

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

Court of Appeals of New Mexico
Filed 2/8/2023 11:15 AM

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,



Mark Reynolds

4 v.

No. A-1-CA-39870

5 **VICENTE L. PEREZ,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF LEA COUNTY**

8 **William G. W. Shoobridge, District Judge**

9 Raúl Torrez, Attorney General

10 Benjamin L. Lammons, Assistant Attorney General

11 Santa Fe, NM

12 for Appellee

13 Bennett J. Baur, Chief Public Defender

14 Thomas J. Lewis, Assistant Appellate Defender

15 Santa Fe, NM

16 for Appellant

17 **MEMORANDUM OPINION**

18 **HANISEE, Judge.**

19 {1} Defendant appeals his conviction for second-degree murder, contrary to
20 NMSA 1978, Section 30-2-1(B) (1994), following a jury trial. He argues that his
21 conviction was not supported by substantial evidence regarding the intent
22 requirement and that his right to confrontation was violated when a pathologist

1 testified based on photos of the autopsy despite not participating in the autopsy itself.

2 We affirm.

3 **DISCUSSION**

4 **Sufficiency of the Evidence**

5 {2} A jury determined that Defendant killed his wife (Victim) by shooting her in
6 the mouth with a rifle. The testimony at trial—from several of Victim’s children who
7 were present during the shooting—indicated that the killing resulted from an
8 argument related to Defendant’s demand that Victim cook him a different breakfast
9 than what Victim served the children. According to the children’s testimony, upon
10 arming himself with a rifle, loading it, and pointing it in Victim’s face, Defendant
11 declared his intention to shoot or kill Victim. During the argument, Victim pushed
12 the rifle barrel away from her face, the rifle hit a nearby stove, and thereafter
13 discharged. The State presented evidence from a firearms expert who testified that
14 she tested the rifle, struck the buttstock of the rifle against a brick wall over twenty
15 times, and observed the rifle did not misfire. Rather, the rifle worked normally and
16 did not accidentally discharge during the test. Defendant was convicted of second-
17 degree murder, a lesser included offense of the first-degree murder which was
18 charged.

19 {3} “The test for sufficiency of the evidence is whether substantial evidence of
20 either a direct or circumstantial nature exists to support a verdict of guilty beyond a

1 reasonable doubt with respect to every element essential to a conviction.” *State v.*
2 *Montoya*, 2015-NMSC-010, ¶ 52, 345 P.3d 1056 (internal quotation marks and
3 citation omitted). The reviewing court “view[s] the evidence in the light most
4 favorable to the guilty verdict, indulging all reasonable inferences and resolving all
5 conflicts in the evidence in favor of the verdict.” *State v. Cunningham*, 2000-NMSC-
6 009, ¶ 26, 128 N.M. 711, 998 P.2d 176. “Contrary evidence supporting acquittal
7 does not provide a basis for reversal because the jury is free to reject [the
8 d]efendant’s version of the facts.” *State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M.
9 438, 971 P.2d 829.

10 {4} Regarding intent to commit second-degree murder, the jury was instructed in
11 pertinent part: “[T]he [S]tate must prove to your satisfaction beyond a reasonable
12 doubt each of the following elements of the crime: . . . [D]efendant knew that his
13 acts created a strong probability of death or great bodily harm to [Victim.]” As well,
14 our Legislature has described the requisite intent for second-degree murder under
15 Section 30-2-1(B):

16 Unless he is acting upon sufficient provocation, upon a sudden quarrel
17 or in the heat of passion, a person who kills another human being
18 without lawful justification or excuse commits murder in the second
19 degree if in performing the acts which cause the death he [or she] knows
20 that such acts create a strong probability of death or great bodily harm
21 to that individual or another.

22 “Under the statute, a defendant must know that his or her acts create a strong
23 probability of death or great bodily harm.” *State v. Suazo*, 2017-NMSC-011, ¶ 16,

1 390 P.3d 674. “[T]he jury may infer intent from circumstantial evidence; direct
2 evidence of a defendant’s state of mind is not required.” *State v. Guerra*, 2012-
3 NMSC-027, ¶ 28, 284 P.3d 1076.

4 {5} The jury heard evidence from Victim’s children, who were present at the time
5 of the shooting and witnessed Defendant point the rifle at Victim. One child testified
6 that Defendant loaded the weapon before pointing it at Victim. Two children
7 testified that they saw Defendant’s finger on the trigger, although both children had
8 previously stated they could not see Defendant’s finger when he held the rifle to
9 Victim’s head. As stated, the State’s firearm expert testified that the rifle functioned
10 normally and was not prone to accidental misfire. A pathologist testified that the
11 presence of soot on the roof of Victim’s mouth indicated the gun went off while the
12 barrel was within a few inches of Victim’s face.

13 {6} We hold that acquiring, loading, and pointing the rifle at Victim’s head at
14 close range while threatening to kill her suffices to establish Defendant’s cognitive
15 awareness that his actions created a strong probability of death or great bodily harm.
16 Defendant articulates conflicts in evidence that could indicate an insufficient state
17 of mind, but we resolve such conflicts in favor of the verdict. *See Cunningham*,
18 2000-NMSC-009, ¶ 26. Testimony indicating that Defendant loaded the gun before
19 pointing it at Victim is particularly relevant to our analysis, a direct indication that
20 Defendant intentionally escalated the risk of great bodily harm. Likewise, testimony

1 indicating that the rifle was unlikely to misfire could give rise to a reasonable
2 inference by the jury that Defendant himself pulled the trigger, despite efforts at trial
3 to impeach the children’s testimony regarding the incident. Accordingly, we affirm
4 Defendant’s conviction for second-degree murder based on sufficient evidence of
5 Defendant’s state of mind at the time of commission.

6 **Confrontation Clause**

7 {7} Defendant challenges the admission of testimony about Victim’s autopsy
8 photos from a pathologist who did not perform the autopsy, which Defendant claims
9 violated his right to confrontation. The State answers that the pathologist did not
10 testify to the actual autopsy itself but gave opinions based merely upon the
11 photographs taken during the autopsy and therefore did not bear upon Defendant’s
12 right of confrontation.

13 {8} “When a defendant alerts the trial court to a confrontation issue with a proper
14 objection, he or she raises a question of law.” *State v. Lopez*, 2000-NMSC-003, ¶ 10,
15 128 N.M. 410, 993 P.2d 727. “In order to preserve an issue for appeal, a defendant
16 must make a timely objection that specifically apprises the trial court of the nature
17 of the claimed error and invokes an intelligent ruling thereon.” *State v. Howl*, 2016-
18 NMCA-084, ¶ 36, 381 P.3d 684 (internal quotation marks and citation omitted). As
19 a preliminary matter at trial, Defendant orally moved to exclude the pathologist’s
20 testimony on grounds that it was based on the autopsy report rather than raw data

1 and photographs. Defendant did not renew his objection when the pathologist was
2 called to the stand and testified two days later. As this was not a proper objection,
3 we review the district court’s admission of the testimony for fundamental error. *See*
4 Rule 12-321(B)(2)(c) NMRA; *see also State v. Lucero*, 1986-NMCA-085, ¶¶ 9-11,
5 104 N.M. 587, 725 P.2d 266 (determining general hearsay objections to be to the
6 adequacy of foundation rather than a specific, timely objection to testimony that
7 properly preserved the issue).

8 {9} “Under the Confrontation Clause, U.S. Const. amend. VI, an out-of-court
9 statement that is both testimonial and offered to prove the truth of the matter asserted
10 may not be admitted unless the declarant is unavailable and the defendant had a prior
11 opportunity to cross-examine the declarant.” *State v. Smith*, 2016-NMSC-007, ¶ 42,
12 367 P.3d 420 (internal quotation marks and citation omitted). “In *Crawford* [*v.*
13 *Washington*, 541 U.S. 36 (2004)], the United States Supreme Court described
14 ‘testimonial’ statements as solemn declarations or affirmations made for the purpose
15 of establishing or proving some fact.” *State v. Navarette*, 2013-NMSC-003, ¶ 7, 294
16 P.3d 435 (alterations, internal quotation marks, and citation omitted). In *Navarette*,
17 our Supreme Court held that one pathologist’s subjective observations recorded in
18 an autopsy report may not provide a basis for another pathologist’s trial testimony.
19 *Id.* ¶ 1. Rather, a pathologist may testify based on their review of “photographs of
20 the body and other raw data,” but may not “rely on the conclusions or opinions of

1 [the performing pathologist and their] original autopsy report.” *State v. Gonzales*,
2 2012-NMCA-034, ¶ 19, 274 P.3d 151; *see Navarette*, 2013-NMSC-003, ¶ 22
3 (stating that “an expert witness may express an independent opinion regarding his
4 or her interpretation of raw data without offending the Confrontation Clause”).
5 Stated differently, a pathologist may testify to their opinions on an autopsy they did
6 not perform if they offer their own opinions, based on photographs or raw data, as
7 an expert witness and avoid parroting the testimonial statements of the performing
8 pathologist. *See Gonzales*, 2012-NMCA-034, ¶ 19.

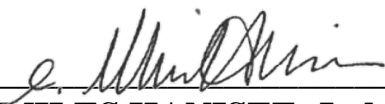
9 {10} As articulated by Defendant, we determine there was no error—let alone
10 fundamental error—in this instance regarding the admission of the pathologist’s
11 testimony. The pathologist testified she formed her own independent opinion on the
12 case after reviewing the original autopsy report, photographs taken during the
13 autopsy, CT scan results, toxicology report, and the associated police report. The
14 pathologist further testified that Victim’s cause of death was an intraoral gunshot
15 wound to the head. The pathologist described how she assessed Victim’s fatal wound
16 by reviewing photographs taken during the autopsy and could make conclusions
17 about the proximity of the gun upon its discharge based on the visible presence of
18 soot in a photograph of the Victim’s mouth. Many of the autopsy photos were
19 entered into evidence as the basis for the testifying pathologist’s opinion, but the
20 performing pathologist’s report was not entered into evidence. In any event,

1 Defendant centrally argues that the testifying pathologist’s reliance on autopsy
2 photos constituted the violation, a circumstance permissible under both *Navarette*
3 and *Gonzales*. As to Defendant’s overall challenge to the testifying pathologist’s
4 opinion at trial, our review of the record reveals no improper reliance on the opinion
5 of the performing pathologist or the original autopsy report itself. Without further
6 argument from Defendant, this evidence satisfies the confrontation requirements
7 established by applicable precedent. *See Gonzales*, 2012-NMCA-034, ¶¶ 19, 27;
8 *Navarette*, 2013-NMSC-003, ¶ 22. We, therefore, hold that the district court did not
9 commit fundamental error in allowing this evidence into the record.

10 **CONCLUSION**

11 {11} For the above reasons, we affirm.

12 {12} **IT IS SO ORDERED.**

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14 _____
J. MILES HANISEE, Judge

15 **WE CONCUR:**

16 
17 _____
SHAMMARA H. HENDERSON, Judge

18 
19 _____
GERALD E. BACA, Judge