

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

2 Opinion Number: _____

3 Filing Date: July 24, 2018

4 **NO. A-1-CA-35330**

5 **STATE OF NEW MEXICO,**

6 Plaintiff-Appellee,

7 v.

8 **ANTHONY BLAS YEPEZ,**

9 Defendant-Appellant.

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

11 **Mary L. Marlowe, District Judge**

12 Hector H. Balderas, Attorney General

13 Maris Veidemanis, Assistant Attorney General

14 Santa Fe, NM

15 for Appellee

16 L. Helen Bennett, P.C.

17 L. Helen Bennett

18 Albuquerque, NM

19 for Appellant

1 **OPINION**

2 **GALLEGOS, Judge.**

3 {1} Defendant Anthony Blas Yopez was convicted by a jury for second-degree
4 murder, contrary to NMSA 1978, Section 30-2-1(B) (1994); tampering with evidence,
5 contrary to NMSA 1978, Section 30-22-5 (2003); and unlawful taking of a motor
6 vehicle, contrary to NMSA 1978, Section 30-16D-1(A) (2009). On appeal, Defendant
7 maintains that the district court improperly excluded expert opinion testimony related
8 to his ability to form deliberate intent and as a result, his conviction for second-degree
9 murder should be reversed and remanded for a new trial. We conclude that the district
10 court erred in excluding the expert testimony, but that such error was harmless. We
11 therefore affirm Defendant’s second-degree murder conviction.

12 **FACTUAL BACKGROUND**

13 {2} Jeannie “Anna” Sandoval was raised by George Ortiz (Victim), her adoptive
14 mother’s boyfriend. In 2012, Sandoval and her boyfriend, Defendant, were living
15 with Victim. According to Sandoval’s testimony at trial, Victim was often angry and
16 would fight with her. The tension between Sandoval and Victim would escalate when
17 they were drinking alcohol, and although the anger was mostly verbal, Victim had
18 previously pushed her, pulled her hair, and slapped her a few times.

19 {3} On October 29, 2012, Victim, Sandoval, and Defendant were alone in Victim’s
20 apartment. Defendant was reading to Sandoval, and all three were drinking alcohol.

1 Sandoval starting arguing with Victim and the argument escalated until Victim
2 pushed Sandoval and hit her in the face. Defendant became upset and stopped
3 reading. Between one and ten minutes later, Defendant went to Victim and they began
4 to struggle. Sandoval testified that Victim and Defendant “tussled” and fell into the
5 hallway, and that Victim’s recliner “ended up going with them.” Defendant restrained
6 Victim with a hand and arm across his neck and chest area. Sandoval ran to her room.
7 She testified that Victim “hit pretty hard when he landed[,]” and that she did not see
8 Defendant hit Victim.

9 {4} Defendant called to Sandoval, and when she came out of her room, there was
10 blood on the floor. Sandoval believed Victim was dead. He was motionless, his eyes
11 were open, and he was not breathing. Defendant tried to calm Sandoval down and
12 told her they “had to get rid of the evidence and the body.” Defendant went to the
13 kitchen, returned with a bottle of cooking oil, and handed it to Sandoval. She took the
14 bottle and dumped the oil around Victim’s body. Sandoval saw Defendant light a
15 piece of paper with a lighter but did not see him set fire to Victim’s body. Sandoval
16 took Victim’s car keys and left with Defendant.

17 {5} Rachel Piatt, Sandoval’s cousin, testified that Sandoval and Defendant came
18 to her home. According to Rachel, Sandoval and Defendant were intoxicated and did
19 not “seem themselves.” Rachel testified that Sandoval told her, “My dad’s dead.”

1 Rachel asked if Sandoval was sure, and Sandoval responded, “Yes, he’s dead.”
2 Rachel asked how she knew and she testified that Sandoval said, “Because [we]
3 burned him.” The next day, after going to Victim’s apartment and looking inside,
4 Rachel called 911. Sandoval and Defendant were taken into custody later that day.

5 {6} An autopsy concluded that the cause of Victim’s death was “homicidal
6 violence” and “thermal injuries,” and the manner of death was “homicide.”
7 Consequently, Defendant was charged¹ with first-degree murder, conspiracy,
8 tampering, and unlawful taking of a motor vehicle.

9 **PROCEDURAL BACKGROUND**

10 {7} As the case proceeded toward trial, Defendant filed a motion in limine that
11 requested either judicial notice of the admissibility of proposed expert testimony with
12 respect to the results of a neuropsychological evaluation by Dr. James Walker or a
13 hearing on the admissibility of the expert testimony. Specifically, Defendant’s motion
14 explained that his proposed experts would testify that he had “the low[-]activity
15 [monoamine oxidase A (MAOA)] gene” and that such condition is “statistically
16 associated with the occurrence of maladaptive, or violent, behavior in individuals
17 who have experienced maltreatment in childhood.” This expert testimony, Defendant
18 asserted, would “serve as almost the entire basis of [his] defense in his capital trial on

19 ¹Sandoval was also charged, and she pleaded guilty to second-degree murder.

1 charges of first-degree murder, among others.” Soon thereafter, Defendant filed a
2 “[n]otice of [i]ncapacity to [f]orm [s]pecific [i]ntent” indicating that he intended to
3 present expert testimony about whether he was capable of forming the specific intent
4 for the crime.

5 {8} In turn, the State filed a motion in limine to exclude Defendant’s proposed
6 expert testimony pursuant to Rule 11-702 NMRA, *Daubert v. Merrell Dow*
7 *Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *State v. Alberico*, 1993-NMSC-047,
8 116 N.M. 156, 861 P.2d 192. The State argued that the evidence was not reliable, not
9 relevant, and so complicated it would confuse and mislead the jury. While the State
10 did not contest the experts’ qualifications, it maintained that current literature does
11 not establish a “direct[] link[]” between a low-activity MAOA variant and increased
12 violent behavior. The State additionally argued that the studies had not been reliably
13 reproduced, the “maltreatment” factor was not sufficiently identifiable, and
14 Defendant’s reports of childhood maltreatment were suspect.

15 **A. The January 29, 2015 *Daubert/Alberico* Hearing**

16 {9} The district court held a *Daubert/Alberico* hearing on January 29, 2015. At the
17 hearing, Dr. Adrian Raine testified that approximately 50 percent of variations in
18 human antisocial and aggressive behavior are due to genetic influences and 50
19 percent to environment. A wide array of biological risk factors are associated with

1 increased violent behaviors, including poor frontal brain functioning, birth
2 complications, poor nutrition, low resting heart rate, and low IQ. Dr. Raine testified
3 that the scientific research demonstrates that individuals with a genotype that confers
4 low levels of MAOA, combined with a history of child abuse, are more likely to be
5 antisocial and aggressive in adulthood. This research includes several studies that
6 were attached to Defendant’s motion in limine, including a study titled Avshalom
7 Caspi, et al., *Role of Genotype in the Cycle of Violence in Maltreated Children*,
8 *Science*, Aug. 2, 2002, 297 at 851. The *Caspi* study refers to connections between the
9 low-activity MAOA gene and aggressive and antisocial behaviors.

10 {10} According to Dr. Raine, 30 percent of humans have a low-functioning MAOA
11 gene. Dr. Raine testified that this relationship between low-activity MAOA and a
12 history of child abuse has been validated, scientists in the field concur that this is a
13 replicable finding, and the relationship has statistical significance.

14 {11} Dr. Raine further explained that the low-activity MAOA condition “can” also
15 contribute to poor impulse control and “doing things without thinking about them
16 ahead of time.” He concluded that the gene-environment interaction produces reliable
17 conclusions and also noted that “a number of people think it’s especially with respect
18 to impulsive behavior.”

1 {12} Dr. Walker, a forensic neuropsychologist, also testified at the hearing. Dr.
2 Walker performed a forensic neuropsychological evaluation of Defendant in order to
3 identify any relevant neuropsychological information. As part of the evaluation, Dr.
4 Walker reviewed police reports, educational records, witness statements, autopsy
5 reports, and crime scene reports. He also interviewed Defendant, administered
6 neuropsychological tests, and made behavioral observations. According to Dr.
7 Walker, Defendant described having a “pretty horrific childhood.” Defendant
8 demonstrated a low-average IQ, no signs of brain injury, and adequate
9 problem-solving skills.

10 {13} In the course of his evaluation, Dr. Walker requested that Dr. David Lightfoot
11 perform genotyping on Defendant to determine whether he had a low- or high-activity
12 MAOA gene. Dr. Walker testified that the results of Dr. Lightfoot’s testing
13 demonstrated that Defendant exhibited “extremely low function of the gene,” which
14 would make him “particularly more likely than the average person to do violent
15 things.” When the district court asked what Dr. Walker’s opinion would be at trial,
16 he stated, “the fact that [Defendant] has a history of childhood abuse [and] a low
17 MAOA activity gene [that] made him exceptionally predisposed to committing
18 violent behavior.”

1 {14} On cross-examination, Dr. Walker confirmed that he is not a medical doctor or
2 a molecular biologist, he does not do genetics research or genotyping on his own, and
3 he does not conduct independent research on the issue. Dr. Walker also testified that
4 even if Defendant were prone to violence because of the low-activity MAOA gene,
5 Defendant could still have had sufficient presence of mind to know what he was
6 doing. According to Dr. Walker, it was possible that Defendant could have intended
7 to take Victim’s life and such intent would have been “perfectly consistent” with the
8 low-activity MAOA variant.

9 {15} At the conclusion of the hearing, the district court determined that Dr. Walker’s
10 opinion that Defendant “has a history of child abuse [and] a low MAOA activity gene
11 [that] made him exceptionally predisposed to committing violent behavior”
12 sufficiently satisfied the *Daubert-Alberico* factors. Nevertheless, the district court
13 noted that Dr. Walker could not testify about Dr. Lightfoot’s genetic testing and did
14 not testify that Dr. Lightfoot’s report meant that Defendant had the low MAOA
15 variant. Because no witness interpreted the genetic study to show that Defendant
16 actually had the low MAOA variant, the district court could not determine whether
17 Dr. Walker’s conclusions were supported. And as a result, the district court found that
18 Dr. Walker’s testimony would not assist the trier of fact and excluded the testimony
19 under Rule 11-702.

1 **B. Motion to Reconsider**

2 {16} Defendant filed a motion to reconsider and provided additional affidavit
3 evidence from Drs. Bernet, Lightfoot, Walker, and Raine. All of the doctors
4 characterized Defendant’s MAOA gene as “low activity.” Dr. Walker’s affidavit
5 stated that Dr. Lightfoot’s conclusion with respect to Defendant’s low-activity
6 MAOA gene

7 formed a necessary basis for [Dr. Walker’s] further opinion that, to a
8 reasonable degree of scientific certainty that [Defendant], due to his
9 genetic characteristics and childhood maltreatment, is predisposed to
10 acts of impulsive violence and is substantially more likely to engage in
11 acts of impulsive violence than the ordinary person.

12 The district court subsequently entered an order on the pleadings, again denying
13 Defendant’s motion to admit the testimony of Dr. Walker. The district court ruled that
14 the *Daubert-Alberico* test was satisfied for studies related to persons with a
15 low-functioning MAOA gene and a history of child abuse, who are predisposed or
16 inclined toward “antisocial and aggressive behaviors,” including violent acts.
17 However, the district court viewed Dr. Walker’s affidavit as a change in his opinion
18 from a conclusion that Defendant was predisposed to “violent behavior” to a later
19 conclusion that he was prone to “impulsive violence.” The district court considered
20 Dr. Walker’s new opinion to be inconsistent with the prior studies on low-activity
21 MAOA, including the *Caspi* study, which referred to violent, rather than impulsive,

1 actions. The district court attached to its order a table from a meta-study submitted
2 by Defendant (compiling and analyzing twenty-seven studies) that listed “antisocial
3 behaviors” associated with low-activity MAOA. That list of antisocial behaviors did
4 not include impulsivity.

5 {17} The district court determined that Dr. Walker’s opinion with respect to
6 impulsivity exceeded the district court’s understanding of the scientific literature as
7 presented by both sides. As a result, the district court was not satisfied that Defendant
8 demonstrated that Dr. Walker’s opinion related to impulsivity had been tested,
9 subjected to peer review or publication, had potential for error, or was grounded in
10 scientific principles. Consequently, the district court concluded that Dr. Walker’s
11 opinion was a “misstatement of the results of the studies [he] relie[d] upon for his
12 opinion.”

13 {18} The district court also determined that Dr. Walker’s testimony would not assist
14 the jury with deciding the issue of deliberate intent. That is, the district court reasoned
15 that any predisposition or inclination toward antisocial or aggressive behavior on
16 Defendant’s part would not explain whether Defendant deliberated prior to engaging
17 with Victim or whether Defendant acted impulsively.

1 **C. Trial and Appeal**

2 {19} At trial, the district court instructed the jury on first-degree murder, which
3 required the jury to find that Defendant killed Victim “with the deliberate intention
4 to take” his life. The jury was also instructed on second-degree murder, voluntary
5 manslaughter, and involuntary manslaughter. The jury ultimately found Defendant
6 guilty of second-degree murder, tampering with evidence, and the unlawful taking of
7 a motor vehicle. Defendant appeals his conviction for second-degree murder and
8 argues that the district court erred in refusing to admit the expert testimony about the
9 low-activity MAOA gene.

10 **DISCUSSION**

11 {20} Defendant argues on appeal that the district court improperly assessed the
12 credibility of his proposed experts, the expert testimony would have provided “an
13 important framework” for Defendant’s actions, and as a result of the exclusion of Dr.
14 Walker’s testimony, Defendant was denied “a likely defense.” The State maintains
15 that the proposed expert testimony did not comport with the underlying studies and
16 science related to the low-activity MAOA expression. Further, the State asserts that
17 a genetic predisposition toward impulsivity or aggression is not a defense to
18 second-degree murder—the crime for which the jury convicted Defendant.

1 **A. Admission of Expert Opinion Testimony under Rule 11-702**

2 {21} Rule 11-702 governs the admissibility of expert testimony and permits a
3 witness who is qualified as an expert by knowledge, skill, experience,
4 training, or education [to] testify in the form of an opinion or otherwise
5 if the expert’s scientific, technical, or other specialized knowledge will
6 help the trier of fact to understand the evidence or to determine a fact in
7 issue.

8 Thus, for evidence to be admissible under Rule 11-702, the following prerequisites
9 must be met: “(1) [the] experts must be qualified; (2) their testimony must assist the
10 trier of fact; and (3) their testimony must be limited to the area of scientific, technical,
11 or other specialized knowledge in which they are qualified.” *State v. Torres*,
12 1999-NMSC-010, ¶ 23, 127 N.M. 20, 976 P.2d 20. With respect to the second
13 prerequisite, “the relevant inquiry is *on this subject* can a jury from *this person*
14 receive appreciable help.” *Alberico*, 1993-NMSC-047, ¶ 44 (alteration, internal
15 quotation marks, and citation omitted). With respect to the third prerequisite,
16 “evidentiary reliability is the hallmark for the admissibility of scientific knowledge.”
17 *Torres*, 1999-NMSC-010, ¶ 26. Hence, the party offering expert testimony based on
18 scientific knowledge must establish that such knowledge is not only relevant, but
19 reliable. *See Alberico*, 1993-NMSC-047, ¶ 24.

20 {22} In order to determine the reliability of the evidence, the district court should
21 consider the following factors:

1 (1) whether a theory or technique ‘can be (and has been) tested’; (2)
2 ‘whether the theory or technique has been subjected to peer review and
3 publication’; (3) ‘the known [or] potential rate of error’ in using a
4 particular scientific technique ‘and the existence and maintenance of
5 standards controlling the technique’s operation’; and (4) whether the
6 theory or technique has been generally accepted in the particular
7 scientific field.

8 *State v. Anderson*, 1994-NMSC-089, ¶15, 118 N.M. 284, 881 P.2d 29. In addition to
9 these four *Daubert* factors, New Mexico courts rely upon a fifth factor: “whether the
10 scientific technique . . . is capable of supporting opinions based upon reasonable
11 probability rather than conjecture.” *Alberico*, 1993-NMSC-047, ¶ 47.

12 {23} This Court reviews the admission of expert testimony for abuse of discretion.
13 *Torres*, 1999-NMSC-010, ¶ 27.

14 An abuse of discretion in a case involving scientific evidence can be
15 found when the trial judge’s action was obviously erroneous, arbitrary,
16 or unwarranted. . . . It is not tantamount to rubber-stamping the trial
17 judge’s decision. It should not prevent an appellate court from
18 conducting a meaningful analysis of the admission of scientific
19 testimony to ensure that the trial judge’s decision was in accordance
20 with the Rules of Evidence and the evidence in the case.

21 *Id.* (alterations omitted) (quoting *Alberico*, 1993-NMSC-047, ¶ 63). “An appellate
22 court should be wary of substituting its judgment for that of the trial court.” *Alberico*,
23 1993-NMSC-047, ¶ 63.

1 **B. The Qualification of the Expert Witnesses is Undisputed and the District**
2 **Court’s Conclusion That the Underlying Scientific Knowledge Satisfied**
3 **the *Daubert-Alberico* Factors is Uncontested on Appeal**

4 {24} In this case, there was no dispute as to the qualification of the expert witnesses.
5 Further, the district court did not reject the science underlying the proposed expert
6 testimony. Instead, the district court considered the *Daubert-Alberico* factors and
7 found the studies demonstrating a correlation between low MAOA expression, a
8 history of childhood maltreatment, and a predisposition toward antisocial and
9 aggressive behaviors to be reliable. No party challenges this finding on appeal, and
10 we therefore do not address whether the witnesses were properly qualified as experts
11 or whether the science underlying the proposed expert testimony actually satisfies the
12 *Daubert-Alberico* factors.

13 **C. The District Court Abused its Discretion in Concluding That the Proffered**
14 **Expert Opinion Testimony Failed to Satisfy the Rule 11-702 Requirement**
15 **That the Opinion Assist the Trier of Fact**

16 {25} Two of the Rule 11-702 prerequisites having been satisfied, this appeal turns
17 primarily on whether the proffered expert opinion testimony satisfied the remaining
18 Rule 11-702 prerequisite that the opinion assist the trier of fact. The district court
19 determined that the opinion testimony would not assist the trier of fact in this case for
20 two reasons: (1) the expert opinion testimony as to Defendant’s predisposition toward
21 impulsive violence is unsupported by the scientific studies presented to the district

1 court; and (2) the expert opinion testimony with respect to Defendant’s predisposition
2 toward aggression, antisocial behavior, and violence is not relevant to the question
3 of whether he deliberately intended to kill Victim. For the reasons described below,
4 we conclude that the district court abused its discretion in excluding the opinion
5 testimony regarding Defendant’s impulsivity, which would have been relevant to the
6 question of deliberate intent.

7 {26} First of all, we observe that the district court was not satisfied that Dr. Walker’s
8 affidavit testimony about Defendant’s impulsivity was based on reliable science. That
9 is, the district court reviewed the testimony, affidavits, and the journal articles
10 submitted by both parties and concluded that Dr. Walker’s opinion with respect to the
11 correlation between low-functioning MAOA and impulsive behavior was not
12 supported by the research that it had determined to be valid and reliable. In particular,
13 the district court pointed out that neither the *Caspi* study nor the meta-study
14 referenced impulsive violence.

15 {27} On appeal, Defendant contends that the scientific evidence met the *Daubert-*
16 *Alberico* factors and argues that the district court “excluded the evidence based on a
17 credibility assessment.” We note that it does not appear that the district court focused
18 on the fact that Dr. Walker altered his opinion from “exceptionally predisposed to
19 violent acts” to “substantially more likely to engage in acts of impulsive violence.”

1 Rather, the district court appears to have focused on the failure of Defendant’s experts
2 to establish that the correlation explained in the literature between low-activity
3 MAOA, childhood maltreatment, and predisposition to violent acts also extended to
4 impulsive behaviors or impulsive violence.

5 {28} In essence, the district court determined that there was an analytical gap
6 between the reliable scientific knowledge presented, including the *Caspi* study and
7 the meta-study, and Dr. Walker’s affidavit testimony that Defendant is “predisposed
8 to acts of impulsive violence and is substantially more likely to engage in acts of
9 impulsive violence than the ordinary person.” While this line of reasoning makes
10 some sense conceptually, our Supreme Court, in *Acosta v. Shell Western Exploration*
11 *& Production, Inc.*, 2016-NMSC-012, ¶ 27, 370 P.3d 761, declined to adopt the
12 ruling of the United States Supreme Court in *General Electric Co. v. Joiner*, 522 U.S.
13 136, 146 (1997), which allows a judge to “reject expert testimony where the
14 ‘analytical gap’ between the underlying evidence and the expert’s conclusion[] is ‘too
15 great[.]’ ” *Acosta*, 2016-NMSC-012, ¶ 27. In declining to adopt the *Joiner* rule,
16 *Acosta* determined that the rule was inconsistent with the policy of our courts to leave
17 credibility determinations and weighing of evidence to the trier of fact. *Acosta*, 2016-
18 NMSC-012, ¶ 28. This is consistent with *Daubert*’s statement that the focus of the
19 inquiry under Rule 11-702 to determine evidentiary relevance and reliability “must

1 be solely on principles and methodology, not on the conclusions that they generate.”

2 509 U.S. at 595.

3 {29} Consequently, although the district court believed that Dr. Walker’s testimony
4 with respect to Defendant’s impulsivity went beyond the underlying science, *Acosta*
5 counsels that the weight to be given to such testimony is for the jury to decide. 2016-
6 NMSC-012, ¶ 28. “Vigorous cross-examination, presentation of contrary evidence,
7 and careful instruction on the burden of proof are the traditional and appropriate
8 means of attacking shaky but admissible evidence.” *Id.* (internal quotation marks and
9 citation omitted).

10 {30} In terms of assistance to the trier of fact, Dr. Walker’s conclusion that
11 Defendant is “predisposed to acts of impulsive violence and is substantially more
12 likely to engage in acts of impulsive violence than the ordinary person” would have
13 been relevant to whether Defendant had the specific intent necessary for first-degree
14 murder. *See State v. Balderama*, 2004-NMSC-008, ¶¶ 14, 27, 135 N.M. 329
15 (recognizing that a neuropsychologist’s testimony that the defendant’s acts were
16 “mere unconsidered and rash impulse” would have tended “to some degree, to refute
17 the element of deliberation necessary for first-degree murder”).

18 {31} Under these circumstances, where the district court found the underlying
19 science to be reliable—and where we assume, but do not decide, the same—we

1 conclude that the district court abused its discretion by excluding Dr. Walker’s
2 testimony. *See Alberico*, 1993-NMSC-047, ¶ 53 (“Reliability and relevancy and are
3 inextricably linked; once the technique is shown to be reliable it is relevant to prove
4 what it purports to prove.” (internal quotation marks and citation omitted)).

5 **D. Any Error in Excluding the Evidence Was Harmless**

6 {32} Before trial, Defendant asserted that the low-activity MAOA expert testimony
7 constituted his defense to the first-degree murder charge. Additionally, Defendant
8 filed a “[n]otice of [i]ncapacity to [f]orm [s]pecific [i]ntent” indicating that he
9 intended to present expert testimony about whether he was capable of forming the
10 specific intent for the crime. Thus, it appears that Defendant offered the expert
11 testimony as a way to negate the specific intent element of first-degree murder. *See*
12 § 30-2-1(A)(1) (stating that first-degree murder requires the State to prove that the
13 death was caused by “willful, deliberate and premeditated killing”); *see also Alberico*,
14 1993-NMSC-047, ¶ 71 (stating that “the proper initial inquiry for the admissibility
15 of expert opinion testimony, or any evidence for that matter, is the purpose for which
16 it is being offered”).

17 {33} Although Defendant’s proposed expert testimony was excluded from use at
18 trial, the jury acquitted him for first-degree murder. Instead, the jury convicted
19 Defendant for second-degree murder, which requires a showing that the defendant

1 knew his acts created a strong probability of death or bodily harm. *See State v. Suazo*,
2 2017-NMSC-011, ¶ 16, 390 P.3d 674 (citing Section 30-2-1(B) and UJI 14-210
3 NMRA). Second-degree murder includes killings that, even though intentional, are
4 “rash and impulsive” and not deliberate. *State v. Garcia*, 1992-NMSC-048, ¶ 23, 114
5 N.M. 269, 837 P.2d 862.

6 {34} Given that Defendant’s purpose in offering the excluded evidence was to
7 establish an impulsiveness on his part in order to defend against the first-degree
8 murder charge, we are not persuaded that Defendant was prejudiced where he was
9 ultimately convicted of second-degree murder. *Cf. Balderama*, 2004-NMSC-008, ¶ 41
10 (“Error in the exclusion of evidence in a criminal trial is prejudicial and not harmless
11 if there is a reasonable possibility that the excluded evidence might have affected the
12 jury’s verdict.”).

13 {35} We acknowledge that Defendant now argues on appeal that the proposed expert
14 testimony would have constituted a defense to the lesser charges of second-degree
15 murder, voluntary manslaughter, and involuntary manslaughter. We are not
16 convinced. Each of these offenses are general intent crimes. *See State v. Jernigan*,
17 2006-NMSC-003, ¶ 18, 139 N.M. 1, 127 P.3d 537 (holding voluntary manslaughter
18 is a usually a general intent crime); *State v. Campos*, 1996-NMSC-043, ¶¶ 31-32, 38,
19 122 N.M. 148, 921 P.2d 1266 (noting “second-degree murder is a general-intent

1 crime”); *State v. Hunt*, A-1-CA-28753, 2009-WL 6690310 mem. op. at *3 (N.M. Ct.
2 App. April 22, 2009) (non-precedential) (explaining that the diminished capacity
3 defense does not apply to general intent crimes like involuntary manslaughter). The
4 MAOA evidence would therefore not have supported a *Balderama*-type of defense
5 for any of the remaining charged crimes. *See Balderama*, 2004-NMSC-008, ¶¶ 14, 27,
6 (recognizing that a neuropsychologist’s testimony that the defendant’s acts were
7 “mere unconsidered and rash impulse” would have tended “to some degree, to refute
8 the element of deliberation necessary for first-degree murder”). Therefore, we are not
9 convinced that Defendant was denied his right to present a defense.

10 {36} In summary, the jury’s verdict acquitting Defendant of first-degree murder
11 demonstrates that it rejected that he had a deliberate intention to kill Victim even
12 without the assistance of expert testimony. The proposed expert testimony had no
13 relevance to the remaining charged offenses of second-degree murder, voluntary
14 manslaughter, and involuntary manslaughter and there is not a reasonable possibility
15 that the evidence might have affected the jury’s verdict. Any error, therefore, in
16 excluding the evidence was not prejudicial and does not require a new trial. *See id.*
17 ¶ 41.

1 **CONCLUSION**

2 {37} The district court erred in excluding Defendant's proposed expert opinion
3 testimony, but the error was harmless. Therefore, we affirm.

4
5

DANIEL J. GALLEGOS, Judge

6 **I CONCUR:**

7
8

LINDA M. VANZI, Chief Judge

9 **KIEHNE, Judge (specially concurring)**

1 **KIEHNE, Judge (specially concurring).**

2 {38} I concur in the majority's decision to affirm Defendant's convictions, but I do
3 not join its ruling that the district court improperly excluded the expert testimony that
4 Defendant proffered at trial, because a decision on that issue is not necessary to
5 resolve this case.

6 {39} In the district court, Defendant offered the expert testimony in question solely
7 to support his defense to the first-degree murder charge. The jury, however, acquitted
8 Defendant on that charge. Thus, it is not necessary for us to decide whether the
9 district court improperly excluded evidence that would have supported a defense to
10 first-degree murder.

11 {40} Defendant now argues that the expert testimony was also relevant to support
12 his defense to the second-degree murder, voluntary manslaughter, and involuntary
13 manslaughter charges. Although Defendant appears not to have preserved this claim
14 in the district court, the State does not argue that we should deem this claim waived.
15 Thus, I believe it is appropriate for this Court to decide it. But the majority's ruling
16 that the proffered expert testimony could not have supported a defense to those
17 charges as a matter of law fully (and correctly) disposes of this claim. The majority's
18 lengthy analysis of the district court's decision to exclude the expert testimony is
19 therefore unnecessary.

1 {41} Because this case can be fully disposed of on other grounds, “the cardinal
2 principle of judicial restraint—if it is not necessary to decide more, it is necessary not
3 to decide more—counsels us to go no further.” *PDK Labs. Inc. v. U.S. DEA*, 362 F.3d
4 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the
5 judgment). And because the Court’s ruling that the district court abused its discretion
6 is unnecessary to resolve this case, it is non-binding dicta. *See Ruggles v. Ruggles*,
7 1993-NMSC-043, ¶ 22 n. 8, 116 N.M. 52, 860 P.2d 182 (stating that language that
8 is “unnecessary to decision of the issue before the [c]ourt” is dicta, “no matter how
9 deliberately or emphatically phrased”). I believe that resolution of the important
10 issues concerning the admission of expert testimony that Defendant raises here should
11 await a case where it is necessary to decide them.

12
13

EMIL J. KIEHNE, Judge