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

Court of Appeals of New Mexico

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3 Filing Date: **DECEMBER 19, 2019**



Mark Reynolds

4 **No. A-1-CA-36403**

5 **STATE OF NEW MEXICO,**

6 Plaintiff-Appellee,

7 v.

8 **WILLIAM KALINOWSKI,**

9 Defendant-Appellant.

10 **APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY**

11 **T. Glenn Ellington, District Judge**

12 Hector H. Balderas, Attorney General

13 Santa Fe, NM

14 John J. Woykovsky, Assistant Attorney General

15 Albuquerque, NM

16 for Appellee

17 L. Helen Bennett, P.C.

18 L. Helen Bennett

19 Albuquerque, NM

20 for Appellant

1 **OPINION**

2 **VARGAS, Judge**

3 {1} Defendant William Kalinowski appeals his convictions for six counts of
4 embezzlement, contrary to NMSA 1978, Section 30-16-8 (2007), and three counts
5 of fraud, contrary to NMSA 1978, Section 30-16-6 (2006). Defendant argues that
6 the district court erred in (1) refusing to allow his expert to testify regarding the
7 effects of the “great recession” on local home builders; (2) limiting the testimony of
8 his other experts; (3) admitting evidence of other uncharged incidents in
9 contravention of Rule 11-404(B) and Rule 11-403 NMRA; and (4) failing to dismiss
10 the case for violation of Defendant’s right to effective assistance of counsel. Finding
11 no error, we affirm the district court on the grounds raised by Defendant.

12 {2} In addition, this Court has raised sua sponte a question regarding the
13 sufficiency of the evidence supporting Counts 1 and 3 relating to the embezzlement
14 of customer deposits paid to Defendant. *See State v. Clemons*, 2006-NMCA-031,
15 ¶ 10, 139 N.M. 147, 130 P.3d 208 (raising sufficiency of the evidence sua sponte);
16 *State v. Maes*, 2003-NMCA-054, ¶ 5, 133 N.M. 536, 65 P.3d 584 (same). After
17 reviewing the supplemental briefing, we conclude that Counts 1 and 3 are not
18 supported by sufficient evidence and thus reverse the corresponding embezzlement
19 convictions. We remand to the district court to vacate Defendant’s convictions on
20 Counts 1 and 3 and enter an amended judgment and sentence.

1 **BACKGROUND**

2 {3} Defendant, operating through several business entities, began building homes
3 in Santa Fe in the late 1990s under the moniker Barranca Builders. Defendant's
4 business grew and he was eventually hired to build homes in Las Campanas luxury
5 golf community in Santa Fe. To fund these construction projects, Defendant relied
6 on substantial down payments from purchasers (deposits) and construction loans
7 obtained either by purchasers or by one of his business entities. Importantly,
8 Defendant did not strictly apply deposit funds, or funds advanced under the
9 construction loans, to the particular projects with which they were associated.
10 Instead, he pooled all the funds together in a single account and used them to pay all
11 the bills of Defendant's business entities.

12 {4} Defendant contracted to build a home in Las Campanas for Robert and Janice
13 Sostrin on October 3, 2007. Under the terms of the agreement and addendum, the
14 Sostrins paid an initial deposit of \$213,750 to Defendant. Though Robert Sostrin
15 testified that he assumed the deposit would be used toward construction costs on his
16 home, neither the terms of the agreement nor any conversations between Defendant
17 and the Sostrins specified the particular purpose for which the money was to be used.
18 Defendant ultimately failed to complete the home, liens were filed by unpaid
19 subcontractors, and the Sostrins were forced to pay an extra \$250,000 to another

1 builder to finish the construction. These events gave rise to the crime charged in
2 Count 1 of the indictment.

3 {5} Defendant also contracted to build three homes for Howard Hawks, doing
4 business as Hawks Holdings, LLC (Hawks Holdings). The contract required Hawks
5 Holdings to pay Defendant an initial deposit of \$363,943. Hawks testified at trial
6 that the deposit funds were “to get the job going[,]” though he did not point to any
7 actual agreement between himself and Defendant as to the specific purpose for the
8 deposit money. Defendant was unable to finish building the homes for Hawks
9 Holdings, liens were filed against the property by various subcontractors, and Hawks
10 Holdings eventually had the project completed for approximately one million dollars
11 over the original contract price. These events gave rise to the crime charged in Count
12 3 of the indictment.

13 {6} Based on these and similar incidents, Defendant was charged with six counts
14 of embezzlement and three counts of fraud for his failure to finish several
15 construction projects. At trial, Defendant was convicted on all of the charges.
16 Defendant appeals those convictions, asserting various claims of error. This Court
17 ordered the parties to submit supplemental briefing regarding the sufficiency of the
18 evidence to support Defendant’s embezzlement convictions related to the deposits
19 paid to Defendant by the Sostrins and Hawks Holdings as charged in Counts 1 and
20 3. We begin our analysis with the sufficiency of the evidence supporting those counts

1 and develop additional facts as necessary to the remaining issues in the body of the
2 opinion that follows.

3 **DISCUSSION**

4 **I. Sufficiency of the Evidence**

5 {7} Questions of sufficiency that require us to engage in statutory interpretation
6 “present[] a question of law which is reviewed de novo on appeal.” *State v. Chavez*,
7 2009-NMSC-035, ¶ 10, 146 N.M. 434, 211 P.3d 891. “In interpreting a statute, our
8 primary objective is to give effect to the Legislature’s intent.” *State v. Trujillo*, 2009-
9 NMSC-012, ¶ 11, 146 N.M. 14, 206 P.3d 125. “In discerning legislative intent, we
10 look first to the language used and the plain meaning of that language.” *Id.* “[W]hen
11 a statute contains clear and unambiguous language, we will heed that language and
12 refrain from further statutory interpretation.” *Id.*

13 {8} “After reviewing the statutory standard, we apply a substantial evidence
14 standard to review the sufficiency of the evidence at trial.” *Chavez*, 2009-NMSC-
15 035, ¶ 11. In reviewing the sufficiency of the evidence to support Defendant’s
16 convictions for embezzlement, “we must determine whether substantial evidence,
17 either direct or circumstantial, exists to support a guilty verdict beyond a reasonable
18 doubt for every essential element of the crimes at issue.” *State v. Mercer*, 2005-
19 NMCA-023, ¶ 13, 137 N.M. 36, 106 P.3d 1283. “We must view the evidence in the
20 light most favorable to the guilty verdict, indulging all reasonable inferences and

1 resolving all conflicts in the evidence in favor of the verdict.” *State v. Holt*, 2016-
2 NMSC-011, ¶ 20, 368 P.3d 409 (internal quotation marks and citation omitted). “The
3 jury instructions become the law of the case against which the sufficiency of the
4 evidence is to be measured.” *Id.* (alterations, internal quotation marks, and citation
5 omitted).

6 {9} “Embezzlement consists of a person embezzling or converting to the person’s
7 own use anything of value, with which the person has been entrusted, with fraudulent
8 intent to deprive the owner thereof.” Section 30-16-8(A). In relevant part, the jury
9 instructions for Counts 1 and 3 required the State to prove beyond a reasonable
10 doubt:

- 11 1. [D]efendant was entrusted with over \$20,000;
- 12 2. [D]efendant converted this money to [D]efendant’s own use.
13 “Converting something to one’s own use” means keeping
14 another’s property rather than returning it, or using another’s
15 property for one’s own purpose rather than the purpose
16 authorized by the owner;
- 17 3. The money belonged to Robert and Janice Sostrin [as charged in
18 Count 1 and Hawks Holdings as charged in Count 3];
- 19 4. At the time [D]efendant converted the money to his own use,
20 [D]efendant fraudulently intended to deprive the owner of the
21 owner’s property. “Fraudulently intended” means intended to
22 deceive or cheat[.]

23 *See* UJI 14-1641 NMRA; *see also* Section 30-16-8(A), (F).

1 {10} At issue here is whether the deposits “belonged to” the Sostrins and Hawks
2 Holdings such that Defendant was “entrusted” with the deposits paid to him, or
3 whether that money became his property upon payment, precluding a finding of
4 entrustment. “One cannot be guilty of embezzlement if he converts his own property;
5 the property converted must be that ‘of another.’ ” 3 Wayne R. LaFave, *Substantive*
6 *Criminal Law* § 19.6(d), at 130 (3d ed. 2018); *see State v. Earp*, 2014-NMCA-059,
7 ¶ 15, 326 P.3d 491 (“[E]mbezzlement necessarily requires the conversion of the
8 property of another[.]”).

9 {11} A survey of cases from other states considering embezzlement in similar
10 contexts have almost universally found that contractors cannot be convicted of
11 embezzlement of down payment funds upon a failure to complete a project because
12 the deposit money is legally the property of the contractor at the time it is paid. As
13 explained by the Supreme Court of Iowa, “[o]nce the money changes hands, both
14 title and possession vest in the contractor.” *State v. Galbreath*, 525 N.W.2d 424, 426
15 (Iowa 1994); *see also Crawford v. State*, 453 So. 2d 1139, 1142 (Fla. Dist. Ct. App.
16 1984) (holding that a down payment to contractor does not retain its character as
17 property belonging to the homeowner and vacating the defendant’s embezzlement
18 conviction); *State v. Marshall*, 541 N.W.2d 330, 332-33 (Minn. Ct. App. 1995)
19 (holding that a security company who accepted advance payments could not be
20 guilty of taking “property of another” when the company failed to perform); *Shelley*

1 v. *State*, 447 So. 2d 124, 126 (Miss. 1984) (concluding even in a case of “fast talk”
2 by a “known crook,” once the owner gave money to the contractor, “it belonged to
3 him” and as such, the defendant’s conviction for embezzlement required reversal);
4 *Commonwealth v. Austin*, 393 A.2d 36, 39 (Pa. Super. Ct. 1978) (concluding that
5 ownership and title of the money received under a construction contract passed to
6 the defendant when paid, requiring reversal of the defendant’s theft conviction);
7 *State v. Amanns*, 2 S.W.3d 241, 245 (Tenn. Crim. App. 1999) (stating that the
8 homeowner relinquished all interest in her down payment at the time she paid it to
9 the defendant under a contract for home improvement); cf. *State v. Coleman*, 33 A.3d
10 468, 473 (Md. 2011) (“When a defendant has a right to receive money or property,
11 he cannot be guilty of stealing it.”).

12 {12} The facts of *Shelly* are instructive. 447 So. 2d at 124-25. In *Shelly*, the
13 homeowners purchased a lot for purposes of constructing a retirement home. *Id.* at
14 124. They entered into a written contract with the defendant to construct the home
15 completely for \$20,000. *Id.* at 124-25. After the defendant cleared the site to prepare
16 for construction to begin, the homeowners paid the defendant a down payment of
17 \$2,000 pursuant to their contract. *Id.* at 125. The homeowners issued four more
18 payments to the defendant, bringing the total amount paid to the defendant for
19 construction work pursuant to their contract to \$13,250. *Id.* At this point, the
20 defendant had not begun work on the home. *Id.* The defendant subsequently did a

1 small amount of foundation work and brought some necessary materials to the work
2 site, but stopped all work thereafter without returning any money to the homeowners.
3 *Id.* The defendant was subsequently charged and convicted of embezzlement of the
4 \$13,250. *Id.* The Supreme Court of Mississippi reversed the conviction, holding that
5 the money belonged to the defendant at the time it was paid to him under the contract
6 and thus he could not be charged with embezzlement under these facts. *Id.* at 126.

7 {13} We similarly conclude that title and ownership of the deposits vested in
8 Defendant at the time the Sostrins and Hawks Holdings paid the money to him. *See*
9 *Galbreath*, 525 N.W.2d at 426; *Crawford*, 453 So. 2d at 1142. Consequently, at the
10 time Defendant used the deposit money for purposes other than the construction of
11 the Sostrin and Hawks Holdings properties, the deposits already legally belonged to
12 Defendant; he could not be found to have converted the deposits because they were
13 his property—not “property of another.” *See Earp*, 2014-NMCA-059, ¶ 15; *see also*
14 *3 LaFave, supra*, § 19.6(d), at 131-32 (“[A] building contractor who receives from
15 the landowner an advance payment on the contract and who thereafter spends the
16 money for his own purposes and does not fulfill the contract, is not guilty of
17 embezzlement, unless the money is earmarked to be used only for a construction
18 purpose.” (footnotes omitted)). As such, we hold the State failed to present evidence
19 sufficient beyond a reasonable doubt to prove the essential element of entrustment
20 and reverse Defendant’s convictions under Counts 1 and 3.

1 {14} The State attempts to distinguish the facts of this case from the foregoing
2 authority by asserting that “a trust relationship exists between homebuyers and home
3 builders in New Mexico by statute.” To support this proposition, the State directs us
4 to the New Mexico Construction Industries Licensing Act (CILA), NMSA 1978,
5 Section 60-13-23(F) (1993). Section 60-13-23, entitled “Revocation or suspension
6 of license by the commission; causes,” lists the circumstances under which the
7 Construction Industries Division will revoke a contractor’s license. Subsection F, on
8 which the State relies, provides that a contractor shall have his or her license
9 “revoked or suspended . . . for . . . conversion of funds or property received for
10 prosecution or completion of a specific contract or for a specified purpose in the
11 prosecution or completion of any contract, obligation or purpose, as determined by
12 a court of competent jurisdiction[.]” *Id.* We are unpersuaded that this statute alone,
13 setting out the circumstances under which a contractor’s license will be revoked or
14 suspended, creates a per se fiduciary relationship between all contractors and their
15 customers in New Mexico sufficient to satisfy the entrustment element of criminal
16 embezzlement.

17 {15} To support its construction of Section 60-13-23(F), the State points to Tenth
18 Circuit case law interpreting this statute in the bankruptcy context. *See In re Romero*,
19 535 F.2d 618 (10th Cir. 1976). In *Romero* the Tenth Circuit refused to discharge the

1 debt of a construction contractor, concluding the predecessor to Section 60-13-23(F)
2 “clearly imposes a fiduciary duty upon contractors who have been advanced money
3 pursuant to construction contracts.” 535 F.2d at 621. This principle was applied to
4 Defendant’s bankruptcy action to prevent the discharge of his debt to Hawks
5 Holdings. *See In re Kalinowski*, 482 B.R. 334 (B.A.P. 10th Cir. 2012).

6 {16} We note at the outset that Tenth Circuit cases are not binding on this Court.
7 *See Moongate Water Co., Inc. v. Doña Ana Mut. Domestic Water Consumers Ass’n*,
8 2008-NMCA-143, ¶ 20, 145 N.M. 140, 194 P.3d 755 (“[W]e are not bound by the
9 analyses or conclusions reached in the federal cases.”). We find nothing in the
10 language of the licensing statute that indicates an intent on the part of the Legislature
11 to create a fiduciary or trust relationship between contractors and those who retain
12 their services. *See Trujillo*, 2009-NMSC-012, ¶ 11 (looking “to the language used
13 and the plain meaning of that language” to discern legislative intent). Instead, the
14 statute focuses on circumstances that authorize the Construction Industries Division
15 to revoke or suspend a contractor’s license. Absent a more specific indication, the
16 principle of lenity counsels against a conclusion that the element of entrustment is
17 satisfied by the mere existence of this licensing statute. *Cf. State v. Ogden*, 1994-
18 NMSC-029, ¶ 25, 118 N.M. 234, 880 P.2d 845 (“Statutes defining criminal conduct
19 should be strictly construed, and doubts about construction of criminal statutes are
20 resolved in favor of lenity.”). We find the State’s reliance on Section 60-13-23

1 unpersuasive and conclude the essential element of entrustment has not been met in
2 this case. Accordingly, we reverse Defendant’s embezzlement convictions under
3 Counts 1 and 3.

4 **II. Exclusion of Defendant’s Expert Ed Paschich**

5 {17} Defendant argues that the exclusion of his expert, Ed Paschich, precluded him
6 from being able to present his theory of defense: that Defendant “employed a
7 legitimate—though flawed—business model” and was prevented from paying all his
8 subcontractors by the onset of the “great recession.” The State argues that the district
9 court properly excluded this information as irrelevant “because it concerned
10 Paschich’s own efforts to weather the recession, and there was no showing that his
11 situation was similar to [Defendant]’s.”

12 {18} Prior to trial, the State moved to exclude testimony from Paschich. Defendant
13 planned to have Mr. Paschich testify generally about the effects of the recent
14 economic recession on construction contracting in New Mexico. Defendant
15 explained that Mr. Paschich would not testify about Defendant’s situation
16 specifically and had not been provided with any information related to Defendant’s
17 case. Instead, Defendant intended to ask Mr. Paschich “to comment on the effects of
18 the [r]ecession, how it affected builders, what builders normally do to try and
19 weather such economic reversals, and how such customary precautions did not save
20 some builders in this instance.” In its motion to exclude Mr. Paschich’s testimony,

1 the State argued that Mr. Paschich was not qualified to comment on the Santa Fe
2 market because he was not building in that area during the relevant time and his
3 testimony would be unhelpful to the jury because the actions of others were
4 irrelevant to Defendant’s conduct. After a hearing, the district court granted the
5 State’s motion, finding “the reliability of the information that [Mr. Paschich] could
6 testify to does not necessarily translate to the situation that the jury has to address,
7 and therefore is not an aid to their decision-making process.”

8 {19} Under Rule 11-702 NMRA, district courts have broad discretion in the
9 exclusion of expert testimony, upon consideration of whether the expert “(1) is
10 qualified, (2) provides testimony that will assist the trier of fact, and (3) provides
11 testimony regarding scientific, technical, or other specialized knowledge with a
12 reliable basis.” *State v. Consaul*, 2014-NMSC-030, ¶ 56, 332 P.3d 850 (internal
13 quotation marks and citation omitted). “The prerequisite that expert testimony must
14 assist the trier of fact to understand the evidence or to determine a fact in issue . . .
15 goes primarily to relevance.” *State v. Hughey*, 2007-NMSC-036, ¶ 17, 142 N.M. 83,
16 163 P.3d 470 (internal quotation marks and citation omitted). “[W]e review a district
17 court’s ruling excluding evidence for an abuse of discretion.” *State v. Garcia*, 2013-
18 NMCA-064, ¶ 11, 302 P.3d 111. “An abuse of discretion occurs when the ruling is
19 clearly against the logic and effect of the facts and circumstances of the case. We
20 cannot say the [district] court abused its discretion by its ruling unless we can

1 characterize [the ruling] as clearly untenable or not justified by reason.” *State v.*
2 *Rojo*, 1999-NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829 (internal quotation marks
3 and citations omitted).

4 {20} The district court determined that testimony from Mr. Paschich would not
5 assist the trier of fact because “[Mr. Paschich] had [financial] difficulties at a time
6 remote from the alleged circumstances in the case”; “Mr. Paschich’s experience
7 [was] . . . too remote from the situation in Santa Fe” as he was primarily building
8 homes in Albuquerque at the time; and Mr. Paschich’s overall experience with the
9 recession was not shown to be similar to Defendant’s.

10 {21} Defendant asserts that “[i]n order to put his ‘lack of criminal intent’ defense
11 to the jury, it was necessary . . . to demonstrate specifically how home builders
12 operate, how the “[g]reat [r]ecession” affected the construction industry in New
13 Mexico, and what [Defendant] could and could not do about it.” This argument
14 misses the mark. The fact that Defendant eventually intended but was prevented
15 from replacing any misappropriated money, does not negate that fraud and
16 embezzlement were committed in the first place. Additionally, it is unclear on
17 appeal, as it was to the district court, exactly how Mr. Paschich’s testimony would
18 have assisted Defendant, especially in light of the district court’s findings that Mr.
19 Paschich’s experience was remote from Defendant’s in both time and location, and

1 lacked similarity. Accordingly, we conclude the district court did not abuse its
2 discretion in excluding Mr. Paschich’s testimony.

3 {22} To the extent that Defendant argues that the exclusion of Mr. Paschich’s
4 testimony infringed on his right to present a defense, we disagree. We again note
5 that Defendant has failed to demonstrate how Mr. Paschich’s testimony would
6 actually have provided him any defense given the lack of clear exculpatory value. In
7 any event, the authority relied on by Defendant is inapposite because it concerns the
8 “presumption against exclusion of *otherwise admissible defense evidence.*” *State v.*
9 *Campbell*, 2007-NMCA-051, ¶ 13, 141 N.M. 543, 157 P.3d 722 (emphasis added)
10 (internal quotation marks and citation omitted). Here, Defendant has failed to
11 demonstrate that the evidence was otherwise admissible. We acknowledge the
12 importance of the constitutional right of the accused to present a defense. *State v.*
13 *Rosales*, 2004-NMSC-022, ¶ 7, 136 N.M. 25, 94 P.3d 768. “However, that right has
14 never been absolute or unlimited.” *Id.* “[A] defendant’s interest in presenting
15 evidence may at times bow to accommodate other legitimate interests in the criminal
16 trial process[,]” including compliance with the rules of evidence. *Id.* (internal
17 quotation marks and citation omitted). Because we conclude that Mr. Paschich’s
18 testimony was properly excluded under Rule 11-702, we reject Defendant’s
19 contention that he was improperly precluded from presenting his defense.

1 **III. Limitation on Testimony of Other Defense Witnesses**

2 {23} Defendant argues the district court erred in impermissibly limiting the
3 testimony of two other defense expert witnesses, Janet McHard and Anne Layne.
4 Specifically, Defendant argues that the district court prevented his experts from
5 testifying that Defendant’s “business records did not display red flags indicative of
6 fraud, and that the records kept by [Defendant’s bookkeeper] . . . were so inaccurate
7 that [Defendant] could not have had an idea of the precarious financial condition of
8 his company when he continued to take draws.” The State responds by asserting that
9 the district court did not limit the testimony as Defendant asserted, and moreover,
10 Defendant elicited this exact testimony from his expert witnesses. We conclude that
11 Defendant has not demonstrated that the district court erred in this regard.

12 {24} Defendant fails to point us to any portion of the record demonstrating that the
13 district court explicitly limited or excluded any of the testimony from Ms. McHard
14 and Ms. Layne. *See Corona v. Corona*, 2014-NMCA-071, ¶ 26, 329 P.3d 701
15 (“[T]he burden is on the appellant to clearly demonstrate that the district court
16 erred.”). After review of the hearing, it appears that while the district court found
17 Defendant failed to lay sufficient foundation to permit Ms. Layne to testify regarding
18 these points, the district court indicated it would allow Ms. McHard to testify about
19 both issues and she did, in fact, testify about the lack of red flags and the inaccuracies
20 in Defendant’s records. Defendant makes no attempt to demonstrate how Ms.

1 Layne’s testimony would have differed from Ms. McHard’s. *See State v. Fuentes*,
2 2010-NMCA-027, ¶ 29, 147 N.M. 761, 228 P.3d 1181 (noting that we will “not
3 review unclear or undeveloped arguments [that] require us to guess at what a
4 part[y’s] arguments might be”). Having failed to carry his burden to demonstrate
5 error, we conclude that the district court did not impermissibly exclude or limit the
6 testimony of Ms. McHard or Ms. Layne.

7 **IV. Other Acts Evidence**

8 {25} Defendant argues that the district court abused its discretion in allowing
9 testimony of Charles Zimmerman and James Arrington relating to “instances of a
10 similar nature to the nine charged in the indictment[,]” contrary to Rule 11-404(B).
11 The State argues that the evidence was relevant for non-propensity purposes and thus
12 was properly admitted. We conclude that the district court did not abuse its discretion
13 in admitting the testimony.

14 {26} During the pretrial proceedings, the State filed notice of its intent to introduce
15 evidence of uncharged misconduct including instances of improper fund diversion
16 from projects not included in the indictment. The State explained that the evidence
17 would be relevant to establish identity, motive, intent, and absence of mistake. The
18 Defendant filed a motion to exclude the evidence on the grounds that it had
19 “negligible” probative value and was impermissibly being offered to prove
20 Defendant’s propensity to commit the crimes charged. The district court denied

1 Defendant’s motion after a hearing, concluding there were non-propensity reasons
2 offered for the testimony, including context, lack of mistake, and identity. At trial,
3 the State offered the testimony of Charles Zimmerman and James Arrington, who
4 each testified to incidents involving Defendant’s alleged misappropriation of funds
5 similar to the charged allegations relating to other projects in Las Campanas.

6 {27} “Evidence of a crime, wrong, or other act is not admissible to prove a person’s
7 character in order to show that on a particular occasion the person acted in
8 accordance with the character.” Rule 11-404(B)(1). “Rule 11-404(B) is a rule of
9 inclusion, not exclusion, providing for the admission of all evidence of other acts
10 that are relevant to an issue in trial, other than the general propensity to commit the
11 crime charged.” *State v. Bailey*, 2017-NMSC-001, ¶ 14, 386 P.3d 1007 (alteration,
12 internal quotation marks, and citation omitted). Rule 11-404(B) itself provides a
13 non-exhaustive list of potential, permissible reasons to admit such evidence, “such
14 as proving motive, opportunity, intent, preparation, plan, knowledge, identity,
15 absence of mistake, or lack of accident.” *Id.* ¶ 13. Evidence is properly excluded
16 under Rule 11-403 as unfairly prejudicial “if it is best characterized as sensational
17 or shocking, provoking anger, inflaming passions, or arousing overwhelmingly
18 sympathetic reactions, or provoking hostility or revulsion or punitive impulses, or
19 appealing entirely to emotion against reason.” *State v. Stanley*, 2001-NMSC-037,
20 ¶ 17, 131 N.M. 368, 37 P.3d 85 (internal quotation marks and citation omitted).

1 {28} “Admission of evidence . . . under Rule 11-404(B) . . . is within the sound
2 discretion of the [district] court, and its determination will not be disturbed on appeal
3 in the absence of an abuse of discretion.” *State v. Romero*, 2019-NMSC-007, ¶ 26,
4 435 P.3d 1231. “Likewise, the exclusion of relevant evidence under Rule 11-403
5 . . . explicitly recognizes the large discretionary role of the [district] court in
6 controlling the introduction of evidence.” *Romero*, 2019-NMSC-007, ¶ 26
7 (alterations, internal quotation marks, and citation omitted). “[A]n abuse of
8 discretion results when the [district] court’s decision is contrary to logic and reason.”
9 *Id.* (internal quotation marks and citation omitted).

10 {29} Defendant’s other acts presented at trial through the testimony of Charles
11 Zimmerman and James Arrington were admissible to show intent. Defendant’s main
12 assertion at trial was that he lacked fraudulent intent when he used the funds at issue
13 for something other than their intended purpose. Thus, evidence of other similar
14 transactions was relevant to disprove Defendant’s assertions that he lacked the
15 requisite criminal intent. *See State v. McCallum*, 1975-NMCA-030, ¶ 7, 87 N.M.
16 459, 535 P.2d 1085 (“In the case of fraud, related incidents of accused’s acts are
17 admissible to establish motive, absence of mistake or accident, common scheme or
18 plan, or the identity of the person charged with various crimes.”); *cf. State v. Nguyen*,
19 1997-NMCA-037, ¶ 10, 123 N.M. 290, 939 P.2d 1098 (“When the defendant admits
20 the act which constitutes the crime, but denies having the required mental state, then

1 evidence of another, nearly identical, act is admissible to show intent and
2 knowledge.”).

3 {30} To the extent that Defendant argues this evidence should have been excluded
4 under Rule 11-403 as unfairly prejudicial, we are unpersuaded. Defendant himself
5 admits that “[t]he testimony . . . added nothing to the presentation of t[h]e State’s
6 case in chief other than to demonstrate that others had experienced the same losses
7 due to [Defendant’s] failure to pay as those whose incidents were charged.” This
8 falls far short of establishing the evidence was “sensational or shocking, provoking
9 anger, inflaming passions, or . . . provoking hostility or revulsion or punitive
10 impulses, or appealing entirely to emotion against reason.” *See Stanley*, 2001-
11 NMSC-037, ¶ 17. Accordingly, we conclude the district court did not err in
12 admitting other act evidence pursuant to Rule 11-404(B) or Rule 11-403.

13 **V. Motion to Dismiss for Ineffective Assistance of Counsel**

14 {31} Finally, Defendant contends that the district court erred in refusing to dismiss
15 the charges against him for violation of Defendant’s right to effective assistance of
16 counsel. The State argues that Defendant cannot be heard to complain of the district
17 court’s refusal to dismiss the case because it granted him the alternative relief he
18 requested, and because there is no remedy to be provided in a case such as this where
19 ineffectiveness is remedied pretrial.

1 {32} This issue arises because it appears that Defendant initially had trouble
2 securing sufficient resources and counsel competent for his defense. Defendant's
3 first attorney represented him pro bono, alerted the district court to the fact that
4 Defendant was indigent, and requested the Law Office of the Public Defender
5 (LOPD) provide the funds necessary to mount a defense, or alternatively to appoint
6 new counsel. The district court granted the motion and ordered the LOPD to fund
7 necessary expert witnesses and to either contract with or provide appropriate
8 counsel. Both Defendant's original and subsequent replacement counsel withdrew
9 from representation, forcing the LOPD to appoint a third attorney to represent him
10 in this case. The LOPD funded a forensic accountant, but it appears that this
11 accountant failed to properly investigate the matter.

12 {33} After discussing the situation with the district court at a hearing, Defendant's
13 counsel moved to dismiss the charges, or in the alternative, stay the proceedings;
14 order the LOPD to adequately fund Defendant's defense; and, if the LOPD did not
15 comply, order the LOPD to show cause why they should not be held in contempt.
16 The district court held a hearing on the matter and ultimately denied Defendant's
17 motion to dismiss the charges but granted the alternative relief requested by
18 Defendant and ordered a show cause hearing, finding that the LOPD had not
19 complied with the court's earlier order to secure competent counsel. Ultimately, the
20 district court declined to hold the LOPD in contempt but instead appointed a special

1 master to ensure that the LOPD complied with its previous order to “make
2 [available] whatever resources are necessary . . . to provide effective assistance of
3 competent counsel to [Defendant] in an adequate and timely fashion[.]”

4 {34} In his briefing, Defendant fails to support his argument with any citation to
5 authority for the proposition that dismissal was required in this circumstance. *See*
6 *State v. Vigil-Giron*, 2014-NMCA-069, ¶ 60, 327 P.3d 1129 (“[A]ppellate courts
7 will not consider an issue if no authority is cited in support of the issue and that,
8 given no cited authority, we assume no such authority exists.”). Additionally,
9 Defendant does not attempt to demonstrate that the counsel and resources he
10 received after the appointment of the special master were in any way constitutionally
11 deficient. *See Patterson v. LeMaster*, 2001-NMSC-013, ¶ 17, 130 N.M. 179, 21 P.3d
12 1032 (“A prima facie case of ineffective assistance is made by showing that defense
13 counsel’s performance fell below the standard of a reasonably competent attorney
14 and, due to the deficient performance, the defense was prejudiced.” (internal
15 quotation marks and citation omitted)); *see also Fuentes*, 2010-NMCA-027, ¶ 29
16 (same). We conclude Defendant has failed to demonstrate error. Our decision does
17 not preclude Defendant’s ability to pursue habeas corpus or other post-sentence
18 relief with respect to a future claim of ineffective assistance of counsel. *See State v.*
19 *Arrendondo*, 2012-NMSC-013, ¶ 44, 278 P.3d 517; *see also* Rule 5-803 NMRA
20 (petitions for post-sentence relief).

1 **CONCLUSION**

2 {35} For the foregoing reasons, we conclude there is insufficient evidence to
3 sustain Counts 1 and 3, requiring that Defendant’s convictions on those counts be
4 reversed. Finding Defendant’s other claims of error unpersuasive, we otherwise
5 affirm. We remand this case to the district court for it to vacate Defendant’s
6 convictions as to Counts 1 and 3 and to enter an amended judgment and sentence
7 consistent with this opinion.

8 {36} **IT IS SO ORDERED.**

9
10 
JULIE J. VARGAS, Judge

11 **I CONCUR:**

12 
13 M. MONICA ZAMORA, Judge

14 **JACQUELINE R. MEDINA, Judge (dissenting in part and concurring in part).**

1 **MEDINA, Judge (dissenting in part and concurring in part).**

2 {37} I concur with the majority’s opinion as to Parts II, III, IV, and V. However, I
3 respectfully disagree with the majority’s conclusion in Part I as to whether the
4 evidence was sufficient to support Defendant’s convictions for embezzlement as
5 charged in Counts 1 and 3. In my opinion, Section 60-13-23(F) makes clear that
6 funds received “for prosecution or completion of a specific contract” still belong to
7 a contractor’s client(s). Therefore I believe there was sufficient evidence that
8 Defendant converted property belonging to another when he used the funds received
9 from the Sostrins and Hawks Holdings for purposes other than completion of their
10 contracts. Accordingly, I dissent.

11 {38} The majority points out that many jurisdictions have “found that contractors
12 cannot be convicted of embezzlement of down payment funds upon a failure to
13 complete a project because the deposit money is legally the property of the contractor
14 at the time it is paid.” Majority Op. ¶ 11. I agree that this logic is sound in
15 jurisdictions that do not impose a fiduciary duty on contractors in regard to their
16 client’s payments. I believe, however, Section 60-13-23(F) imposes such a duty. *See*
17 Restatement (Second) of Trusts § 23 cmt. c. (1959) (“A trust may be created by
18 statute without a manifestation of intention on the part of any person as settlor.”). As
19 it does not appear that any of the jurisdictions the majority cites have enacted a
20 statute similar to Section 60-13-23(F), I find these cases distinguishable.

1 {39} Although our courts have not yet had the opportunity to address Section 60-
2 13-23(F)'s implications, the Tenth Circuit addressed its predecessor statute in *In re*
3 *Romero*, 535 F.2d 618. In *In re Romero*, the issue was whether a contractor's misuse
4 of certain monies advanced for completion of a construction project constituted
5 "defalcation¹ while acting as an officer or in any fiduciary capacity," which is a non-
6 dischargeable debt under the Bankruptcy Act. 535 F.2d at 620-21, n.2. The court
7 examined the previous version of Section 60-13-23(F), which provided for the
8 revocation or suspension of a contractor's license for "diversion of funds or property
9 received for prosecution or completion of a specific contract, or for a specified
10 purpose in the prosecution or completion of any contract, obligation or purpose[.]"
11 *Romero*, 535 F.2d at 621. In light of CILA's purpose to provide "a comprehensive
12 method for the licensing and control of contractors in order to protect the public from
13 either irresponsible or incompetent contractors[.]" the Court concluded that NMSA
14 1953, Section 67-35-26(G) (1967) (Vol. 1, 1967 Pocket Supp.), "clearly imposes a
15 fiduciary duty upon contractors who have been advanced money pursuant to
16 construction contracts." *Romero*, 535 F.2d at 621 (quoting in part *Peck v. Ives*, 1972-
17 NMSC-053, ¶ 5, 84 N.M. 62, 499 P.2d 684). Consequently, the Tenth Circuit held
18 that the contractor was acting in a fiduciary capacity imposed by law, which "existed

¹ "Defalcation" is defined at "[t]he fraudulent misappropriation of money held in trust; financial wrongdoing involving a breach of trust[.]" *Defalcation*, Black's Law Dictionary (11th ed. 2019).

1 independent of any express understanding he had with [his client.]” *See Romero*, 535
2 F.2d at 622. The Tenth Circuit has since reaffirmed *Romero* on numerous occasions,
3 including its application to Defendant for his contract with Hawks Holdings. *See*
4 *Kalinowski*, 482 B.R. at 344 (holding that Defendant’s debt owed to Hawks
5 Holdings constituted “defalcation while acting in a fiduciary capacity” and, was
6 therefore, non-dischargeable in bankruptcy).

7 {40} While Tenth Circuit cases are not binding on this Court, *see Moongate Water*
8 *Co., Inc.*, 2008-NMCA-143, ¶ 20, I find *Romero* persuasive. *See State v. Long*, 1996-
9 NMCA-011, ¶ 7, 121 N.M. 333, 911 P.2d 227 (noting that our courts follow federal
10 law to the extent we find it persuasive). As noted, the purpose of CILA is to
11 “provide[] a comprehensive method for the licensing and control of contractors in
12 order to protect the public from either irresponsible or incompetent contractors.”
13 *Peck*, 1972-NMSC-053, ¶ 5; *see Mascarenas v. Jaramillo*, 1991-NMSC-014, ¶ 14,
14 111 N.M. 410, 806 P.2d 59 (“The wrong to be remedied is the exploitation of the
15 public by incompetent and unscrupulous contractors who are unable or unwilling to
16 obtain a license. In effect, the wrongs to be remedied are circumstances which permit
17 unlicensed contractors to flourish and profit at the expense of the public.”).
18 Consistent with this purpose, CILA requires all contractors in the state of New
19 Mexico to obtain a license, *see NMSA 1978, § 60-13-12(A)* (1989), which are only
20 issued after an applicant meets strict licensing requirements. *See NMSA 1978, § 60-*

1 13-14 (1997). Additionally contractors must pass an examination that tests “general
2 business knowledge, rules and regulations of the division and the provisions of
3 [CILA]” or complete a business and law course approved by the licensing
4 commission. NMSA 1978, § 60-13-16(A)-(C) (1997).² In order to keep their license,
5 contractors must meet industry-related continuing education requirements, *see*
6 NMSA 1978, § 60-13-18(D) (2007), as well as refrain from committing certain
7 prohibited acts. *See* § 60-13-23. As relevant here, Section 60-13-23(F) provides that
8 a contractor’s license “shall be revoked or suspended for,” *inter alia*, “conversion of
9 funds or property received for prosecution or completion of a specific contract or for
10 a specified purpose in the prosecution or completion of any contract, obligation or
11 purpose, as determined by a court of competent jurisdiction.” In addition to losing
12 their license, a contractor who violates Section 60-13-23(F) might be required to pay
13 an administrative penalty of up to ten percent of the dollar amount of the contract or
14 work performed. *See* NMSA 1978, § 60-13-23.1(A)(2) (1989). Thus, it is clear our
15 Legislature imposes heightened duties on contractors, one of which is a duty not to
16 convert funds received for completion of a specific contract.

² In the case of legal entities seeking to obtain a contractor’s license, the entity must have in its employ a “qualifying party” “who submits to the examination for a license to be issued under [CILA] and who is responsible for the licensee’s compliance with the requirements of [CILA.]” NMSA 1978, § 60-13-2(E) (2013); Section 60-13-14(A);

1 {41} Although Section 60-13-23, on its face, merely lists grounds for revocation or
2 suspension of a contractor’s license, Subsection F nonetheless indicates that the
3 Legislature intended to impose a fiduciary duty on the contractors of New Mexico.
4 Importantly, after *Romero* was decided, our Legislature amended Section 60-13-
5 23(F) to replace the phrase “*diversion* of funds or property” with “*conversion* of
6 funds or property.” Compare § 67-35-26(G) (emphasis added), with § 60-13-23(F)
7 (emphasis added). I do not believe this alteration was without significance. Our
8 courts generally define “conversion,” in relevant part, as “the unlawful exercise of
9 dominion and control over personal property *belonging to another* in exclusion or
10 defiance of the owner’s rights[.]” *AAA Auto Sales & Rental, Inc. v. Sec. Fed. Sav. &*
11 *Loan Ass’n*, 1992-NMCA-130, ¶ 9, 114 N.M. 761, 845 P.2d 855 (emphasis added).
12 “Conversion” in its literal sense is defined as “[t]he act of *changing from one form*
13 *to another*; the process of being exchanged.” *Conversion*, Black’s Law Dictionary
14 (11th ed. 2019) (emphasis added); see *State v. Jade G.*, 2007-NMSC-010, ¶ 18, 141
15 N.M. 284, 154 P.3d 659 (“[I]n construing a statute, statutory words are presumed to
16 be used in their ordinary and usual sense.” (internal quotation marks and citation
17 omitted)). Accordingly, when the Legislature substituted the word “diversion” with
18 “conversion,” it presumably intended to clarify that a contractor is capable of (but
19 prohibited from) altering the nature of the funds he receives for the completion of a
20 specific contract by using the funds for a purpose other than “prosecution or

1 completion of a specific contract.” Section 60-13-23(F). In other words, Section 60-
2 13-23(F) recognizes that contractors have a fiduciary duty to use their client’s funds
3 received for completion of a specific contract for that purpose. Thus, by using the
4 word “conversion,” the Legislature made clear that funds received by contractors for
5 the prosecution or completion of a specific contract still belong to the client and must
6 be applied toward completion of the agreed upon contract unless and until the
7 contractor completes the specified construction. To read Section 60-13-23(F) any
8 other way would render it absurd, as a contractor could not convert their own funds.
9 *See Foremost Ins. Co. v. Allstate Ins. Co.*, 486 N.W.2d 600, 609 (Mich. 1992) (“[A]
10 person cannot convert his own property[.]” (alteration, internal quotation marks, and
11 citation omitted)); *Hahn v. Tanksley*, 317 S.W.3d 145, 156 (Mo. Ct. App. 2010)
12 (“[The defendants] could not convert their own property.”); *see also State v.*
13 *Peppers*, 1990-NMCA-057, ¶ 25, 110 N.M. 393, 796 P.2d 614 (“We avoid
14 construing statutes so as to render their application absurd or unreasonable.”).
15 Accordingly, I believe contractors can be convicted of embezzling funds received
16 from clients for “prosecution or completion of a specific contract.” Section 60-13-
17 23(F).

18 {42} Here, the evidence was sufficient to demonstrate that Defendant received the
19 funds for completion of the Sostrin’s home, as well as the three homes for Hawks
20 Holdings. The Sostrins paid Defendant an initial deposit of \$213,750 “represent[ing]

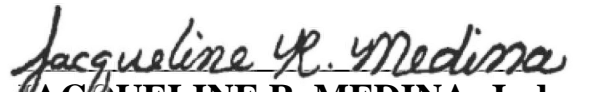
1 15% of the agreed upon [b]ase [m]odel [c]ost” under the terms of the agreement and
2 addendum entered into to construct a house on land that was to be sold to the
3 Sostrins. Similarly, Hawks Holdings paid Defendant a “project deposit” of \$363,943
4 to complete three homes for Howard Hawks. Additionally, the contract specified
5 that “[Defendant’s p]rofit in the amount of \$20.00 per square foot of the pre-
6 approved [c]onstruction [b]udget . . . is being withheld by [Hawks Holdings] on each
7 house until [Hawks Holdings sold the houses to third party purchasers.]” While the
8 contracts did not specify that the deposits must be used for construction, I find this
9 evidence sufficient to demonstrate that the deposits constituted “funds . . . received
10 for prosecution or completion of a specific contract” (i.e., to complete Defendant’s
11 clients’ homes), and therefore, they still belonged to Defendant’s clients under
12 Section 60-13-23(F).

13 {43} Although Defendant was not personally licensed as a contractor, there was
14 ample evidence that he was the de facto manager of K2 Construction Company LLC,
15 the contractor listed as the builder in both the Sostrin’s and Hawks Holdings’
16 contracts. As the de facto manager of a legal entity licensed and operating as a
17 contractor, Defendant was responsible for complying with CILA, including Section
18 60-13-23(F). *See Kalinowski*, 482 B.R. at 343-44 (holding that Defendant was the
19 de facto manager of K2 Construction Company LLC and, therefore, subject to the
20 same fiduciary duty imposed by Section 60-13-23(F)). Additionally, whether or not

1 Defendant’s role vis-a-vis K2 imposed on him a duty to comply with Section 60-13-
2 23(F), he purported to have the capacity to build the Sostrins and Hawks Holdings’
3 homes and is, consequently, a contractor, as defined by CILA. *See* NMSA 1978,
4 § 60-13-3(A)(2) (1999) (defining “contractor” as “any person who undertakes,
5 offers to undertake by bid or other means or purports to have the capacity to
6 undertake, by himself or through others, contracting [which] includes constructing
7 . . . any . . . building”); § 60-13-12(A) (“No person shall act as a contractor without
8 a license[.]”). And although Defendant was not, himself, a *licensed* contractor, I
9 believe he was still subject to the fiduciary duty imposed by Section 60-13-23(F), as
10 to interpret CILA as only imposing such a duty on licensed contractors (but not
11 unlicensed ones) would run contrary to CILA’s purpose and lead to the absurd result
12 of creating a double standard more favorable to unlicensed contractors. *See*
13 *Mascarenas*, 1991-NMSC-014, ¶ 14; *Little v. Jacobs*, 2014-NMCA-105, ¶ 20, 336
14 P.3d 398 (“The effect of our holding is to create another detriment to contracting
15 without a license, which is consistent with the purpose of CILA.”); *see also Peppers*,
16 1990-NMCA-057, ¶ 25 (“We avoid construing statutes so as to render their
17 application absurd or unreasonable.”).

18 {44} Contrary to Defendant’s fiduciary duty, however, Defendant did not strictly
19 use the funds advanced to him for completion of the four homes, but rather pooled
20 them together and used them to pay his many business entities’ bills. As a result, the

1 Sostrins and Hawks Holdings had to collectively pay over one million dollars to
2 have their homes completed by other contractors. Accordingly, I would hold that
3 there was sufficient evidence that Defendant converted property of another as to
4 Counts 1 and 3. Lastly, because there is not an “insurmountable ambiguity” as to
5 Section 60-13-23(F)’s import, the rule of lenity is inapplicable in this case. *See State*
6 *v. Davis*, 2003-NMSC-022, ¶ 14, 134 N.M. 172, 74 P.3d 1064 (“The rule of lenity
7 counsels that criminal statutes should be interpreted in a defendant’s favor when
8 insurmountable ambiguity persists regarding the intended scope of a criminal
9 statute.”).

10 
11 **JACQUELINE R. MEDINA, Judge**