule 11-803(B), (NMRA 2007) as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." In *State* v *Robinson*, 94 NM 693, 697, 616 P2d 406 (NMSC 1980) this court found that admissibility of an excited utterance depends on the circumstances surrounding the utterance.

The statements made by Eloy were not made at the time of the startling event, but hours later. In *State v. Maestas, 92 N.M. 135, 139-41, 584 P.2d 182, 186-88 (Ct. App. 1978),* the Court of Appeals considered the scope of the excited utterance exception. The victim in *Maestas* was severely beaten. At trial she could not or would not identify her assailant. *Id. at 142, 584 P.2d at 189.* The issue was whether the victim's out-of-court statements identifying the defendant as her assailant were admissible. The Court of Appeals held admissible the victim's statements made to her mother shortly after the beating while the victim was still under the stress of excitement from the beating. However, the Court held inadmissible the victim's statements to her sister-in-law later that evening and her sister the next morning. *Id. at 141, 584 P.2d at 188.* See, *State v. Woodward,* 121 N.M. 1, 5-6; 908 P.2d 231 (NMSC 1995)

The Court noted that New Mexico follows the Wigmore test for the admissibility of excited utterances.

> First. "There must be some shock, startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting."
>
> Second. "The utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance."
>
> Third. "The utterance must relate to the circumstances of the occurrence preceding it."
>
> *Maestas*, at 141 (quoting *State v. Buck*, 33 N.M. 334, 336-37, 266 P. 917, 918 (1927)).

An excited utterance, by the plain meaning of its words, indicates there must be some excitement. But the concern in Mr. Chavez's case is the second factor in *Buck*, that the utterance must have been before there has been time to contrive and misrepresent. Here there was certainly time to contrive, he had more than two hours before Ms. Pollaro arrived home and Eloy Montano was certainly someone known for contriving. During the cross-examination of Detective Hix, many instances of Eloy lying to the police were brought out. Eloy was worried about protecting himself and would have said anything to do so.

In a case in which Mr. Montano did not testify, and the defense related to whether it was Mr. Montano or Mr. Chavez who committed the crime, the

statements from Montano were very harmful. The trial court erred in admitting the statement.

Present Sense Impression

The trial court allowed the remaining statement in as a present sense impression. There are two problems with this statement, not only the fact that the hearsay was allowed in, but then statements allegedly made by Mario were also admitted.

Dawn Pollaro had never met Mario nor talked to him. Therefore she did not know what he sounded like on the phone and could not testify that the statements were actually made by Mario. However, once Eloy made the statement "that's Mario" the court allowed the statements to come in.

Rule 11-803(A) NMRA (2007) defines the present sense exception as "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" In *State v. Perry*, 95 N.M. 179, 180-181, 619, P.2d 855, 856-857 (NMCA 1980), the court of appeals, after reviewing the rule on present sense impression, stated: "[b]asically, all that the foregoing requirements need mean is that there be no apparent motive to lie. The requirements assist the trial court in reaching its determination."

In this case there is a very important motive to lie, Eloy was trying to put all the blame on Chavez. His statements were not trustworthy and there was no way to test their trustworthiness. The trial court should have excluded the statements.

ISSUE THREE: The conviction and sentence for five counts of tampering with evidence violates the double jeopardy clause.

Facts Supporting Argument

In addition to the first degree murder count and the armed robbery count, Mr. Chavez was charged with five separate tampering with evidence charges relating to (1) the handgun, (2) the body, (3) a vehicle, (4) a license plate, and (5) a wallet. All charges related to the murder and robbery of Garland Taylor on August 16, 2004. (R.P., p. 2) The jury found him guilty of all tampering charges. (R.P. 330-334) The trial court sentenced him to 3 years on each count to be served consecutively, adding 15 years to the other charges. (RP 348).

Standard of Review

Double jeopardy presents a question of law, which the Court reviews de novo. *State v. Bernal*, 2006 NMSC 50, P 6, 140 N.M. 644, 146 P.3d 289.

Argument

Mario Chavez was charged with five separate counts of tampering with evidence. The statute provides that "tampering with evidence consist of

destroying, changing, hiding, placing, or fabricating any physical evidence with intent to prevent the apprehension, prosecution, or conviction of any person or to throw suspicion of the commission of a crime upon another." §30-22-5 NMSA (2003) All five counts in the indictment charge that Chavez tampered with evidence with intent to prevent his apprehension, prosecution or conviction. The jury instructions were exactly the same, changing only the item "tampered with" (RP 306, 308, 310, 312,314).

The five counts relate to the following items:

1. Placed and/or hid a handgun

   The handgun used to shoot the victim was found in a search of a field on Tramway. (Vol. 14, p. 204, 206) Several credit cards in the victim's name were also found. (Id.) Detective Hix testified that Eloy Montano told him where the gun could be found. (Vol. 19, p. 7) Mario Chavez testified that he saw the gun and the wallet in Eloy's truck. (Vol 20, pp. 195-196)

2. Placed or hid the body of Garland Taylor
   The body of Garland Taylor was found in the master bedroom closet. (Vol. 12, p. 113) Detective Hix testified that Eloy told him that Mario moved the body. (Vol. 19, p. 6)

3. Placed or hid a vehicle
   A silver Nissan Centra registered in Mario's mother's name was the vehicle allegedly seen at the crime scene and was left at a shopping center on August 16, 2004. The license plate was later removed (Vol. 20, p.198)(see #4 below) and the vehicle towed to Victoria Chavez's house on August 17, 2004. (Vol. 14, p. 185, 194)

4. Changed and/or hid and/or placed a license plate (that belonged to car in #3)

   When the vehicle was found at Vitoria Chavez's house it did not have a license plate on it. (Vol. 14, p. 186) An Arizona license plate was found

during a search of Victoria Chavez's home. (Vol. 14, p. 195) Mario testified he and Eloy went back to where the Nissan was parked and Eloy took off the license plate. (Vol. 20, p. 198)

5. Changed and/or hid and/or placed a wallet and/or its contents

   The victim's wallet was found at a Jewish Community Center in Tucson, AZ and was entered as an exhibit by stipulation. (Vol. 16, pp. 45-46) Credit Cards in the victim's name were found on a stretch Tramway near I-25. (Vol.. 14, p. 204-205) (See, also #1, above)

Evidence is a word that can be used as a singular or plural item. In a plain meaning of the wording of the statute, tampering with evidence would mean one item of evidence or many items of evidence. There is no intent that the legislature meant to allow a separate charge of tampering with evidence for every piece of evidence that is touch or moved by the defendant.

The items listed above were pieces of evidence relating to the murder of Garland Taylor. The evidence was dealt with on August 16, 2004, the date of the crime. The body of the victim was moved after the victim was shot. The remaining pieces of evidence were all taken when the perpetrator left the crime scene and disposed of that day. There should have been only one tampering with evidence charge, or in the alternative, the counts should have been merged for the purpose of sentencing.

The United States and the New Mexico Constitutions both guarantee that no person shall "be twice put in jeopardy" of punishment for the same offense. U.S. Const. amend. V; N.M. Const. art. II, § 15. The federal protection is applicable to

the states through the Due Process Clause of the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

Arguably, the New Mexico Constitution provides greater protection than the federal constitution in this area. The Court recognized this in *State v. Nunez*, 129 N.M. 63, 2000 NMSC 13. "When compared to recent United States Supreme Court Fifth Amendment jurisprudence, New Mexico's constitutional and statutory protection against double jeopardy, on its face, is of a different nature, more encompassing and inviolate." *Nunez* at ¶27. *Nunez* addressed the question of double prosecutions, and held the New Mexico Double Jeopardy Clause forbids bringing criminal charges and civil forfeiture petitions for the same crime in separate proceedings. The *Nunez* decision recognizes a greater protection in the New Mexico Constitution and Appellant Chavez would ask the Court to examine whether under the facts of this case, ie. multiple punishments, the New Mexico Constitution would provide greater protections as well.

The prohibition against double jeopardy relates to two general categories of cases: cases in which a defendant has been charged with multiple violations of a single statute based on a single course of conduct, known as "unit of prosecution" cases; and cases in which a defendant is charged with violations of multiple statutes for the same conduct, known as "double-description" cases. *Swafford v.*

State, 112 N.M. 3, 8, 810 P.2d 1223, 1228 (1991). The issue presented here relates to what this Court has described as a unit of prosecution issue.

In two recent cases, this Court has addressed the unit of prosecution argument as it related to the tampering with evidence statute. In *State v. DeGraff*, 139 N.M. 211, 2006 NMSC 11, 131 P.3d 61, the Court determined that:

> In the absence of clear evidence that the Legislature intended to punish a defendant for every individual piece of evidence hidden, we apply the rule of lenity and presume that the Legislature did not intend to impose multiple punishments on a single action.
>
> *DeGraff* at ¶ 34

While this Court acknowledged that the word evidence is ambiguous, the Court decided to consider whether a defendant's actions can be divided into discrete acts, and permit only a single conviction where they cannot. The Court continued:

> Because we conclude that the statute does not clearly define the unit of prosecution, we consider whether Defendant's acts are separated by sufficient "indicia of distinctness." *Swafford*, 112 N.M. at 13, 810 P.2d at 1233. Such indicia include the timing, location, and sequencing of the acts, the existence of an intervening event, the defendant's intent as evidenced by his conduct and utterances, and the number of victims. *Herron v. State*, 111 N.M. 357, 361, 805 P.2d 624, 628 (1991).
>
> *DeGraff* at ¶ 35. See also *State v. Saiz*, 144 N.M. 663, 2008 NMSC 48.

Appellant submits that when defendant seeks to “tamper” with the evidence of the crime, and the events occur in close proximity to the murder (one victim),

that they should be considered one unit of prosecution. In this case, the defendant moved the body to the closet in the master bedroom and then went about "covering up" the crime by getting rid of the gun and the wallet (and its contents) and abandoning the car. There should have been only one tampering with evidence charge.

CONCLUSION

For the reasons set forth above, Mario Chavez' conviction should be reversed and the sentence vacated. As it relates to the third issue presented, four of the five tampering charges should be vacated and the sentence adjusted accordingly.

Respectfully submitted:

Kathleen McGarry
McGarry Law Office
P.O. Box 310
Glorieta, New Mexico 87535
(505) 757-3989
kate@kmcgarrylaw.com

Counsel for Appellant Mario Chavez

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *DEFENDANT-APPELLANT'S BRIEF IN CHIEF* was served by hand delivery to the Attorney General's Box in the Supreme Court of New Mexico this 26th. day of May, 2009.

_____

Kathleen McGarry
Counsel for Appellant Chavez