State of New Mexico Compilation Commission is Publishing the New Mexico Statutes Annotated and Other Legal Publications of the State of New Mexico

State of New Mexico is the Only Official Publisher of State Laws and Rules
The state of New Mexico is no longer outsourcing its legal publications but, has instead become its own official publisher.

Trademark Name of Official Publications
The state of New Mexico Compilation Commission will use the trademark name of “New Mexico Legal Publications” on official publications of the state. The state has a private contractor, Conway Greene Co. of Cleveland, Ohio, that will assist the state in publication and delivery of the official publications. The state will continue to deliver all publications previously delivered by Lexis, Michie, Matthew Bender and American Legal publishing and will offer additional publications in the near future.

State is Only Source of Official Publications
Official publications of New Mexico laws and court rules are not available through Michie, Matthew Bender, Lexis, American Legal or other out of state publishing companies. If you have received official publications from Michie, Matthew Bender, Lexis or American Legal in the past, you do not need to cancel your subscription with them as the subscription to official publications is the property of the state of New Mexico.

New Mexico Rules Annotated 2004
Recently, Lexis Law Publishing Company, using the trademark name “Michie,” auto-shipped their version of the New Mexico court rules to state subscribers of the official laws and court rules although these rules were not ordered by the subscribers. Lexis has not used the trade name “Michie” on their rules since the 2000 edition. Reverting to this trade name has created a significant amount of confusion in the marketplace.

Unless you ordered the privately-published Lexis version of the laws and court rules or the Lexis CD-ROM, you do not need to pay for their books or CD ROMs. Even if you are told otherwise by sales

SPECIAL INSERT:
NEW MEXICO HISPANIC BAR NEWSLETTER
RES PUBLICA

Continued on page 7
COURSES OPEN TO LAWYERS FOR CLE CREDIT SUMMER 2004!

**Law Office Management for the Solo or Small Firm Practice**
David Martinez, J.D.
*Thursday, 5:00 – 8:00pm (June, 3 to July, 22)*

This course will explore the nuts and bolts of setting up and successfully managing a solo or small office practice. Topics to be covered include: marketing your practice, creating a financial plan, setting up the right bank accounts, covering your overhead and paying yourself, insurance needs, opportunities for court appointed cases, available resources in the legal community, case selection, fee agreements, computer needs and business planning.

**Spanish for Lawyers**
Presiliano Torrez, J.D., Co-Instructor, Monica G. Torrez, licensed attorney in Colombia
*Tuesday, 5:00-8:00pm (June, 1 to July, 20)*

This course will stress and teach the basic legal terminology that is used in our judicial system in a variety of practice settings. The course will strive to give the practitioner a basic understanding of the legal framework that their Spanish speaking clients come from if they are from countries with civil system traditions. Basic terminology will be taught in the areas of criminal law, domestic relations and minor civil disputes. There will be an emphasis in practical aspects of language usage and the student should enroll with the idea of actively participating.

**New Mexico Legal History**
David A. Reichard, Ph.D./J.D., Assistant Professor of History, CSU,
*Monday, Wednesday and Thursday, 6:00-8:00pm (July, 5 to July, 29)*

This course will examine the intersection of law and society in New Mexico from the pre-colonial period through the present. Themes include the history of Pueblo social and legal systems, the relationship of Spanish colonialism and Mexican independence to New Mexico’s legal system, the impact of the Treaty of Guadalupe Hidalgo and U.S. occupation/territorial governance, the struggle for statehood, the relationship of New Mexico to the U.S. government, and shifting ideas about crime and justice. There will be a special focus on legal issues involving land, water and other resources (including land grants, water rights, and conservation).

- To register lawyers may contact Gloria Gomez: 277-5265 or gomez@law.unm.edu. Members of the UNM Clinical Law Program, Access to Justice Network may take the course for the $5.00 per credit. For more information about the Access to Justice Network visit http://lawschool.unm.edu/Clinic/pro_bono/index.htm or call Associate Dean Antoinette Sedillo Lopez: 277-5265. Non-members may take it for $30.00 per CLE credit. (1 credit = 50 minutes of class attendance). Fees are not refundable.

- A law student who is not enrolled at UNM may apply to be a summer visiting student to take these courses for law school credit. Enrollment information is on line at http://lawschool.unm.edu/admissions.index
¡Se Necesita - Abogados Para Hacer Trabajos Voluntarios!

El Cuerpo de Abogacía del Estado de Nuevo México y KLUZ-TV (Canal 41 de Albuquerque) le gustaría hospiciar un programa de llamadas-para telespectadores de habla hispana. Necesitamos abogados que hablen español para que puedan responder a las extensas llamadas telefónicas referentes a casos legales.

Para más información acerca de este excitante programa, o para ser uno de nuestros voluntarios, comuníquese con Lizeth Cera-Cruz, 797-6068 o lcera-cruz@nmbar.org.

Nombre
Dirección
Teléfono
Área de practica

Envié a: Lizeth Cera-Cruz, 5121 Masthead NE, PO Box 92860 Albuquerque, NM 87199; número de fax 797-6047.

Wanted - Bilingual Attorneys for Volunteer Work!

The State Bar of New Mexico and KLUZ-TV (Albuquerque Channel 41) would like to host a legal call-in program for Spanish-speaking viewers. Spanish speaking attorney volunteers are needed to answer telephone inquiries on a wide range of legal issues.

For more information about this exciting program, or to volunteer, contact Lizeth Cera-Cruz, 797-6068 or lcera-cruz@nmbar.org.

Name
Address
Phone #
Practice Area

Return to: Lizeth Cera-Cruz, 5121 Masthead NE, PO Box 92860 Albuquerque, NM 87199; fax to 797-6047.
First Annual Elder Law Seminar and Reception  
**Friday, May 14, 1 - 5 p.m. • State Bar Center • 3.3 General and 1.2 Ethics CLE Credits**

The Elder Law Section of the State Bar launches its First Annual Seminar and Reception with a half-day, Friday afternoon program focused on services and court proceedings designed to help attorneys and their elder clients. The seminar, co-sponsored by Lawyer Referral for the Elderly Program (LREP) of the State Bar, features speakers from the areas of medical and legal ethics, practical application of enabling statutes to the needs of the elderly and judges who decide cases involving elder issues. A reception sponsored by the Elder Law Section follows the seminar at 5 p.m. and all are welcome to attend.

- $99 Standard and Non-Attorney
- $89 Elder Law Section Members, Gov’t. and Paralegals

Everyday Professionalism for Solo and Small Firm Practitioners  
**Tuesday, May 18, 1:30 - 3:30 p.m. • Petroleum Club • 2.0 Professionalism CLE Credits**

The purpose of this co-sponsored program with the Solo and Small Firm Practitioners is to educate attorneys about what professionalism is, and to provide concrete strategies and tips for increasing professionalism among attorneys as they interact with each other, judges, court reporters and clients.

- $55 Standard and Non-Attorney
- $40 Solo Section Members, Gov’t. and Paralegals

Trial Strategies Using Expert Witnesses: A Direct and Cross Examination with a View from the Bench  
**Friday, May 21, 1 - 4:30 p.m. • State Bar Center • 3.9 General CLE Credits**

The purpose of this co-sponsored program with the Solo and Small Firm Practitioners is to educate attorneys about what professionalism is, and to provide concrete strategies and tips for increasing professionalism among attorneys as they interact with each other, judges, court reporters and clients.

- $99 Standard and Non-Attorney
- $89 Governmental and Paralegals

**PROFESSIONALISM SELF-STUDY**

**2004 Professionalism: An Historical Perspective**

- **Wednesday, May 12**
- **Wednesday, May 26**
- **Wednesday, June 9**

11:00 a.m. • $59 • 2.0 Professionalism CLE Credits

**2004 Professionalism: An Historical Perspective**

- $59 • $5 S/H (if applicable) • 2.0 Professionalism CLE Credits
- VHS
- DVD

**IMPORTANT NOTICE:** As of January 2004, professionalism VHS/DVD’s are yours to keep. However, your certificate of completion must be returned to CLE. CLE will then file your credits with MCLE.

Pursuant to NM MCLE Rule 18-203(D), Self-Study credits (max of 5) may be applied only to CLE requirements for the year in which they are earned, and may not be carried over to subsequent year requirement or backward to prior year.

**FOUR EASY WAYS TO REGISTER**

**Phone:** (505) 797-6020, Monday - Friday, 9 a.m. - 4 p.m. (Please have credit card information ready)

**Fax:** (505) 797-6071, Open 24 hours

**Internet:** www.nmbar.org

**Mail:** CLE of the SBNM, PO Box 92860, Albuquerque, NM 87199
TABLE OF CONTENTS

Notices .................................................. 6 - 10
Legal Education Calendar .............................. 11
Writs of Certiorari ...................................... 12 - 13
Opinions .................................................. 14 - 48
Advertising .............................................. 49 - 56

 PROFESSIONALISM TIPS

WITH RESPECT TO MY LIENTS:
I WILL ADVISE MY CLIENT
 THAT CIVILITY AND
 COURTESY ARE NOT WEAKNESSES.

MEETINGS

MAY

5
Employment & Labor Law Section
Board of Directors, noon, State Bar Center

Trial Practice Section Board of Directors, 4:30 p.m., State Bar Center

7
Board of Bar Commissioners,
11 a.m., State Bar Center

Committee for Delivery of Legal Services to People with Disabilities,
oon, New Mexico Commission for the Blind

Legal Services and Programs Committee,
1:30 p.m., State Bar Center

8
Ethics Advisory Committee,
10 a.m., Dines & Gross, PC

10
Taxation Law Section Board of Directors,
noon, via teleconference

13
Public Law Section Board of Directors,
oon, State Bar Center

Business Law Section Board of Directors,
3:30 p.m., State Bar Center

STATE BAR WORKSHOPS

MAY

1
Real Estate Workshop
9 a.m. – noon, 1500 Paseo del Pueblo Sur
Meeting Room, Taos, NM

12
Family Law Workshop
6 – 8 p.m., State Bar of New Mexico
Albuquerque, NM

Lawyer Referral for the Elderly
Program Workshop & Clinic
1 – 4:30 p.m., Arrey Site Senior Center
Truth or Consequences, NM

21
Consumer Debt/Bankruptcy Workshop
6 – 8 p.m., UNM-Gallup Gurley Hall-Room
2215, 200 College Rd., Gallup, NM

For more information, call Marilyn Kelley
at 1-505-797-6048 or 1-800-876-6227; or visit
the SBNM Web site at www.nmbar.org.

FROM THE NEW MEXICO SUPREME COURT

No. 27,225: State v. Valente Balderama ................................. 14

FROM THE NEW MEXICO COURT OF APPEALS

Nos. 22,937 and 23,345: State v. Kevin Gee consolidated with
State v. Richard Ernest DeGurski ........................................ 35

No. 23,529: Peter Mack Brown v. C.B. Trujillo .......................... 39

No. 23,800: Kenneth L. Weddington v. Anna N. Weddington .......... 44

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the SBNM Web site at www.nmbar.org.

BAR BULLETIN - APRIL 29, 2004 - VOLUME 43, NO. 17
Second Judicial District Court
Children’s Court Monthly Judges’ and Managers’ Meeting

The Second Judicial District Children’s Court will hold its monthly judges’ and managers’ meeting at noon, May 4, in the jury room, John E. Brown Juvenile Justice Center, 5100 Second St. NW, in Albuquerque. Children’s Court judges and managers of court-related agencies will meet to discuss ongoing concerns and projects. For a copy of the meeting agenda, call (505) 841-7644.

Family Court Open Meetings

The Second Judicial District Family Court judges will hold open meetings to discuss ongoing concerns and projects at noon on the first business Monday of each month in the Conference Center, located on the third floor of the Bernalillo County Courthouse. The next regular meeting will be held on May 3. Contact Mary Lovato, (505) 841-6778, for more information or to have something placed on the agenda.

U.S. District Court for the District of New Mexico
Notice of Electronic Availability of Criminal Case File Documents

Effective May 10, documents filed in criminal cases in federal court will be available to the public electronically. Personal and/or otherwise sensitive information should not be included in any document filed with the court, as any personal information not otherwise protected will be made available over the Internet via WebPACER. The following personal data identifiers must be partially redacted from the document whether it is filed traditionally or electronically: Social Security numbers to the last four digits; financial account numbers to the last four digits; names of minor children to the initials; dates of birth to the year; and home addresses to the city and state.

In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers specified above may file an unredacted document under seal. This document shall be retained by the court as part of the record. The court may, however, also require the party to file a redacted copy for the public file. Because filings will be remotely, electronically available and may contain information implicating not only privacy but also personal security concerns, anyone filing official documents with the court should exercise caution when filing a document that contains any of the following information and consider accompanying any such filing with a motion to seal. Until the court has ruled on any motion to seal, no document that is the subject of a motion to seal, nor the motion itself or any response thereto, will be available electronically or in paper form: 1) any personal identifying number, such as driver’s license number; 2) medical records, treatment and diagnosis; 3) employment history; 4) individual financial information; 5) proprietary or trade secret information; 6) information regarding an individual’s cooperation with the government; 7) information regarding the victim of any criminal activity; 8) national security information; and 9) sensitive security information as described in 49 U.S.C. § 114(s).

Counsel is strongly urged to share this notice with all clients so that an informed decision about the inclusion of certain materials may be made. If a redacted document is filed, it is the sole responsibility of counsel and the parties to be sure that all documents and pleadings comply with the rules of this court requiring redaction of personal data identifiers. The clerk will not review filings for redaction. The court should also be aware that it will need to partially redact the personal identifiers listed above from documents it prepares that routinely contain such information (e.g., order setting conditions of release).
Center for Legal Education
PBS Taping of Program on Identity Theft

Santa Fe Productions will be taping a PBS program that will air nationwide in December 2004. The program, co-sponsored by the State Bar Center for Legal Education, is called “Identity Theft: Protecting Yourself in the Information Age” and features attorney, author,
NOTICES

lecturer and identity theft expert Mari Frank. The program will be taped from 6 to 8:30 p.m., May 20 at KNME-TV5 television studios, 1130 University Blvd. NE, Albuquerque. This program will help attendees understand the growing risks of this exploding crime wave and provide real ways for them to protect themselves. Members of the audience will be on-camera for this national production; therefore, attendance will constitute an implied consent to be used in the program.

“Identity Theft: Protecting Yourself in the Information Age” will help attendees recognize and protect themselves against the rising tide of privacy violations. Nationally, 9.9 million consumers reported that they were victims of identity theft in 2003. In January 2004, the Federal Trade Commission reported that identity theft was number one on the FTC’s list of top 10 consumer complaints -- the fourth year in a row that identity theft has led the list. It is the fastest growing crime in America. This seminar will provide tools that everyone can use in their own home to monitor their identity and privacy and to take action if they become the victim of identity theft.

Dress is business or business casual and participants should not wear all white or stripes for the taping. Materials for this seminar will be distributed to attendees at the taping of the program. One general CLE credit will be given only to those who attend the live program. Space is limited to 30 people and reservations will be on a first-come, first-served basis. Response to this program is expected to be very high. In order to guarantee a seat for this program, RSVP to Mary Patrick, program coordinator for CLE, (505) 242-6845.

For information about the section, visit the State Bar Web site, www.nmbar.org, or call Eric Miller, section chair, (505) 995-1017.

Lawyers Assistance Committee Monthly Meeting

The Lawyers Assistance Committee will meet at 5:30 p.m., May 3, at the First United Methodist Church at Fourth and Lead SW in Albuquerque. The group meets regularly on the first Monday of the month.

For more information, contact Bill Stratvert, (505) 242-6845.

Paralegal Division Compensation and Benefits Survey Completed - Results Available Online

The State Bar Paralegal Division has completed its Compensation, Utilization and Benefits Survey, conducted in early 2004. The survey report is available in full text on the division’s Web page. Visit the State Bar Web site, www.nmbar.org, and click on “Divisions, Sections, Committees,” then “Divisions,” to access the Paralegal Division site.

Public Law Section Board Meeting

The Public Law Section board meeting will be held at noon, May 13, at the State Bar Center. Contact Randy Van Vleck, (505) 982-5573, or Deborah Moll, (505) 827-2000, for more information.

Solo and Small Firm Practitioners’ Section 2004 Luncheon Speaker Schedule

The State Bar Solo and Small Firm Practitioners’ Section will host monthly luncheon meetings on the third Tuesday through May at the Petroleum Club, 500 Marquette Ave., in Albuquerque. For all new, first-time members, the first lunch is free. Reservations are required for members and guests. Contact Bill Herring, (505) 243-4664. Luncheon meetings will begin at noon with a speaker program. Members, guests and any member of the bar are welcome. The cost is $14 in advance and $16 at the door. Make the check payable to “State Bar of New Mexico,” c/o Bill Herring, 3104 Coca Rd. NW, Albuquerque, NM 87104-2843.

May 18, noon: “Professionalism,” Albuquerque attorney Don Becker.

Trial Practice Section Upcoming Luncheon Speaker

The State Bar Trial Practice Section will host a luncheon meeting from 11:30 a.m. to 1:30 p.m., June 2 at the State Bar Center. Albuquerque Metropolitan Court Judge Kevin Fitzwater will speak following the luncheon regarding mental health programs in the courts.

All State Bar members are welcome to attend. The cost for the luncheon is $10 per person and reservations are required. Contact Christine Morganti, (505) 797-6028 or cmorganti@nmbar.org, by May 26 to RSVP. Checks may be made payable to the State Bar of New Mexico, c/o Trial Practice Section, PO Box 92860, Albuquerque, NM 87199-2860.

Young Lawyers Division Judicial Brownbag Luncheon State Court in Santa Fe

The Young Lawyers Division (YLD) Region 2 will host the judges of the First Judicial District for a “Brownbag Luncheon” from noon (sharp) to 1:30 p.m., May 20, at the Judge Steve Herrera Judicial Complex, 100 Catron St., Santa Fe. The judges will discuss the rudiments of state court practice and what judges love and hate in their courtrooms. The event will also provide an opportunity to meet other YLD members. Lunch will be provided, so reservations must be made in advance by contacting Brent Moore, (505) 476-3783, or brent_moore@nmenv.state.nm.us.

Lunch with Justice Chavez

The State Bar Young Lawyers Division (YLD), Region 5, is sponsoring a judicial luncheon with Supreme Court Justice Ed Chavez from noon to 1:30 p.m., May 20 at the State Bar Center. This will be part of the YLD’s informal “brownbag” luncheon series. Lunch will be provided. Space is limited; reservations are requested. Call Carolyn Ramos, (505) 884-0777, by May 17.
OTHER BARS

Albuquerque Association of Legal Professionals
Monthly Meetings

The Albuquerque Association of Legal Professionals will hold its monthly board meetings on the first Tuesday of each month and its general meetings on the third Tuesday of each month. For more information and details on the organization, call Valerie Begay, (505) 243-4275.

Albuquerque Bar Association
Law Day Events

The Albuquerque Bar Association will host the annual Law Day Luncheon from 11:45 a.m. to 1:30 p.m., May 5 at the Hyatt Regency in downtown Albuquerque. This year marks the 50th anniversary of the U.S. Supreme Court decision in Brown v. Board of Education, which desegregated public schools in America. The luncheon discussion, “To Win Equality by Law,” will focus on the case featuring University of New Mexico School of Law Dean Suelyn Scarneccia and faculty, Antoinette Sedillo Lopez and Alfred Mathewson, who will be joined by George Martinez, professor at Southern Methodist University School of Law.

American Academy of Matrimonial Lawyers
National Conference on Divorce

The American Academy of Matrimonial Lawyers (AAML) and the American Institute of Certified Public Accountants (AICPA) will hold their National Conference on Divorce May 13-14 in Las Vegas, Nev. The conference is geared to both legal and financial professionals and will cover a broad array of financial and legal issues surrounding divorce. For more information, call (888) 777-7077 or access the AICPA Web site, www.cpa2biz.com/conferences.

Valencia County Bar Association
District Judge Candidate Forum

The Valencia County Bar Association will sponsor a district court judge candidate forum at 6 p.m., May 12 at the District Court, 444 Luna Ave., Los Lunas. The event is free to the public. Questions directly from the audience will not be allowed, however, questions to the candidates can be forwarded anonymously to Greg Gaudette, PO Box 3038, Los Lunas, NM 87031; or faxed to (505) 805-3186. A reception will follow at Toppers Restaurant, 820 Main St., Los Lunas, NM (next to Guggino’s Pharmacy and Bible Store). The cost of the reception is $10. Tickets can be purchased in advance or at the door. For more information, call (505) 865-3180.

OTHER NEWS

Advocacy Inc.
Statewide Training – Children’s Court Practice

Advocacy Inc. is sponsoring statewide trainings on Children’s Court Practice. They are scheduled in Farmington on May 7 and in Silver City on May 21. These trainings will be specially directed to the needs of guardians ad litem, but will include information that will assist respondents’ lawyers, New Mexico Children Youth and Families Department staff, Children’s Court attorneys, judges, social workers, Court-Appointed Special Advocates and Citizens’ Review Board members in their work in Children’s Court proceedings. The trainings have been approved for 7.8 general CLE credits. There is no charge to attend, however, attorneys will be required to pay for filing fees. To register, call (505) 256-9369.

National Immigration Law Center/N.M. Center on Law and Poverty
Regional Training on Immigrants and Public Benefits

The National Immigration Law Center, with support from the New Mexico Center on Law and Poverty, is sponsoring a regional training on immigrants and public benefits from 8:30 a.m. to 5 p.m., May 7 at the Albuquerque Convention Center (401 2nd St. NW), Albuquerque. The training will educate state and local organizations and advocates in New Mexico, Colorado, Arizona and Texas about laws governing immigrant eligibility for federal public benefits. The one-day training event will include an overview of barriers that prevent immigrants and their eligible children from enrolling in benefits; a presentation on the obligations of agencies and hospitals to provide language access to their services; advocacy activities; and media and public messages on immigrants and benefits.

After April 28, registration costs are $50 for nonprofits and $65 for all other groups. All prices include breakfast and materials. For more information, including how to register for the event, contact Kat Beaulieu at the New Mexico Center on Law and Poverty (505) 255-2840 or e-mail him at kat@nmpovertylaw.org. CLE credit is pending.

Santa Fe Collaborative Law Group
Level I Collaborative Family Law Training

The Santa Fe Collaborative Law Group (SFCLG) is sponsoring Level I Training in Collaborative Family Law to be held from 9 a.m. to 4 p.m., May 21 at the Inn on the Alameda, Santa Fe. This program has been pre-approved for MCLE credit and meets the initial training requirements in connection with membership in the SFCLG. The cost is $50 for SFCLG members and $75 for others. To obtain more information and/or registration information, contact Sandra Rotruck, mgpa@cybermesa.com or (505) 982-4813; or Catherine Downing, (505) 820-1515 or cathdown@aol.com. Early registration is advised as space is limited to 40 spaces.
TO WIN EQUALITY BY LAW
BROWN V. BOARD AT 50
1954-2004

YOUNG LAWYERS DIVISION “ASK-A-LAWYER” CALL-IN
Saturday, May 8, 2004 - 9 a.m. to 1 p.m.

In observation of Law Day 2004, the Young Lawyers Division and the State Bar of New Mexico will host a Call-in Program in several cities on Saturday, May 8, to provide legal information to the public. This is your opportunity to provide pro bono service to the public. You do not have to be a member of the Young Lawyers Division to participate in this program. We only ask that you be willing to volunteer your time!

Attorneys in all practice areas, including Spanish-speaking attorneys, are needed to handle calls in all locations. Legal assistants are needed for intake in all locations except Albuquerque.

RETURN THIS FORM AS SOON AS POSSIBLE TO THE CALL-IN COORDINATOR FOR YOUR SITE.

Locations: □ Albuquerque □ Farmington □ Clovis □ Las Cruces
Occupation: □ Attorney □ Paralegal □ Spanish-speaking

Attorneys, please indicate all areas of law for which you can answer callers’ questions:

- Bankruptcy
- Business
- Civil (General)
- Civil Rights
- Contracts
- Criminal
- Elder
- Employment/Labor
- Estate Planning
- Family
- Insurance
- Landlord - Tenant
- Medical/Medicaid
- Personal Injury/Torts
- Real Estate
- Real Property
- Social Security
- Tax
- Worker’s Compensation

Name_________________________________________________________
Address________________________________________________________
City/State/Zip ___________________________________________________
Telephone___________________ Fax_________________________
E-mail _________________________________________________________

Albuquerque  Moe Chavez  PO Box 3727 Albuquerque NM  87190
Clovis        Monica Casias  800 Pile #A Clovis NM  88101
Farmington   Rick Tedrow  4000 E. 30th St Farmington NM  87402
Las Cruces  Steve L. Almanza  PO Box 20000 Las Cruces NM  88004

QUESTIONS: (505) 797-6050; FAX: (505) 797-6074

VOLUNTEERS NEEDED!
MAY

3  Is a New Rule Needed Regarding Class Action Litigation?  
Teleconference  
TRT, Inc.  
2.4 E  
(800) 672-6253  
www.trtcle.com

6  Essential Issues of Arbitration  
Teleconference  
TRT, Inc.  
2.4 G  
(800) 672-6253  
www.trtcle.com

6  Ethical Issues in Representing Debtors and Creditors  
Teleseminar  
Center for Legal Education of SBNM  
1.2 E  
(505) 797-6020  
www.nmbar.org

10  Land Use Planning and Eminent Domain in New Mexico  
Albuquerque  
National Business Institute  
6.7 G / 0.5 E  
(800) 930-6182  
www.nbi-sems.com

4  Expert Opinions - Adjudication or Legislation?  
Teleconference  
TRT, Inc.  
2.4 G  
(800) 672-6253  
www.trtcle.com

10  When Counsel's Duties Conflict  
Teleconference  
TRT, Inc.  
2.4 P  
(800) 672-6253  
www.trtcle.com

4  Impact of the No Child Left Behind Act on Special Education  
Albuquerque  
Lorman Education Services  
7.2 G  
(715) 833-3940  
www.lorman.com

11  Is the Attorney - Client Privilege on the Ropes?  
Teleconference  
TRT, Inc.  
2.4 E  
(800) 672-6253  
www.trtcle.com

4  Mortgage Foreclosures and Workouts: Trends and Strategies for Commercial Properties  
Teleseminar  
Center for Legal Education of SBNM  
1.2 G  
(505) 797-6020  
www.nmbar.org

12  Human Resources Law Update  
Midland, TX  
Sterling Education Services  
7.8 G  
(715) 855-0495  
www.sterlingeducation.com

5  Effective Time Management for Lawyers  
Teleconference  
TRT, Inc.  
2.4 P  
(800) 672-6253  
www.trtcle.com

12  Personal and Professional Liability Issues  
Teleconference  
TRT, Inc.  
2.4 E  
(800) 672-6253  
www.trtcle.com

5  Workers' Compensation Law Update  
Albuquerque  
Council on Education in Management  
6.6 G  
(800) 942-4494  
www.counciloned.com

12  2004 Professionalism - An Historical Perspective  
VR - State Bar Center - Albuquerque  
Center for Legal Education of SBNM  
2.0 P  
(505) 797-6020  
www.nmbar.org

7  Children's Court Practice  
Silver City  
Advocacy, Inc.  
7.8 G  
(505) 256-9369

7  Electronic Document Retention Policies and Electronic Discovery  
Teleconference  
TRT, Inc.  
2.4 G  
(800) 672-6253  
www.trtcle.com

7  Mental Stress Claims  
Albuquerque  
Lorman Education Services  
7.2 G  
(715) 833-3940  
www.lorman.com

7  Morning in Santa Fe with Jonathan Blattmachr: Topical Estate Planning Ideas  
Albuquerque  
Lorman Education Services  
7.2 G  
(715) 833-3940  
www.lorman.com

G = General  E = Ethics  
P = Professionalism  VR = Video Replay

Programs have various sponsors; contact appropriate sponsor for more information.
### WRITS OF CERTIORARI

**As Updated by the Clerk of the New Mexico Supreme Court**

Kathleen Jo Gibson, Chief Clerk
New Mexico Supreme Court
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

**Effective April 27, 2004**

### Petitions for Writ of Certiorari Filed and Pending:

<table>
<thead>
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<th>NO.</th>
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<td>Harrington v. State Engineer (COA 23,871)</td>
<td>4/22/04</td>
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<td>Jacobs v. LeMaster (12-501)</td>
<td>4/21/04</td>
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<td>DeHerrera v. Henderson (COA 23,636)</td>
<td>4/21/04</td>
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<td>State v. Henderson (COA 24,506)</td>
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<td>State v. Nakai (COA 24,654)</td>
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<td>State v. Yazzie (COA 24,388)</td>
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<td>State v. Frank (COA 24,402)</td>
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<td>State v. Roy (COA 24,403)</td>
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<td>NO. 28,607</td>
<td>Montoya v. Ulbarri (12-501)</td>
<td>4/20/04</td>
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<td>NO. 28,603</td>
<td>State v. Baca (COA 24,504)</td>
<td>4/14/04</td>
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<td>State v. Kee (COA 24,561)</td>
<td>4/12/04</td>
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<td>State v. Jackson (COA 22,043)</td>
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<td>Noe v. Noe (COA 24,628)</td>
<td>4/12/04</td>
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<td>Plouse v. LeMaster (12-501)</td>
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<td>Barr v. Exel Company (COA 24,197)</td>
<td>4/8/04</td>
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<td>State v. Madrid (COA 24,485)</td>
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<td>State v. Yazzie (COA 24,519)</td>
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<td>State v. Russell (COA 24,482)</td>
<td>4/7/04</td>
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<td>State v. Lowe (COA 22,523)</td>
<td>4/6/04</td>
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<td>Gamoobra v. Urena (COA 23,104)</td>
<td>4/6/04</td>
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<td>State v. Soto (COA 24,406)</td>
<td>4/5/04</td>
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<td>State v. Innis (COA 24,588)</td>
<td>4/5/04</td>
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<td>NO. 28,550</td>
<td>Godshall v. Coldwell (COA 23,16)</td>
<td>3/31/04</td>
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<td>NO. 28,546</td>
<td>Fernandez v. Ford Motor Company (COA 24,368)</td>
<td>3/25/04</td>
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<td>NO. 28,502</td>
<td>State v. Craig (COA 24,149)</td>
<td>2/16/04</td>
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(April 29, 2004 • Volume 43, No. 17)
**PETITIONS FOR WRIT OF CERTIORARI DENIED:**

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<td>Didyoung v. Dow (COA 23,417)</td>
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<td>27,912</td>
<td>State v. Lopez (COA 23,456)</td>
<td>4/21/04</td>
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FACTUAL AND PROCEDURAL BACKGROUND

{3} Victim’s decomposing body was discovered among some mesquites outside of Deming, New Mexico, on August 16, 2000. A forensic pathologist testified that she had suffered numerous injuries, including fractures to the front of the skull involving both eye sockets, a fracture to the rear of the skull, fractures of the spinous process of the cervical column consistent with a twisting of the neck or blunt force, fractured ribs, and bruises to the thigh and lower back. The pathologist concluded that Victim’s death was caused by blunt-force injuries to the head and neck.

{4} Three men were arrested in connection with the murder: Defendant and his two acquaintances, Arturo Carbajal and Robert Bertola. Carbajal entered into a plea agreement with the State and was the State’s primary witness at trial. According to Carbajal, the three men went looking for Victim because Defendant said he wished to speak with her. The men located Victim, who was visiting a friend’s house, but Defendant decided not to approach her at that time. Instead, Defendant drove away in Bertola’s truck, while Carbajal and Bertola approached Victim and asked her for a ride to the store.

{5} Carbajal testified that, after going to the store with Victim and Carbajal, Bertola asked Victim “if she wanted to party and get crazy.” At some point while the three were driving around Deming in Victim’s car, Victim requested that Bertola take over the driving responsibilities. She also suggested that they needed to leave the city limits. Bertola then drove them to a remote location outside of Deming. Bertola stopped the car in a field near a tree after stating that he needed to use the restroom. Bertola got out of the car and stood next to the car for about ten minutes until Defendant arrived, driving Bertola’s truck. Defendant parked the truck about ten feet behind Victim’s car.

{6} According to Carbajal, he was seated on the passenger side of Victim’s car when Defendant arrived. At the insistence of Defendant, Carbajal got out of the car and stood near the rear of the passenger side of the car. He saw Defendant grab Victim, who then started slapping Defendant. Defendant then pulled her out of the car, threw
Defendant’s version of the events differed were significant inconsistencies between cross-examination, Carbajal admitted there receiving or transferring a stolen vehicle and his charges were eventually reduced to re Carbajal was initially charged with murder, pursuant to a plea agreement. Although defending Carbajal’s objectivity on the basis that Carbajal testified for the State they were eventually apprehended. Based on this evidence, and testimony that Defendant had made previous threats against Victim, the State requested a verdict of first-degree murder. According to the State, Defendant had orchestrated a plan to lure Victim to the murder scene, where he deliberately killed her. As evidence of deliberate intent, the State pointed to: (1) previous threats against Victim made by Defendant; (2) the alleged plan to lure her to the murder scene; (3) evidence that Defendant had the presence of mind during his initial beating of Victim to stop, demand a murder weapon, walk away from his victim to retrieve the murder weapon, and then return to kill her; and (4) Defendant’s activity following the murder in disposing of evidence and fleeing the country.

Defendant sharply contested Carbajal’s credibility at trial. Defendant challenged Carbajal’s objectivity on the basis that Carbajal testified for the State pursuant to a plea agreement. Although Carbajal was initially charged with murder, his charges were eventually reduced to receiving or transferring a stolen vehicle and tampering with evidence. Additionally, on cross-examination, Carbajal admitted there were significant inconsistencies between statements he made prior to entering into the plea agreement and statements he later made while testifying for the State.

Although Defendant did not testify, his statement to police regarding the events of the murder came into evidence through another State witness, Detective Frank Peña, who questioned Defendant after his arrest. Defendant’s version of the events differed significantly from Carbajal’s.

According to Defendant’s statement, after he left Bertola and Carbajal near the house where Victim was staying, Defendant had been “driving around and cruising” in Bertola’s truck when he observed Victim driving with Bertola and Carbajal in Victim’s car. Defendant told Detective Peña that “he was falling in love with her” and that he was “worried that something was going to happen to her” in the car with the other men. Defendant said that he began to follow the car, “wanting to know where they were going.” When Victim’s car stopped in a field, Defendant pulled up behind it in Bertola’s truck.

According to Defendant, he approached Victim and asked her to leave with him, but she refused. Defendant told Detective Peña that as he was speaking with her, one of the other two men struck Victim in the face. Defendant admitted to “getting extremely angry” at Bertola and Carbajal, and said he wanted to “kick their asses.” Rather than confront the two men, however, Defendant began to walk back toward the truck. According to Defendant, Victim followed, yelling at him and pushing him. As Defendant turned to face Victim, Bertola knocked her to the ground and went to his truck to retrieve a steel pipe. Defendant claimed that Bertola returned, struck Victim with the pipe, then threw the pipe to Defendant. Defendant struck her on the head and neck, then dropped the pipe to the ground.

Defendant admitted that Victim was still alive when he struck her twice with the pipe. He told Detective Peña that after he struck Victim, he heard Bertola and Carbajal arguing, “stating something to the effect that they had to finish her. They had to kill her.” Defendant said that he had difficulty recalling the details and that he had “blanked out” during the murder.

Because Defendant admitted to killing Victim with the pipe, the sole issue at trial was whether he was guilty of first- or second-degree murder. The State argued Victim’s murder was committed with deliberate intent to kill, constituting first-degree murder. Defendant contended that he killed Victim as the result of a “mere unconsidered and rash impulse,” constituting second-degree murder. Defense counsel repeatedly denied that Defendant was involved in any kind of plan, either to lure Victim to the remote area or to kill her. The defense’s theory was that Defendant came upon Victim, Bertola and Carbajal, and “whether it was for [Victim’s] own protection or in and out of jealousy, he beat [Victim] with that pipe. He didn’t stop and consider the consequences of his actions. He didn’t plan it . . . . He came upon them and went off.”

Defendant identified only one witness, Dr. Marc Caplan, Ph.D., a neuropsychologist, to support his theory that he killed Victim as the result of a mere unconsidered and rash impulse. Dr. Caplan was expected to provide expert testimony that Defendant suffered neurological deficits, of unknown etiology, that resulted in “difficulty planning and anticipating as well as greater difficulty controlling angry impulses.” Dr. Caplan’s testimony was revealed to the State in advance of trial, and the prosecutor was given an opportunity to interview him. The State neither filed pre-trial motions challenging the admissibility of Dr. Caplan’s testimony nor did it object to his testimony during trial.

During her opening statement to the jury, defense counsel expressly relied on Dr. Caplan’s anticipated testimony. Defense counsel informed jurors that they would hear from Dr. Caplan, who had conducted a neuropsychological evaluation of Defendant, and that Dr. Caplan would testify that Defendant “suffers from impulse control disorder and . . . has difficulty planning.” According to Defendant, Dr. Caplan’s testimony was critical to the defense’s theory of the case, because it directly impacted on the sole remaining issue: whether Defendant killed with deliberate intent (first-degree murder) or as a result of a mere unconsidered and rash impulse (second-degree murder).

During a bench conference at the end of the second day of trial, defense counsel explained to the court that she needed to alert Dr. Caplan as to when he would testify so that he could cancel patient appointments. The trial judge indicated that it was possible for Dr. Caplan to testify out of order. In response, the prosecutor explained that he had the same problem with his forensic expert and that the State might complete its case sooner than expected. To this the trial judge replied, “Well, then we won’t have to have Dr. Caplan then, will we?” There was no discussion concerning the admissibility of Dr. Caplan’s testimony. Indeed, the trial court concluded the discussion by instructing the parties: “Well, we’ll take him out of order. I mean, whatever time we decide that he’s going to block off his schedule, he’s going to testify during that period of time, whether it’s in your case or it’s in her case.”
At midmorning the next day the State rested its case. Defense counsel advised the court that Dr. Caplan would not be available to testify until 2:00 p.m., as he was traveling to the courthouse from out of town. The judge then explained to the jury: “[W]e understand that the defense is going to put on Dr. Caplan; he’s not going to be here until 2:00. We apologize for that but that happens in these cases. So I’m going to send you home for a long lunch. So you need to be back here around 1:45.”

The next event in the record is a telephone conference with Dr. Caplan, during which he was placed under oath and questioned by defense counsel, the prosecutor, and finally the trial judge himself. What precipitated this telephone conference is unclear. What is evident from the record is that at no point did the prosecutor object to the anticipated testimony of Dr. Caplan. Rather, after speaking with Dr. Caplan telephonically and reviewing Dr. Caplan’s report, the trial court sua sponte excluded Dr. Caplan’s testimony, citing Rules 11-401, 11-402 and 11-403 NMRA 2001. The trial court concluded that it would be misleading to the jury to present psychological testimony when that testimony would not support an instruction on diminished capacity, see UJI 14-5110 NMRA 2004, and therefore the testimony was irrelevant and a “waste of time.” When the jury returned from lunch, without making any reference to the promised testimony of Dr. Caplan, the trial court told the jury, “You have now heard all the evidence in this case.” The jury then deliberated and returned a guilty verdict on the charge of first-degree murder, from which Defendant now appeals.

DISCUSSION

1. Exclusion of Dr. Caplan’s Testimony

As a preliminary matter, the State argues that Defendant did not preserve the issue of the admissibility of Dr. Caplan’s testimony. The State’s argument is not well taken. Rule 12-216(A) NMRA 2004 states that to preserve an issue for review “it must appear that a ruling or decision by the district court was fairly invoked, offered only one witness to testify on that issue, and reasonably relied on the trial court’s earlier pronouncements to counsel and to the jury that Dr. Caplan would testify—exacerbates the potential that the alleged error is fundamental. See State v. Garcia, 46 N.M. 302, 309, 128 P.2d 459, 462 (1942) (fundamental error must go to the foundation of the defendant’s case or take from the defendant a right which was essential to his defense). We therefore reject the State’s argument that the issue was inadequately preserved.

A. Relevancy of the testimony

All relevant evidence is generally admissible, unless otherwise provided by law, and evidence that is not relevant is not admissible. Rule 11-402 NMRA 2004. “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 11-401 NMRA 2004 (emphasis added). Any doubt whether the evidence is relevant should be resolved in favor of admissibility. Stanley, 2001-NMSC-037, ¶ 6.

In reviewing the relevancy of Dr. Caplan’s testimony, we first consider whether his testimony directly related to Defendant’s theory of the case. See State v. Melendez, 97 N.M. 740, 742, 643 P.2d 609, 611 (Ct. App. 1981) (stating that tendered evidence of the victim’s reputation for violence was relevant to the defendant’s claims that occupants of a car were aggressors and that he had reasonable apprehensions for his life and safety), rev’d on other grounds, 97 N.M. 738, 643 P.2d 607 (1982); State v. Debarry, 86 N.M. 742, 743-44, 527 P.2d
DU JI 14-201 NMRA 2004 (emphasis added).

26 Defendant contends that Dr. Caplan’s testimony regarding Defendant’s neurological deficits was relevant because, if believed by the jury, it would tend to make less probable the State’s theory that Defendant killed “as a result of careful thought and the weighing of the consideration for and against the proposed course of action.” Defendant argues that a reasonable juror could infer from Dr. Caplan’s testimony that when Defendant killed Victim, he did so more likely as the result of an “unconsidered and rash impulse” and less likely as a result of “careful thought.”

27 We conclude that, had the jury been provided with Dr. Caplan’s testimony regarding Defendant’s neurological deficits, the jury would have had specific evidence tending, to some degree, to refute the element of deliberation necessary for first-degree murder. Dr. Caplan performed a neuropsychological forensic evaluation of Defendant, which consisted of fourteen diagnostic tests and the collection of an extensive psychosocial history. Dr. Caplan’s evaluation report, which was reviewed by the trial court, describes Defendant’s history of closed head injuries and a “constellation of behavioral problems . . . suggestive of frontal lobe dysfunction.” This neuropsychological dysfunction “results in difficulties in planning and anticipating as well as greater difficulty controlling angry impulses.” Defendant told Dr. Caplan that, since the age of sixteen or seventeen, he has had “blackouts” and becomes “unaware of what happens” when he is in a rage.1 Dr. Caplan diagnosed Defendant with impulse-control disorder, polysubstance abuse, and antisocial personality disorder. Dr. Caplan concluded his report: “Given this man’s history and evidence of neurological deficits, there is some evidence for diminished capacity. Historically he presents with a constellation of behaviors that suggest significant problems in controlling impulses, planning and anticipating dangerous situations and the ability to postpone or discriminate in achieving his goals.” During the offer of proof via telephone conference, Dr. Caplan repeated that Defendant has neurological dysfunction, which results in problems in impulse control and difficulty in planning. Dr. Caplan described Defendant’s neurological dysfunction as “sort of the underpinning to diminished capacity, in other words difficulty in judging, difficulty in appreciating consequences of one’s actions, difficulty in planning.”

28 Dr. Caplan further indicated that substance abuse tends to “further impair whatever kind of abilities [Defendant] had.”

29 In attempting to refute the relevancy of Dr. Caplan’s testimony, the State correctly points out that Dr. Caplan was also prepared to testify that Defendant was capable of forming specific intent. The specific intent required for first-degree murder is a deliberative intent, which by definition involves careful thought and the weighing of the consideration for and against a proposed course of action, and does not describe every intentional killing. See State v. Campos, 1996-NMSC-043, ¶ 39, 122 N.M. 148, 921 P.2d 1266 (“It is [the] deliberate intent to cause death, beyond the defendant’s intentional actions, that makes premeditated first-degree murder a specific-intent crime.”).

30 Defendant’s theory at trial, however, was not that Defendant was incapable of forming deliberate intent, and Defendant therefore did not raise the diminished-capacity defense.2 Defendant’s strategy was to show that he did not, at the time of the killing, form the deliberate intent to kill. He sought to raise a reasonable doubt about whether the State carried its burden of proving the mental state required for first-degree murder. Dr. Caplan clearly viewed Defen-

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1 Dr. Caplan also noted in his report that while Defendant claimed a history of “blackouts,” he performed “quite well” on memory tests. Additionally, Dr. Caplan stated that while Defendant claimed he had difficulty recalling details of the offense, when evaluated by Dr. Caplan he was able to recall many such details. For this reason, the testimony of Dr. Caplan, once admitted, would be helpful to the prosecution to impeach Defendant’s statement to Officer Peña that he was “blanking out” and unable to recall many details of the murder.
of the instruction on the basis that it was a “waste of time” was error. See Rule 11-403 NMRA 2004.

B. Exclusion on the basis of misleading the jury

37 The State also argues that the trial court properly excluded Dr. Caplan’s testimony under Rule 11-403 because it would be misleading to allow expert testimony that does not support the giving of the diminished-capacity instruction, UJI 14-5110. See State v. Lujan, 94 N.M. 232, 234, 608 P.2d 1114, 1116 (1980) (“Unless there is evidence that the defendant could not have formed the requisite intent, the diminished responsibility instruction is improper.”). Defendant concedes the evidence was not sufficient to support the giving of the diminished-capacity instruction. We agree. Dr. Caplan was clear in his testimony and in his report that Defendant’s neurological deficits did not reach the de-

5 We note that the term “diminished capacity,” although a term of art, is somewhat misleading and has resulted in considerable confusion. In State v. Padilla, 66 N.M. 289, 292, 347 P.2d 312, 314 (1959), we noted that the terms, “diminished responsibility” and “partial responsibility” were misnomers, and that the theory in fact “contemplates full responsibility, not partial, but only for the crime actually committed.” The same is true with respect to the term, “diminished capacity,” which contemplates not a partial ability but an inability to form specific intent. Therefore, the term “diminished capacity” should be carefully construed to mean an inability to form specific intent. See UJI 14-5110 NMRA 2004.

3 The State overstates the holding in Lujan when it asserts that Lujan precludes the admission of evidence falling short of incapacity to form specific intent. Lujan addressed whether the diminished-capacity instruction would be proper where the evidence falls short of incapacity. The admissibility of such evidence was not at issue in Lujan, and indeed the defendant in that case was allowed to present such expert testimony to support his theory of the case.
This distinction is significant because in those cases where the evidence does support the diminished-capacity instruction, an additional burden of proof is added to the prosecution. The diminished-capacity instruction is proper only when there is evidence that reasonably tends to show that the defendant’s claimed mental disease or disorder rendered the defendant incapable of forming specific intent at the time of the offense. See State v. Begay, 1998-NMSC-029, ¶ 38, 125 N.M. 541, 964 P.2d 102. When UJI 14-5110 is given, the use note instructs the trial court to add the following instruction to the essential elements of the first-degree murder instruction: “The defendant was not suffering from a mental disease or disorder at the time the offense was committed to the extent of being incapable of forming [a deliberate] intent to take away the life of another.” See Begay, 1998-NMSC-029, ¶¶ 39, 41. When the defendant has advanced evidence that reasonably tends to show an incapacity to form specific intent, the prosecution then has the additional burden of proving that the defendant was capable of forming the deliberate intent despite the alleged intoxication or mental disorder. Here, Defendant concedes he did not offer such evidence, and therefore the prosecution does not have the additional burden of proving that Defendant was capable of forming the deliberate intent to kill.

The court nevertheless raised the legitimate concern that the jury might be misled where such expert testimony is insufficient to warrant the diminished-capacity instruction. This concern is legitimate because the jury might interpret Dr. Caplan’s testimony to mean that Defendant’s neurological deficits prevented him from being capable of forming the deliberate intent to kill, and that therefore he did not. Nevertheless, we hold that the probative value of the testimony in this case outweighs the danger of misleading the jury, and that the testimony should not have been excluded on that basis.

We believe that in cases in which expert testimony is offered to prove or disprove a mens rea element, it is often appropriate for the trial court to make explicit to the jury the precise purposes for which the expert testimony is offered. See Peterson, 509 F.2d at 414 (recognizing that the admission of expert testimony regarding the defendant’s abnormal mental condition requires “careful administration by the trial judge”). In order to mitigate the potential of misleading the jury and thereby prejudicing the prosecution, while at the same time preserving Defendant’s right to challenge the State’s evidence against him, a limiting instruction may be appropriate. On remand, assuming the testimony of Dr. Caplan is not excluded on different grounds, we suggest the following jury instruction as a model:

You must not conclude from Dr. Caplan’s testimony that Defendant was incapable of forming the deliberate intention to take away the life of another. This expert testimony was admitted solely to assist you in determining, based on all of the facts and circumstances of the killing, including Defendant’s mental condition, whether Defendant in fact formed a deliberate intention to take away the life of Victim rather than an unconsidered and rash impulse.

C. Harmless Error

The State’s final argument is that any error in the exclusion of Dr. Caplan’s testimony was harmless, because his testimony would have lost all persuasive force given the weight of incriminating evidence. Defendant does not challenge the sufficiency of the evidence to convict him of murder. Rather, Defendant argues that he was denied the opportunity to present evidence that had a tendency to make his theory of the case—that he did not form the deliberate intent to kill—more probable. Error in the exclusion of evidence in a criminal trial is prejudicial and not harmless if there is a reasonable possibility that the excluded evidence might have affected the jury’s verdict. See Clark v. State, 112 N.M. 485, 487, 816 P.2d 1107, 1109 (1991) (holding that the admission of evidence was not harmless if there was a reasonable possibility that evidence might have contributed to conviction). Here the inquiry is whether there is a reasonable possibility the trial court’s exclusion of Dr. Caplan’s testimony might have contributed to Defendant’s conviction for first-degree rather than second-degree murder.

Although there was overwhelming evidence that Defendant killed Victim, the evidence was in direct conflict as to whether Defendant killed with deliberate intent or through a rash impulse. The only eyewitness testimony regarding Victim’s murder was that provided by Carbajal, whose credibility was sharply contested at trial. If we accept only the testimony of Carbajal, ignore the defense’s cross-examination of him and also ignore Defendant’s account of the events of the murder, then surely the error is harmless. The evidence would overwhelmingly support the conclusion that Defendant murdered the Victim and did so with the requisite deliberate intent. However, we should not ignore the cross-examination or the testimony which introduced Defendant’s version of the events.

Defendant’s statement was to the effect that after being pushed and yelled at by the Victim as he tried to walk away, Bertola became the aggressor, struck Victim first, and threw the steel pipe to the Defendant; then, while “blanking out,” Defendant suddenly struck Victim and dropped the pipe to the ground. Dr. Caplan was Defendant’s only witness, and his testimony represented Defendant’s entire case to rebut the essential element of deliberate intent. Dr. Caplan’s testimony was Defendant’s only means of reinforcing his theory of the case and bringing together what trial counsel argued in both her opening and closing statements. Defendant’s utter dependence on Dr. Caplan for his defense exacerbates the potential for prejudice caused by the exclusion of Dr. Caplan’s testimony. See State v. Ellis, 963 P.2d 843, 856 (Wash. 1998) (holding the trial court’s decision to exclude expert testimony on the defendant’s inability to form specific intent in a first-degree murder trial deprived him of his
II. Admission of Victim’s Hearsay Statements

{46} Defendant also argues that the trial court abused its discretion by admitting an out-of-court statement that Victim made to her cousin, Robert Snow. The New Mexico Rules of Evidence prohibit the use of out-of-court statements, offered to prove the truth of the matter asserted, unless such a statement falls into a recognized hearsay exception and is relevant and otherwise admissible. See Rule 11-801 NMRA 2004 (describing hearsay rule); Rule 11-401; Rule 11-403. We review the trial court’s admission of hearsay statements for an abuse of discretion. State v. Lopez, 2000-NMSC-003, ¶ 10, 128 N.M. 410, 993 P.2d 727.

{47} Snow testified that Defendant and Victim went to his house in Victim’s car, about a week before Victim was murdered. Defendant was driving and Victim looked “distracted” and “like she’d been crying.” Snow “asked [Victim] to come out of the vehicle so [he] could see what was wrong with her.” When Snow asked Defendant what was going on, Defendant said that he and Victim were “domesticating, fighting.” According to Snow, Defendant ordered him “not to let [Victim] use the tele[phone] or anything like that.” Defendant had the keys to Victim’s car and was unwilling to return them to Victim. Finally, Defendant threw the car keys at Victim, hitting her in the chest. Snow “ended up knocking [Defendant] around a little bit and [Victim] got away and got in the car and drove off.” Snow testified that he was “defending” Victim and “didn’t feel it was right what [Defendant] was doing to [her].”

{48} At a critical point during this exchange, Victim told Snow that “[Defendant] had her for three days already, wouldn’t let her use the phone, wouldn’t let her out of his sight.” Defense counsel filed a motion in limine, arguing that Snow’s recitation of what Victim had said to him out of court was inadmissible hearsay and amounted to improper character evidence. See Rule 11-404(A) NMRA 2004 (providing that “[e]vidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion”).

{49} We agree that Victim’s statement that Defendant “had her for three days” was presented to prove the truth of the matter asserted; namely, that Defendant had been holding Victim against her will for the previous three days. Therefore, to be admissible, Victim’s statement must fall within a recognized hearsay exception.

{50} The trial court admitted Victim’s statement as an excited utterance, because Snow laid a predicate that Victim was distraught and fearful at the time she made the out-of-court statement. See Rule 11-803(B) NMRA 2004 (providing exception for statements “relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition”). Defendant argues that the court abused its discretion in admitting Victim’s statement as an excited utterance. Defendant does not argue that the admission of Victim’s statement violated his constitutional rights, but only argues that Victim’s statement was inadmissible under the Rules of Evidence. Cf. State v. Lopez, 1996-NMCA-101, ¶ 13, 122 N.M. 459, 926 P.2d 784 (reviewing de novo the defendant’s constitutional claims regarding the reliability of an out-of-court statement admitted as an excited utterance, but applying abuse-of-discretion standard to question whether statement was properly admitted under the hearsay rule).

{51} In deciding whether to admit an out-of-court statement under the excited utterance exception, the trial court should consider a variety of factors in order to assess the degree of reflection or spontaneity underlying the statement. These factors include, but are not limited to, how much time passed between the startling event and the statement, and whether, in that time, the declarant had an opportunity for reflection and fabrication; how much pain, confusion, nervousness, or emotional strife the declarant was experiencing at the time of the statement; whether “the statement was self-serving; and whether the statement was] made in response to an inquiry.”

State v. Bonham, 1998-NMCA-178, ¶ 6, 126 N.M. 382, 970 P.2d 154 (quoting 2 John William Strong, McCormick on Evidence § 272, at 219 (4th ed. 1999)), abrogated on other grounds by State v. Traeger, 2001-NMSC-022, ¶¶ 19-26, 130 N.M. 618, 29 P.3d 518. “[T]he trial court has wide discretion in determining whether the utterance was spontaneous and made under the influence of an exciting or startling event.” Id. ¶ 7. Given that Victim was “distracted, . . . upset,” and looked “like she’d been
Defendant also contends that Victim’s out-of-court statement amounted to improper character evidence because it demonstrated a prior bad act—that Defendant held Victim against her will—and was not relevant to the crime for which he was tried. Evidence of Defendant’s prior bad acts is inadmissible to the extent it serves only to prove that he acted in conformity with an alleged propensity for violence. See Rule 11-404(B) ("Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith."); Rule 11-403 (providing for exclusion of otherwise relevant evidence on grounds of undue prejudice). “On the other hand, evidence of Defendant’s other bad acts can be admissible if it bears on a matter in issue, such as intent, in a way that does not merely show propensity.” State v. Niewiadowski, 120 N.M. 361, 363-64, 901 P.2d 779, 781-82 (Ct. App. 1995).

The trial court did not rule on whether Victim’s out-of-court statement was inadmissible character evidence. Accordingly, we determine that the admissibility of Victim’s out-of-court statement under Rule 11-404(B) and Rule 11-403 may be addressed by the trial court, when, and if, this issue is raised at Defendant’s new trial.

CONCLUSION

We reverse and remand for proceedings consistent with this opinion.

IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:
PAMELA B. MINZNER, Justice
RICHARD C. BOSSON, Justice
PETRA JIMENEZ MAES,
Chief Justice
(concurring in part and dissenting in part)

PATRICIO M. SERNA, Justice
(concurring in part and dissenting in part)

Serna, Justice (concurring in part and dissenting in part)

I concur with the majority’s conclusion that the trial court properly admitted the victim’s statement. Respectfully, I dissent from the majority opinion’s analysis and conclusions regarding the admissibility of Caplan’s testimony. I would affirm Defendant’s conviction for first degree murder.

In New Mexico, diminished capacity, as a partial defense to first degree murder that lowers criminal responsibility to second degree murder, is mental illness or intoxication that results in the defendant’s inability to form a deliberate intention to take away the life of another. The majority concludes that Caplan’s testimony was “admissible, not for the purpose of proving the inability to deliberate, but rather to show that [Defendant] did not form a deliberate intent to kill.” Majority opinion, ¶ 2. The majority holds that Caplan’s testimony that Defendant’s “neurological deficits,” which result in “impulsiveness and difficulty in planning,” was admissible “to show that he did not, at the time of the killing, form the deliberate intent to kill,” “not that Defendant was incapable of forming a deliberate intent” based on his mental illness. Id. ¶¶ 26, 28, 30. The majority, I believe, creates a distinction without a difference by attempting to separate diminished capacity from negating the element of deliberate intent with evidence of mental illness. The question in this case, whatever the label used, is whether Defendant should be allowed to introduce expert testimony of a mental illness to show a lack of deliberation for purposes of reducing first degree murder to second. This Court has previously defined this question as diminished capacity and created specific requirements for its use, most notably the requirement that the mental illness cause an inability to deliberate. The majority creates a new rule allowing a defendant to offer expert testimony that, due to a mental illness that results merely in impulsiveness and poor planning, he or she did not possess a deliberate intent to kill at the time of the murder. In effect, the majority disregards the requirements of a diminished capacity defense and renders the doctrine of diminished capacity in New Mexico a nullity.

The trial court has discretion regarding the admission or exclusion of evidence, and a trial court’s evidentiary ruling will not be disturbed on appeal absent an abuse of that discretion. See State v. Brown, 1998-NMSC-037, ¶ 32, 126 N.M. 338, 969 P.2d 313. In order to find an abuse of discretion, this Court must conclude that the trial court’s decision to admit testimony was obviously erroneous, arbitrary, or unwarranted. Id. ¶ 39. To conclude that the trial court abused its discretion, we must hold that the decision was against the logic and effect of the facts and circumstances of the case and that the decision was clearly untenable or was not justified by reason. Id. ¶ 32. I do not believe that the trial court’s exclusion of evidence was obviously erroneous, arbitrary, unwarranted, and clearly against logic under the circumstances of the case. I believe that the trial court correctly determined that Defendant was attempting to present Caplan’s testimony to support a diminished capacity defense and that Caplan’s testimony was not of a sufficient quality to be admissible on the issue of diminished capacity under established New Mexico law.

Defendant attempted, at trial and on appeal, to support a diminished capacity defense. At the telephonic hearing with Caplan in the trial court, defense counsel’s ultimate question posed to the expert was whether, even though Defendant could form specific intent, he had a “diminished capacity which results in controlling impulses, anticipating dangerous situations, and the ability to postpone or discriminate in achieving his goals.” Defendant, in characterizing his trial argument, states that “[d]efense counsel always offered the evidence to prove that [Defendant] had a diminished capacity to deliberate or premeditate,” and acknowledges that “[t]he theory of relevance argued on appeal is the only theory of relevance the trial attorney ever suggested.” Defendant, on appeal, argues that “evidence that [Defendant] had a diminished capacity to judge circumstances and lacked the ability to control his behavior due to a neurological deficit was relevant to the distinction between first and second-degree murder.” In response to defense counsel’s question of whether he suffered from “diminished capacity,” Caplan could only testify that, generally, Defendant’s neurological dysfunction tended to produce difficulties with apathy, lack of motivation, ability to control one’s behavior, impulsivity, and, being easily distracted, poor work habits. Caplan stated that Defendant did have the ability to form specific intent as he understood the term. Caplan did not state that Defendant was unable to plan or control his impulses; Caplan could only state his opinion that Defendant, due to mental illness or injury, had some “difficulty” and some “problems” doing such tasks that would potentially translate into difficulty in deliberation. Thus, I believe it is clear that Defendant’s sole argument regarding the relevance of this evidence is that he has a diminished capacity that should reduce his culpability from first to
second degree murder.

{60} In this context, I believe that the trial court’s ruling was not only a proper exercise of discretion but actually required by New Mexico case law. This Court has defined diminished capacity as “the allowing of proof of mental derangement short of insanity as evidence of lack of deliberate or premeditated design.” State v. Padilla, 66 N.M. 289, 292, 347 P.2d 312, 314 (1959). In other words, this theory allows a defendant to challenge the State’s proof of the element of deliberate intent to reduce the degree of homicide based on mental illness, which is identical to the majority’s characterization of Defendant’s intended use of Caplan’s testimony. Our cases regarding the admission of expert testimony to demonstrate that, due to mental illness, a defendant could not form deliberate intent require the inability to do so. I believe that Padilla and State v. Lujan, 94 N.M. 232, 608 P.2d 1114 (1980), overruled on other grounds by Sells v. State, 98 N.M. 786, 653 P.2d 162 (1982), control and are not distinguishable. Padilla defined diminished capacity and concluded that, when evidence of diminished capacity is presented, the trial court had a duty to give an instruction on that theory “and not submit a mere abstract statement of the law.” Padilla, 66 N.M. at 296, 347 P.2d at 316. Lujan clarified that the evidence of diminished capacity must show an inability to deliberate. In Lujan, as in the present case, the theory of defense was a diminished capacity to form a deliberate intent. 94 N.M. at 233, 608 P.2d at 1115.

There is evidence in the record that the defendant was able to form a deliberate intention, with no evidence to the contrary. There was some expert testimony that the defendant was unable to control his emotions and was unable to stop himself from committing the homicides. But the inability to form an intention is distinct from those, and unless there is evidence that the defendant could not have formed the requisite intent, the diminished responsibility instruction is improper.

Id. at 233-34; 608 P.2d at 1115-16 (emphasis added). This Court thus concluded that while the defendant presented expert testimony that he had impulse control problems with regard to his actions as well as being unable to control his emotions, the defendant did not show, as required, that he could not form a deliberate intention. As a result, the defendant was not entitled to advance the theory of diminished capacity.

{61} I believe the same is true in the present case. While Caplan was of the opinion that Defendant has difficulty in the area of impulse control and planning, he specifically stated that Defendant had the ability to form specific intent. As noted below, I believe that, in the context of the defense argument that diminished capacity due to mental illness should reduce first degree murder to second, specific intent can only mean deliberate intent. Defendant concedes on appeal that no New Mexico case supports the admission of expert testimony to establish a tendency to have difficulty planning, as opposed to an incapacity to form a deliberate intent. There is no defense in New Mexico of a partial diminished capacity, or in other words, an impeded but existing ability to form a deliberate intent based on mental illness. In New Mexico, as demonstrated by Lujan, diminished capacity is a term of art that requires more than a diminished ability to form a deliberate intent; it requires an inability to form a deliberate intent. See State v. Fekete, 120 N.M. 290, 298, 901 P.2d 708, 716 (1995) (approving of the trial court’s modification of the defendant’s jury instruction on diminished capacity and noting that the defendant’s “theory at trial was that he was insane at the time of the killing and, because of his mental illness, was unable to form the deliberate intent to kill the victim”) (emphasis added); State v. Beach, 102 N.M. 642, 644 n.1, 699 P.2d 115, 117 n.1 (1985) (“Although the defendant raised the issue as diminished capacity, in New Mexico, . . . it is raised as inability to form the specific intent required to commit a crime.”), overruled on other grounds by State v. Brown, 1996-NMSC-073, 122 N.M. 724, 931 P.2d 69; Padilla, 66 N.M. at 292, 347 P.2d at 314 (noting that the phrases diminished responsibility and partial responsibility are “misnomer[s]”). Thus, I believe that the trial court correctly excluded Caplan’s testimony under Lujan and that this exclusion was not an abuse of discretion.

{62} Defendant argues on appeal that the trial court based its ruling on Caplan’s statement that Defendant could form a specific intent. Defendant argues that his “expert would have testified that even though [Defendant] did not have a diminished capacity to form specific intent, he did have a diminished capacity to plan or deliberate.” He argues that Caplan distinguished the ability to form a specific intent from an ability to form deliberate intent and that the trial judge erred in failing to recognize this distinction. This argument fails for three reasons. First, I believe Defendant misconstrues the ruling; the trial court fully understood his argument below. The judge stated,

So you’re attempting to establish some kind of diminished capacity in a legal sense based on [the expert’s] testimony. But based on his testimony that he has presented so far, I don’t see how you would get me to give the jury the jury instruction 14-5110 on diminished capacity, because the way the instruction reads we would also have to amend the elements instruction for first degree murder to state that . . . the burden of proof on the state is another element, the defendant was not . . . suffering from a mental disease or disorder at the time the offense was committed to the extent of being incapable of forming an intent to take away the life of another . . . .

The trial court’s specific reference to UJI 14-5110 NMRA 2004 refutes Defendant’s argument that the trial court ignored the expert’s opinion regarding Defendant’s ability to form a deliberate intent or misinterpreted the expert’s reference to specific intent. UJI 14-5110 specifically refers to “the defendant’s ability to form the deliberate intention to take away the life of another.” UJI 14-5111 NMRA 2004, by comparison, deals more generally with the capacity to form specific intent for non-homicide cases. The judge’s reference to UJI 14-5110, rather than UJI 14-5111,
demonstrates that the judge understood the particular type of specific intent at issue in this case. The judge correctly noted that UJI 14-5110 requires that an additional element be added to the first degree murder instruction, specifically, that the State must prove beyond a reasonable doubt that Defendant did not suffer from a mental disorder at the time of the offense “to the extent of being incapable of forming an intent to take away the life of another.” The trial court also correctly concluded that the expert’s testimony was inadequate to trigger this additional element because the expert testified that Defendant was capable of forming a specific intent, even though he had difficulty doing so.

Second, a closer inspection of the expert’s report, which the trial court admitted at Defendant’s request for purposes of ruling on the admissibility of the evidence, reveals that the expert did not distinguish between an ability to form a specific intent and an ability to form a deliberate intent. Instead, the expert distinguished between an ability to form a specific intent and a difficulty in planning and controlling impulses.

Third, I agree with the State that, when a defendant argues that he or she has a diminished capacity that would reduce first degree murder to second, there is no distinction between arguing diminished capacity to form specific intent and diminished capacity to deliberate. In other words, the specific intent at issue in this case is deliberate intent, and a diminished capacity defense seeks to negate the element of deliberation by showing an inability to deliberate. See State v. Campos, 1996-NMSC-043, ¶ 39, 122 N.M. 148, 921 P.2d 1266 (“It is [the] deliberate intent to cause death, beyond the defendant’s intentional actions, that makes premeditated first-degree murder a specific-intent crime.”). Therefore, for these reasons, I believe that Defendant’s appellate argument concerning the distinction between specific intent and deliberate intent is specious.

The majority does not discuss diminished capacity and instead attempts to create a new use for evidence of mental illness while concluding that Defendant did not raise a diminished capacity defense. As discussed above, I disagree with this characterization of Defendant’s proposed use of the evidence in the trial court. I believe that Defendant was attempting to present a diminished capacity defense, through both argument of counsel and in the professor of the expert’s testimony. See majority opinion, ¶ 27 (“Given this man’s history and evidence of neurological deficits, there is some evidence for diminished capacity.” . . . Dr. Caplan described neurological dysfunction as ‘sort of the underpinning to diminished capacity . . . .’). The majority distinguishes between a defense based on mental illness resulting in an inability to deliberate, which this Court has previously labeled diminished capacity, and a defense challenging the essential element of deliberate intent based on mental illness resulting in poor planning and impulsive ness. I am respectfully unable to accept this distinction for several reasons. First, I believe that Defendant did not preserve this argument in the trial court. Second, and most importantly, I believe that the contrast between a defense of diminished capacity and a defense negating the element of deliberation based on mental illness creates a false distinction. Third, I believe that, even accepting this distinction, the evidence offered by Defendant was of such minimal probative value in comparison to the potential for misleading the jury that the trial court did not abuse its discretion in excluding the evidence under Rule 11-403 NMRA 2004. Fourth, even if the trial court abused its discretion in excluding the evidence, I believe it was harmless error.

The majority characterizes the issue as whether Defendant was entitled to present evidence to assist the jury in weighing his contention that he lacked the deliberate intent necessary for a conviction of first degree murder. I believe that the question is not Defendant’s general right to challenge the State’s evidence of deliberation. It is of course the State’s burden to prove the element of deliberate intent beyond a reasonable doubt, and Defendant has many avenues of attacking the State’s proof on this issue. See State v. Provost, 490 N.W.2d 93, 102 (Minn. 1992) (“This is not to say that factual evidence bearing on defendant’s mentally abnormal condition is not admitted. This kind of evidence comes in as a matter of course, as, for example, in this case, where the jurors heard evidence on the history of the relationship between the defendant and his wife.”). The more specific question presented by this appeal, however, is whether Defendant can present expert testimony of a mental illness resulting in poor planning to challenge the element of deliberation. As the Supreme Court of Minnesota has concluded, “[t]he concern is whether expert opinions should be allowed to add a psychiatric gloss.” Id. Respectfully, I believe that even if a distinction could be drawn between a diminished capacity defense as defined by our case law and a lesser mental illness defense based on the element of deliberation, I do not believe that this argument, that Caplan’s testimony is relevant not to a diminished capacity defense at all but instead as simply evidence which tends to negate the element of deliberation, was made to the trial court as required by our rules of preservation.

The trial court specifically stated that the expert was of the opinion that Defendant’s mental condition did not affect his ability to form specific intent. The trial court asked the expert, “the question is presented in this case . . . whether or not [Defendant] was suffering from some kind of mental disease or disorder at the time the offense was committed to the extent that he was incapable of forming an intent to take away the life of another person.” The trial court then asked defense counsel if she had any further argument, and she answered, “I’m not sure what argument you’re asking for. Whether or not he should be allowed to testify?” The trial court again indicated that he thought the defense was “attempting to establish some kind of diminished capacity in a legal sense” based on the expert’s testimony and that Defendant “was not suffering from a mental disease or disorder at the time the offense was committed to the extent of being incapable of forming an intent to take away the life of another.” The trial court then told defense counsel, “I don’t think you have evidence from this testimony that’s admissible to prove that.” The trial court again asked defense counsel whether she wanted to make any further record, and she stated that she wanted the report admitted as an exhibit but did not
make any argument other than diminished capacity. The trial court understandably viewed the offer of Caplan’s testimony as invoking the doctrine of diminished capacity because, prior to the majority’s opinion in this case, that was the only recognized use in New Mexico for such testimony. Defense counsel did nothing to alert the trial court to a different argument and, in fact, actively pursued a line of questioning during the proffer on diminished capacity. If defense counsel actually intended to use Caplan’s testimony simply to support his challenge to the State’s burden to prove deliberate intent, there is no reason why defense counsel could not have made this argument to the trial court to demonstrate to the court why it erred in finding that the testimony was insufficient to show diminished capacity. I believe it was Defendant’s obligation to make the argument to the trial court because the trial court clearly did not understand this desired use of the testimony.

{68} “A trial is first and foremost to resolve a complaint in controversy, and the rule [of preservation] recognizes that a trial court can be expected to decide only the case presented under issues fairly invoked.” State v. Gomez, 1997-NMSC-006, ¶ 14, 122 N.M. 777, 932 P.2d 1.

{69} It is the responsibility of counsel at trial to elicit a definitive ruling on an objection from the court. It is also trial counsel’s duty to state the objections so that the trial court may rule intelligently on them and so that an appellate court does not have to guess at what was and what was not an issue at trial. State v. Lucero, 116 N.M. 450, 453, 863 P.2d 1071, 1074 (1993). Defendant never gave the trial court an opportunity to consider any use of the expert testimony other than a diminished capacity defense. Thus, a ruling on this issue was not fairly invoked.

{70} Defendant argues, in his reply brief, that he properly preserved this issue through his opening statements, as well as during the hearing. The majority also appears to rely on defense counsel’s opening argument to support the conclusion that Defendant properly preserved his argument, although the majority concedes that “the preferred practice would have been for defense counsel to reiterate clearly for the court the purpose for which she was offering Dr. Caplan’s testimony and to formally object to the trial court’s ruling.” Majority opinion, ¶ 20. Remarkably, although the majority recounts defense counsel’s opening statement, the majority does not discuss the argument defense counsel actually presented to the trial court during the discussion of the admissibility of Caplan’s testimony. Defense counsel argued at trial that Caplan’s testimony would demonstrate Defendant’s “diminished capacity” which results in problems in controlling impulses, anticipating dangerous situations, and the ability to postpone or discriminate in achieving his goals.” (Emphasis added.) Respectfully, I believe we must base our conclusions regarding preservation on the argument defense counsel actually made to the trial court. I do not believe that the trial court could be expected to disregard the arguments being made by counsel and Caplan’s opinions during the hearing on the admissibility of the evidence in favor of defense counsel’s vague remarks during opening statement regarding the general mens rea distinction between first and second degree murder. Our rules of preservation require that a ruling be invoked in a timely manner. Trial courts cannot be expected to glean subtle legal arguments regarding the admissibility of evidence from ambiguous statements made to the jury at a time when the question of admissibility is not before the court. An argument made to the jury at a remote time and in a vague manner cannot be said to have fairly invoked a ruling or to have provided the trial court with a reasonable opportunity to intelligently rule on the question now addressed by the majority. The majority also bases its conclusion that Defendant preserved his claim on the fact that the trial court raised this issue sua sponte. While I agree with the majority that the trial court invoked its own ruling on the question of the admissibility of the evidence, the trial court made this ruling in the context of Defendant’s attempted presentation of a diminished capacity defense. The trial court clearly understood the purpose of Caplan’s testimony as establishing a diminished capacity defense. Despite defense counsel’s understandable surprise at the trial court’s timing, nothing prevented counsel from making the new argument which the majority concludes Defendant makes on appeal in order to fairly invoke a timely ruling on this novel use of the evidence. Because the trial judge followed the proper sua sponte procedure set out in the majority opinion by outlining his concerns and by giving counsel a fair opportunity to respond, defense counsel had an obligation to alert the trial court to a permissible use of the evidence, just as any proponent of evidence would have to do in response to an objection by the opposing party.

{71} Regarding any reliance by Defendant or the majority on defense counsel’s opening statement, this Court rejected an analogous argument in State v. Apodaca, 118 N.M. 762, 772, 887 P.2d 756, 766 (1994), which also involved a contention “that the court improperly limited the presentation of her defense” by excluding testimony. The Court recounted that the defendant had an initial use for the evidence and then decided to use the evidence for impeachment. Id. The Court rejected the defendant’s argument that “mere mention of the evidence earlier that morning was sufficient to preserve the issue” and held that the “[d]efendant had the duty to inform the court of the nature of her objection so that the court could make an informed decision as to its admissibility.” Id. Similarly, in this case, counsel’s remarks in opening statement did not fulfill the requirements of preservation. Moreover, on appeal, Defendant argues that “[t]he judge was put on notice by defense counsel’s opening statement that Dr. Caplan would be testifying about [Defendant’s] diminished capacity to deliberate and plan a murder.” Thus, even if the opening statement could be said to preserve an argument, it preserved only a diminished capacity argument and not an argument that the evidence negates deliberation independently of diminished capacity. The trial court gave Defendant several opportunities to make further argument or additional claims. Defendant declined to do so. If Defendant truly preserved his argument in his opening statements, as he argues, he should have had no difficulties making this argument to the trial court when the issue was discussed during the hearing. Thus, I do not believe that Defendant preserved an argument in the trial court that the evidence was relevant to negate the element of deliberation without reference to the concept of diminished capacity. Because Defendant failed to demonstrate to the trial court that he was entitled to present evidence of diminished capacity, he was obligated to argue any new theory, such as relevance of “poor planning” mental disorder to challenge the element of deliberation, to the trial court in the first instance.

{71} The majority also relies on Rule 11-103(A) NMRA 2004 for its conclusion that Defendant properly preserved his argument. The majority notes that Rule 11-
103(A) requires that the trial court’s ruling affect a substantial right of the party and, for a ruling excluding evidence, the party seeking to admit the evidence must make known to the trial court the substance of the evidence by offer or by the context of the questions asked and concludes that these requirements were met by Defendant. Majority opinion, ¶ 21. I respectfully disagree. Even if the ruling affects a substantial right and the substance of the evidence is known by the trial court, the rule of preservation must still be met. Defendant certainly made an offer of proof as to the substance of Caplan’s testimony, but the issue here is whether he preserved the legal argument as to the use of the evidence. The problem remains that Defendant did not inform the trial court of his desired use of Caplan’s testimony and did not even attempt to correct the trial court’s reasonable belief that Defendant offered the testimony to support a diminished capacity defense. As our cases show, the requirement of an offer of proof in Rule 11-103(A)(2) is meant to supplement, not substitute for, the requirement in Rule 12-216(A) that a party fairly invoke a ruling in the trial court.

¶ 72 In State v. Baca, 1997-NMSC-045, ¶¶ 12-15, 124 N.M. 55, 946 P.2d 1066, this Court addressed whether a defendant preserved his claim that the trial court erred by excluding testimony as hearsay because it did not meet the argued exception to the hearsay rule. We noted that “[a] defendant must obtain a clear ruling from the trial court in order to preserve the grounds alleged to have been in error,” and we relied upon Rule 11-103(A) for the proposition that “[a]n objection that does not state the grounds for the objection preserves no issue for appeal.” Id. ¶ 13. This Court also noted that “the objection need not be specific if the specific ground is apparent from the context.” Id. In Baca, the defendant “tendered the evidence and requested that the trial court ‘be fair’ to his client and admit the . . . testimony.” Id. ¶ 15. We concluded that the defendant had not preserved the issue of whether the testimony constituted hearsay, despite the fact that the substance of the evidence was clearly known by the trial court and that the defendant argued that the testimony “would raise a reasonable doubt about the [d]efendant’s guilt and would call into question the veracity of the [s]tate’s witnesses.” Id. ¶ 10. This Court stated that “the defense made no specific argument that the testimony should be admitted because it was not hearsay” and instead, following his argument that the trial court be fair by admitting the testimony, moved on to argue exceptions to the hearsay rule as a basis for admission. Id. ¶ 15. We concluded that “[t]he context of these arguments would not have put the court on notice that the defense objected to treatment of the testimony as hearsay” and held that the defendant failed to preserve the issue for review. Id.

¶ 73 Similarly, Defendant in the present case failed to put the trial court on notice that he wished to present Caplan’s testimony for anything other than diminished capacity. Thus, I respectfully believe that the majority’s treatment of preservation under Rule 11-103 conflicts with our precedent. See Baca, 1997-NMSC-045, ¶¶ 12-15; see also State v. Garcia, 100 N.M. 120, 123, 666 P.2d 1267, 1270 (Ct. App. 1983) (addressing rule 11-103(A)(2) and concluding that the defendant failed to make an offer of proof necessary to preserve the issue of whether the trial court properly excluded testimony).

¶ 74 I do not believe that the trial court’s sua sponte action should relieve Defendant of his obligation to preserve an argument separate from diminished capacity. Innumerable cases from this Court have required criminal defendants to properly preserve arguments for appeal, even where general or related objections were made to the trial court but the argument differed on appeal. E.g., State v. Jacobs, 2000-NMSC-026, ¶ 12, 129 N.M. 448, 10 P.3d 127 (concluding that the defendant’s objection at trial that the jury would misuse evidence of escape did not preserve his appellate argument that joinder of the escape charge was improper, and holding that “absent fundamental error, even in a death penalty case issues must be properly preserved”); State v. Harrison, 2000-NMSC-022, ¶ 27, 129 N.M. 328, 7 P.3d 478 (‘‘While it may be proper for a defendant to have multiple theories of the crime, Defendant, in order to preserve an argument for appeal, must alert the trial court as to which theory is at issue in order to allow the trial court to rule on the objection.’’); State v. Allen, 2000-NMSC-002, ¶¶ 17, 31, 128 N.M. 482, 994 P.2d 728 (noting that although a defendant objected after a witness testified, the objection was not timely, and thus applying fundamental error analysis to the unpreserved issue); Apodaca, 118 N.M. at 772, 887 P.2d at 766 (discussed above); Baca, 1997-NMSC-045, ¶¶ 12-15 (discussed above); Lucero, 116 N.M. at 452-53, 863 P.2d at 1077-74 (recounting that defense counsel objected to the admission of testimony for relevancy but “conclud[ing] that trial counsel did not lodge an objection about the validity of [the expert’s] testimony,” so the error claimed on appeal was unpreserved); State v. Chamberlain, 112 N.M. 723, 730, 819 P.2d 673, 680 (1991) (noting that the defense objected to the prosecution’s closing argument at the end of the argument while recognizing that “many of the asserted errors [on appeal] were not objected to by the defense,” and holding that “[f]ailure to make a timely objection to alleged improper argument bars review on appeal, unless the impropiety constitutes fundamental error’’); State v. Lopez, 84 N.M. 805, 808-09, 508 P.2d 1292, 1295-96 (1973) (concluding that, although the defendant objected to the trial court that the state failed to prove all essential elements of a prima facie case, which the defendant argued included the issue that prosecution occur where the crime was committed, the defendant failed to preserve his appellate argument that venue was improper). Respectfully, I believe the majority’s conclusion regarding preservation is inconsistent with these cases, especially considering the existence of a conference on the very issue between the parties and the trial court at which no reference was made to the argument later advanced on appeal. As we have previously stated, relaxation of the timely objection rule “may encourage the defense to gamble on the verdict with the intent of raising the claim of error on appeal if the gamble does not pay off.” State v. Clark, 108 N.M. 288, 297, 772 P.2d 322, 331 (1989), overruled on other grounds by State v. Henderson, 109 N.M. 655, 664, 789 P.2d 603, 612 (1990), overruled on other grounds by Clark v. Tansy, 118 N.M. 486, 493, 882 P.2d 527, 534 (1994).

¶ 75 The significance of the majority’s reference to “the potential that the alleged error is fundamental” and its reliance on a fundamental error case is unclear to me. Majority opinion, ¶ 21. Although the majority concludes that Defendant properly preserved the issue, it appears that the majority is relying in part on the fact that it characterizes the error as potentially fundamental, a consideration not previously part of our preservation analysis.

¶ 76 When an issue has not been properly preserved, we have the discretionary power to review it for fundamental error. However, “[t]he doctrine of fundamental error should be applied sparingly, to prevent a miscarriage
of justice, and not to excuse the failure to make proper objections in the court below. With regard to a criminal conviction, the doctrine is resorted to only if the defendant’s innocence appears indisputable or if the question of his [or her] guilt is so doubtful that it would shock the conscience to permit the conviction to stand.

State v. Reyes, 2002-NMSC-024, ¶ 42, 132 N.M. 576, 52 P.3d 948 (quoted authority omitted) (alteration in original). As discussed below, Defendant’s innocence is not indisputable and his guilt is not so doubtful as to shock the conscience to permit his conviction to stand. In contrast to a fundamental error standard, if a defendant properly preserves a claim that the trial court erred in excluding evidence, appellate courts apply an abuse of discretion standard. Despite the reference to fundamental error review, the majority applies an abuse of discretion standard of review to Defendant’s claim that the trial court erred in excluding his evidence. Majority opinion, ¶ 22. Thus, based on the majority’s rejection of the State’s argument that Defendant failed to preserve this claim and its application of an abuse of discretion standard of review, the majority treats the issue as properly preserved. Because our discretionary review for fundamental error under Rule 12-216(B) is separate and qualitatively different from our review of preserved errors under Rule 12-216(A), and because Defendant does not attempt to invoke fundamental error review or argue that the error in this case is fundamental, it is unclear to me why the majority refers to fundamental error review in its discussion of preservation.

Beyond the issue of preservation, I do not believe that New Mexico law recognizes a distinction between the use of evidence of mental illness for diminished capacity and for negating mens rea. The trial court correctly rejected the evidence and jury instruction for diminished capacity because Defendant’s expert could not opine that Defendant had an inability to deliberate, merely a problem or difficulty in doing so. As stated above, a defense of diminished capacity, as previously defined in our cases, “means the allowing of proof of mental derangement short of insanity as evidence of lack of deliberate or premeditated design.” Padilla, 66 N.M. at 292, 347 P.2d at 314. In other words, mental illness actually resulting in diminished capacity to deliberate reduces first degree murder to second because it negates the mens rea element of first degree murder. That is precisely the theory Defendant was attempting to present in this case. The majority states that Defendant wished “to show that he did not, at the time of the killing, form the deliberate intent to kill” based on his “neurological dysfunction.” Majority opinion, ¶ 30. The majority avoids the use of the term “diminished capacity” and instead distinguishes the issue by contending that “[p]roof of incapacity to form the requisite deliberate intent . . . is not the only means of defending against the State’s allegation that the defendant acted with the deliberate intent to take away the life of the victim,” relying on authority from other jurisdictions. Majority opinion, ¶ 31. However, cases from other jurisdictions have distinguished the use of mental illness as an excuse to criminal liability from the use of mental illness to negate mens rea. See, e.g., United States v. Brawner, 471 F.2d 969, 998 (D.C. Cir. 1972) (“Our doctrine has nothing to do with ‘diminishing’ responsibility of a defendant because of his [or her] impaired mental condition, but rather with determining whether the defendant had the mental state that must be proved as to all defendants.”) (footnote omitted). This distinction is inapposite in New Mexico. Padilla did not recognize the defense of diminished capacity as an excuse to criminal liability when the State has otherwise proved the elements of the crime beyond a reasonable doubt; instead, this Court recognized a defense to mens rea based on evidence of mental illness, that is, a means of negating the mental state element of the crime so as to negate guilt rather than excuse it.7 Mental illness has been recognized as an excuse to criminal liability in New Mexico only if it meets the definition of legal insanity. See UJI 14-5101 NMRA 2004. Thus, because New Mexico has already adopted a mens rea based form of diminished capacity, the question in this case is not whether there are other uses for evidence of mental illness but, instead, what limitations New Mexico places on this use. Based on Padilla and Lujan, New Mexico limits the use of evidence of mental illness as a means of negating mens rea to specific intent crimes and to evidence that establishes an inability to form the particular specific intent at issue.

7 In fact, the court in Brawner, upon which the majority’s Peterson case is based, relied on our decision in Padilla as a basis for adopting a mens rea based form of diminished capacity. Brawner, 471 F.2d at 1000 n.63. It should also be noted that federal law now precludes expert testimony on the ultimate question of the defendant’s state of mind, Fed. R. Evid. 704(b), which makes federal law inconsistent with Ellis and Elliot.

STATE OF NEW MEXICO v. VALENTE BALDERAMA – NO. 27,225
impulsive and a poor planner, is admissible to prove that a defendant did not in fact, at the time of the killing, form a deliberate intent to kill. 

{79} In Padilla, this Court began by mentioning the insanity defense, which was described as “being incapable of preventing oneself from committing the act as a result of disease of the mind.” *Id.* at 293, 347 P.2d at 314. We then addressed, as a matter of first impression in this state, the doctrine of diminished responsibility, or diminished capacity, based on mental illness. *Id.* at 292, 347 P.2d at 314. The Court noted that the trial court refused the defendant’s tendered instruction, which stated, “If you find the defendant was legally sane, then the Court instructs you that as an additional defense if you find . . . whether by reason of a disease or defect of the mind the defendant was incapable of thinking over the fatal act beforehand with a calm and reflective mind (or with a fixed and settled deliberation and coolness of mind) then, you shall find the defendant not guilty of first degree murder and will pass on to the question of whether he is guilty of second degree murder.” *Id.* at 293, 347 P.2d at 315 (emphasis added). This is a diminished capacity instruction. We noted that the defendant properly received an instruction on intoxication which instructed the jury that if it found that, due to defendant’s use of alcohol or marijuana, “‘the mind of the defendant was incapable of that cool and deliberate premeditation necessary to constitute murder in the first degree,’ it should find him guilty of murder in the second degree. *Id.* (emphasis added). We then questioned as to why there should be a different rule and perhaps a more lenient one with respect to a user of alcohol or drugs than in the case of one who may be afflicted with a mental disease not of his [or her] own making. If alcohol or drugs can legally prevent a person from truly deliberating, then certainly a disease of the mind, which has the same effect, should be given like consideration. *Id.* at 294, 347 P.2d at 315 (emphasis added). This Court then quoted from cases we found to be “directly in point”: “If the appellant was so afflicted with insanity that he [or she] was ‘mentally incapable of deliberating or premeditating, and to entertain malice aforethought, and to form a specific intent to take the life of the deceased, in such event the jury should not find him [or her] guilty of murder in the first degree.’” *Id.* (quoting *State v. Green*, 6 P.2d 177, 186 (Utah 1931)). Not only did Padilla adopt diminished capacity as a defense, it compared it to intoxication rendering a defendant “incapable” of forming deliberate intent and adopted holdings which also set out diminished capacity as requiring that the mental illness be such that the defendant is “incapable of deliberating or . . . form[ing] a specific intent to take the life of the deceased.” *Id.* (quoted authority omitted). 

{80} Although the State and the trial court understood Defendant’s argument at trial to be diminished capacity as previously defined by our case law, the majority limits its discussion of diminished capacity to a distinction between the clear diminished capacity standard of an inability to form specific intent and the new standard of allowing evidence of mental illness which “‘may influence the probability that a defendant premeditated or deliberated.’” Majority opinion, ¶ 31 (quoted authority omitted). I believe that Padilla and the authority relied upon by this Court correctly set out the standard requiring that a defendant’s admission of evidence of mental illness result in an incapacity to deliberate in order to negate the intent required for first degree murder. Certainly, in the more than forty years since this Court decided Padilla, no New Mexico case has interpreted Padilla as broadly permitting the introduction of any evidence of mental illness to negate mens rea. The reason this Court required an inability to deliberate rather than a mere tendency toward impulsiveness is, to me, both logical and sound. We concluded that evidence establishing mental illness resulting in an inability to form intent would demonstrate that, at the time of the murder, the defendant could not have formed the specific intent necessary to support first degree murder. Evidence of mental illness resulting in a propensity to be a poor planner or impulsive, on the other hand, is as the case with any other character trait such as a quick temper, does not shed adequate light on the defendant’s intent at the time of the murder. 

{81} Our observation in Padilla that diseases of the mind “should be given like consideration” as intoxication that prevents one from deliberating is instructive. The defense of diminished capacity due to intoxication has been limited to specific intent crimes and, like diminished capacity due to mental illness, requires a level of intoxication that results in an inability to form the relevant specific intent. *Ruiz v. Territory*, 10 N.M. 120, 133, 61 P. 126, 127 (1900) (“Voluntary intoxication is not a defense in law that will excuse the commission of the crime of murder in the first degree, or any other degree, unless such intoxication is so gross as to render the defendant incapable of knowing the difference between right and wrong, or incapable of forming a willful and deliberate intention to kill.”); accord *State v. Begay*, 1998-NMSC-029, ¶ 38, 125 N.M. 541, 964 P.2d 102 (stating that when there is “evidence which reasonably tends to show that defendant’s claimed intoxication rendered him [or her] incapable of acting in a purposeful way,” an instruction on diminished capacity is warranted) (quoting *State v. Luna*, 93 N.M. 773, 780, 606 P.2d 183, 190 (1980)); *State v. Cooley*, 19 N.M. 91, 103, 140 P. 1111, 1114 (1914) (“If, by reason of intoxication, the mind of the defendant was incapable of that cool and deliberate premeditation, necessary to constitute murder in the first degree, . . . necessarily it would be murder in the second degree . . . .”). We have specifically rejected the argument that intoxication resulting in a diminished capacity can negate the mens rea for second degree murder and other general intent crimes. *Campos*, *Ellis* and *Elliot*, which are cited by the majority, did not interpret or even cite Padilla. The question in Padilla was not whether to add an element to the State’s burden of proof or to create an additional instruction for the use of mental illness expert testimony for diminished capacity as compared to its use for negating mens rea. Instead, the question was whether to allow a defense of mental illness in order to negate mens rea, and this Court recognized the defense but limited it to specific intent crimes and required evidence of an inability to form the specific intent. Thus, I do not believe that *Elliot* and *Ellis* modify Padilla or expand the permissible use of expert testimony of mental illness to negate mens rea.
In response to the dissent’s argument that “‘knowing’ is a specific state of mind that may be affected by external influences such as extreme intoxication or internal mental deficiencies that do not rise to the level of insanity,” id. ¶ 62 (Franchini, J., dissenting), we held that “the legislature did not intend to depart from or legislatively overrule the long line of case law . . . that held intoxication is not a defense to second-degree murder.” Id. ¶ 43. This Court also recognized the danger of diminished capacity defenses outside the confines of specific intent crimes:

[R]ead [leading] the statute as allowing for an intoxication defense to second-degree murder could lead to surprising and unintended results. . . . [I]t is quite conceivable that a defendant who argues successfully that intoxication negated the knowledge mens rea for second-degree murder could not be convicted of any degree of homicide—under either the murder or manslaughter statutes—for the killing. This possibility most certainly was not intended by the legislature when it amended the murder statute.

Id. n.6 (citations omitted). Based on our analysis in Campos, a defendant is not permitted to introduce evidence of intoxication to challenge the mens rea for second degree murder or felony murder. Brown, 1996-NMSC-073, ¶ 23. Thus, even though, as the dissent in Campos argued, evidence of intoxication might be relevant to the mens rea of general intent crimes, a trial court may properly exclude evidence of intoxication when the defendant is not legally entitled to assert a diminished capacity defense.

¶ 82 I believe that the majority’s analysis is inconsistent with this authority. Outside the limitations imposed by a diminished capacity defense, the majority allows Defendant to introduce evidence of mental illness to negate mens rea, restricted only by the principle of relevance. However, this rationale could apply equally to general intent crimes with requisite mental states that might be implicated by mental illness. If we were to give “like consideration” to mental illness and intoxication, as Padilla recognized is the preferred approach, then, relying on our rationale in Campos, I believe that evidence of mental illness to negate mens rea should continue to be limited to specific intent crimes and also limited to evidence demonstrating an inability to form specific intent. I believe that a broader rule conflicts with the legislative intent discussed in Campos. I respectfully believe the majority, although attempting to distinguish mental illness evidence challenging the element of deliberation from evidence of diminished capacity, actually expands the notion of diminished capacity and thus effectively greatly broadens New Mexico law on this issue.

¶ 83 The majority agrees with Defendant that “testimony regarding Defendant’s neurological deficits was relevant because, if believed by the jury, it would tend to make less probable the State’s theory that Defendant killed ‘as a result of careful thought.’” Majority opinion, ¶ 26. The majority concludes that “had the jury been provided with Dr. Caplan’s testimony regarding Defendant’s neurological deficits, the jury would have had specific evidence tending, to some degree, to refute the element of deliberation necessary for first-degree murder.” Id. ¶ 27. I respectfully question these conclusions; I do not believe that the testimony tends to refute the element of deliberation. The majority describes Caplan’s testimony as mental illness or neurological dysfunction resulting in planning difficulty and impulse control which Defendant is entitled to present to the jury to support his argument that he lacked the deliberate intent necessary for first degree murder because it demonstrates that he did not act with calculated judgment but instead “‘went off.’” Id. ¶ 28.

The majority concludes that the testimony is “relevant to whether Defendant formed the intent to murder Victim” deliberately or whether he killed her as the result of a mere unintended and rash impulse. Id. I question how a mental defect characterized by general poor-planning and impulsiveness is relevant to deliberation on a specific occasion. A bank robber who is a poor planner still has the capacity to plan a bank robbery, however badly, and is thus responsible for it under the law. Similarly, in the present case, despite being a poor planner, impulsive, and quick-tempered, Defendant was fully capable of instructing his cohorts to lure the victim to an isolated area where he first stranded her, and, failing to achieve the desired result, requested a deadly weapon with which to beat the victim to death. The evidence of Defendant’s mental defect does not show whether Defendant did or did not have a deliberate intent to kill the victim in this specific instance because it is only a mere tendency and Defendant still possessed the ability to do so. As the Supreme Court of Minnesota observed,

In our view, psychiatric opinion testimony is not helpful on whether a person capable of forming a specific intent did in fact formulate that intention. Though a subjective state of mind may at times be difficult to determine, there is no mystery to mens rea, the latinism notwithstanding. Jurors in their everyday lives constantly make judgments on whether the conduct of others was intentional or accidental, premeditated or not. Thus, to do something intentionally is to do it with the purpose of accomplishing that something. To set a person on fire with the purpose of ending that person’s life is to torch with intent to kill. The psychiatrist may look at what the defendant said and did to give an opinion whether the torching was done with intent to kill or to hurt, but the factfinder can do this too; indeed, it is the factfinder’s job to do it, not the expert’s as a thirteenth juror.

Provozet, 490 N.W.2d at 101-02 (citation omitted). I do not believe that we should allow Caplan to become, effectively, a thirteenth juror. By allowing all psychiatric testimony relevant to mens rea, I believe the majority opinion has the “potential to transform criminal trials into psychiatric shouting matches,” State v. Wilcox, 436 N.E.2d 523, 533 (Ohio 1982), and I believe that this battle of experts can only cloud the jury’s determination of mens rea. See Provozet, 490 N.W.2d at 100 (“The confusion that would result from inviting mental health experts into the legal arena to help establish criminal culpability is not to be underestimated; it is an invitation to semantic jousting, metaphysical speculation and intuitive moral judgments masked as factual determinations. The resultant confusion is not to be considered an adverse reflection on either law or psychiatry; rather, it is simply a reflection that the two disciplines speak from different perspectives.” (quotation marks and quoted authority omitted)).

¶ 84 Even if the evidence could be said
to be marginally relevant, relevancy, as Campos showed in the context of intoxication, is not the only factor, or even the most important factor, in evaluating evidence offered to show diminished capacity in order to refute mens rea. See Provost, 490 N.W.2d at 99 ("[T]o conclude that psychiatric testimony may have some relevance to a guilty mind is only the beginning, not the end, of any inquiry into admissibility of that testimony."). Although a number of jurisdictions recognize a mens rea based form of diminished capacity, as New Mexico did in Padilla, the vast majority of these jurisdictions limit this defense to specific intent crimes regardless of notions of relevance as applied to general intent crimes. If New Mexico courts had previously intended to adopt the pure mens rea rule for evidence of mental illness that has been adopted by only a very small number of jurisdictions, there would have been no reason to limit the defense of diminished capacity to specific intent crimes and to an inability to form the relevant specific intent as this Court did in Padilla and Lujan.

The majority describes the relevancy of the testimony as "tend[ing] to make less probable the State’s theory" that Defendant acted deliberately. Majority opinion, ¶ 26. The notion that Defendant’s impulsiveness mental defect is relevant to the murder itself because the disorder makes it more or less likely that he did not act deliberately is character evidence. See Rule 11-404(A)(1) NMRA 2004. In effect, I respectfully believe that the majority opinion replaces our previous standard of requiring an inability to form a specific intent with a propensity standard, thereby substituting a tendency for an incapacity and thus reducing the threshold requirement for the quantum of evidence required to make a diminished capacity defense. In other words, the majority’s analysis permits Defendant to argue that, because Defendant, due to mental illness, tended to have difficulties planning or deliberating, like a character trait or propensity, a defendant might not have committed the crime in question if he or she was acting in conformity with his or her character. This theory represents a significant change in New Mexico law and, I believe, necessitates overruling some of our cases.

The defense of diminished capacity was not recognized at common law and has been viewed with suspicion. Courts and legislatures are often wary that “subtle gradations of mental illness recognized in the psychiatric field are of little utility in determining criminal responsibility.” People v. Carpenter, 627 N.W.2d 276, 283 (Mich. 2001). As a result, a number of jurisdictions have rejected the defense in any form, both as an excuse to criminal liability and to negate mens rea. E.g., id.; Provost, 490 N.W.2d at 99-102; Chestnut v. State, 538 So. 2d 820 (Fla. 1989). This Court noted a split in authority in Padilla, and even though New Mexico elected to adopt the defense, we limited the defense to specific intent crimes and required an inability to form the specific intent. On other occasions, this Court has rejected the argument of irresistible impulse as a complete defense, see State v. Hartley, 90 N.M. 488, 491, 565 P.2d 658, 661 (1977) (rejecting evidence that traits similar to those at issue in this case “might hinder [the defendant’s] ability to prevent the commission of the alleged crimes” as inadequate to establish insanity), and we have viewed this type of propensity evidence with skepticism, see Lytle v. Jordan, 2001-NMSC-016, ¶ 35-36, 130 N.M. 198, 22 P.3d 666. If this Court extends the permissible evidence of mental illness to character, I believe it would be a fundamental change in this State’s position on the use of mental illness either as a complete defense, i.e., insanity, or to negate mens rea, i.e., diminished capacity. Treating mental illness as character evidence could apply to any determination of mens rea, could extend beyond the limited context of specific intent crimes, and could result in a complete defense to criminal liability. As we indicated in Campos with respect to intoxication, I believe this use of mental illness evidence is contrary to legislative intent. Cf. Carpenter, 627 N.W.2d at 284 (“[T]he future safety of the offender as well as the community would be jeopardized by the possibility that one who is genuinely dangerous might obtain his complete freedom merely by applying his psychiatric evidence to the threshold issue of intent.”).

My concern is possibly best understood as questioning the relevancy, or at the very least the probative value, of an expert opinion that Defendant’s mental condition results in a mere tendency to have a difficulty planning. A diminished capacity, as that term has been used in New Mexico, negates the element of deliberation because a defendant’s inability to deliberate in general would necessarily result in a lack of deliberation for the event in question. However, a mere tendency to act impulsively does not necessarily mean that a particular act was accomplished on impulse, and a difficulty in planning does not necessarily mean that there was no plan on a particular occasion. Defendant’s expert has no personal knowledge from which to testify that Defendant did or did not plan this murder. See Rule 11-602 NMRA 2004 (requiring that witnesses have personal knowledge of matters about which they testify). Thus, conformity with character can be the only relevancy of his “tendency” testimony, yet this form of “diminished capacity character” or “partial diminished capacity” evidence has not previously been recognized in New Mexico and conflicts with the requirements of diminished capacity as it has been applied in this State. To me, evidence of a mental illness establishing a tendency is not relevant to an accused’s mental state on a particular occasion. See State v. Boutman, 328 N.W.2d 703, 705 (Minn. 1982) (“[P]sychiatric evidence relative to the state’s obligation to establish the intent of the defendant is argumentative and of no probative value.”). Moreover, the State argues that evidence that a defendant who admits to a killing has problems controlling impulses merely states the obvious. I agree. See Bethea v. United States, 365 A.2d 64, 85 (D.C. 1976) (“[I]t is obvious that brutal murders are not committed by normal people. To give (such) an instruction . . . is to tell the jury that they are at liberty to acquit one who commits a brutal crime because he has the abnormal tendencies of persons capable of such crimes.”) (quoted authority omitted) (alterations and
establish a deliberate plan to murder the victim.

rea in that case was based on the illness that falls short of both the legal for first degree murder based on a mental illness result in diminished capacity. Cf. Carpenter, 627 N.W.2d at 283 (“Through the guilty but mentally ill statute], the Legislature has demonstrated its policy choice that evidence of mental incapacity short of insanity cannot be used to avoid or reduce criminal responsibility by negating specific intent.”). While the doctrine of diminished capacity as described in Padilla and Lujan could be said to survive the guilty but mentally ill statute, see Sims v. Sims, 1996-NMSC-078, ¶ 22, 122 N.M. 618, 930 P.2d 153 (“[N]o innovation upon the common law that is not clearly expressed by the legislature will be presumed.”). I believe that the majority’s expansion of the use of evidence of mental illness as a defense to criminal conduct is inconsistent with the legislative intent expressed in Section 31-9-3. I further believe that such a change in New Mexico law relating to evidence of mental illness “should lie within the province of the legislature.” Bethea, 365 A.2d at 92. Given the nationwide legislative response restricting the use of mental illness as a defense to criminal conduct, I would anticipate that the Legislature will reexamine this issue.

The majority recognizes that the trial court had a “legitimate concern that the jury might be misled” by Caplan’s testimony. Majority opinion, ¶ 39. This recognition should end the inquiry in this case. If the trial court had a legitimate concern about jury confusion, it is the trial court’s responsibility to weigh this concern against the probative value of the evidence. On appeal, this Court does not re-weigh the factors listed in Rule 11-403. Instead, we ask only whether the trial court’s balancing can be described as unreasonable or against logic. The legitimate concern for jury confusion, combined with the minimal probative value of the evidence, makes it abundantly clear to me that the trial court acted well within its broad discretion.

In response to the trial court’s legitimate concern for jury confusion, the majority drafts a new instruction for mental illness not resulting in an inability to deliberate. However, it seems to me that the problem of jury confusion persists. The majority’s instruction distinguishes the issue of whether the defendant “was incapable of forming the deliberate intention” without the context or definition of diminished capacity and then instructs the

Although Defendant asserts that this case is similar to State v. Garcia, 114 N.M. 269, 837 P.2d 862 (1992), the determination of mens rea in that case was based on the facts surrounding the crime, not a general expert opinion. Applying Garcia here, the facts in this case establish a deliberate plan to murder the victim.
jury to consider the expert testimony to determine whether the defendant formed the deliberate intention. Majority opinion, ¶ 40. The only significant difference between the draft instruction and UJI 14-5110, as the majority appears to note, is that the prosecution does not have to also prove that despite the mental illness, the defendant could form the intent to kill. However, the State retains the burden of proving the element of deliberate intent beyond a reasonable doubt. The added element of capacity to form a deliberate intent called for by UJI 14-5110 is merely intended to clarify the State’s burden of proving mens rea. As a result, I do not believe that the majority’s instruction clarifies to the jury how the law treats evidence of mental illness, what the legal definition of diminished capacity is, and why Defendant is not entitled to a diminished capacity defense based on Caplan’s testimony.

But if psychiatric opinion testimony is admitted on the issue of whether the defendant did or didn’t have the requisite guilty mind, the jury will inevitably take the testimony as an invitation to consider whether the defendant could or couldn’t have a guilty mind. Indeed, why else (so jurors would quite properly wonder) would the psychiatrist be testifying? Cautioning the jury not to consider diminished capacity or responsibility would only cause confusion. The law cannot give psychiatric testimony on the one hand and taketh it away with the other.

Provost, 490 N.W.2d at 100.

{94} Even if this new instruction did clarify the matter for the jury, however, I question how the trial court could abuse its discretion by not entertaining an instruction that neither previously existed in New Mexico law nor was presented to it by defense counsel. If Defendant’s evidence has the potential for jury confusion, it should have been Defendant’s burden not only to explain the intended use of the testimony to the judge but also to offer a way to clarify the issue for the jury. In the absence of such an argument, I believe that the majority places too great a burden on trial judges in performing the difficult gatekeeping task of screening evidence and enforcing the Rules of Evidence.

{95} Defendant argues that, by excluding Caplan’s testimony, the trial court violated his constitutional right to present evidence. However, the trial court’s ruling does not implicate this constitutional right. The trial court relied on Rule 11-403, and the proper exercise of discretion to exclude evidence based on this evidentiary rule does not have constitutional ramifications. See Crane v. Kentucky, 476 U.S. 683, 690 (1986) (“[W]e have never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability—even if the defendant would prefer to see that evidence admitted.”). “[T]he proposition that the Due Process Clause guarantees the right to introduce all relevant evidence is simply indefensible.” Montana v. Egelhoff, 518 U.S. 37, 42 (1996). In Egelhoff, the United States Supreme Court upheld the authority of states to deny criminal defendants the opportunity to defend criminal charges with evidence of intoxication. Similarly, “a state is not constitutionally compelled to recognize the doctrine of diminished capacity and hence, the state may exclude expert testimony offered for the purpose of establishing that a criminal defendant lacked the capacity to form a specific intent.” Muench v. Israel, 715 F.2d 1124, 1144-45 (7th Cir. 1983). Thus, a defendant does not have a due process right to introduce evidence of mental illness not meeting the legal definition of insanity or diminished capacity in order to avoid or mitigate criminal responsibility. See Währlich v. Arizona, 479 F.2d 1137, 1138 (9th Cir. 1973) (rejecting an argument that the defendant had a due process right to present expert testimony “tending to disprove an essential ingredient of the offense” apart from insanity or diminished capacity); see also Stevens v. State, 806 So. 2d 1031, 1051 (Miss. 2001) (affirming exclusion of expert testimony regarding an inability to form specific intent), cert. denied, 537 U.S. 1232 (2003). In fact, some states have rejected any defense to criminal liability based on a mental illness that fails to meet the legal definition of insanity, whether as a diminished capacity defense or a defense to mens rea. See, e.g., Smith v. Commonwealth, 389 S.E.2d 871, 879-80 (Va. 1990) (upholding exclusion of evidence of mental defect failing short of insanity offered to rebut premeditation); Carpenter, 627 N.W.2d at 283. New Mexico did not historically recognize a diminished capacity defense, and this Court did not adopt the doctrine of diminished capacity until Padilla, which accepted only a limited version of the defense that requires an inability to form a deliberate intent. Padilla, 66 N.M. at 292, 347 P.2d at 314. Thus, excluding evidence of mental illness failing to meet the legal definition of insanity or diminished capacity does not violate a fundamental principle of justice or, by extension, a defendant’s constitutional right to present evidence. A defendant has no due process right to introduce evidence that is irrelevant or otherwise inadmissible under established rules of evidence. I would reject Defendant’s argument; I believe that the trial court’s application of Rule 11-403 should be assessed only under an abuse of discretion standard and independently of constitutional principles.

{96} I believe that the trial court, in its exercise of discretion, faithfully attempted to apply this Court’s prior cases. As Defendant has argued, his defense was based on reducing first degree murder to second degree murder due to his diminished ability to deliberate. I believe that either Defendant can pursue this theory based on his proffer, in which case he is entitled to the diminished capacity instruction and the jury receives appropriate guidance, see Padilla, 66 N.M. at 296, 347 P.2d at 316 (“[I]t was the duty of the court to direct the jury’s attention to the facts which the defendant contends constitutes a defense, and not submit a mere abstract statement of the law.”), or as in Lujan, his proffer is insufficient to meet the threshold requirement of diminished capacity, in which case he is not entitled to the instruction and, as the trial court determined, receiving evidence on a theory Defendant is not entitled to pursue would be a waste of time and confusing to the jury. The majority asserts that “New Mexico courts have long allowed such expert testimony relating to a defendant’s mental state at the time of the commission of the offense.” Majority opinion, ¶ 32. If this use of expert testimony is so well established, however, I would question why Defendant did not make this new argument to the trial court and did not cite the cases the majority relies upon in either the trial court or this Court. I would not fault the trial court for referring to Padilla and Lujan based on Defendant’s use of the term “diminished capacity” and for failing to devise the third option of a partial diminished capacity instruction similar to the majority’s. Therefore, I do not believe the trial court abused its discretion in excluding the evidence under Rule 11-403.

{97} In any event, considering the
majority’s belief that the trial court misapprehended the law relating to expert testimony of mental illness, I question whether remanding for a new trial is the appropriate remedy. In an analogous situation, the federal Court of Appeals for the District of Columbia, whose Peterson case is cited by the majority, reaffirmed its position on the use of mental illness evidence from Brawner and reversed a trial court’s exclusion of expert testimony. United States v. Children, 58 F.3d 693, 730 (D.C. Cir. 1995). However, based on the trial court’s misapplication of law, the court remanded for an evidentiary hearing in order to allow the trial court, in the first instance, to assess the admissibility of the evidence under the federal equivalents to Rule 11-403 and Rule 11-702 NMRA 2004. Id. I believe this remedy would be more faithful to the proper role of an appellate court, as well as advancing judicial economy, than an outright remand for a new trial.

{98} Whether Defendant’s argument is a distinction between diminished capacity to form specific intent and a diminished capacity to deliberate or simply an opportunity to present evidence of a mental illness resulting in a tendency to be a poor planner independent of a diminished capacity defense, because Defendant failed to properly preserve either claim, I would review these arguments for fundamental error. See Chamberlain, 112 N.M. at 730, 819 P.2d at 680 (“Failure to make a timely objection to alleged improper argument bars review on appeal, unless the impropriety constitutes fundamental error.”). “The rule of fundamental error applies only if there has been a miscarriage of justice, if the question of guilt is so doubtful that it would shock the conscience to permit the conviction to stand, or if substantial justice has not been done.” State v. Oroso, 113 N.M. 780, 784, 833 P.2d 1146, 1150 (1992). I do not believe there has been a miscarriage of justice, and I do not believe the question of guilt is so doubtful that it shocks the conscience to affirm the conviction. I conclude that the evidence presented by the State in this case was overwhelming.

{99} Defendant and the victim were acquaintances. A relative of the victim’s, Robert Snow, beat Defendant shortly before the murder. The victim’s mother testified that Defendant went to her home at approximately one in the morning about a week prior to the murder, knocked heavily on the door, and said he wanted to speak to the victim. Defendant stated that “he had been jumped that night,” and that he was “going to get her the next time she goes to town.” The victim’s mother testified that she asked if Defendant was threatening her daughter, and that he said yes. On August 10, the date of the murder, Defendant and his accomplices planned to lure the unarmed victim, a five foot three, ninety pound woman, to an isolated area. The victim was visiting a friend at the friend’s trailer; the victim’s distinctive gold Mustang was parked outside. The victim’s friend and the friend’s father testified that Arturo Carbajal and Robert Bertola walked up to their trailer and began a conversation with them.

{100} Carbajal testified that, earlier that day, Defendant met with him and Bertola and asked for a ride to the victim’s friend’s home, where Defendant thought he would find her. Defendant drove Bertola’s black pickup while Carbajal and Bertola accompanied him as passengers. Carbajal testified that Defendant drove past the trailer, stating, “I’m not going to stop, I’m just going to go ahead and pass by, I don’t want her to see me.” A short distance away, Defendant stopped, told Bertola to walk back to the trailer and ask the victim for a ride to the store, and stated, “you know what to do.” Bertola had Carbajal accompany him.

{101} Snow lived in the same trailer park as the victim’s friend; he testified that he saw a black pickup drive slowly down the street on the day that the victim disappeared. Snow testified that the truck came back a few minutes later, and after a few more minutes, he noticed two men walking down the street. The victim was preparing to drive her friend’s father to the store when Bertola and Carbajal approached. The victim decided to take Bertola, Carbajal, and her friend’s father to the store. The victim later returned her friend’s father to the trailer and left with Bertola and Carbajal.

{102} Carbajal testified that Bertola drove them to an isolated area, stopped, and claimed that he needed to urinate; instead, he stood outside the car. Defendant arrived about five to ten minutes later, driving Bertola’s truck. Carbajal testified that Defendant approached the car and said that he wanted to speak to the victim. The victim refused; after Defendant’s third request to speak to her, he grabbed her, and then she slapped him. Defendant took the victim, threw her to the ground, and began kicking her. Carbajal testified that she asked for his help, but that he did not come to her aid. Carbajal testified that Defendant “got on top of her and was twisting her neck. He was saying this damn whore doesn’t want to die, . . . I need something to kill her, to kill this whore.” Bertola retrieved a three foot steel pipe from the truck and gave it to Defendant. Defendant struck the victim, with a great deal of force, on the head and neck with the pipe two or three times.

{103} An autopsy revealed that the victim had bruises on her thigh, lower back, and head; several ribs were fractured, and other ribs were separated from the cartilage, consistent with the testimony that Defendant repeatedly kicked her. The victim sustained fractures in her third cervical vertebra, constituting a broken neck caused by either blunt force or twisting of her neck, consistent with testimony that Defendant twisted her neck and beat her on the neck with the pipe. The victim had an extensive fracture of her skull on her forehead, which indicated “considerable force,” consistent with testimony that Defendant struck her head with the pipe. The victim also sustained fractures near her nose, on her jaw, and on the back of her head. The cause of the victim’s death was blunt force injury to her head and neck.

{104} Carbajal testified that, after he murdered the victim, said, “help me pick her up, I don’t want to be caught or get caught.” They moved the victim’s body into the trunk and dumped it a short distance away, and then they drove the victim’s car to Mexico. The victim’s blood was found in the trunk of her car. Defendant’s wallet and driver’s license were found inside the car.

{105} Maria Carbajal, Carbajal’s mother, also testified for the State. She testified that Defendant admitted to her that he had murdered the victim and dumped her body. Maria testified that Defendant said he killed the victim because she was responsible for Defendant being in jail on a particular occasion. She testified that Defendant said that Bertola handed him the pipe and that he described hitting her with it, saying that he “made sure she was dead.”

{106} The State presented Defendant’s statement to the police through Detective Frank Pena. Defendant claimed that he was cruising around in Bertola’s truck when he happened to see his accomplices and the victim. He followed out of curiosity and parked behind the victim’s Mustang. Defendant claimed that, out of concern for the victim, he tried to convince the victim to leave with him, but she declined. He stated that Bertola knocked the victim to the ground, kicked her, and began beating
her with the pipe. Defendant stated that Bertola threw him the pipe and that he hit the victim a few times with the pipe. He said the victim was alive when he began to strike her. He stated that Carbajal did not participate in the murder. Defendant stated that Bertola and Carbajal were arguing, and one of them said, “something to the effect that they had to finish her. They had to kill her.” Defendant stated that the victim was no longer conscious when they put her in the trunk of the Mustang; they then drove a short distance, they all got out of the car, opened the trunk, and removed the victim’s body, who was at this time unresponsive and bleeding.

{107} The fact that Defendant killed the victim is undisputed. Even Defendant concedes that he had a plan to lure the victim to an isolated area and, at the very least, beat her. Through Carbajal’s testimony, the State demonstrated that Defendant planned to isolate the victim by directing his accomplices to lure and isolate her while concealing his presence. Carbajal’s testimony demonstrates that Defendant was attempting to kill the victim by twisting her neck and, when that method failed to end her life, he asked for a weapon with which to kill her. This testimony provides direct evidence of Defendant’s deliberate intent to kill the victim.

{108} The majority concludes that “the evidence was in direct conflict as to whether Defendant killed with deliberate intention or through a rash impulse,” stating that the only eyewitness testimony was provided by Carbajal, “whose credibility was sharply contested.” Majority opinion, ¶ 42. I respectfully disagree with the majority’s limitation of Carbajal’s testimony. This testimony was properly admitted, and there is no argument on appeal that it should not have been admitted; nothing in harmless error or fundamental error review allows an appellate court to reweigh the credibility of a witness and to then discount that witness’s testimony. Carbajal’s credibility may have been hotly contested at trial, but the weight of the testimony was to be determined by the jury. I also disagree that Carbajal’s testimony is the only eyewitness evidence. Defendant’s statement, offered by the State, is an admission and serves as an eyewitness account of the killing. As discussed below, I believe that Defendant’s statement clearly supports that he killed the victim with deliberation. Maria Carbalaj’s testimony includes another admission by Defendant, an eyewitness, that directly supports deliberation. Maria recounted that Defendant admitted that he murdered the victim out of retaliation, supporting a deliberate intent. Maria also testified that Defendant “made sure [the victim] was dead,” again supporting deliberate intent rather than a rash impulse.

{109} Further, beyond the question of eyewitness evidence, I respectfully disagree that only Carbajal’s testimony supports the State’s theory that Defendant committed first degree murder. Even without Carbajal’s properly admitted testimony, I believe there was a great deal of evidence supporting deliberation. Snow testified that he beat Defendant. The victim’s mother testified that Defendant, days before the murder at about one a.m., demanded to speak to the victim, stated that he had been attacked, and threatened to “get” the victim. Snow testified that, on the day of the murder, he saw Bertola’s truck, which Defendant admitted he was driving, as well as Bertola and Carbajal, in the vicinity of the victim. The State provided testimony of the victim’s friend and father that the victim had difficulties controlling his impulses and planning. I believe, was of such minimal probative value that it would not have affected the jury’s verdict had it been admitted. Moreover, on appeal, Defendant contends that his theory of the case is that he deliberately tricked the victim into going to a remote place but that he did not plan in advance to kill her; instead, the killing was rash and impulsive. Defendant poses the key question for the jury as not whether Defendant formed an intent to kill but when: while he was driving to the remote location or while he concocted the plan to lure the victim to that location, such that there would be a deliberate intent, or, instead, while he was in the process of beating the victim, such that it would be rash and impulsive. Under these circumstances, the effect of Caplan’s testimony would necessarily have been de minimis. Defendant’s conceded plan to lure the victim to a remote location on the day in question would completely undermine Caplan’s testimony that Defendant had difficulty planning. The jury had before it overwhelming evidence of the particular circumstances that support a careful plan to track down, isolate, and murder the victim. Caplan’s testimony, not that Defendant was also evidence of first degree murder rather than a rash impulse because it indicates that the three of them moved her while she was unconscious but still apparently alive and dumped her body, supporting yet another deliberate plan to kill her by leaving her incapacitated in an isolated area with life-threatening wounds. Thus, I do not agree that the evidence of deliberation was in direct conflict; I conclude that the State’s evidence overwhelmingly supports the jury’s finding of deliberation.

{111} Even if I were to question and compare Carbajal’s and Defendant’s conflicting stories, I would point out that Defendant’s story was extremely implausible. Despite independent evidence, such as the fact that Defendant admitted that he was driving Bertola’s truck, and eyewitness testimony that this truck was seen in the victim’s vicinity immediately prior to Bertola and Carbajal approaching the victim’s location, Defendant claimed that he coincidentally saw the victim driving with the other men and followed out of concern for her and curiosity. Defendant claimed that he wanted to save the victim from the other men but admitted he joined in the beating, delivering the fatal blows with the pipe himself. Expert testimony that, generally speaking, Defendant had difficulties controlling his impulses and planning, I believe, was of such minimal probative value that it would not have affected the jury’s verdict had it been admitted. Moreover, on appeal, Defendant contends that his theory of the case is that he deliberately tricked the victim into going to a remote place but that he did not plan in advance to kill her; instead, the killing was rash and impulsive. Defendant poses the key question for the jury as not whether Defendant formed an intent to kill but when: while he was driving to the remote location or while he concocted the plan to lure the victim to that location, such that there would be a deliberate intent, or, instead, while he was in the process of beating the victim, such that it would be rash and impulsive. Under these circumstances, the effect of Caplan’s testimony would necessarily have been de minimis. Defendant’s conceded plan to lure the victim to a remote location on the day in question would completely undermine Caplan’s testimony that Defendant had difficulty planning. The jury had before it overwhelming evidence of the particular circumstances that support a careful plan to track down, isolate, and murder the victim. Caplan’s testimony, not that Defendant was
incapable of forming, and therefore did not form, a deliberate intent at the time of the murder, but instead, that Defendant merely had a tendency to have difficulty planning and therefore might not have planned on this occasion, could not have affected the verdict in my mind.

{112} The majority relies in part on the fact that Caplan was Defendant’s only witness. Majority opinion, ¶ 43. Respectfully, I am not persuaded that this fact is relevant. In this case, Defendant has admitted to at least second degree murder, I believe that his own statement supports deliberation, and he even concedes to planning to lure the victim. The fact that Defendant had no other witnesses reflects the strength of the State’s case, not the value or potential impact on the jury of the excluded evidence. Although the majority concludes that “Defendant’s utter dependence on Dr. Caplan for his defense exacerbates the potential for prejudice caused by the exclusion of Dr. Caplan’s testimony,” id., I do not believe that dependence on otherwise inadmissible testimony makes that testimony admissible.

{113} The issue, whether Defendant committed first or second degree murder, was clearly before the jury. Caplan’s testimony does not show whether, on this specific occasion, Defendant formed the deliberate intent to kill. Caplan’s report contains conflicting admissions by Defendant, which would not have supported Defendant’s theory. Caplan wrote that Defendant, following a head injury, claimed that he had “‘black outs’” when he becomes very angry, and that during such episodes, Defendant is “‘unaware of what happens.’” Caplan then wrote that, at the time of Caplan’s “evaluation, however, he was able to recall many of the details of the instant offense,” supporting the inference that Defendant was not so angry at the time of the murder that he had a blackout, and thereby negating, rather than supporting, the theory of an uncontrolled impulse.

{114} Even if I agreed that Defendant’s arguments were preserved, and that the trial court erred by excluding Caplan’s testimony, I believe the error would be harmless. The majority concludes otherwise, stating that “[i]f we accept only the testimony of Carbajal, ignore the defense cross-examination of him and also ignore Defendant’s account of the events of the murder, then surely the error is harmless.” Majority opinion, ¶ 42. I respectfully disagree. The majority is instead disregarding the testimony of Carbajal, Maria Carbajal, and numerous other State’s witnesses as well as significant portions of Defendant’s statements in favor of select assertions which would support second degree murder. The majority does not discuss in its analysis Defendant’s admission that he struck the unarmed, unconscious victim twice on the head and neck with a steel pipe in the context of his cohort’s discussion that “they had to finish her” and “[t]hey had to kill her.” Defendant’s statement as a whole clearly supports deliberation, not a rash and impulsive killing, which explains the fact that the State introduced Defendant’s statement. Under our cases, Defendant’s statement alone would be sufficient to support his first degree murder conviction. See State v. Sosa, 2000-NMSC-036, ¶ 14, 129 N.M. 767, 14 P.3d 32 (“Based upon the evidence, a reasonable jury could determine that Defendant intended to kill [the victim] when he went to [the victim’s] home armed with a gun, waited for him to arrive, and then shot the unarmed victim numerous times.”); State v. Cunningham, 2000-NMSC-009, ¶ 28, 128 N.M. 711, 998 P.2d 176 (concluding that evidence demonstrating that the defendant emptied one gun, returned to his vehicle to retrieve another gun, and then shot the incapacitated and defenseless victim supported deliberation); State v. Coffin, 1999-NMSC-038, ¶ 76, 128 N.M. 192, 991 P.2d 477 (rejecting the defendant’s argument that he did not have enough time to weigh and consider the killing and affirming convictions when the defendant shot the victim several times while the victim was walking away or lying on the ground); State v. Salazar, 1997-NMSC-044, ¶ 46, 123 N.M. 778, 945 P.2d 996 (holding that “testimony alleging that the Defendant pursued [the victim], pointed the gun, and fired provides an adequate source of direct evidence that the Defendant acted with deliberation, intending to kill [the victim]”); State v. Garcia, 95 N.M. 260, 261-62, 620 P.2d 1285, 1286-87 (1980) (noting that the fact that defendant was the aggressor, that the victim tried to run away, and that, although only a few seconds elapsed, the defendant had the opportunity to weigh his actions before he shot and killed the victim supported his first degree murder conviction). When Defendant’s statement is viewed in combination with the other evidence, there is no reasonable probability that the exclusion of Caplan’s testimony contributed to Defendant’s conviction.

{115} “In order to warrant reversible error, Defendant ‘must show a reasonable probability that the court’s failure to allow the testimony contributed to [Defendant’s] conviction.’” Apodaca, 118 N.M. at 773, 887 P.2d at 767 (quoted authority omitted); accord Rule 11-103(A) NMRA 2004. Under a harmless error analysis for evidentiary errors that do not violate a constitutional right, the Court evaluates whether substantial evidence supports the conviction, State v. Moore, 94 N.M. 503, 504, 612 P.2d 1314, 1315 (1980), and assesses the strength of the State’s case in relation to the excluded evidence, see id. Again, I believe there was overwhelming evidence to support the conviction, including but certainly not limited to Carbajal’s testimony. See State v. Williams, 91 N.M. 795, 798, 581 P.2d 1290, 1293 (Ct. App. 1978) (concluding that the erroneous exclusion of evidence offered by defendant “was harmless because the evidence of defendant’s guilt was overwhelming”).

{116} In addition, it is notable that, given the majority’s acceptance of what I view as character evidence, the State would have been, and will be, entitled to ask Caplan about Defendant’s prior instances of conduct in order to challenge the expert’s opinion regarding Defendant’s difficulty with planning. See Rule 11-405(A) NMRA 2004. The expert, in his report, identifies at least two prior instances of criminal conduct that likely would have required planning by Defendant. Cross-examination of this nature would severely limit the impact of the expert’s testimony on the jury and, in my view, would have only strengthened, and will only strengthen on remand, the State’s case, which might explain the State’s decision not to object to this evidence below. Therefore, I do not believe that there is a reasonable probability that the trial court’s exclusion of the testimony contributed to Defendant’s conviction.

{117} In conclusion, I agree with the majority that the trial court did not err by admitting the victim’s statement, but I respectfully dissent from the portion of the majority opinion addressing admissibility of Defendant’s expert’s testimony. I would affirm Defendant’s convictions.

PATRICIO M. SERNA,
Justice

I CONCUR:
PETRA JIMENEZ MAES,
Chief Justice
OPINION
JAMES J. WECHSLER,
CHIEF JUDGE

{1} We consolidate these appeals for opinion because they both raise issues of whether the district court committed fundamental error in giving the general intent jury instruction when a defendant is charged with a specific intent crime. Defendant Kevin Gee appeals his convictions for four counts of forgery. He argues on appeal that it was fundamental error for the district court to give both specific intent and general intent jury instructions when forgery is a specific intent crime. Gee additionally argues ineffective assistance of counsel. He contends that defense counsel was ineffective for allowing the jury to hear a highly prejudicial story of the attack on one of the victims. Defendant Richard Degurski appeals his convictions for larceny over $250.00 and receipt of stolen property. He contends on appeal that it was fundamental error for the district court to give the general intent instruction without instructing the jury that it did not apply to the specific intent crime. Because the instructions in each case substantially followed the applicable law, there was no fundamental error. We also conclude that Gee’s counsel was not ineffective and therefore we affirm in both cases.

Background in Gee’s Appeal

{2} Gee was indicted for four counts of forgery for passing forged checks written on the account of John C. or Frances Strader. At trial, Mike Hindi the owner of the Mini Mart convenience store at which Gee passed the checks, testified that he heard the Straders, and they informed him that their checkbook had been stolen a few days earlier in a purse snatching. Upon the prosecutor’s inquiry during direct examination as to whether Hindi had a conversation with the Straders regarding a vehicle, Hindi testified that he thought Gee drove a vehicle similar to the one that was used during the purse snatching.

{3} After the conversation with the Straders, Hindi telephoned the police.
contacted Gee and informed him that the checks were stolen from the Straders during a purse snatching, and Defendant stated he “would take care of it.” Gee began to make small cash installment payments to cover the bad checks.

{4} The Straders testified at trial that Frances Strader’s purse had been stolen in Albuquerque two days prior to Gee’s passing the first check. According to Frances Strader, the checkbook was in her purse, and the four checks in question were stolen from her. Neither of the Straders had seen Defendant before trial. John Strader testified that the maker’s signatures on the checks did not belong to him or his wife, that they never wrote any checks to Defendant, and that he did not own any property in the Espanola area. The Straders provided handwriting samples as evidence for the jury’s comparison. Defendant did not call witnesses.

Background in Degurski’s Appeal

{5} Degurski was charged with one count of larceny over $250.00 and one count of receiving stolen property over $250.00 for having stolen and pawned a Snap-On air hammer valued between $250.00 and $300.00, belonging to Carl Hooten. At trial, Hooten testified that he and Degurski worked together at Goodyear as the only two mechanics during Hooten’s tenure. When Hooten left Goodyear for another job, he left his air hammer at Goodyear because he did not have time to pick it up.

{6} When he had need for his air hammer at his new job, Hooten sent his wife, Shelley Hooten, to retrieve it from Goodyear. Shelley Hooten testified that she could not find the air hammer, so she asked Degurski about its whereabouts. Degurski responded that he had not seen the air hammer and did not have the time to help her look for it. A few months later, Hooten saw the air hammer for sale at a pawn shop. After going to the police, he was able to prove the air hammer was his and recover it. The owner of the pawn shop identified Degurski at trial as the person who pawned the air hammer, and Hooten testified that he had never given Degurski permission to pawn the air hammer.

Erroneous Jury Instruction Claims

{7} Both Gee and Degurski argue that when given together, the general intent and the specific intent instructions were inconsistent and confusing to the jury. They contend that general criminal intent is easier to prove than specific intent, and the general intent instruction enabled the jury to convict them of the specific intent crimes based on the general criminal intent of performing a purposeful act. There is, however, a difference in their positions. Gee faced only a specific intent crime. The general intent instruction was unnecessary in his case. Degurski, on the other hand, was defending a charge requiring only general intent, receiving stolen property, in addition to the specific intent charge of larceny. The general intent instruction was, therefore, necessary in Degurski’s trial. Degurski contends that fundamental error occurred because the district court did not instruct the jury that the general intent instruction only applied to the receiving stolen property charge.

{8} Because neither Gee nor Degurski objected to the instructions given at trial, we review only for fundamental error. State v. Cunningham, 2000-NMSC-009, ¶ 8, 128 N.M. 711, 998 P.2d 176; see also State v. Benally, 2001-NMSC-033, ¶ 12, 131 N.M. 258, 34 P.3d 1134 (stating that when issue concerning jury instructions has not been preserved, review is for fundamental error). The doctrine of fundamental error only applies “for the protection of those whose innocence appears indisputable[e], or open to such question that it would shock the conscience to permit the conviction to stand.” Cunningham, 2000-NMSC-009, ¶ 13 (internal quotation marks and citation omitted). We will reverse for fundamental error when the foundation or basis of a defendant’s case or an essential right in a defense is affected. Id. When reviewing jury instructions for fundamental error, we apply the fundamental error standard of review to the same inquiry we perform for review for reversible error -- whether the instruction or instructions would confuse or misdirect a reasonable juror due to contradiction, ambiguity, omission, or misstatement. Benally, 2001-NMSC-033, ¶ 12.

{9} Based on Lopez v. State, 94 N.M. 341, 610 P.2d 745 (1980), and State v. Gunzelman, 85 N.M. 295, 512 P.2d 55 (1973), overruled on other grounds by State v. Bender, 91 N.M. 670, 671, 579 P.2d 796, 797 (1978), fundamental error did not occur in the cases on appeal. In Lopez, our Supreme Court examined the jury instruction for the specific intent crime of larceny given in connection with the general intent jury instruction. Lopez, 94 N.M. at 342, 610 P.2d at 746. The larceny instruction read:

For you to find the defendant guilty of larceny . . ., the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant took and carried away . . ., (describe property) belonging to another, (which had a market value over $ . . .);
2. At the time he took this property, the defendant intended to permanently deprive the owner of it;
3. This happened in New Mexico on or about the . . . day of . . ., 19 . . . .

Id. (footnotes omitted). The general intent instruction read:

In addition to the other elements of . . . (identify crime or crimes) the state must prove to your satisfaction beyond a reasonable doubt that the defendant acted intentionally when he committed the crime. A person acts intentionally when he purposely does an act which the law declares to be a crime, even though he may not know that his act is unlawful. Whether the defendant acted intentionally may be inferred from all of the surrounding circumstances, such as the manner in which he acts, the means used, [and] his conduct [and any statements made by him].

Id. (alteration in original). The Court affirmed the defendant’s conviction, stating that the larceny statute and the general intent instruction, when read together, “correctly state the law applicable to larceny.”

Id.

{10} The defendant in Gunzelman was convicted of burglary. Gunzelman, 85 N.M. at 296, 512 P.2d at 56. The district court instructed the jury on burglary as follows:

The material allegations of the indictment necessary to be proven to your satisfaction and beyond a reasonable doubt before you can find the defendant guilty are that . . . [Gunzelman], did without authority or permission enter the dwelling house of [the victim], . . . with intent to commit a theft therein.

Id. at 300, 512 P.2d at 60. It also gave the following general intent instruction:
To constitute criminal intent it is not necessary that there should exist an intent to violate the law or to do a wrong. Criminal intent exists whenever a person intentionally does that which the law declares to be a crime, even though he may not know that he is committing a crime or that his act is wrong.

Id. The defendant did not object to these instructions. Id.

{11} Our Supreme Court held that the jury had been properly instructed because the burglary instruction followed the language of the burglary statute. Id. at 301, 512 P.2d at 61. It observed that the “instructions must be considered as a whole, and we have held that instructions are sufficient which substantially follow the language of the statute or use equivalent language.” Id.

{12} The instructions given in both cases on appeal closely track the statutes for the crimes charged. Gee was charged with forgery. NMSA 1978, § 30-16-10 (1963) states:

Forgery consists of:
A. falsely making or altering any signature to, or any part of, any writing purporting to have any legal efficacy with intent to injure or defraud; or
B. knowingly issuing or transferring a forged writing with intent to injure or defraud.

Whoever commits forgery is guilty of a third degree felony.

At trial, the district court gave the following jury instruction for the four counts of forgery:

For you to find the defendant guilty of forgery as charged in Count I, the state must prove to your satisfaction beyond a reasonable doubt that the defendant acted intentionally when he committed the crime charged. A person acts intentionally when he purposely does an act which the law declares to be a crime, even though he may not know that his act is unlawful. Whether the defendant acted intentionally may be inferred from all of the surrounding circumstances, such as the manner in which he acts, the means used, his conduct and any statements made by him.

{13} With regard to Degurski, the larceny (over $250.00) statute, NMSA 1978, § 30-16-1 (1987), states in pertinent part:

Larceny consists of the stealing of anything of value which belongs to another.

. . .

Whoever commits larceny when the value of the property stolen is over two hundred fifty dollars ($250) but not more than two thousand five hundred dollars ($2,500) is guilty of a fourth degree felony.

The instructions given at trial for the receiving stolen property charge read:

For you to find the defendant guilty of Receiving Stolen Property (disposing) as charged in Count II, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
1. The Snap-On Air Hammer and accessories had been stolen;
2. The defendant disposed of this property;
3. At the time he disposed of this property, the defendant knew or believed that it had been stolen;
4. The property had a market value over $250;
5. This happened in New Mexico on or about . . . .

In addition, the following “general intent” instruction was given:

In addition to the other elements of the crimes charged, the State must prove to your satisfaction beyond a reasonable doubt that the Defendant acted intentionally when he committed the crime. A person acts intentionally when he purposely does an act which the law declares to be a crime. Whether the Defendant acted intentionally may be inferred . . .
from all of the surrounding circumstances, such as the manner in which he acts, the means used, his conduct, and any statements made by him.

{14} A comparison of the applicable statutes and the instructions given indicates that both juries were instructed that “substantially follow the language of the statute or use equivalent language.” Gunzelman, 85 N.M. at 301, 512 P.2d at 61; see also State v. Lucero, 110 N.M. 50, 52, 791 P.2d 804, 806 (Ct. App. 1990) (“Instructions are sufficient if, when considered as a whole, they fairly present the issues and the applicable law.”). The instructions for both Defendants also informed the juries that they were to read the instructions as a whole.

{15} Following the instructions given, a reasonable juror could not have convicted either Defendant without a finding of specific intent. The specific intent required is set forth in each instruction. For forgery, it was necessary to find that Gee intended to injure, deceive, or cheat the Straders or the Mini Mart, and for larceny, that Degurski intended to deprive the owner of the air hammer. A finding that either Defendant acted purposely in carrying out the required specific intent is not inconsistent with the specific intent instructions. See, e.g., State v. Ruiz, 94 N.M. 771, 779, 617 P.2d 160, 168 (Ct. App. 1980) (stating that “[w]hen one intends to commit a felony or theft under the burglary statute one also has the general criminal intent of purposely doing an act even though he may not know the act is unlawful”). To find guilt based only on a purposeful act, as Defendants argue, a juror would have had to ignore the elements instruction as well as the instruction that the instructions be read as a whole. We cannot say that a reasonable juror would act in such a manner.

{16} The cases on appeal are not like State v. Parish, 118 N.M. 39, 878 P.2d 988 (1994) or State v. Stampley, 1999-NMSC-027, 127 N.M. 426, 982 P.2d 728 (stating that if a jury instruction is ambiguous, the jury instructions as a whole may cure the ambiguity). {17} In Stampley, also a reversible error case, the defendant was convicted of first degree murder, attempted first degree murder, drug trafficking, and aggravated assault. Stampley, 1999-NMSC-027, ¶ 1. The State also initially charged the defendant with one count of “attempted first degree depraved mind murder” a crime that does not exist in New Mexico. Id. ¶ 45. The district court ultimately dismissed this count. Id. However, the record did not indicate that the jury was ever informed of the dismissal. Id. The Court did not submit instructions to the jury defining first degree murder, and therefore the jury had no alternative but to look to instructions that contained a definition for a crime that did not exist. Id. ¶¶ 47, 48. Our Supreme Court reversed the conviction because the jury could have convicted the defendant of a crime that did not exist, holding that the instructions given “were capable of at least two interpretations, one of which would have been erroneous.” Id. ¶ 48. In both cases on appeal, under a fundamental error analysis, the instructions when considered as a whole would not lead a reasonable juror to believe that there was more than one proper interpretation.

{18} We also consider the committee commentary for UJI14-141 NMRA 2003 to be of assistance. See State v. McCravy, 100 N.M. 671, 673, 675 P.2d 120, 122 (1984) (“The committee commentary is persuasive authority, although it is not binding on this Court.”). The committee commentary specifically rejects Defendants’ position that the general intent instruction is inconsistent with a specific intent instruction. It states:

The adoption of this mandatory instruction for all nonhomicide crimes requiring criminal intent supersedes cases holding that a general intent instruction is not required if the crime includes a specific intent. . . . The adoption of the instruction also supersedes dicta in [Gunzelman] that a general criminal intent instruction is inconsistent with an instruction which contains the element of intent to do a further act or achieve a further consequence, the so-called specific intent element.

{19} Furthermore, even if the committee commentary mandated that the instruction not be given, a failure to follow a use note does not require automatic reversal, and would require preservation for review on appeal. See State v. Doe, 100 N.M. 481, 484, 672 P.2d 654, 657 (1983) (holding that “a defendant cannot sit back and insert error into a trial by his or her inaction and receive an automatic reversal when the crime has been fairly instructed on”).

Gee’s Ineffective Assistance of Counsel Argument

{20} Gee argues that his trial counsel was ineffective by allowing the jury to hear the “highly prejudicial” story of the attack on Frances Strader and the State’s suggestion that Gee was responsible for the attack. We disagree.

{21} At trial, the jury heard testimony from the store owner Hindi that Gee drove a vehicle similar to that which was used during the purse snatching. Near the end of John Strader’s direct examination, the State asked him whether he had discussed a vehicle when Hindi called regarding the checks. Strader responded that “a witness saw somebody run down the alley . . . and get in a black Jeep. . . . And then when [Hindi] called, he told me that [Gee] did have a black Jeep.” Gee’s counsel never objected to this testimony. The State then asked the following question:

Q. Just to clarify, at the time that your wife’s purse was snatched, you didn’t see anybody?

A. No. I was putting my walker in the car . . . and he grabbed her purse and jerked her down in some gravel and skinned her all up.

On cross-examination, defense counsel emphasized that Strader had not seen who snatched his wife’s purse, nor had Strader himself seen any Jeep, black or otherwise.

{22} To justify ineffective assistance of counsel sufficient for a reversal, Defendant must show that: (1) counsel’s performance fell below that of a reasonably competent attorney, and (2) Defendant was prejudiced
by the deficient performance. State v. Hester, 1999-NMSC-020, ¶ 9, 127 N.M. 218, 979 P.2d 729. “Absence a showing of both incompetence and prejudice, counsel is presumed competent.” State v. Padilla, 116 N.M. 448, 449, 863 P.2d 1069, 1070 (1993). Prejudice depends on whether “the allegedly incompetent representation prejudiced the case such that but for counsel’s error, there is a reasonable probability that the result of the conviction proceedings would have been different.” State v. Baca, 1997-NMSC-045, ¶ 20, 124 N.M. 55, 946 P.2d 1066.

{23} In this case, Gee’s counsel did object on relevance grounds to the first mention of the attack on Frances Strader. The court overruled the objection. As a result, “[d]efense counsel could have reasonably concluded that any further objection would not have resulted in a different outcome.” State v. Nysus, 2001-NMCA-102, ¶ 36, 131 N.M. 338, 35 P.3d 993. Our further review of the transcript reveals that defense counsel’s strategy upon having his initial objection overruled could have been to disassociate Defendant from the purse snatching through cross-examination. We cannot say that this strategy was unsound given the circumstances, nor will we second-guess counsel’s strategy at trial. See State v. Peters, 1997-NMCA-084, ¶ 40, 123 N.M. 667, 944 P.2d 896 (stating whether to object to evidence is a matter of trial tactics and failure to object does not establish ineffective assistance); see also Lyle v. Jordan, 2001-NMSC-016, ¶ 43, 130 N.M. 198, 22 P.3d 666 (“On appeal, we will not second guess the trial strategy and tactics of the defense counsel.”) (internal quotation marks and citation omitted).

{24} Moreover, Gee has not established that the outcome of his trial would have been different but for ineffectiveness of counsel. See Hester, 1999-NMSC-020, ¶ 9. To the contrary, a review of the evidence at trial leaves little doubt of Gee’s guilt. The State provided evidence that Gee passed forged checks belonging to the Straders at the Mini Mart, the Straders did not write any checks to Gee, and the Straders did not sign the four forged checks as maker. Intent may be inferred from circumstantial evidence. See State v. Gattis, 105 N.M. 194, 200, 730 P.2d 497, 503 (Ct. App. 1986) (stating that an accused’s intent can be inferred from the accused’s acts, conduct, and words). While Gee did provide an “innocent” explanation as to where he obtained the checks, the jury was free to disregard that explanation. See State v. Vigil, 87 N.M. 345, 350, 533 P.2d 578, 583 (1975) (stating that a jury may disregard a particular version of events). Gee has failed to meet either prong of the test for ineffective assistance of counsel.

Abandoned Arguments

{25} In their docketing statements, both Gee and Degurski raise the issue that there was insufficient evidence to support their convictions. In addition, Degurski also raises the issue that his defense counsel was ineffective for agreeing to allow an amendment of the criminal information which added the larceny count. These issues were not briefed and are deemed abandoned. State v. Thomas, 113 N.M. 298, 299, 825 P.2d 231, 232 (Ct. App. 1991) (stating that issues not briefed are deemed abandoned).

Conclusion

{26} The district courts in both cases did not commit fundamental error when they gave both “general intent” and “specific intent” instructions to the respective juries, and Gee’s trial counsel was not ineffective as a matter of law. We affirm the convictions in both cases.

{27} IT IS SO ORDERED.

JAMES J. WECHSLER,
Chief Judge

WE CONCUR:
MICHAEL D. BUSTAMANTE, Judge
RODERICK T. KENNEDY, Judge

OPINION

LYNN PICKARD, Judge

{1} Petitioner (Debtor) appeals the trial court’s grant of summary judgment, which dismissed his petition to redeem property sold under judgment or decree of foreclosure. Debtor argues that the trial court erred in finding that he had not substantially complied with the redemption statute as a matter of law. Debtor also contends that genuine issues of material fact exist to preclude the trial court’s denial of an extension of the redemption period in equity, but we interpret his argument as raising the issue of law of whether, when viewing the facts in the light most favorable to Debtor, equity permits the trial court to grant an extension. Finally, Debtor asserts that Respondent (Purchaser) waived his right to strict compliance with the redemption statute by agreeing to issue a quitclaim deed in exchange for the redemption price. We affirm.
FACTS AND PROCEEDINGS

{2} Debtor owned a tract of property in Tres Piedras, New Mexico, on which a predecessor to Chase Manhattan Bank (Chase) held a mortgage. In June 2000, Chase began foreclosure proceedings that concluded with a foreclosure judgment against Debtor in November 2000. At a sheriff’s sale of the property on October 24, 2001, Purchaser acquired the property. The order confirming the sale was not issued until December 21, 2001.

{3} When the court entered the order confirming the sale, the time for Debtor to exercise his right to redemption commenced. See NMSA 1978, § 39-5-18 (1987). Debtor’s mortgage had shortened the redemption period to one month. See NMSA 1978, § 39-5-19 (1965) (permitting the nine-month statutory period for redemption to be shortened by contract to not less than one month). The parties operate under the assumption that the final day for redemption was January 20, 2002. But see U.S. Bank Nat’l Ass’n v. Martinez, 2003-NMCA-151, ¶ 5, 134 N.M. 665, 81 P.3d 608 (holding that one-month period means a calendar month so that redemption period for a sale confirmed on December 21 would end on January 21).

{4} Debtor made arrangements with Arriba Mortgage Company to secure private financing that would enable him to redeem the property. Debtor worked with Taos Title Company (Taos Title), which contacted Purchaser. According to Debtor, Purchaser agreed to come to the closing and stated that all the arrangements had been made for the January 11th closing, that Purchaser would attend the closing, and did not make further efforts to find an alternative lender who would allow the money to be deposited in court. Purchaser’s response included his own affidavit, stating that he had never agreed to come to the closing and had never agreed to sign a quitclaim deed.

{9} On August 26, 2002, Debtor placed the redemption amount into the court registry. That same day, the court heard Debtor’s motion for reconsideration. The arguments in this hearing focused mostly on Debtor’s request for an extension of the redemption period in equity. The trial court remained unconvinced. It stated that Debtor was not entitled to equitable relief because, even assuming Purchaser’s misrepresentation as to the closing, Debtor still had the option of depositing the funds in the court registry before the redemption period expired. Finding that any factual issue pertaining to Purchaser’s agreement to come to the closing was “peripheral,” the trial court denied Debtor’s motion for reconsideration of its summary judgment for Purchaser and entered its final order.

DISCUSSION

{10} “On appeal of an order granting summary judgment, the evidence is viewed in a light most favorable to the party opposing summary judgment, and the evidence is reviewed to determine whether there are disputed material factual issues warranting trial on the merits.” Blackwood & Nichols Co. v. N.M. Taxation & Revenue Dep’t, 1998-NMCA-113, ¶ 5, 125 N.M. 576, 964 P.2d 137 (citation omitted). We review the issues de novo, considering the whole record. Tempest Recovery Servs., Inc. v. Belone, 2003-NMSC-019, ¶ 7, 134 N.M. 133, 74 P.3d 67.

ISSUE ONE: Substantial Compliance

{11} Debtor’s stated argument is that there is a genuine issue of material fact as to whether he substantially complied with the provisions of Section 39-5-18, which sets forth the procedures for redemption. We, however, view his argument as raising the question of law of whether, when viewed in the light most favorable to him, the trial court could find substantial compliance. Section 39-5-18 reads:

A. After sale of any real estate pursuant to any such judgment or decree of any court, the real
state may be redeemed by the former defendant owner of the real estate . . . :

(1) by paying to the purchaser, his personal representatives or assigns, at any time within nine months from the date of sale, the amount paid, with interest from the date of purchase at the rate of ten percent a year, together with all taxes, interest and penalties thereon, and all payments made to satisfy in whole or in part any prior lien or mortgage not foreclosed, paid by the purchaser, with interest on such taxes, interest, penalties and payments made on liens or mortgages at the rate of ten percent a year from the date of payment; or

(2) by petitioning the district court in which the judgment or decree of foreclosure was entered for a certificate of redemption and by making a deposit of the amount set forth in Paragraph (1) of this subsection in cash in the office of the clerk of the district court in which the order, judgment or decree under which the sale was made was entered, at any time within nine months from the date of sale.

Debtor argues that the trial court misapplied the law by failing to consider statutory provisions permitting tender of the redemption amount directly to the purchaser and by “applying an unduly technical and rigid approach to substantial compliance.” He also states that the trial court improperly decided that the disputed fact of Purchaser’s agreement to come to the closing was not material to this issue. We disagree with Debtor’s arguments.

Substantial compliance is a doctrine of statutory interpretation that examines whether an actor follows a statute “sufficiently so as to carry out the intent for which the statute was adopted” and in a manner that “accomplishes the reasonable objectives of the statute.” Lane v. Lane, 1996-NMCA-023, ¶ 17, 121 N.M. 414, 912 P.2d 290 (internal quotation marks and citation omitted). The doctrine is premised on the concept that the Legislature “cannot anticipate every contingency.” Id. Our analysis examines the nature and purpose of the statute, and we examine the acts purporting to achieve compliance in light of “the purposes served by strict compliance with the letter of the statute.” Id. ¶ 18.

Redemption is a statutory right that our courts construe narrowly. See Union Esperanza Mining Co. v. Shandon Mining Co., 18 N.M. 153, 165, 135 P. 78, 80 (1913) (characterizing redemption as a “statutory right that is not to be enlarged by judicial interpretation”); see also 30 Am. Jur. 2d Executions and Enforcement of Judgments § 434 (1994) (stating that “the right of redemption is recognized as a substantive right to be exercised in strict compliance with statutory terms”). Originally, our redemption statute permitted only one course of action: payment of the redemption amount to the purchaser. NMSA 1915, § 4775 (1909). In the 1930 case of Richardson v. Pacheco, 35 N.M. 243, 244, 294 P. 328, 328 (1930), a debtor who could not find the purchaser in time to tender the redemption amount attempted to redeem the property by tendering cash to the clerk of the district court. Our Supreme Court rejected this effort, holding that the debtor could achieve redemption only by following the letter of the statute. Id. at 245, 294 P. at 329. In 1931, the Legislature amended the statute to permit redemption through a cash deposit in the office of the clerk of the district court. 1931 N.M. Laws ch. 149, §§ 2, 4, 6.

Our key case examining substantial compliance with the redemption statute is Dalton v. Franken Construction Cos., 1996-NMCA-041, 121 N.M. 539, 914 P.2d 1036. In that case, the debtor tendered an unendorsed cashier’s check to the district court on the last day of the redemption period, and the funds were not transferred into the court account until after the redemption period expired due to the judge’s being out of town and the court’s policy of not signing faxed orders. Id. ¶¶ 5-6. We held that the failure to tender cash or its equivalent to the court before the deadline was “more than merely a technical deficiency” and did not rise to the level of substantial compliance. Id. ¶ 14.

Debtor argues that placing the redemption amount in escrow at Taos Title was the functional equivalent of paying Purchaser. We disagree. The difference between making money available to Purchaser upon his execution of a quitclaim deed at a closing at an escrow company and giving Purchaser cash in hand is apparent, and the difference is greater than the deviation from the standard procedure asserted in Dalton. In fact, such a conditional tender has been expressly rejected by our Supreme Court. Moise v. Timm, 33 N.M. 166, 167, 262 P. 535, 535 (1927) (holding that a conditional tender is not effective); Nutter v. Occidental Life Ins. Co., 26 N.M. 140, 144, 189 P. 882, 883 (1920) (holding that tender conditioned on delivery of a deed is not effective); Union Esperanza Mining Co., 18 N.M. at 165, 135 P. at 80 (holding that a tender on the condition that purchaser execute a deed and agree that nothing more is due is not effective).

Debtor argues that those cases are no longer good law in light of NMSA 1978, § 39-5-23 (1931), which requires the purchaser to execute and record evidence of the redemption. Thus, Debtor argues that the quitclaim deed was nothing more than what Section 39-5-23 requires. That statute, however, does not indicate that a debtor or its financier can condition the payment to the purchaser required by Section 39-5-18(A)(1) upon Section 39-5-23’s previous or contemporaneous satisfaction. Moreover, we do not know what problems might have erupted at the closing that caused the lenders in this case to make the availability of funds conditional or to refuse to deposit them with the court. As indicated above, we still believe that the deviation from statutory compliance is more significant than in Dalton and that Moise and the other cases remain good law under the facts of this case. By conditionally tendering money to Purchaser and then filing the Petition without a cash deposit with the trial court, Debtor did not substantially comply with either procedure the Legislature has created.

We agree with Debtor that the redemption statute has not given the purchaser “any right to retain title to the property by turning down the debtor’s cash payment.” However, Debtor did not offer a “cash payment,” but rather a conditional tender, which our case law has given a purchaser the option to refuse. Furthermore, our Legislature responded to the circumstance of purchaser unavailability in Richardson by creating an alternative process for the debtor, not by regulating the conduct of the purchaser. Thus, Debtor does not present us with a contingency that the Legislature has not anticipated, and we see no reason to deviate from the statute to this extent under these circumstances.

Whether Purchaser’s actions somehow induced Debtor to think his conditional tender would be accepted is an issue to be considered in equity, as we do below. In analyzing substantial compliance, we look to whether Debtor’s actions fulfill
the spirit of the redemption law. We cannot say that putting funds in escrow with a title company conditioned on the giving of a quitclaim deed rises to this level. Accordingly, we find no error in the trial court’s rejection of Debtor’s substantial compliance argument.

ISSUE TWO: Extension of Redemption Period

{20} Debtor contends that he is entitled to equitable relief if he can prove that Purchaser acted wrongfully by reneging on a promise to come to the January 11th closing. He argues that because a genuine issue of material fact exists as to whether Purchaser agreed to come to the closing, there can be no summary judgment. Although we ordinarily review a trial court’s decision to dismiss a debtor’s request for an equitable extension of the redemption period for an abuse of discretion, see Dalton, 1996-NMCA-041, ¶ 15, because the trial court’s decision came in the context of summary judgment, we view the evidence in the light most favorable to the nonmoving party, Blackwood & Nichols Co., 1998-NMCA-113, ¶ 5, to determine whether the trial court had discretion to exercise under the facts so viewed, see United Props. Ltd. Co. v. Walgreen Props., Inc., 2003-NMCA-140, ¶¶ 6-7, 134 N.M. 725, 82 P.3d 535. Thus, the issue is whether the trial court erred as a matter of law in holding that Debtor was not entitled to equitable relief, accepting as true Debtor’s contentions that Purchaser made misrepresentations about his willingness to participate in the closing upon which Debtor relied. We hold that there was no error as a matter of law because Debtor’s showing did not bring his case within any of the situations in which a trial court can exercise discretion.

{21} In general, there are two situations in which a court will use its equitable powers to grant a debtor an extension of the redemption period. In the first type of situation, the debtor fulfills all of the requirements of the redemption statute, but redemption is not complete because of a clerical error or technical mix-up. See First Fed. Sav. & Loan Ass’n v. McKain, 617 P.2d 583, 585-86 (Kan. Ct. App. 1980) (permitting an equitable extension when purchaser filed a voucher with the court increasing the redemption amount by $290.30 two days after debtor properly tendered payment to the court); Loomis v. Nat’l Supply Co. of Kansas, 161 P. 627, 628-29 (Kan. 1916) (permitting an equitable extension when debtor properly tendered amount specified by the court clerk, but the clerk had misstated the rate of interest). In the present case, Debtor asserts no such mistake.

{22} In the second type of situation, courts look for evidence of fraud, deceit, or collusion to justify the grant of a redemption period extension. See 30 Am. Jur. 2d Executions and Enforcement of Judgments § 443 (1994). In Dalton, we held that a trial court’s exercise of its equitable discretion requires “some showing of wrongful conduct on the part of the person against whom relief is sought.” 1996-NMCA-041, ¶ 16 (internal quotation marks and citation omitted). We affirmed the trial court’s rejection of the debtor’s request for an equitable extension because the debtor had not alleged any wrongdoing by the purchaser. Id. To this extent, we agree with Debtor that, in this line of cases, a showing of wrongful conduct on the part of the purchaser is an “essential predicate” for the exercise of the court’s discretion.

{23} We also agree with Debtor that in purchaser-misconduct cases, the purchaser’s wrongdoing need not rise to the level of illegality. In Plaza National Bank v. Valdez, 106 N.M. 464, 464-65, 745 P.2d 372, 372-73 (1987), the debtors had contacted the purchaser to confirm the amount necessary for redemption, and the purchaser sent a letter to the debtors’ attorney specifying an amount. Then, ten days before the expiration of the redemption period, the purchaser paid off a secondary mortgage on the property, which effectively raised the amount necessary for redemption. Id. at 465, 745 P.2d at 373. The Court held that although the purchaser did not break any law, these actions “subjected the debtors to an extreme and unnecessary burden” and created an “unconscionable advantage” for the purchaser. Id. at 467, 745 P.2d at 375. Thus, the trial court had properly used its equitable power to grant the debtors’ request for an extension of the redemption period.

{24} However, insofar as Debtor argues that the trial court erred in basing its holding entirely on the issue of illegality, we do not agree that the trial court did so. Initially, we note that Debtor does not cite us to a particular point in the transcript that supports this notion. In our own review of the record, we see that the trial court only makes one mention of illegality, noting that “nothing in the record . . . indicates [Purchaser] bound himself legally or contractually to honor the redemption without some court procedure behind it.” The trial court gave additional reasons for its decision to grant summary judgment, including its findings that the actions Debtor took did not substantially comply with the redemption statute, that the affidavits did not show that Purchaser’s actions amounted to a promise to come to the closing that would merit Debtor’s reliance, and that Debtor’s proper course of action should have been to deposit money in the court registry.

{25} Furthermore, we do not agree that Plaza National Bank stands for the proposition that any and all misconduct on the part of a purchaser will merit an equitable extension of the redemption period. An examination of case law from other jurisdictions reveals that a court properly exercises its equitable discretion to extend the redemption period only when it would further the purposes of the redemption statute.

{26} Redemption statutes essentially protect debtors, and they do so in two basic ways. First, redemption statutes give debtors more time to secure financing, which protects debtors from disruption and allows individuals facing temporary hardships to recover and reclaim their properties. Marshall E. Tracht, Renegotiation and Secured Credit: Explaining the Equity of Redemption, 52 Vand. L. Rev. 599, 608 (1999). During this additional time, a debtor may also convince the lender that the default is not permanent and may renegotiate the terms of the loan. Id. at 630.

{27} Second, a redemption statute may increase the price of property at a foreclosure sale by creating the risk that a debtor will easily redeem his or her property from a purchaser who bids too low. Id. at 608. This protects the debtor, because when the foreclosure sale price is lower than the amount of the debt, the balance of the debt falls back to the debtor. Taking advantage of this provision, some lenders will purchase a property at a foreclosure sale for considerably less than the amount of the debt, thereby receiving the property for a minimal price while retaining the right to recover the full amount of the debt. Id. at 606. In theory, redemption statutes help to prevent this type of dealing without restricting the actions of the lender or preventing full repayment. If a foreclosure price is inordinately low, the debtor can redeem and prevent the lender from gaining an unjust windfall, while still remaining obligated to pay the balance of his or her debt.

{28} When a purchaser’s misconduct allows him or her to evade or undermine these protections, courts can use their equitable
discretion in favor of the debtor. For example, an early United States Supreme Court case upheld an equitable extension when the purchaser’s particularly egregious conduct defrauded the debtor by preventing her from realizing that a foreclosure had taken place. See *Graffam v. Burgess*, 117 U.S. 180, 186-87 (1886) (allowing debtor to redeem because of purchaser’s misconduct that included purposely preventing debtor from knowing of foreclosure sale until redemption period was over even though purchaser observed debtor expend considerable sums in repairs and improvements to the property, employing individuals to watch debtor’s movements in order to break into and take possession of the home in debtor’s absence, and removing debtor’s personal property). As a result, the debtor was effectively denied the benefits of the redemption period, as she did not know that she had the opportunity to redeem or renegotiate. *Id.* at 187. The Court upheld an extension of the redemption period in equity.

{29} Furthermore, the purchaser in *Graffam* foreclosed on a property worth $10,000 to satisfy the debtor’s obligation of just $200. *Id.* at 186. The purchaser then paid $73.10 for the property at the foreclosure sale. *Id.* at 182. Courts commonly view such price discrepancies as indicative of a purchaser’s attempt to evade the protections for a debtor discussed above. See *Malvaney v. Yager*, 54 P.2d 135, 136, 140-42 (Mont. 1936) (upholding an equitable extension when a 320-acre farm with outbuildings and granaries was mortgaged to secure a debt of $1000, which was a “fraction of its real value”); see also *McDaniel v. Wetzel*, 106 N.E. 209, 210 (Ill. 1914) (setting aside a purchase when a property worth $4000 was sold for less than $400 at the sheriff’s sale and there were multiple deficiencies in the requirements for sale).

{30} In the above cases, the courts used equity to protect a debtor who was ready, willing, and able to tender the redemption amount in accordance with the statute, but who failed to effect redemption because of the misconduct of a purchaser. See also *Plaza Nat’l Bank*, 106 N.M. at 466, 745 P.2d at 374 (stating that the trial court found that prior to the purchaser’s misconduct, the debtor was “ready, willing and able” to pay the redemption amount at the proper time). For example, in *Malvaney*, 54 P.2d at 141-42, the debtor was unable to acquire insurance proceeds that were rightfully his within the redemption period. Had the purchaser not schemed to prevent the debtor from getting the insurance money, the proceeds would have enabled the debtor to tender the redemption amount within the redemption period. The purchaser in *Malvaney* also made reliable assurances to the debtor that he would extend the redemption period if necessary. *Id.* at 141. The Montana Supreme Court characterized this as a situation in which the debtor “has acted upon assurances that the redemption within the statutory time would not be insisted upon, yet, after the period has expired, the mortgagee purchaser seeks to rely upon a strict statutory right.” *Id.* at 142.

{31} Similarly, the Utah Supreme Court applied an equitable extension in *United States v. Loosley*, 551 P.2d 506, 508 (Utah 1976). In that case, the debtor had tendered the proper redemption amount to the purchaser one day before the expiration of the redemption period, but the purchaser returned the money seven days after the period expired, making compliance impossible. *Id.* at 507.

{32} Conversely, courts will not allow a debtor who is otherwise unable to pay the redemption amount to shield him or herself from losing property by merely asserting purchaser misconduct. In *Wylie v. Amalgamated Trust & Savings Bank*, 392 N.E.2d 656, 657, 661 (Ill. App. Ct. 1979), the court affirmed the grant of summary judgment for the purchaser, despite the debtors’ allegations that a genuine issue of material fact existed as to whether the purchaser had fraudulently promised to grant an extension of the redemption period. The Wylie court held that although one individual agreed that he would “be willing to entertain any proposal” for redemption and another individual “appeared to be amenable” to an extension, these statements were too vague to be considered a promise for an extension. *Id.* at 660 (internal quotation marks omitted). Furthermore, the debtor had furnished no explanation of why he had not secured the money earlier. The court stated, “[w]ithout a satisfactory explanation, the record merely indicates that plaintiffs had until November 14 to redeem and failed to redeem their property.” *Id.*

{33} In the instant case, even if we assume that there was misconduct and deceit and that Debtor relied on Purchaser’s assurances that he would come to the closing, none of the factors favoring an equitable extension are present. There is nothing to suggest that Purchaser prevented Debtor from enjoying the extra time to secure funds that the redemption period affords. The strongest evidence of Purchaser’s misconduct is the affidavit of the Taos Title Company employee, stating that Purchaser “indicated that he was agreeable and would come to the Taos Title Company” for the closing. Even assuming that this amounted to a promise to come to the closing, this does not approach the egregious conduct contemplated in *Graffam*. Debtor was still aware that he had one month to effect redemption, and, as opposed to the situation in *Plaza National Bank*, the amount of money he needed to redeem his property did not change.

{34} Debtor provides no evidence to suggest that the trial court was required to act to prevent an unjust windfall to Purchaser. Debtor contends that the redemption amount, $204,000, was “significantly below the market value” for the property. However, Debtor does not provide evidence of the market value of the property, so we cannot consider whether the price paid at foreclosure was less than the fair market value. See *State ex rel. Educ. Assessments Sys., Inc. v. Coop. Educ. Servs. of N.M., Inc.*, 110 N.M. 331, 332, 795 P.2d 1023, 1024 (Ct. App. 1990) (stating that the party seeking review has the burden of providing an adequate record to review the issues on appeal). The record reveals that the property at issue was the subject of a mortgage with Chase that secured a debt of $160,000 and that Debtor’s debt to Chase was $185,202.57 by the time of foreclosure. Purchaser paid $199,900 for the property at the sheriff’s sale. From these facts, we see no indication that the foreclosure sale failed to get adequate value for the property, nor do we see any reason for the trial court to have used its equitable powers to protect Debtor in this respect.

{35} Finally, there is no indication that Debtor was ready, willing, and able to tender the proper amount within the redemption period, notwithstanding Purchaser’s misconduct. In contrast to *Malvaney* and *Loosley*, Purchaser’s misconduct was apparent to Debtor before the expiration of the redemption period. When Purchaser did not appear at the January 11th closing, there remained a full nine days, or more than one-quarter of the total redemption period, for Debtor to secure alternative financing. Although on appeal Debtor indicates that “it was too late” to obtain funds at this point, the evidence shows that he “did not make further efforts” to obtain the necessary money. Debtor did not re-
request an extension of the redemption period from Purchaser, and his initial petition for redemption did not request an extension of the period from the court.

{36} In fact, nothing in Debtor’s arguments indicates that Purchaser prevented him from redeeming his property. On the contrary, Debtor’s evidence indicates that it was extremely difficult for him to obtain any financing for redemption, even with the full month available, and that the only lenders he could find were ones who demanded that Debtor place additional conditions on his tender of funds to Purchaser.

{37} Because of the strictness of the redemption statute and the beneficial purposes thereof, we believe that, absent gross disparity between the property’s value and the sale price, Debtor must make a threshold showing of some causal connection between Purchaser’s alleged misconduct and Debtor’s inability to comply with the statute in order to invoke a trial court’s exercise of discretion in equity. See, e.g., Steinour v. Oakley State Bank, 262 P.1052, 1055 (Idaho 1928) (applying equity when the actions of the purchaser “prevented” the debtor from complying with the statute). Here, that showing would be one that Debtor could have obtained the necessary funds for a proper tender but for Purchaser’s misconduct. Absent this showing, we cannot say that there was a genuine issue of material fact as to whether Debtor was entitled to an equitable extension.

{38} In sum, Debtor’s situation, while unfortunate, was not one that the redemption statute seeks to prevent. Purchaser’s alleged misconduct did not prevent Debtor from availing himself of the full benefits of the statute. Debtor did not show any of the other situations in which a trial court would be entitled to apply equity. Accordingly, we hold that the trial court did not err in denying equitable relief as a matter of law.

ISSUE THREE: Waiver of Strict Compliance

{39} Finally, Debtor asserts that Purchaser waived his right to strict compliance with the redemption statute. Debtor did not raise this argument below. We do not review arguments that are raised for the first time on appeal. Campos Enters., Inc. v. Edwin K. Williams & Co., 1998-NMCA-131, ¶ 12, 125 N.M. 691, 964 P.2d 855. Debtor contends that his waiver argument is implicit in the statutory-compliance and equitable arguments he made below. Therefore, we do not separately consider this argument, and instead we reject the argument for the reasons stated in our discussion of the first two issues above.

CONCLUSION

{40} We affirm the trial court’s grant of summary judgment in favor of the Purchaser and its dismissal of Debtor’s claims with prejudice.

{41} IT IS SO ORDERED.

LYNN PICKARD, Judge
WE CONCUR:
A. JOSEPH ALARID, Judge
JONATHAN B. SUTIN, Judge

REVISED APRIL 16, 2004
FROM THE NEW MEXICO COURT OF APPEALS

Opinion Number: 2004-NMCA-034

KENNETH L. WEDDINGTON, Petitioner-Appellee, versus ANNA N. WEDDINGTON, Respondent-Appellant.
No. 23,800 (filed: January 22, 2004)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
DEBORAH DAVIS WALKER, District Judge

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for Appellant

for Appellee

OPINION

JONATHAN B. SUTIN, Judge

{1} In this domestic relations feud, Anna Weddington (Mother) appeals from an order determining the amount to be deposited into a college fund account and awarding Kenneth Weddington (Father) a portion of his attorney fees and costs. Mother contends that the district court did not have jurisdiction to make any determination regarding the college fund account and, even if it did, it erred in interpreting and reforming the plain language in the marital settlement agreement regarding the account. She also contends that the district court abused its discretion in awarding Father a portion of his attorney fees and costs as a sanction against her for the motions she filed leading up to the order from which she appeals. We affirm.

BACKGROUND

Mother and Father were married in 1983. In 1998 Father filed a petition for divorce. The parties have three children. In their marital settlement agreement (the agreement), the parties agreed to a division of their community property and debts, and agreed on their separate property, child support, a parenting plan for the children, and spousal support. The parties agreed that child support would be reviewed and re-set in 2003, but until that time it would “not be modified unless there [was] a substantial change in the time-sharing arrangement.” In addition, the agreement stated:

This agreement regarding the non-modifiability of child support was reached by the parties who considered it an integral portion of the overall settlement and with the knowledge that either or both parties may earn or receive more or less money than shown on the Child Support Worksheets during the period of non-modifiability.

There was also a provision for the modification of child support upon the emancipation of each child.

{3} The parties agreed to the division of Father’s Voluntary Separation Incentive Worksheets during the period
(VSI) payments from the military. The amounts that Mother received from the VSI payments were designated as spousal support. In 2000 Mother would receive a lump sum payment of $5,000. In 2001 she would again receive a lump sum payment of $5,000. In 2002 Mother would receive $3,500 in a lump sum payment. Father was awarded the remainder of the VSI payments in 2000-2002 as his separate property. Beginning in 2003, until VSI payments ceased in 2020, Mother would receive $3,500 annually in a lump sum payment as spousal support and “[t]he remainder of the VSI payment [would] go into a custodial college fund account which [would] be established in the name of [Father] and the parties’ children.” The parties agreed that the account would be used to pay expenses for the children’s college education.

{4} The agreement was made a part of the court’s final order of divorce in June 1999. In February 2002, Mother filed a petition to enforce the agreement and to modify child support. Mother argued that the oldest child would soon graduate from high school and that the college account needed to be established. Further, Mother argued in her petition that because the oldest child was near emancipation, child support should be modified. Father moved to dismiss Mother’s petition and responded that there was no provision for funding the college account until 2003 and that there was to be no modification to child support until 2003. The court determined that it did not have jurisdiction to change the parties’ agreement and granted Father’s motion to dismiss with regard to the college account. The court also denied the motion to change the custody arrangements.

{5} In the hearing, the district court stated that, although child support could be modified, in a case such as this, where the parties agreed not to modify child support for a particular period of time, the court would give that fact great weight. At the same time, however, the court decided that the parties should exchange financial information and that a ruling on modification of child support would be reserved pending that exchange. The court wanted the parties to see what effect the exchanged information would have on the child support. The court stated that Mother should decide whether or not to proceed based on what the information revealed. If she did not request a hearing on the child support modification within thirty days, modification would be denied. Thirty days later, Mother requested a hearing on her motion to modify child support.

{6} At the hearing on Mother’s motion to modify child support, Mother was prepared to present evidence that Father was not living up to the parties’ agreement to a 50/50 time share. The district court determined, however, that what Mother intended to show was not a substantial material change of circumstances and that Mother would have to show the court “why it is totally inequitable for the parties to follow the agreement.” Mother then acknowledged that Father met his 50/50 time share responsibility, but proceeded to argue that Father was not carrying his share of expenses and responsibilities for the children. There was a great deal of discussion about providing food and clothing and paying for other expenses on a 50/50 basis. The court suggested that the parties get together with their counsel and work the problems out because the court did not see a basis for modifying the child support. Thereafter, a stipulated order was entered, in which Mother dismissed her motion to modify child support with prejudice until February 1, 2003. Father’s request for attorney fees and costs was reserved until the next hearing.

{7} Mother filed an objection with affidavits with regard to the amount of attorney fees and costs requested by Father on the basis that the fees were unreasonable. Further, she asserted that she was carrying the majority of the children’s financial burden and that an award of attorney fees to Father would be detrimental to the children. Father responded that the fees requested were reasonable in light of the proceedings. Further, he pointed out that Mother’s motions were all dismissed as inappropriately filed. At the hearing on Father’s request for attorney fees and Mother’s objection, the district court noted that the motions filed by Mother were in clear derogation of the parties’ agreement. As a result, the court determined that it would assess fees against Mother.

{8} The court went on to express its concern with the dynamics between the parties and their children. The court noted that the parties were using money against one another and placing the children in the middle. The court decided to appoint a guardian ad litem for the children. The guardian was to meet with both parties and the children to look at budgets and help them see the realities of what they have to spend and what the children can realistically expect. The court determined that $2,000 would be a reasonable attorney fee and ordered Mother to pay it as Father’s share of the initial guardian ad litem fee. The remainder of the hearing was taken with Mother expressing her unhappiness with the proceedings and her continuing view that Father was not sharing everything 50/50 and she was carrying the financial burden of the children. The court pointed out to Mother that she had an incorrect understanding of what 50/50 meant. The court expressed its hope that the guardian ad litem would be able to assist the parties in making financial decisions that were more realistic than those they had been making.

{9} The district court requested Father’s counsel to draft the order reflecting the
court’s decision. A presentment hearing was required because Mother would not approve the order as drafted. Mother argued that she had a problem with the language regarding the taxation of the VSI. The court explained its intent regarding the taxes and the amount to be deposited in the college account. Mother then argued that they had never agreed that taxes would be paid from the VSI payments before the account was funded. The court recognized that there was nothing in the agreement about taxes, but the court interpreted the funding language to be the net remainder. The court stated that Father could not be required to deposit money that he did not have. In order to avoid more hearings on the issue, the district court addressed it and decided to interpret the language as it made sense to the court.

12 In its order, the court determined that “the amount of the VSI to be deposited into the College Account is the net amount, which is the VSI payment, less spousal support to be paid to Respondent, less any taxes associated directly on that amount.” The court also awarded Father $2,000 in attorney fees. Finally, the court appointed a guardian ad litem for the children. Mother moved to reconsider the order with regard to the college account and the award of attorney fees. The district court did not rule on the motion and it was deemed denied by operation of law. Thereafter, mother appealed.

DISCUSSION

The College Account Issue

13 Mother argues that the district court did not have jurisdiction to make any ruling on the college account. She contends that issues regarding the college account were not before the court at the time that it made its ruling because the court had earlier dismissed Mother’s motion to enforce the agreement and establish the college account. She further contends that, after that dismissal, nothing remained for the court to decide in connection with the college account. Mother argues that because there was no actual controversy before the court regarding the college account, the court’s determination of what would be deposited into the account was simply an advisory opinion. A claim of lack of subject matter jurisdiction can be raised at any time. Gonzalez v. Surgidev Corp., 120 N.M. 133, 138, 899 P.2d 576, 581 (1995). This Court reviews subject matter jurisdiction de novo. Ottino v. Ottino, 2001-NMCA-012, ¶ 6, 130 N.M. 168, 21 P.3d 37.

14 We disagree with Mother. NMSA 1978, § 40-4-7(C) (1997) states that “[t]he court may order and enforce the payment of support for the maintenance and education after high school of emancipated children of the marriage pursuant to a written agreement between the parties.” The college account provisions concern the education of the children. The district court has the authority to construe an agreement regarding the care and education of minor children. See § 40-4-7(C); Rhinehart v. Nowlin, 111 N.M. 319, 323, 805 P.2d 88, 92 (Ct. App. 1990) (“[T]rial courts are given exclusive jurisdiction of all matters relating to the guardianship, care, custody, maintenance and education of the children.”). That the education question is to be obtained after the children’s emancipation makes no difference. See Ottino, 2001-NMCA-012, ¶ 5 n.1 (“We are bound to apply the statute in effect at the time of the divorce, even though [Section 40-4-7] was amended in 1997 to allow district courts to order and enforce the payment of support for the maintenance and education after high school of emancipated children of the marriage pursuant to a written agreement of the parties.” (internal quotation marks and citation omitted)).

15 This case is not controlled by our interpretation of Section 40-4-7 in Ottino, upon which Mother relies. The statute has changed since the filing for the underlying divorce in Ottino, and the filing date of the divorce decree in that case controlled the Court’s analysis and decision. 2001-NMCA-012, ¶ 5. Section 40-4-7(C) now allows the court to order and enforce payment for post-secondary education pursuant to a written agreement between the parties. That is to interpret and enforce a contract as made by the parties. The 1997 amendment to Section 40-4-7(C) did not permit the district court “to modify that which the legislature has only granted jurisdiction to enforce,” or “enlarge the Court’s jurisdiction to force parties to provide post-minority support without their consent.” We see it differently. Once the parties have voluntarily agreed to provide for post-secondary education, there exists an agreement that the district court can interpret, if it is ambiguous, and also enforce. See Schaef er v. Hinke, 93 N.M. 129, 131, 597 P.2d 314, 316 (1979) (stating that “[t]he function of the courts is to interpret and enforce a contract as made by the parties” and that if there is an ambiguity, the court must ascertain the intent of the parties). Enforcement of the parties’ agreement regarding post-minority education is now governed by statute and the district court has jurisdiction to enforce the agreement after employing contract construction tools.

18 In addition, Mother argues that the district court improperly gave an advisory opinion. We disagree. Advisory opinions are those that resolve a hypothetical situation that may or may not arise. See Santa Fe S. Ry. v. Baucis Ltd. Liab. Co., 1998-NMCA-002, ¶ 24, 124 N.M. 430, 952 P.2d 31. This was not a hypothetical situation. The record showed clear disagreement concerning the meaning of the agreement provisions regarding the college account. The court’s resolution of that disagreement cannot be deemed merely advisory.

Interpretation of Language and Need for a Hearing

19 Mother argues that even if the court had jurisdiction to entertain relief regarding the college account, the court nevertheless erred in interpreting plain language in the agreement, and further, that the court should not have engaged in contract interpretation

46 Bar Bulletin - April 29, 2004 - Volume 43, No. 17
without notice and an evidentiary hearing. Mother asserts that the district court erroneously rewrote the contract by interpreting the language rather than applying the plain meaning of the contract language as written. Contract language reasonably and fairly susceptible to different construction can be deemed ambiguous and open to interpretation. Schueller v. Schueller, 117 N.M. 197, 199, 870 P.2d 159, 161 (Ct. App. 1994). We review a district court’s determination of ambiguity de novo. Sit- tery v. Matthews, 2000-NMCA-037, ¶ 15, 129 N.M. 134, 2 P.3d 871. Once we agree with the district court that an ambiguity exists, if the court’s interpretation is consistent with the language of the agreement read as a whole and is supported by the record, we review the court’s resolution of the ambiguity for abuse of discretion. See Thompson v. Rothman, 791 A.2d 921, 923-24 (Me. 2002).  

{20} It is obvious from the record that the parties did not agree on the meaning of the language that “[t]he remainder of the VSI payment shall go into a custodial college fund account which shall be established in the name of [Father] and the parties’ children.” From the circumstances, the amount to be deposited in the college account is unclear. The agreement does not state a specific dollar amount but simply uses the word “remainder” after Mother is paid her lump sum spousal support. The district court recognized that there was substantial uncertainty regarding the amount of money to go into the college account and that that uncertainty was fueling the litigation between the parties. In order to resolve the conflicts that this uncertainty was engendering, the court decided to interpret the meaning of “remainder.” We do not think it was error for the district court to determine that the college account provision was ambiguous.  

{21} Nor do we think it was error for the court to interpret the provision. The court was not limited to the bare words of the document but could consider the context. See Levenson v. Mobley, 106 N.M. 399, 402, 744 P.2d 174, 177 (1987). Mother argues that tax consequences were included in other parts of the agreement, but not this section, evidencing a clear intent to exclude tax considerations from this section. However, the district court considered the term “remainder” in context of the entire agreement and determined that the only fair and sensible way to construe the term was as a net remainder, that is, the VSI payment less any income taxes that would be attributable to the amount. See Thompson, 791 A.2d at 924-25 (holding that a district court has discretion in interpreting a term in a divorce judgment when the interpretation is consistent with the document as a whole).

{22} Mother remains persistent on the ambiguity issue by arguing that the district court determined that the agreement was clear when it declined to modify the college account agreement, and the court should not have reformed the agreement and added material terms to it. Just because the court found the agreement clear regarding the fact that child support could not be modified until 2003 and that the college account would not be funded until 2003 does not mean that it could not find ambiguity regarding the meaning of the term “remainder” in the college account provision. We disagree that, because the district court dismissed Mother’s motions on the basis that the agreement was clear on those issues, every term in the agreement was clear and unambiguous.  

{23} In addition, Mother argues that there was no evidentiary hearing allowing her the opportunity to present evidence regarding the parties’ negotiations and intentions. We reject this argument. It does not appear that Mother raised below the issue of not having a specific evidentiary hearing. She could have objected after the court first announced its interpretation of the college account to be “the net amount left” after taxes at the October hearing, or during Mother’s discourse with the court about the tax matter during the December hearing. Mother’s attorney did not object to a lack of a specific evidentiary hearing at any time. Additionally, issues regarding the funding of the college account were raised in three out of the four hearings and Mother actually presented her own interpretation of the “remainder” language in one of those hearings. Father asserted that the “remainder” was minus taxes attributable to the VSI payment. In particular, the December hearing took place because Mother would not sign Father’s proposed order from the October hearing because she “had a problem with the wording with regard to the taxing of [the] college fund.” Mother’s counsel knew they were going to the presentment hearing to dispute the college account tax issue and she could have been prepared to bring forth evidence at that time but was not. Mother’s counsel also could have objected or requested an evidentiary hearing at that time but did not. Mother was allowed to argue her side. The record shows that there was argument on the issue and that the district court determined it would be unfair to interpret the “remainder” language as anything other than the VSI payment less taxes due on that payment. We cannot say that the district court reached a decision on the meaning of the term without allowing Mother a fair opportunity to present evidence and her view or without having considered Mother’s view.  

**Attorney Fees**  

{24} The district court found that Mother filed her motions “in the face of a very clear Marital Settlement Agreement determining what funds will be put into [a] college fund and when, as well as the fact that alimony or child support would not be modified until February of 2003.” The court awarded Father $2,000 for fees incurred in defending those motions.  

{25} Mother argues that the trial court erred in awarding attorney fees to Father as a sanction for her filing motions to modify child support and the college account. We review the district court’s award of attorney fees for an abuse of discretion. See Bustos v. Bustos, 2000-NMCA-040, ¶ 24, 128 N.M. 842, 999 P.2d 1074. Mother appears to be arguing that the award of the fees as a sanction should be reversed because the district court made no finding that there was no arguable basis in law or fact to support Mother’s claims. See State ex rel. N.M. State Highway & Transp. Dep’t v. Baca, 120 N.M. 1, 8, 896 P.2d 1148, 1155 (1995) (requiring specific findings of misconduct to warrant an award of attorney fees as a sanction for bad faith or vexatious litigation). She argues that the court’s own statements and decisions regarding the college account show that Mother’s uncertainty regarding the account was not unreasonable and that the filing of her motion to enforce the agreement was not in bad faith or vexatious. Similarly, she argues that her motion to modify child support was brought in good faith as the agreement indicated that child support would be modified upon emancipation of each child.  

{26} Mother’s reliance on Baca is misplaced. Baca did not involve a statutory provision permitting the district court to

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1 It should be noted that Mother’s trial counsel was different than her appellate counsel.
award attorney fees. The parties were to bear their own attorney fees. The Supreme Court held, however, under certain circumstances attorney fees could be awarded as a sanction for bad faith or vexatious litigation. See id. Thus, in cases where attorney fees cannot normally be awarded, there must be a strong showing to support the award as a sanction. See id. That is not the case here because attorney fees can be awarded in domestic relations cases. See Rule 1-127 NMRA 2003; § 40-4-7(A); N.M. Right to Choose/NARAL v. Johnson, 1999-NMSC-028, ¶ 24, 127 N.M. 654, 986 P.2d 450 (recognizing, as allowable, attorney fees in divorce and child custody proceedings). Thus, Baca and other civil cases relied on by Mother are not persuasive here.

{27} In awarding attorney fees in domestic relations cases, the district court is to consider a number of factors including disparity of the parties’ resources, prior settlement offers, the total amount of fees and costs expended by each party, and the success on the merits. Rule 1-127. Here, the court was presented with evidence of Father’s attorney’s attempts to show Mother that there was no basis for her motions. The court was also aware of the total amount of attorney time expended and fees incurred by both Father and Mother in this case. Finally, the court noted that it was clear from the agreement that the parties had agreed to fund the college account in 2003 and that child support would not be modified until 2003. Father succeeded in defending against Mother’s motions. These factors support the award of attorney fees to Father.

{28} Mother argues that the court did not consider the disparity in the parties’ resources. Although below Mother argued disparity in passing in her motion for reconsideration, it appears she did not present any evidence to show financial disparity. Further, the district court may have taken financial disparity into consideration when it refused to award Father his entire request and granted him only $2,000 of the more than $6,000 he asked for. Moreover, disparity is only one factor to be considered and disparity cannot support reversal where the other factors weigh in favor of the award of attorney fees. See Gilmore v. Gilmore, 106 N.M. 788, 792, 750 P.2d 1114, 1118 (Ct. App. 1988) (holding that financial disparity is only one factor to be considered and, in considering other factors, denial of fees to party claiming disparity is not an abuse of discretion).

{29} We hold that the district court did not abuse its discretion in awarding Father $2,000 in attorney fees under the circumstances of this case.

CONCLUSION

{30} We affirm. The parties will bear their own costs on appeal.

{31} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

LYNN PICKARD, Judge
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