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

2 **STATE OF NEW MEXICO,**

3           Plaintiff-Appellee,

4 **v.**

**No. 35,221**

5 **RUBEN FLOREZ,**

6           Defendant-Appellant.

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

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

9 Hector H. Balderas, Attorney General

10 Santa Fe, NM

11 for Appellee

12 Bennett J. Baur, Chief Public Defender

13 Sergio Viscoli, Appellate Defender

14 B. Douglas Wood III, Assistant Appellate Defender

15 Santa Fe, NM

16 for Appellant

17   **MEMORANDUM OPINION**

18 **BUSTAMANTE, Judge.**

1 {1} Defendant seeks review of his convictions for three counts of assault on a  
2 peace officer. This Court issued a notice of proposed disposition proposing to dismiss  
3 Defendant's appeal for lack of a final, appealable order. Defendant has filed a  
4 memorandum opposing this Court's notice of proposed disposition, which we have  
5 duly considered. Unpersuaded, we dismiss Defendant's appeal.

6 {2} As we pointed out in this Court's notice, the jury's verdict was entered on  
7 August 3, 2015, and on October 7, 2015, Defendant filed a motion for new trial on the  
8 grounds of newly discovered evidence. We noted that the motion was scheduled to be  
9 addressed at the sentencing hearing, but that a judgment and sentence was entered on  
10 October 22, 2015, and nothing in the notice expressly disposed of the motion for new  
11 trial. As a result, we proposed to conclude that, in the absence of an order expressly  
12 disposing of Defendant's motion for new trial, there was not a final order from which  
13 Defendant could appeal. [CN 1]

14 {3} In support of our proposed disposition, we noted that our precedent  
15 acknowledged that the "timely filing of a post-judgment motion pursuant to Rule  
16 5-801 [NMRA] suspends the finality of the preceding judgment and sentence until  
17 such time as a written ruling upon the motion is entered." *See State v. Romero*,  
18 2014-NMCA-063, ¶ 8, 327 P.3d 525. Further, we suggested that there exists little  
19 basis for treating a motion for new trial filed prior to the entry of a final judgment or

1 within thirty days of a final judgment any differently from a motion filed pursuant to  
2 Rule 5-801. Thus, we suggested that if a motion for new trial based on newly  
3 discovered evidence is filed within thirty days of what would otherwise be a final  
4 judgment, then the motion must be expressly ruled on before jurisdiction is conveyed  
5 to this Court.

6 {4} In response, Defendant contends that the motion for new trial *was* expressly  
7 ruled on. In support of his argument, Defendant directs this Court to page 76 of the  
8 record proper. Defendant asserts that “[t]he district court denied the motion for a new  
9 trial on October 19, 2015[,] in a document simply titled ‘COURT PROCEEDINGS’  
10 which was filed in the district court on October 21, 2015[,] and made a part of the  
11 record proper for this appeal thereafter.” [MIO 1]

12 {5} Having reviewed this document, we note that it is not an order by a judge  
13 expressly ruling on the motion, but merely a clerical notation in the record reflecting  
14 the judge’s oral ruling. [RP 76] As such, it is insufficient to convey the finality  
15 necessary to support the current appeal. *See* Rule 12-201(D)(1) NMRA (providing  
16 that, when a post-judgment motion is filed, “the full time prescribed in this rule for the  
17 filing of the notice of appeal shall commence to run and be computed from the filing  
18 *of an order* expressly disposing of the last such remaining motion” (emphasis added));  
19 *Harrison v. ICX, Ill.-Cal. Express, Inc.*, 1982-NMCA-089, ¶ 4, 98 N.M. 247, 647 P.2d

1 880 (“[A]ppeals will lie only from a formal written order or judgment signed by the  
2 judge and filed in the case, or entered upon the records of the court and signed by the  
3 judge thereof.” (internal quotation marks and citation omitted)), *abrogated on other*  
4 *grounds by Martinez v. Friede*, 2004-NMSC-006, ¶¶ 25-26, 135 N.M. 171, 86 P.3d  
5 596.

6 {6} Accordingly, we dismiss Defendant’s appeal as prematurely filed.

7 {7} **IT IS SO ORDERED.**

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**MICHAEL D. BUSTAMANTE, Judge**

10 **WE CONCUR:**

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**JONATHAN B. SUTIN, Judge**

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**TIMOTHY L. GARCIA, Judge**