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AG Balderas: Artesia Man Who Murdered His Girlfriend to Stay in Prison

The Office of the Attorney General prosecuted Dallas Hnulik for the brutal murder of Brandy Capps

Carlsbad, NM – This afternoon, Attorney General Hector Balderas announced that the New Mexico Court of Appeals agreed with the Office of the Attorney General Criminal Appeals Division and affirmed the conviction and sentence of Dallas Hnulik for the 2010 murder of his girlfriend, Brandy Capps. Attorney General Hector Balderas prioritized the case early in his administration and his prosecutors successfully convicted Hnulik of second-degree murder in July of 2015.

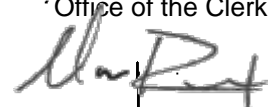
“My office will continue to work with local law enforcement across New Mexico to attack violent crime and keep the most dangerous criminals behind bars,” Attorney General Balderas said. “Violence against women and domestic violence will not be tolerated in New Mexico, and I am thankful for hard work of the Eddy County Sheriff’s Office and Pecos Valley Drug Task Force. I am also very proud of the Office of the Attorney General prosecutors for securing this conviction and our Criminal Appeals Division for working to have this hard fought conviction upheld.”

In the summer of 2015, Hnulik was convicted after a Carlsbad jury deliberated for only two hours. In November of that year, Fifth Judicial District Judge Lisa B. Riley sentenced him to 12 years of incarceration for murdering Ms. Capps, who suffered a gunshot wound to the face at a range of approximately four inches.

See attached for a photo of Dallas Hnulik and the Court of Appeals opinion.

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Mark Reynolds

1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 Opinion Number: _____

3 Filing Date: February 21, 2018

4 **No. A-1-CA-35323**

5 **STATE OF NEW MEXICO,**

6 Plaintiff-Appellee,

7 v.

8 **DALLAS HNULIK,**

9 Defendant-Appellant.

10 **APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY**

11 **Lisa B. Riley, District Judge**

12 Hector H. Balderas, Attorney General

13 Santa Fe, NM

14 Laurie P. Blevins, Assistant Attorney General

15 Albuquerque, NM

16 for Appellee

17 Bennett J. Baur, Chief Public Defender

18 William A. O'Connell, Assistant Appellate Defender

19 Santa Fe, NM

20 for Appellant

1 **OPINION**

2 **KIEHNE, Judge.**

3 {1} Defendant appeals his conviction for second-degree murder arising from the
4 shooting of his girlfriend, Brandy Capps (Victim). Defendant argues that statements
5 made by Victim should not have been admitted at trial because they were
6 inadmissible hearsay, and that his conviction must be reversed. We hold that all but
7 one of the challenged statements were properly admitted under Rule 11-803(3)
8 NMRA. The remaining statement was not admissible under any exception to the rule
9 against hearsay, but its admission was harmless error. Defendant also challenges the
10 admission of evidence about a previous domestic violence dispute between him and
11 Victim. We hold that the domestic dispute evidence was admissible under Rule 11-
12 404(B) NMRA.

13 **BACKGROUND**

14 {2} Defendant was in a romantic relationship with Victim for the two years that
15 preceded her death. The evidence showed that the relationship was rocky and
16 Defendant occasionally became violent with Victim. At the time of Victim's death at
17 the end of July 2010 she lived in Lubbock, Texas, but was visiting Defendant and
18 friends in Artesia, New Mexico, where she used to live. On the day of Victim's death,
19 Defendant was in the driver's seat of Victim's car as the couple set out from

1 Defendant's father's house to run errands. Victim was in the passenger seat.
2 Defendant testified that he reached into the back seat area to get a revolver, and as he
3 brought the gun to the front seat area, it went off. A bullet struck Victim in the face
4 and she died as a result of the gunshot wound.

5 {3} At trial, the State argued that Defendant intentionally shot Victim to prevent
6 her from testifying against him in a domestic violence case pending against him in
7 Lubbock, and out of anger because she planned to break up with him. Defendant
8 testified that the shooting was an accident and that the gun simply "went off."
9 Defendant claimed that the gun was in a bag of clothing in the back seat of the car.
10 He testified that he did not know the hammer of the gun was cocked, and that as he
11 was bringing the gun over the seat, the gun fired accidentally.

12 {4} Among the evidence the State presented to prove that the shooting was not an
13 accident, Victim's friends and family testified about statements Victim had made to
14 them. Collectively, they testified that Victim stated that she was anxious to leave
15 Artesia and never return, and that she wanted to break off her relationship with
16 Defendant. The State also presented evidence of a 2009 domestic violence incident
17 in Artesia involving the couple in which the officer who arrested Defendant heard
18 him shout "I'm not going to jail over this shit," and saw him standing over Victim in
19 an aggressive manner.

1 {5} Defendant challenges the admission of Victim’s statements on hearsay grounds,
2 and argues that the domestic violence incident was improper propensity evidence and
3 that it was unfairly prejudicial. For the reasons that follow, we are not persuaded.

4 **DISCUSSION**

5 {6} “We review the admission of evidence under an abuse of discretion standard
6 and will not reverse in the absence of clear abuse.” *State v. Sarracino*, 1998-NMSC-
7 022, ¶ 20, 125 N.M. 511, 964 P.2d 72. An abuse of discretion occurs when a trial
8 court “exercises its discretion based on a misunderstanding of the law.” *State v. Vigil*,
9 2014-NMCA-096, ¶ 20, 336 P.3d 380.

10 **I. Two of Victim’s statements were relevant to negate Defendant’s accident** 11 **defense**

12 {7} The State introduced statements that Victim made to two witnesses, Brooklyn
13 Edwards, Victim’s niece, and Dova Cronian, a former coworker and friend of
14 Victim’s. Defendant objected to these statements as hearsay. The Court admitted the
15 statements made to Ms. Edwards as both excited utterances and evidence of Victim’s
16 state of mind and future intent, and it admitted the statements made to Ms. Cronian
17 as evidence of Victim’s state of mind.

18 {8} Ms. Edwards was one of Victim’s closest friends. Ms. Edwards testified that
19 Victim moved to Lubbock from Artesia because she wanted to start getting her life
20 together, go to school, and leave Defendant. She understood that Victim planned to

1 go to Artesia for the weekend in order to get the rest of her belongings and to talk to
2 Defendant to “get things figured out.” Ms. Edwards testified that Victim called her
3 on Friday night, the night before the shooting, and said that she was upset, angry,
4 ready to go home to Lubbock, “tired of everything” and frustrated. Victim also told
5 her that she and Defendant had been fighting. Victim planned to get all of her things,
6 go home to Lubbock, said she was “done with him,” and did not want to return to
7 Artesia.

8 {9} Ms. Cronian testified that Victim called her because Victim had run out of gas
9 in Defendant’s mother’s driveway. She stated that Victim sounded anxious and said
10 “please hurry and come over here and bring me gas as fast as you can get here.” When
11 Ms. Cronian arrived, Victim said that she “needed [Ms. Cronian] to get the gas as
12 soon as [she] could because [Victim] needed it so she could leave as soon as
13 possible.” Victim told Ms. Cronian that she was going back to Lubbock and was
14 never returning to Artesia.

15 {10} Ms. Cronian invited Victim to go with her to get the gas, but Victim said that
16 she could not, again asking Ms. Cronian to hurry because “she needed to leave as
17 soon as possible,” and stated that she would explain later why she could not go with
18 her. After dropping off the gas, Ms. Cronian called Victim and asked her if she would
19 be all right, and Victim replied, “I will be. I will be leaving as soon as I can, and I’m

1 gonna get the fuck out of here, and I'm never fucking coming back." Victim then
2 assured Ms. Cronian that she would call her as soon as she got onto the highway to
3 Lubbock.

4 {11} "Hearsay is an out-of-court statement offered to prove the truth of the matter
5 asserted." *State v. King*, 2015-NMSC-030, ¶ 24, 357 P.3d 949 (internal quotation
6 marks and citation omitted); see Rule 11-801(C) NMRA. "Hearsay is not admissible
7 except as provided by [the New Mexico Rules of Evidence] or by other rules adopted
8 by [our] Supreme Court or by statute." Rule 11-802 NMRA. One such exception
9 permitted by the Rules is a hearsay statement showing the declarant's "then-existing
10 mental, emotional, or physical condition." Rule 11-803(3). This includes statements
11 which show the declarant's "motive, intent or plan." *Id.* Our Supreme Court has held
12 that while evidence demonstrating the declarant's state of mind is admissible as an
13 exception to the rule against hearsay, evidence explaining the reasons for the
14 declarant's state of mind is inadmissible. *King*, 2015-NMSC-030, ¶ 27. "Although
15 [Rule 11-803(3)] allows hearsay statements that show the declarant's then existing
16 mental condition, the rule does not permit evidence explaining why the declarant held
17 a particular state of mind." *State v. Leyba*, 2012-NMSC-037, ¶ 13, 289 P.3d 1215
18 (internal quotation marks and citation omitted); *State v. Baca*, 1995-NMSC-045, ¶ 19,
19 120 N.M. 383, 902 P.2d 65 (same).

1 {12} But it is not enough that a declarant's statements fall within the state-of-mind
2 hearsay exception; they must also be relevant to some issue in the case. *See* Rule 11-
3 401 NMRA ("Evidence is relevant if it has any tendency to make a fact more or less
4 probable than it would be without the evidence, and . . . the fact is of consequence in
5 determining the action."). *Baca* indicates that in a criminal prosecution, statements
6 within the state-of-mind exception are admissible only if the declarant's state of mind
7 is of consequence to the determination of the declarant's conduct. 1995-NMSC-045,
8 ¶ 20; *see Leyba*, 2012-NMSC-037, ¶ 15 (indicating that statements expressing a
9 declarant's mental state must be relevant). "When the state of mind does not prove
10 or negate action or inaction by the declarant, then admissibility of hearsay state-of-
11 mind evidence must be considered under some other rule." *Baca*, 1995-NMSC-045,
12 ¶ 20.

13 {13} *Baca* explains that evidence of a crime victim's state of mind is commonly
14 relevant, and properly admissible, to help a jury decide issues of "(1) self defense
15 (rebutted by extrajudicial declarations of the victim's passive state of mind), (2)
16 suicide (rebutted by statements inconsistent with a suicidal bent), and (3) accident
17 (rebutted by [the] victim's fear of placing self in way of such harm)." *Id.* ¶ 21. Such
18 evidence of the victim's state of mind "is a relevant part of the conduct in question[.]"
19 because it "precedes and informs the conduct." *Id.* That sort of properly-admitted

1 evidence “is distinguishable from a state of mind that arises out of the conduct and
2 is relevant not because it itself is of consequence but only because an inference can
3 be drawn therefrom to make the existence of some other fact more or less probable.”
4 *Id.* The latter sort of evidence, which is offered after the fact to show “the truth of the
5 underlying facts rather than solely to show state of mind,” must be excluded because
6 of the danger that “the jury will consider the victim’s statement of fear [as] somehow
7 reflecting on [the] *defendant’s* state of mind rather than the victim’s[.]” *Id.* ¶ 22
8 (internal quotation marks and citations omitted).

9 {14} Under this standard, all of Victim’s statements made to Ms. Edwards and Ms.
10 Cronian were properly admitted, except for Victim’s statement to Ms. Edwards that
11 she was upset because she and Defendant had been fighting, which we will address
12 below. These statements demonstrated Victim’s state of mind and future intent: that
13 she was upset, wished to end her relationship with Defendant, and intended to return
14 home to Lubbock as soon as possible. Evidence of Victim’s state of mind was
15 relevant because it “preced[ed] and inform[ed] the conduct” at issue. *Id.* ¶ 21. At trial,
16 Defendant claimed that the shooting was an accident. In support of this claim, defense
17 counsel argued that although Victim and Defendant had arguments, their relationship
18 was generally good, and that there was no tension or argument between them in the
19 hours leading up to the shooting. Victim’s statements were relevant because they

1 provided a possible motive for the shooting—Defendant’s anger over her plan to
2 break up with him—and rebutted Defendant’s claim that he shot Victim by accident.
3 Defendant acknowledged that they had been arguing immediately before the shooting
4 when he said, “I don’t even remember what we were arguing about.” In closing
5 argument, the State asked the jury to consider Victim’s statements as evidence that
6 Defendant had a motive to shoot Victim.

7 {15} Defendant argues, however, that Victim’s statements were irrelevant because
8 his own mental state was the only one at issue. Defendant argues that statements
9 about a victim’s state of mind might be admissible to rebut a defense claim that a
10 victim’s own conduct caused his or her accidental death, but here there was no claim
11 that Victim fired the gun. Instead, Defendant never disputed that he fired the fatal
12 gunshot, and the only question was whether he intended to shoot Victim, or whether
13 the shooting was an accident. According to Defendant, Victim’s plans shed no light
14 on his intent, but statements about her plans were improperly offered to show his
15 motive.

16 {16} In support of his claim, Defendant relies on our Supreme Court’s opinions in
17 *Baca* and *Leyba*, but those opinions are distinguishable. First, neither opinion
18 disapproves of evidence about a victim’s state of mind that is relevant to show the
19 existence of a possible motive for the defendant’s actions. Second, both opinions

1 involved very different facts that made the state-of-mind statements then at issue
2 inadmissible.

3 {17} First, *Baca* did not involve a claim of self-defense, accident, or suicide. In
4 *Baca*, the defendant was charged with killing his wife by shooting her, and then
5 running over her and their three-year-old daughter with a car. *See Baca*, 1995-NMSC-
6 045, ¶¶ 1-2. His defense was that another man committed the crimes. *See id.* ¶ 8. The
7 daughter survived, and later nodded her head when a therapist asked if she was afraid
8 of her father. *See id.* ¶ 9. Testimony about this non-verbal statement was admitted
9 against the defendant at trial. *See id.* ¶ 11. On appeal, our Supreme Court held that
10 this statement was both irrelevant and unfairly prejudicial. *Id.* ¶¶ 20-22. Our Supreme
11 Court explained that state-of-mind evidence is frequently relevant when a criminal
12 defendant raises issues of self-defense, suicide, or accident: “In such cases the state
13 of mind of the victim is a relevant part of the conduct in question[,]” because it
14 “precedes and informs the conduct.” *Id.* ¶ 21. That sort of evidence “is distinguishable
15 from a state of mind that arises out of the conduct and is relevant not because it itself
16 is of consequence but only because an inference can be drawn therefrom to make the
17 existence of some other fact more or less probable.” *Id.* *Baca* held that the daughter’s
18 after-the-fact fear of her father was inadmissible because it had not been offered
19 solely to show the daughter’s state of mind, but was instead offered to prove “that her

1 father attempted to kill her and that he did in fact kill her mother[.]” *Id.* ¶ 22.

2 {18} Second, the daughter’s statement in *Baca* was irrelevant because it said nothing
3 about her state of mind *before* the criminal act occurred, and thus provided no
4 relevant information about the crime itself or the defense. Instead, the daughter’s
5 statement arose out of the alleged conduct and was offered for the improper purpose
6 of encouraging the jury to infer that because the daughter was afraid of her father, he
7 must be guilty as charged. Here, by contrast, Victim’s statements related to her state
8 of mind before the shooting, and were relevant because they demonstrated the
9 existence of a possible motive for Defendant to shoot her.

10 {19} Defendant’s reliance on *Leyba* is equally unavailing. In that case, the defendant
11 killed his pregnant girlfriend and her father, but claimed that he acted in self-defense.
12 2012-NMSC-037, ¶¶ 2-4. At trial, the state offered excerpts from the victim’s diary
13 in which the victim wrote that her boyfriend (i.e. the defendant) had beat her up, and
14 she expressed fear of the defendant based on those acts. *See id.* ¶¶ 3, 8. Our Supreme
15 Court held that some of the statements were improperly admitted because they did not
16 reflect the victim’s state of mind at the time she wrote them. But even those that did
17 were irrelevant because “anxiety or confusion or even her fear proves nothing without
18 the cause of those emotions—[the d]efendant’s alleged prior acts—which are not
19 admissible under this hearsay exception.” *Id.* ¶ 15. The state did not explain why the

1 victim's fear was relevant, and thus the statements were only offered to show the
2 defendant's state of mind, which was improper. *See id.* ¶¶ 15-16. In other words, the
3 cause of the victim's fear was not properly admitted under the state-of-mind
4 exception, and the victim's fear, by itself, did not rebut the defendant's self-defense
5 claim. Here, by contrast, all of Victim's statements except her statement that she was
6 upset because she and Defendant had been fighting were properly admitted under the
7 state-of-mind exception, and they were relevant because they showed the existence
8 of a possible motive for the shooting.

9 {20} We are not alone in holding that a victim's statements of intent to break up with
10 or divorce a partner or spouse are properly admitted to show the existence of a motive
11 to commit violence on the part of the partner or spouse. For example, in *State v.*
12 *Calleia*, 20 A.3d 402, 419 (N.J. 2011), the New Jersey Supreme Court held that a
13 wife's statements of intent to divorce her husband were admissible, along with other
14 evidence of their deteriorating relationship, to show that her husband had a motive
15 to kill her. The court acknowledged general statements in previous case law that
16 evidence of a victim's state of mind should not be used to prove a defendant's
17 motivation or conduct, but clarified that the correct rule is that a "deceased victim's
18 then-existing state of mind cannot directly prove a defendant's motive; the state-of-
19 mind exception to the hearsay rule does not permit imputation of a defendant's state

1 of mind out of no more than a deceased person's feelings about that defendant."
2 *Id.* at 412-13. In other words, "subject to certain exceptions, a fact probative of the
3 victim's state of mind, standing alone, does not tend to prove any material fact about
4 a defendant's conduct or state of mind." *Id.* at 413. But "[w]hen a victim's projected
5 conduct permits an inference that [the] defendant may have been motivated by that
6 conduct to act in the manner alleged by the prosecution, the statement satisfies the
7 threshold for relevance." *Id.* at 415. Other courts have reached similar conclusions.
8 *See, e.g., United States v. Donley*, 878 F.2d 735, 738 (3d Cir. 1989) (stating that the
9 defendant claimed he killed his wife in the heat of passion after finding her with
10 another man; evidence that the victim said she planned to leave the defendant was
11 properly admitted "to persuade the jury to infer from her statements that she had such
12 a plan and, in turn, to infer from that plan and the defendant's awareness of it that he
13 had a motive for murder other than the one he claimed"); *Pierce v. State*, 705 N.E.2d
14 173, 176 (Ind. 1998) (allowing evidence of the victim's statements indicating a poor
15 relationship with the defendant as relevant "to controvert defense evidence" that the
16 defendant and the victim "were getting along well at the time of the murder");
17 *Commonwealth v. Tassinari*, 995 N.E.2d 42, 49 (Mass. 2013) (noting that evidence
18 of the victim's request for divorce and her statements indicating a tense relationship
19 with her husband were relevant to the defendant husband's motive to kill her). We

1 hold that Victim's statements were properly admitted under Rule 11-803(3).

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

4 {21} Ms. Edwards's testimony that Victim said she was upset because she and
5 Defendant had been fighting was inadmissible as evidence of Victim's state of mind,
6 because New Mexico law is that the state-of-mind exception does not include any
7 statement which explains the cause of the declarant's state of mind. *See King*, 2015-
8 NMSC-030, ¶ 27; *Leyba*, 2012-NMSC-037, ¶ 13 ("Although [Rule 11-803(3)] allows
9 hearsay statements that show the declarant's then-existing mental condition, the rule
10 does not permit evidence explaining why the declarant held a particular state of
11 mind." (alteration, emphasis, internal quotation marks, and citation omitted)); *Baca*,
12 1995-NMSC-045, ¶ 19 (same).

13 {22} Neither was the statement admissible as an excited utterance under Rule 11-
14 803(2). Statements which relate to a startling event or condition, and are made while
15 the declarant is "under the stress or excitement" of the "startling event or condition,"
16 can be admitted as excited utterances. Rule 11-803(2). The rationale for allowing
17 their admission is that the exciting event or condition causes the declarant to
18 experience such surprise, "shock, or nervous excitement" that he or she temporarily
19 lacks the "capacity for conscious fabrication." *State v. Suazo*, 2017-NMSC-011, ¶ 11,
20 390 P.3d 674 (internal quotation marks and citation omitted). A court should consider

1 the totality of the circumstances and several factors to determine the amount of
2 “reflection or spontaneity” behind the statement. *Id.* (internal quotation marks and
3 citation omitted). Such factors include: the amount of “time [that] passed between the
4 startling event and the statement[;]” whether “the declarant had an opportunity for
5 reflection and fabrication; how much pain, confusion, nervousness or emotional strife
6 the declarant was experiencing at the time of the statement; whether the statement
7 was self-serving; and whether the statement was made in response to an inquiry.” *Id.*
8 (alteration, internal quotation marks, and citation omitted). There is no specific time
9 frame in which the statement must be made to fall under Rule 11-803(3). *State v.*
10 *Hernandez*, 1999-NMCA-105, ¶ 15, 127 N.M. 769, 987 P.2d 1156. Rather, the
11 inquiry turns on whether the victim was under the stress and strain of the excitement
12 at the time the statement was made. *State v. Lopez*, 1996-NMCA-101, ¶ 31, 122 N.M.
13 459, 926 P.2d 784.

14 {23} At trial, the State argued that the statements made to Ms. Edwards were excited
15 utterances because Ms. Edwards stated that Victim was yelling and on the verge of
16 tears while she was making the statements. On appeal, however, the State does not
17 defend the district court’s ruling that this statement was admissible as an excited
18 utterance, and with good reason. The State did not present evidence about the factors
19 used to determine the spontaneity of the statement. The State did not, for example,

1 present evidence about when the argument between Defendant and Victim occurred,
2 so it is not possible to determine the amount of time which passed between the
3 startling event and the statement, or to determine whether Victim had time to reflect
4 or fabricate. Further, no evidence was presented to show whether this argument was
5 of the kind that would cause Victim to experience so much “pain, confusion,
6 nervousness, or emotional strife” that she would have been unable to reflect or
7 fabricate her statements. *Suazo*, 2017-NMSC-011, ¶ 11 (internal quotation marks and
8 citation omitted). Thus, we hold that the statement was not admissible as an excited
9 utterance under Rule 11-803(2).

10 {24} The State contends that even if this Court were to hold that the testimony at
11 issue on appeal in this case was inadmissible, its admission was harmless error.
12 Defendant does not address the effect the errors he alleges had on the verdict.
13 Improperly admitted evidence is reviewed for non-constitutional harmless error. *See*
14 *State v. Serna*, 2013-NMSC-033, ¶ 23, 305 P.3d 936. Non-constitutional error is
15 harmless “when there is no reasonable probability [that] the error affected the
16 verdict.” *State v. Tollardo*, 2012-NMSC-008, ¶ 36, 275 P.3d 110 (emphasis, internal
17 quotation marks, and citation omitted). Harmless error review “requires a case-by-
18 case analysis.” *Id.* ¶ 44.

19 {25} We hold that the admission of the hearsay statement through Ms. Edwards was

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

1 arguing, and that Defendant intended to shoot Victim, but upon later reflection
2 realized that his reasons for doing so were inadequate.

3 {26} Testimony was also presented from an acquaintance of Defendant who was
4 then incarcerated for violation of probation, and had previously been convicted of
5 felonies including forgery. The witness testified that he was working at a car wash in
6 Artesia while Defendant was there, and that they saw a friend of Victim drive by.
7 Defendant gestured rudely at Victim's friend, and explained to the witness that he and
8 Victim were arguing at the time of the shooting, that Victim was yelling at him so he
9 grabbed a gun, and that Victim had spat in Defendant's face. At that point, Defendant
10 told the witness that he shot Victim. Defendant later asked the witness not to say
11 anything. In light of all the evidence presented at trial, we find that the isolated
12 hearsay statement that Victim and Defendant had been arguing was harmless error.

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

15 {27} At trial, the State presented evidence of Defendant's arrests in Lubbock and
16 Artesia, both of which showed that Defendant had physically abused Victim.
17 Defendant does not argue that the admission of evidence of his June 2010 arrest in
18 Lubbock was improper. Rather, he argues that the evidence of his 2009 arrest in
19 Artesia was improper character evidence which should have been excluded under
20 Rule 11-404(B), particularly because it did not result in criminal charges. Defendant

1 further argues that this evidence was more prejudicial than it was probative, and
2 should have been excluded under Rule 11-403.

3 {28} We note that “Rule 11-404(B) is a rule of inclusion not exclusion, providing
4 for the admission of all evidence of other acts that is relevant to an issue in trial, other
5 than the general propensity to commit the crime charged.” *State v. Phillips*, 2000-
6 NMCA-028, ¶ 21, 128 N.M. 777, 999 P.2d 421 (internal quotation marks and citation
7 omitted). Evidence of a prior bad act is admissible “if it bears on a matter in issue,
8 such as intent, in a way that does not merely show propensity.” *Sarracino*, 1998-
9 NMSC-022, ¶ 22 (internal quotation marks and citation omitted). “If evidence of prior
10 acts is relevant and admissible for a purpose other than proving a defendant’s
11 propensity to commit a crime, the probative value of the evidence must outweigh its
12 prejudicial effect.” *State v. Williams*, 1994-NMSC-050, ¶ 17, 117 N.M. 551, 874 P.2d
13 12, *overruled on other grounds by Tollardo*, 2012-NMSC-008, ¶ 37 n.6; *see State v.*
14 *Woodward*, 1995-NMSC-074, ¶ 29, 121 N.M. 1, 908 P.2d 231, *abrogated on other*
15 *grounds as recognized by State v. Montoya*, 2014-NMSC-032, ¶ 15, 333 P.3d 935.

16 {29} In this case, the State offered evidence of the dispute in Artesia to establish that
17 Defendant had a motive to kill Victim to prevent her from testifying against him in
18 domestic violence cases. Although the event in Artesia did not lead to formal charges,
19 his statement at the time, “I’m not going to jail over this shit,” was still relevant to

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

11 {30} Defendant placed his own intent at issue by claiming that the gun fired by
12 accident. *See State v. Niewiadowski*, 1995-NMCA-083, ¶ 13, 120 N.M. 361, 901 P.2d
13 779 (noting that the defendant placed his intent at issue by claiming that he acted in
14 self-defense). Thus, evidence of Defendant's prior arrests for violence against Victim
15 was admissible to rebut his claim of accident and to establish that he intended to
16 shoot Victim, either to prevent her from testifying against him, or due to anger at her
17 plan to break up with him, or simply during the course of one of their many
18 arguments.

19 {31} We also hold that Defendant was not unfairly prejudiced by the introduction

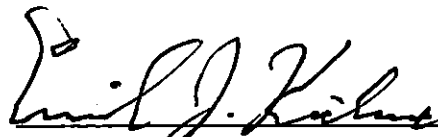
1 of the Artesia arrest, much less that the probative value of that evidence was
2 outweighed by unfair prejudice under Rule 11-403. “Because a determination of
3 unfair prejudice is fact sensitive, much leeway is given trial judges who must fairly
4 weigh probative value against probable dangers.” *Woodward*,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

1 additional instance of potential domestic violence against Victim was unfairly
2 prejudicial or that any unfair prejudice outweighed its probative value.

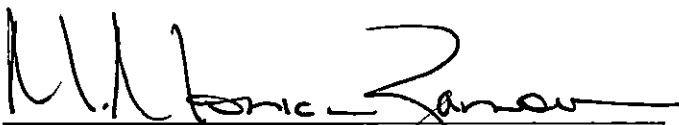
3 **CONCLUSION**

4 {32} For the reasons set forth above, we affirm the district court's judgment and
5 sentence.

6 {33} **IT IS SO ORDERED.**

7 
8 _____
EMIL J. KIEHNE, Judge

9 **WE CONCUR:**

10 
11 _____
M. MONICA ZAMORA, Judge

12 
13 _____
J. MILES HANISEE, Judge