IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v. **No. A-1-CA-42456**

CURTIS TAYLOR, III,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Emeterio L. Rudolfo, District Court Judge

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MEMORANDUM OPINION

HENDERSON, Judge.

{1} This matter was submitted to the Court on Defendant's brief in chief pursuant to the Administrative Order for Appeals in Criminal Cases from the Second, Eleventh, and Twelfth Judicial District Courts in *In re Pilot Project for Criminal Appeals*, No. 2022-002, effective November 1, 2022. Following consideration of the

brief in chief, the Court assigned this matter to Track 2 for additional briefing. Now having considered the brief in chief, answer brief, and amended reply brief, we affirm Defendant's convictions. However, we vacate Defendant's firearm enhancements and remand to the district court to amend Defendant's judgment and sentence to reflect Defendant's conviction for the indeterminate offense of tampering with evidence.

DISCUSSION

{2} Following a jury trial, Defendant appeals his convictions of one count of voluntary manslaughter, one count of conspiracy to commit voluntary manslaughter, one count of shooting at or from a motor vehicle (great bodily harm), and one count of tampering with evidence (indeterminate degree felony). [RP 158-63] Defendant contends that the district court erred in admitting officer testimony explaining surveillance footage admitted into evidence [BIC 16-20], it was fundamental error to fail to instruct the jury that his conspiracy conviction required specific intent [BIC 24-34], the district court erred by imposing a three-year firearm enhancement on Defendant's convictions for "brandishing" a firearm [BIC 35-38], and the district court imposed a greater sentence than allowable for Defendant's tampering with evidence conviction [BIC 21-23].

I. Officer Testimony

{3} Defendant challenges the admissibility of the investigating officer's statements while the State presented video surveillance footage of the charged crimes. [BIC 16-20; RB 1-5] The State asked the officer about what he found useful or what he noticed specifically when reviewing the video in the course of his investigation. [BIC 9] This included statements identifying bullet casings found at the crime scene when they were ejected from guns used by Defendant and others. [BIC 9-12]

{4} The helpfulness of either expert or lay opinion testimony that identifies an individual or object in video evidence "is based on whether the witness is more likely than the jury to make an accurate identification." *State v. Stalter*, 2023-NMCA-054, ¶ 28, 534 P.3d 989 (internal quotation marks and citation omitted); *see also State v. Chavez*, 2022-NMCA-007, ¶ 41, 504 P.3d 541 (concluding that "a witness may identify an object appearing in a video when the witness is more likely that the jury to correctly identify the object—i.e., when the witness has a special familiarity with the object"). "We review the admission of evidence under an abuse of discretion standard and will not reverse in the absence of a clear abuse." *State v. Arvizo*, 2021-NMCA-055, ¶ 29, 499 P.3d 1221 (internal quotation marks and citation omitted). "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the trial court abused its

discretion by its ruling unless we can characterize it as clearly untenable or not justified by reason." *Id.* (internal quotation marks and citation omitted).

{5} Relevant to Defendant's appeal, the officer testified that one of the first steps in his investigation was reviewing still images and the surveillance footage after the previous detective passed over the case materials. [11/15/23 CD 10:02:15-10:02:30] The officer discussed the various camera angles that he reviewed of the incident, specifically focusing on the exterior camera angle and the interior door camera angle because they provided the most information during his investigation of the incident. [*Id.* 10:02:55-10:06:00] When the State began asking questions of the officer as to what details he found "significant" about the video during his investigation, the district court ultimately overruled Defendant's objection and allowed the officer to describe details he found important that were not clear or obvious from just watching the video. [*Id.* 10:07:10-12:10]

{6} Over the course of the video sections played to the jury, the officer testified to his familiarity with the gun that Defendant used. The officer additionally testified that he was aware what type of ammunition the gun used, the type of ammunition that was found at the crime scene, and he was able to specifically identify the type of gun in the video. [*Id.* 10:12:20-12:50; 10:15:40-16:20] The officer later testified that you could see "bronze-ish colored item[s]" fly from the passenger side of a vehicle. [*Id.* 10:19:00-19:25] The officer testified that the video showed other people

picking up the items. [*Id.* 10:20:45-21:15] Referencing the same items, the officer testified, "From my, I guess training and experience, I know the style of firearms I saw on the camera usually eject a casing. So, they appear to land in kind of the area where those people are bending over." [*Id.* 10:21:15-21:40]

{7} The officer additionally testified that Defendant had a firearm in his hand while on the surveillance footage when he entered the building. [*Id.* 10:33:05-34:15] Based on the officer's training and experience with firearms, the officer explained where a bullet casing would be ejected from Defendant's gun during use. [*Id.* 10:36:40-36:45] The officer stated that the surveillance video showed that, while Defendant had his armed raised with the gun, you could see the same bronze item falling to the ground. [*Id.* 10:49:05-49:40] The officer then testified that Defendant then leans over, and the bronze items are no longer on the ground after Defendant stands up. [*Id.* 10:49:40-50:20] At the same time, someone can be heard to say, "Go! We'll have somebody pick it up. Go!" [*Id.* 10:51:00-51:15] The officer then begins to say that this yelling occurs when "someone's seen bending over picking up something that I believe to be shell casings." [*Id.* 10:51:35-5] However, Defendant objected to this statement, and the district court sustained the objection. [*Id.* 10:51:50-51:55] Finally, relevant to Defendant's appeal, the officer testified that he could see other individuals picking up bullet casings in the video. [*Id.* 10:54:10-54:55]

{8} Defendant argues that the district court erred by allowing the investigating officer to testify that he believed Defendant was tampering with evidence while commenting on the surveillance footage the State introduced into evidence. [BIC 17-18; RB 2-3] Defendant relies on this Court's opinion in *State v. Chavez*, where this Court held that the district court abused its discretion by allowing a testifying officer to state that they believed that the video showed "[the d]efendant holding a gun; what the video does or does not depict was for the jurors to determine for themselves." 2022-NMCA-007, ¶ 42. This Court reasoned that the testifying officer "did not testify to any specific experience that makes [them] particularly adept at detecting concealed firearms." *Id.* ¶ 43. As such, "under the circumstances here, it was not helpful to the jury for [the officer] to provide [their] interpretation of the video and that the admission of [their] interpretation was therefore an abuse of discretion." *Id.*

{9} However, despite Defendant's arguments now on appeal, our review of the trial testimony shows that the district court sustained Defendant's objection to the officer's testimony that he believed Defendant was picking up shell casings. [BIC 11; 11/15/23 CD 10:51:50-51:55] To the extent that Defendant challenges the remainder of the officer's testimony, [BIC 17] Defendant does not argue that the officer's testimony was not helpful to the jury. [BIC 17-18] Rather, Defendant argues that the jury was in the same position as the officer when viewing the footage

and therefore must draw its own conclusion from the surveillance video. [BIC 18-19] But this fails to consider the officer's statements that, through his training and experience with firearms, he was familiar with the types of guns used and explained that the bronze items were bullet casings based on this knowledge. Additionally, the record proper establishes that the State admitted evidence of other bullet casings found at the scene. [RP 147]

{10} Accordingly, it appears that the officer's testimony was helpful for the jury because the officer was "more likely than the jury to correctly identify" the bullet casings in the video through his knowledge of the firearms used during the shooting. *See Chavez*, 2022-NMCA-007, ¶ 41. We therefore cannot say that the district court abused its discretion in allowing the officer's testimony to identify the bullet casings in the video surveillance footage played to the jury. *See Arvizo*, 2021-NMCA-055, ¶ 29. Because we conclude that the district court did not err in admitting the testimony, we do not discuss Defendant's harmless error argument. [BIC 19-20]

II. Jury Instructions

{11} "The standard of review we apply to jury instructions depends on whether the issue has been preserved. If the error has been preserved, we review the instructions for reversible error. If not, we review for fundamental error." *State v. Benally*, 2001-NMSC-033, ¶ 12, 131 N.M. 258, 34 P.3d 1134 (citation omitted). "Under both standards we seek to determine whether a reasonable juror would have been

confused or misdirected by the jury instruction," which "may stem not only from instructions that are facially contradictory or ambiguous, but from instructions which, through omission or misstatement, fail to provide the juror with an accurate rendition of the relevant law." *Id.* (internal quotation marks and citation omitted). Defendant admits that he failed to preserve his argument. [BIC 28] We therefore review for fundamental error. *See id.*

{12} Defendant contends that conspiracy to commit manslaughter required the jury to be instructed on specific intent to kill because "[v]oluntary manslaughter is a mitigated form of second degree-murder," second degree murder encompasses both "reckless and intentional killings," and without the instruction "[t]here is a significant possibly that the jury convicted [Defendant] for conspiracy to commit a reckless homicide." [BIC 24-27; RB 7-9]

{13} We disagree with Defendant's premise that second degree murder encompasses both "reckless and intentional killings,"[1] as second degree murder

[1]Defendant's argument relies on *State v. Baca*, where our Supreme Court held that "conspiracy to commit depraved-mind murder" could not be charged under New Mexico law "as it presently stands." 1997-NMSC-059, ¶ 53, 124 N.M. 333, 950 P.2d 776, *abrogated on other grounds by State v. Revels*, 2025-NMSC-021, ¶ 37, 572 P.3d 974. As our Supreme Court explained, the intent requirement for conspiracy could not encompass depraved-mind murder—conspiracy is a specific attempt crime and "specific intent is the intent to do a further act or achieve a further consequence," while "depraved-mind murder is an unintentional killing resulting from highly reckless behavior." *Id.* ¶ 51 (internal quotation marks and citations omitted). Citing to this Court's similar analysis finding that "attempted depraved-mind murder did not exist" and other jurisdictions, our Supreme Court agreed that conspirators can

requires intentional conduct and cannot be premised on merely reckless conduct, no additional jury instruction was required. Defendant's argument that a conviction of second degree murder can be based on merely reckless conduct is founded on a misunderstanding of our Supreme Court's opinion in *State v. Garcia*, 1992-NMSC-048, ¶ 22, 114 N.M. 269, 837 P.2d 862. [BIC 25] Our Supreme Court explained in *Garcia* that there are two types of *intentional* killings in New Mexico: first degree and second degree murder. "New Mexico's statutory scheme murder consists of two categories of *intentional* killings: those that are willful, deliberate, and premeditated; and those that are committed without such deliberation and premeditation but with knowledge that the killer's acts create a strong probability of death or great bodily harm." *Id.* ¶ 22 (emphasis added). The Court explained that the first category of intentional murder—first degree murder—is willful, deliberate, and premeditated and the second category of intentional murder—second degree murder—is committed without such deliberation and premeditation. *Id.* Both first and second degree murder, however, are intentional crimes. The distinction between them turns on whether the killing is premeditated, making it first degree murder, or whether, it is "the kind of killing expressly contemplated . . . as not a deliberate murder—

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act recklessly, but "they cannot agree to accomplish a required specific result unintentionally." *Id.* ¶¶ 51-52 (internal quotation marks and citation omitted). *Baca* is inapposite. Unlike depraved-mind murder, second degree murder—and by extension voluntary manslaughter—does not encompass reckless conduct.

namely, a killing that, *even though intentional*, is committed on a mere unconscionable and rash impulse, i.e., a rash impulsive killing," making it a second degree murder. *Garcia*, 1992-NMSC-048, ¶ 22, (emphasis added) (alteration, internal quotation marks and citation omitted). The statute defining second degree murder has been read by our courts to include intentional killings, and "an intentional killing would always include these elements—i.e., the elements of killing with knowledge of the requisite probability" of creating "a strong probability of death or great bodily harm." *Id.* ¶ 20. (internal quotation marks and citation omitted). Defendant misconstrues *Garcia*'s holding when he argues that second degree murder encompasses "reckless" killing. *Garcia*'s discussion does not discuss the difference between "intentional" and "reckless," but rather the difference between "deliberate" and "intentional" when charging a defendant with first degree versus second degree murder. *See id.* ¶¶ 17-22; *see also id.* ¶ 17 (explaining that a "mere unconsidered and rash impulse, even though it includes an intent to kill, is not a deliberate intention to kill" (internal quotation marks and citation omitted)).

{14} Voluntary manslaughter is a lesser included offense of second degree murder. "The difference between second degree murder and voluntary manslaughter is that voluntary manslaughter requires sufficient provocation." *State v. Gaitan*, 2002-NMSC-007, ¶ 11, 131 N.M. 758, 42 P.3d 1207; *compare* UJI 14-220 NMRA, *with* UJI 14-210 NMRA. But both crimes are intentional killings and cannot be

committed with merely reckless disregard. *See State v. Dominguez*, 2005-NMSC-001, ¶ 14, 137 N.M. 1, 106 P.3d 563 (comparing voluntary manslaughter to shoot at or from a motor vehicle and explaining "[t]he mens rea required for voluntary manslaughter is the same as the mens rea required for second degree murder: objective knowledge that the defendant's acts create a strong probability of death or great bodily harm"), *overruled on other grounds by State v. Montoya*, 2013-NMSC-020, ¶ 54, 306 P.3d 426.

{15} "By contrast, shooting at or from a motor vehicle requires a *reckless disregard*, which is defined as knowledge that the defendant's conduct created a substantial and foreseeable risk, that the defendant disregarded that risk and that the defendant was wholly indifferent to the consequences of the conduct and to the welfare and safety of others." *Id.* (emphasis added) (alteration, internal quotation marks, and citation omitted)); *see also State v. Abeyta*, 1995-NMSC-051, ¶ 24, 120 N.M. 233, 901 P.2d 164 ("The mens rea required for voluntary manslaughter is that a defendant intended to cause the harmful act."), *abrogated on other grounds by State v. Campos*, 1996-NMSC-043, ¶ 32 n.4, 122 N.M. 148, 921 P.2d 1266. It is *involuntary* manslaughter, not voluntary manslaughter, that can encompass reckless conduct. *See* NMSA 1987, § 30-2-3(B) (1994) ("Involuntary manslaughter consists of manslaughter committed in the commission of an unlawful act not amounting to

felony, or in the commission of a lawful act which might produce death in an unlawful manner *or without due caution or circumspection*." (emphasis added)).

{16} Here, the district court instructed the jury on the elements of voluntary manslaughter and conspiracy according to the relevant uniform jury instructions. [RP 97, 102] *See* UJI 14-210, -220, -2810 NMRA. The voluntary manslaughter jury instruction notified the jury that the jury must find "[D]efendant killed [Victim]" and "[D]efendant knew that his acts created a strong probability of death or great bodily harm to [Victim]." [RP 97] The conspiracy jury instruction notified the jury that the jury must find that "[D]efendant and the other person intended to commit voluntary manslaughter." [RP 102] The jury was additionally instructed that, to convict Defendant of voluntary manslaughter, they must find Defendant acted "intentionally when he committed the crime," meaning "he purposely does an act which the law declares to be a crime." [RP 110] As such, the jury was sufficiently instructed they must find both the intent requirement of voluntary manslaughter and the dual intent requirement of conspiracy to convict Defendant. *See State v. Baca*, 1997-NMSC-059, ¶ 46, 124 N.M. 333, 950 P.2d 776, *abrogated on other grounds by State v. Revels*, 2025-NMSC-021, ¶ 37, 572 P.3d 974 (explaining the dual intent requirement for a conviction of conspiracy).

{17} Accordingly, our Supreme Court's prohibition on conspiracy convictions for underlying crimes of reckless conduct in *Garcia*—one of the centerpieces of

Defendant's argument for a jury instruction requiring the jury to find that Defendant acted intentionally and not recklessly in killing victim—and *Garcia*'s discussion of the difference between an intentional, premeditated killing committed deliberately and an intentional killing based on "a mere unconsidered and rash impulse, even though it includes an intent to kill," *see id.* ¶¶ 17-22 (internal quotation marks and citation omitted)), simply do not apply to the instant case. Further, the district court's instructions otherwise accurately stated the law. As such, the district court's failure to additionally instruct the jury that conspiracy to commit voluntary manslaughter required additional intent to kill does not amount to error, let alone rise to the level of fundamental error.

III. Firearm Enhancement

{18} Next, Defendant contends that the district court erred in imposing a three-year firearm enhancement on his voluntary manslaughter and shooting at a motor vehicle convictions for "brandishing" a firearm, because the jury did not find that Defendant "brandished" a firearm under the language of the statute at the time. [BIC 35] Rather, the jury only found that Defendant "used" a firearm. [BIC 35] Defendant admits that he did not preserve his argument at trial because he did not object to the verdict forms or jury instructions at trial. [BIC 35] However, Defendant claims that his argument is a "challenge to an illegal sentence," and can therefore be raised for the first time on appeal. [BIC 35-38; RB 13; ARB 13]

{19} Defendant argues that this Court's analysis in *State v. Garrett*, 2026-NMCA-016, 584 P.3d 1049, is dispositive. We agree. In *Garrett*, this Court reviewed an identical challenge to Defendant's argument in the instant case—the district court exceeded its sentencing authority to apply the firearm enhancement because the jury found that the defendant "used" a firearm in the commission of the crimes and not "brandished" a firearm in the commission of the crimes. *Id.* ¶ 27. This Court first concluded that we review this issue de novo because a district court's sentencing power is "derived exclusively from statute," and this "authority is properly considered part of the district court's subject matter jurisdiction" such that it can be raised for the first time on appeal. *Id.* ¶ 28 (alterations, internal quotation marks, and citations omitted). Second, this Court concluded that a specific finding of "used" did not meet the statutory requirement for the firearm enhancement at the time. *Id.* ¶ 29. As such, "the district court exceeded its jurisdiction in applying the firearm enhancement to [the d]efendant's conviction" because "the jury did not make a separate finding of fact as to whether a firearm was brandished in the commission of that crime." *Id.* This Court reasoned that, because it is the special interrogatory that supports the firearm enhancement, failure to specifically find the needed element requires that the enhancement be vacated even if the evidence could have allowed the jury to infer the necessary element. *Id.* ¶ 30.

{20} Here, it is undisputed that the special verdict form utilized to support the firearm enhancements found that Defendant "used" a firearm rather than "brandished" a firearm. [RP 138-41] Therefore, the sentence enhancement was not authorized by the jury's verdict, and Defendant's firearm enhancements must be vacated. *See id.* ¶ 31 ("Because the special interrogatory states that [the d]efendant used a firearm, rather than brandished it, the sentence enhancement was not authorized by the jury's verdict.").

IV. Tampering with Evidence Sentence

{21} Finally, Defendant argues that the district court's eighteen-month sentence as a fourth-degree felony for indeterminate crime tampering with evidence constitutes an illegal sentence because the greatest sentence a district court can impose for indeterminate crime tampering with evidence is as a petty misdemeanor. [BIC 21-23] The State agrees, and asks that we remand to the district court for entry of an amended judgment and sentence. [AB 14-15] While we are not bound by the State's concession, *see State v. Montoya*, 2015-NMSC-010, ¶ 58, 345 P.3d 1056, we agree.

{22} Defendant relies on our Supreme Court's opinion in *State v. Radosevich*, 2018-NMSC-028, 419 P.3d 176. [BIC 22-23] In *Radosevich*, our Supreme Court held that NMSA 1978, Section 30-22-5(B)(4) (2003) "cannot be constitutionally applied to impose greater punishment for commission of tampering where the underlying crime is indeterminate than the punishment prescribed under Section 30-

22-5-(B)(3) where the underlying crime is a misdemeanor or petty misdemeanor." 2018-NMSC-028, ¶ 27. Our Supreme Court concluded that "the indeterminate tampering offense in Section 30-22-5(B)(4) can be insulated from invalidity by limiting its penalties to those prescribed in the statute for the lowest level of tampering, which are currently the petty misdemeanor penalties." *Id.* ¶ 29.

{23} Both parties agree on appeal that while the State initially submitted jury instructions for tampering with the crime of murder, the State changed the instruction to the indeterminate crime tampering charge before submission of all jury instructions to the jury. [BIC 13; AB 7] However, due to an error, the jury instruction submitted to the jury still included the "tampering with the crime of murder" language by mistake. [BIC 14; AB 7] The judge notified the jury of the mistake, instructed the jury to disregard that language, and notified the jury that it would provide the correct instruction as soon as the instruction was prepared. [BIC 14; 7] While it appears that the corrected jury instruction does not appear in the record, [RP 83-117] our review of the trial shows that the district court notified that jury of the change and instructed the jury to consider indeterminate crime tampering with evidence, and then later gave the jury a corrected instruction. [11/16/23 CD 9:19:05-19:50; 10:32:15-34:50; 1:01:10-02:00]

{24} Accordingly, we agree that Defendant's judgment and sentence does not accurately reflect his conviction for indeterminate crime tampering with evidence.

We therefore remand to the district court with directions to amend the judgment and sentence to reflect Defendant's conviction and his resentencing. *See id.* ¶ 34.

CONCLUSION

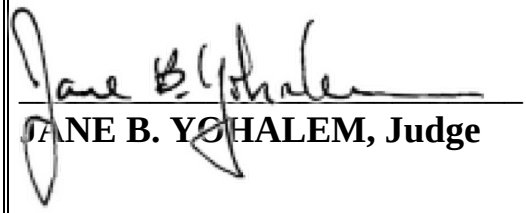
{25} For the foregoing reasons, we affirm Defendant's convictions, but reverse the application of the firearm enhancements and remand to the district court to amend Defendant's judgment and sentence on Defendant's conviction for the indeterminate crime, tampering with evidence.

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

SHAMMARA H. HENDERSON, Judge

WE CONCUR:

JENNIFER L. ATTREP, Judge



JANE B. YOHALEM, Judge