

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

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,

4 v.

5 **FRANCIS DAVID FAIR,**

6 Defendant-Appellant.

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

8 **David A. Murphy, District Court Judge**

9 Raúl Torrez, Attorney General  
10 Serena R. Wheaton, Assistant Attorney General  
11 Santa Fe, NM

12 for Appellee

13 Bennett J. Baur, Chief Public Defender  
14 Allison H. Jaramillo, Assistant Appellate Defender  
15 Santa Fe, NM

16 for Appellant

17 **MEMORANDUM OPINION**


18 **DUFFY, Judge.**

19 {1} Defendant Francis Fair appeals his conviction for involuntary manslaughter  
20 (firearm enhancement), contrary to NMSA 1978, Section 30-2-3(B) (1994).

21 Defendant argues that the State made “two material misrepresentations” during trial  
22 that impacted the defense’s ability to cross-examine two prosecution witnesses.

23 Perceiving no reversible error, we affirm.

Court of Appeals of New Mexico  
Filed 5/29/2024 11:45 AM

  
Ramon J. Maestas  
Chief Clerk

**No. A-1-CA-41126**

1 **BACKGROUND**

2 {2} Defendant was charged and convicted for the shooting death of Roberto  
3 Herrera (Victim). The events underlying Defendant’s conviction are largely  
4 undisputed. On the day of the shooting, Defendant, Victim, and two other friends  
5 were together in an upstairs loft drinking alcohol and smoking marijuana. Victim  
6 was playing with Defendant’s gun. Victim was seen putting bullets in the magazine  
7 and taking them out. Witnesses stated that they also saw Defendant handling the gun.  
8 No witness testified to seeing exactly how the following events unfolded, but at some  
9 point the gun discharged, Victim was shot in the head, and Defendant was standing  
10 directly in front of or right next to Victim. Victim died from his injuries.

11 {3} Following an investigation, Defendant was charged with first degree murder,  
12 contrary to NMSA 1978, Section 30-2-1(A)(1) (1994). Before trial, Defendant filed  
13 a motion to suppress testimony from Dr. Clarissa Krinsky (the OMI Doctor), about  
14 the autopsy performed on Victim. Defendant argued that the OMI Doctor should not  
15 be permitted to testify about the decision not to request a toxicology evaluation of  
16 Victim because the autopsy had been performed by another doctor, Dr. Karen Kline-  
17 Parhomavich, who had subsequently left the state and was unavailable to testify. The  
18 district court granted the motion in part and prohibited the OMI Doctor “from  
19 testifying as to why Dr. Kline-Parhomavich did not request toxicology results

1 because the testimony would call for speculation and would violate Defendant's  
2 confrontation rights."

3 {4} During opening statements at trial, defense counsel framed the case as a  
4 product of the government jumping to conclusions and rushing to judgment because  
5 of "sloppiness . . . and a lack of a thorough investigation. For instance, the  
6 government never request[ed] or conduct[ed] a toxicology screen to see how much  
7 alcohol or drugs were in [Victim]'s system." The State objected at that point and  
8 during the ensuing bench conference, the prosecutor stated that a toxicology  
9 screening *had* been performed on Victim and turned over to defense counsel.  
10 Defense counsel said that the parties could figure this out later, outside the presence  
11 of the jury, and continued with his opening statement. After the State rested, the  
12 prosecutor sought to correct the record and disclosed that a toxicology report had not  
13 been done on Victim. Defense counsel moved for a mistrial on the basis that the  
14 defense had intended to argue that the failure to request a toxicology screening was  
15 part of the problem with the investigation in this case, but the defense had not  
16 pursued any questioning on the subject in reliance on the State's representation that  
17 a screening had been done on Victim. The district court denied Defendant's motion.

18 {5} A second issue arose concerning the district court's ruling that the defense  
19 could not cross-examine the lead detective regarding two pending lawsuits or an  
20 internal affairs investigation. The State had filed a pretrial motion in limine arguing

1 that it would be improper to allow Defendant to impeach the detective with the  
2 pending civil suits in an effort to challenge his investigation in this case. The district  
3 court heard the motion during trial and the prosecutor clarified that it was also asking  
4 the court to prevent defense counsel from questioning the detective about an internal  
5 affairs investigation, emphasizing that there had been no finding of dishonesty with  
6 respect to the internal affairs investigation. Defense counsel argued that the detective  
7 had received a thirty-six hour suspension, to which the State responded that the  
8 disciplinary determination had later been reversed by the Albuquerque Police  
9 Department. The district court ruled that cross-examination would not be allowed  
10 on these matters because they were pending and there had been nothing definitive  
11 offered to show that the officer acted in a dishonest way. After the State rested later  
12 that day, the prosecutor clarified that the detective's suspension had not yet been  
13 reversed but an offer had been made to do so and the matter was currently in  
14 arbitration. It does not appear that Defendant sought or the district court granted any  
15 relief with respect to this clarification.

16 {6} Defendant was convicted of involuntary manslaughter and now appeals.

17 **DISCUSSION**

18 **I. Toxicology Screening**

19 {7} Defendant argues that the district court erred in denying his request for a  
20 mistrial because, as we understand his argument, the State's misstatement regarding

1 the toxicology report resulted in a Confrontation Clause violation and prevented him  
2 from presenting a defense. Specifically, Defendant argues that the misstatement  
3 prevented him from cross-examining the OMI Doctor about the lack of a toxicology  
4 report, which in turn prevented him from establishing that the State’s investigation  
5 was deficient because it overlooked the possibility that Victim’s death was an  
6 accident.

7 {8} We review the district court’s denial of a motion for mistrial for an abuse of  
8 discretion. *State v. Hernandez*, 2017-NMCA-020, ¶ 14, 388 P.3d 1016. “The district  
9 court abuses its discretion in ruling on a motion for mistrial if it acts in an obviously  
10 erroneous, arbitrary, or unwarranted manner, or when the decision is clearly against  
11 the logic and effect of the facts and circumstances before the court.” *Id.* (internal  
12 quotation marks and citations omitted); *see also State v. Allen*, 2000-NMSC-002,  
13 ¶ 95, 128 N.M. 482, 994 P.2d 728 (“An isolated, minor impropriety ordinarily is not  
14 sufficient to warrant reversal because a fair trial is not necessarily a perfect one.”  
15 (internal quotation marks and citation omitted)).

16 {9} We initially reject Defendant’s premise that he was denied the ability to cross-  
17 examine the OMI Doctor. Defendant argues that he “[took] the State at its word” and  
18 did not examine the OMI Doctor about the toxicology report based on the State’s  
19 representation that a screening had been performed on Victim. While there is no  
20 doubt that the prosecution was in the wrong both in objecting during opening and

1 waiting until the third day of trial to correct the record, it nevertheless appears that  
2 Defendant was armed with sufficient information to meet the State's objection and  
3 was not prevented from questioning the OMI Doctor during trial. Defendant *was*  
4 able to cross-examine the OMI Doctor at trial, and the district court never issued a  
5 ruling that prevented him from asking the OMI Doctor about whether the toxicology  
6 screening was completed. Likewise, to the extent Defendant argues he was  
7 dissuaded from pursuing this line of questioning based on the prosecutor's  
8 misstatement, we observe that Defendant filed a pretrial motion in limine on this  
9 very subject, indicating that Defendant knew or should have known that a toxicology  
10 screening had not, in fact, been performed on Victim. Therefore, despite the  
11 problems caused by the prosecutor's mistaken objection, we cannot agree that  
12 Defendant was unduly restricted in his cross-examination.

13 {10} Substantively, we are similarly unpersuaded that the State's error foreclosed  
14 an avenue of defense. Defendant asserts that additional cross-examination of the  
15 OMI Doctor regarding the lack of a toxicology report "would have allowed the  
16 defense to further demonstrate to the jury that the investigation into whether the  
17 death in this case was an accident, a murder or somewhere in-between was lacking."  
18 However, Defendant has not demonstrated why a toxicology screening on *Victim*  
19 was relevant or how the lack of such a screening is probative of a deficient  
20 investigation.

1 {11} Defendant has likewise failed to explain how or why a toxicology screening  
2 on Victim is relevant to the categorization of the homicide as a murder or an  
3 accident. The unstated implication is that Victim’s impairment somehow contributed  
4 to his death, though Defendant has not explained how or why this is the case.<sup>1</sup> Even  
5 if we accept that Victim’s impairment was in some way relevant to the homicide  
6 charge, we observe that even without a toxicology screening, the jury heard  
7 testimony regarding Victim’s impairment from several witnesses at trial. For  
8 example, one witness testified that the group, including Victim, had been smoking  
9 marijuana all day and drinking alcohol prior to the incident. Another witness  
10 confirmed that Victim smoked marijuana on that day. Yet another witness testified  
11 that Victim, along with Defendant and another witness, was smoking and drinking  
12 prior to the incident, and that Victim was “buzzed” at that time, meaning “impaired  
13 by alcohol and marijuana.” In light of this testimony, it appears that a positive  
14 toxicology screening would merely be cumulative on the question of whether Victim  
15 was impaired and would, at best, serve only to quantify Victim’s level of  
16 impairment. *See State v. Johnson*, 2004-NMSC-029, ¶ 38, 136 N.M. 348, 98 P.3d  
17 998 (defining cumulative evidence as “additional evidence of the same kind tending

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<sup>1</sup> Defendant argued in various pretrial matters that Victim may have intentionally shot himself. However, Defendant did not clearly advance this argument at trial, instead referring to the shooting as an “accident.”

1 to prove the same point as other evidence already given” (internal quotation marks  
2 and citation omitted)).

3 {12} For these reasons, we conclude Defendant has not demonstrated an abuse of  
4 discretion on the part of the district court in denying his motion for a mistrial. We  
5 see no indication that Defendant was meaningfully prevented from cross-examining  
6 the OMI Doctor, and Defendant has not demonstrated either that the lack of a  
7 toxicology screening on Victim was probative of a deficient investigation or that it  
8 prevented Defendant from presenting his theory that Victim’s death was an accident.  
9 We hold that the district court did not err in denying Defendant’s motion for a  
10 mistrial.

## 11 **II. Evidentiary Ruling Excluding Pending Investigations**

12 {13} As we understand his second argument, Defendant contends that the district  
13 court erred in limiting the scope of his cross-examination of the lead detective by  
14 prohibiting questions regarding pending lawsuits and disciplinary proceedings.  
15 Defendant asserts that these proceedings involved a finding of dishonesty or  
16 discipline against the detective for not conducting a thorough investigation, which  
17 are legitimate sources of cross-examination and impeachment under Rule 11-  
18 608(B)(1) NMRA (stating that a trial court “may, on cross-examination, allow  
19 [specific instances of a witness’s conduct] to be inquired into if they are probative  
20 of the character for truthfulness of the witness”). *See also State v. Lymon*, 2021-



1 NMSC-021, ¶ 47, 488 P.3d 610 (“[U]nder Rule 11-608(B), a trial court may allow  
2 on cross-examination inquiry into specific instances of a witness’s prior conduct if  
3 the specific instances are probative of the witness’s character for truthfulness.”).

4 {14} We reject Defendant’s assertion that the district court’s ruling amounts to a  
5 Confrontation Clause violation and employ our traditional abuse of discretion  
6 standard to review the district court’s evidentiary ruling. *See State v. Rojo*, 1999-  
7 NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829. We cannot conclude that “the trial  
8 court abused its discretion by its ruling unless we can characterize it as clearly  
9 untenable or not justified by reason.” *Id.* (internal quotation marks and citation  
10 omitted). Absent a clear abuse of discretion, we will not reverse the ruling below.  
11 *See State v. Sarracino*, 1998-NMSC-022, ¶ 20, 125 N.M. 511, 964 P.2d 72.

12 {15} The district court based its decision to prohibit cross-examination regarding  
13 lawsuits and disciplinary proceedings on the fact that the matters were pending and  
14 there had been no definitive finding that the officer had acted in a dishonest way.  
15 Defendant argues that “whether there are pending lawsuits is not a consideration  
16 under [Rule 11-608(B)],” and therefore, the district court’s ruling was based on a  
17 misapprehension of the law. The State responds that the district court was correct in  
18 its decision to disallow cross-examination based on unsubstantiated allegations of  
19 misconduct, noting that our Supreme Court has cautioned trial courts to “take care  
20 to distinguish actual misconduct from a mere accusation of misconduct.” *See State*

1 *v. Robinson*, 1983-NMSC-040, ¶ 5, 99 N.M. 674, 662 P.2d 1341. The *Robinson*  
2 Court recognized that “impeachment of a witness by insinuations based on  
3 unsubstantiated allegations of prior misconduct provides the trier of fact with no  
4 information relevant to the witness’s credibility and carries a great potential for  
5 prejudice.” *Id.* ¶ 7. In light of *Robinson*, we perceive no abuse of discretion in the  
6 district court’s decision to prohibit questioning regarding pending lawsuits or  
7 disciplinary proceedings. *See also State v. Torres*, 2018-NMSC-013, ¶ 58, 413 P.3d  
8 467 (observing that the focus of Rule 11-608(B) is whether the specific instances of  
9 conduct at issue “[are probative of the] witness’s character for truthfulness,” and that  
10 Rule 11-608(B) is “permissive, not mandatory”); *Segura v. K-Mart Corp.*, 2003-  
11 NMCA-013, ¶ 28, 133 N.M. 192, 62 P.3d 283 (observing that under Rule 11-608,  
12 “even though such evidence may be relevant, its admissibility is left to the sound  
13 discretion of the trial court”).

14 {16} Defendant argues in his reply brief that the disciplinary proceedings were not  
15 merely unsubstantiated allegations—they were a final decision ripe for  
16 impeachment. During the hearing on the State’s motion, Defendant argued that the  
17 appeal of the detective’s suspension had been denied. The State claimed that the  
18 detective’s suspension had been reversed. The prosecutor later clarified that the  
19 disciplinary proceedings had not been reversed, but were in arbitration and that the  
20 city had offered to rescind the detective’s suspension with back pay. Defendant

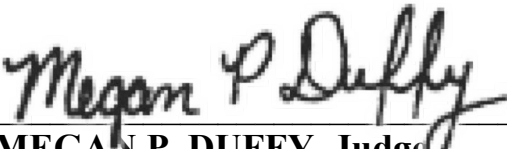
1 argues that in light of the prosecutor’s clarification, it appears the underlying  
2 disciplinary proceedings were final, and the prosecutor’s mistake was prejudicial  
3 because “the district court did not allow the defense to cross-examine [the detective]  
4 about a finding of dishonesty or about discipline he received for not conducting a  
5 thorough investigation under Rule 11-608(B), in part because the State  
6 misrepresented that it was not a final decision.”

7 {17} Even if we accept Defendant’s position that the disciplinary proceedings were  
8 final—a view we do not necessarily endorse given the pending arbitration—the  
9 district court based its ruling on the fact that Defendant had not offered evidence to  
10 establish that the disciplinary proceedings involved an adjudication or determination  
11 of dishonesty. The prosecutor’s clarification had no impact on this aspect of the  
12 district court’s ruling, and Defendant has not demonstrated that the district court  
13 erred in limiting cross-examination regarding the disciplinary proceedings on that  
14 basis. Consequently, as with the pending lawsuits, we perceive no error in the district  
15 court’s determination that the detective should not be subject to cross-examination  
16 on the matters at issue.

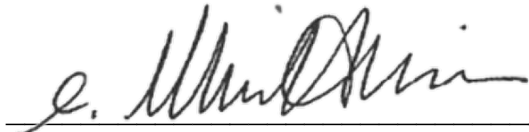
17 **CONCLUSION**

18 {18} For the above and foregoing reasons, we affirm.

19 {19} **IT IS SO ORDERED.**

20   
21 MEGAN P. DUFFY, Judge

1 **WE CONCUR:**

2 

3 **J. MILES HANISEE, Judge**

4 

5 **KRISTINA BOGARDUS, Judge**