Legal Education Calendar

Writs of Certiorari


2005-NMCA-042: State v. Hector Nicholas Garcia

2005-NMCA-043: Carolyn Wegner and Elaine Mosqueda v. Hair Products of Texas and Spring Tyme and New Mexico Uninsured Employers’ Fund

2005-NMCA-044: State v. Donald Collins

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2005 Annual Awards

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Current Legitlalities and Realities of the End-of-Life Debate
Wednesday, May 11, 2005 • 1 - 5 p.m. • State Bar Center, Albuquerque • 3.5 General and 1.0 Ethics CLE Credits

Co-Sponsor: Public and Legal Services Department, New Mexico State Bar Foundation
Presenters: Rob Schwartz, Esq., Walter Forman, M.D., C.M.D., David A. Bennahum, M.D., Ellen Leitner, Esq., Debbie Armstrong, Esq., Hon, Merri Rudd, Jane Wishner, Esq.
The legalities and realities involved in the Terri Schiavo case have once again stirred the debate over end-of-life issues. Right-to-life versus right-to-die? What is medically implied by persistent vegetative state, hospice and palliative care? What legal devices in New Mexico can families use for protection? Should a line be drawn between federalism and social policy? Does the federal government have any right to intervene in situations in which palliative care is necessary to sustain life? In this seminar, these complex issues and more will be discussed. Additionally, the Public and Legal Services Department (PLSD) of the New Mexico State Bar Foundation will provide a free Living Wills Workshop following this program in the lobby of the State Bar Center at which information will be available and refreshments served.

☐ Standard Fee $99

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The Impact of Domestic Violence on Children and the Growing Incidence of Juvenile Domestic Violence
Friday, May 13, 2005 • 9 a.m. - 4:30 p.m. (Lunch Provided) • State Bar Center, Albuquerque
6.2 General and 1.0 Ethics CLE Credits

In this full-day seminar, two troubling topics of domestic violence will be covered: the effect of domestic violence on children who witness it and the growing incidence of juvenile domestic violence in which children are the offender. Featured will be attorney Sarah Buel who will share her 28 years of experience in working with battered women, abused children and juveniles. A domestic violence survivor who struggled to put herself through college, Buel is a 1990 cum laude graduate of Harvard Law School, where she founded the Harvard Battered Women's Advocacy Project, the Harvard Women in Prison Project, and the Harvard Children and Family Rights Project. She later served as a prosecutor in Massachusetts, helping to establish award-winning domestic violence and juvenile programs. In 1992, she narrated the Academy Award winning documentary Defending Our Lives. By 1996, Buel was profiled by NBC as one of the five most inspiring women in America. She is currently a clinical professor at the University of Texas School of Law and founder of its Domestic Violence Clinic, as well as an adjunct professor at Harvard Medical School. She has written extensively on family violence issues and remains committed to improving the court and community response to abuse victims. Dr. Victor LaCerva, current medical director of the Family Health Bureau, NM Department of Health will also be featured in this program. LaCerva holds a clinical faculty appointment with the Department of Pediatrics at UNM Medical School. He was the co-creator of the award-winning video Stolen Childhood, exploring the adverse impact on children of exposure to domestic violence. He has spent the past 14 years actively working in violence prevention.

☐ Standard and Non-Attorney $169  ☐ Government & Paralegal $159  ☐ Children's Law Section Member $149

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Professionalism Tip

With respect to the courts and other tribunals:
I will voluntarily withdraw claims or defenses when they are superfluous or do not have merit.

Meetings

May
9 Taxation Section Board of Directors, noon, via teleconference
11 Committee on Women and the Legal Profession, noon, Lewis and Roca Jontz Dawe, LLP, Hyatt Office Tower, 19th floor
12 Public Law Section Board of Directors, noon, RMD Legal Bureau, Santa Fe
13 International and Immigration Law Section Board of Directors, 1:30 p.m., State Bar Center
14 Ethics Advisory Committee, 10 a.m., State Bar Center
17 Solo and Small Firm Practitioners Section Board of Directors, 11:30 a.m., State Bar Center

State Bar Workshops

May
11 Landlord/Tenant Workshop - TENANTS, 6 p.m., State Bar Center
11 “Living Wills” Workshop (now known as Advance Health Care Directives), 5 p.m., State Bar Center
19 Lawyer Referral for the Elderly Workshop, 10:30 a.m., Ancianos Inc. Senior Citizens Program, Taos
25 Family Law Workshop, 5:30 p.m., Branigan Library, Las Cruces
25 Consumer Debt/Bankruptcy Workshop*, 6 p.m., State Bar Center

*Consumer Debt/Bankruptcy workshops include a one-on-one consultation with an attorney. For more information, call Marilyn Kelley at (505) 797-6048 or 1-800-876-6227; or visit the SNBM Web site, www.nmbar.org.
COURT NEWS

NM Supreme Court
Court Reporter Provisional Licensing

The New Mexico Supreme Court has approved a pilot project to be administered by the Board Governing the Recording of Judicial Proceedings. It will permit graduating court reporters to hold a two-year provisional license to provide court-reporting services under the supervision of a New Mexico certified court reporter. For specific requirements of the provisional license, contact Linda McGee, CCR Board Administrator, PO Box 92648, Albuquerque, NM 87199-2648.

Law Library Closure

The Supreme Court Law Library will be closed May 28-30 for Memorial Day Weekend. Call (505) 827-4850 for more information.

Proposed Amendments to District Court Civil Discovery Rules

The Supreme Court is considering the adoption of proposed revisions to the Rules of Civil Procedure for the District Courts discovery Rules 1-030 and 1-030.1 NMRA. Attorneys who would like to comment on the proposed revisions should send written comments by May 13 to: Kathleen J. Gibson, Chief Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, NM 87504-0848. For reference: The proposed amendments were printed in the April 25 (Vol. 44, No. 16) Bar Bulletin.

First Judicial District Court Criminal Bench and Bar Brownbag

The First Judicial District Criminal Bench and Bar will have a brownbag meeting at noon, May 17 in the courtroom of Judge Michael E. Vigil. Issues and topics for discussion may be submitted to any of the First Judicial District Court’s Criminal Divisions.

Family Law Brownbag

The First Judicial Court will host its family law brownbag meeting at noon, May 10 in the Grand Jury Room on the second floor of the Steve Herrera Judicial Complex in Santa Fe. The event will feature a meeting with child psychologists to discuss attachment and bonding and other psychological issues that arise in the area of family law. For more information, or to suggest agenda items to be discussed, contact Elege Simons, (505) 982-3610 or esimons@rubinkatzlaw.com. Provide $1, your name and bar number and receive 1.0 general CLE credit (pending approval).

Second Judicial District Court Announcement of Vacancy

A vacancy on the Second Judicial District Court will exist as of July 1 due to the creation of a new judgeship position by the NM State Legislature. The chair of the Second Judicial District Court Nominating Commission now solicits nominations and applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14 of the New Mexico Statutes Annotated 1978. Applications may be obtained from the Judicial Selection Web site: http://lawschool.unm.edu/judsel/index.htm, or e-mailed/faxed/mailed by calling Reva Chapman, (505) 277-4700. The deadline for applications/nominations has been set for 5 p.m., June 3. Applications received after that time are not considered.

Destruction of Tapes

Pursuant to the Supreme Court ordered Judicial Retention and Disposition Schedule, the Second Judicial District Court will destroy tapes filed with the court in the criminal cases for years 1979 to 1984, included but not limited to cases that have been consolidated. Cases on appeal are excluded. Attorneys who have cases with tapes, and wish to have duplicates made, should verify tape and log information with the Special Services Division, (505) 841-6717, from 8 a.m. to noon, and from 1 to 5 p.m., Monday through Friday. Aforementioned tapes will be destroyed after May 20.

Fifth Judicial District Court Judicial Appointment

Gov. Bill Richardson has appointed Ralph Davis Shamas, Sr. as District Judge in the Fifth Judicial District. Shamas, a Roswell native, received a bachelor’s degree from the University of New Mexico and is a graduate of the University of Iowa School of Law. He first joined the Roswell law firm of Atwood, Malone, Turner and Sabin and went on to have partnerships with Tandy Hunt and Charles Currier. Most recently, Shamas established his own practice in the areas of civil law and criminal defense. Shamas replaces William P. Lynch, who was selected to be a U.S. Magistrate judge in Las Cruces.

Seventh Judicial District Court Judicial Vacancy

A vacancy on the Seventh Judicial District Court exists as of April 25 upon the resignation of Judge Thomas G. Fitch. The chair of the Seventh Judicial District Nominating Commission solicits applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14 of the New Mexico Statutes Annotated 1978. Applications may be obtained from the Judicial Selection Web site, http://lawschool.unm.edu/judsel/index.htm, or e-mailed/faxed/mailed by calling Reva Chapman, (505) 277-4700. The deadline for applications is 5 p.m., May 13. Applications received after that date are not considered.

Ninth Judicial District Court Announcement of Vacancy

A vacancy on the Ninth Judicial District Court will exist as of July 1 due to the creation of a new judgeship position by the NM State Legislature. The chair of the Ninth Judicial District Court Nominating Commission now solicits nominations and applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14 of the New Mexico Statutes Annotated 1978. Applications may be obtained from the Judicial Selection Web site, http://lawschool.unm.edu/judsel/index.htm, or e-mailed/faxed/mailed by calling Reva Chapman, (505) 277-4700. The deadline for applications/nominations has been set for 5 p.m., June 3. Applications received after that time are not considered.

Eleventh Judicial District Court Announcement of Vacancy

A vacancy on the Eleventh Judicial District Court will exist as of July 1 due to the creation of a new judgeship position by the NM State Legislature. The chair of the Eleventh Judicial District Court Nominating Commission now solicits nominations and
applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14 of the New Mexico Statutes Annotated 1978. Applications may be obtained from the Judicial Selection Web site, http://lawschool.unm.edu/judsel/index.htm, or e-mailed/faxed/mailed by calling Reva Chapman, (505) 277-4700. The deadline for applications/nominations has been set for 5 p.m., June 3. Applications received after that time are not considered.

Bernalillo County Metropolitan Court Announcement of Vacancy

Two judicial vacancies on the Bernalillo County Metropolitan Court will exist as of July 1 due to the creation of a new judgeship position by the NM State Legislature. The chair of the Bernalillo County Metropolitan Court Nominating Commission now solicits nominations and applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14 of the New Mexico Statutes Annotated 1978. Applications may be obtained from the Judicial Selection Web site, http://lawschool.unm.edu/judsel/index.htm, or e-mailed/faxed/mailed by calling Reva Chapman, (505) 277-4700. The deadline for applications/nominations has been set for 5 p.m., June 3. Applications received after that time are not considered.

Eddy County Magistrate Court Magistrate Vacancy

Gov. Bill Richardson announced he is seeking candidates from Eddy County that are interested in serving as magistrate. Richardson will appoint a judge to fill an opening created by the retirement of Judge Larry Wood. Interested candidates should send a letter of interest, resume and letters of recommendation to Gov. Bill Richardson, Attention Legal Division, State Capitol Building, Suite 400, Santa Fe, New Mexico 87501 by 5 p.m., May 10. Materials may also be sent by fax to (505) 476-2207. After submitting a letter of interest, candidates may be required to undergo a criminal background check.

St ate B ar N e w s

Bankruptcy Law Section Brownbag Meeting

The Bankruptcy Law Section will hold a brownbag meeting at noon, May 13 on the 10th Floor of the U.S. Bankruptcy Courthouse, 500 Gold Avenue SW, Albuquerque. The topic for the event will be "Noticing" and is free and open to attorneys and staff. The speaker will be the Chapter 13 trustee, Kelley L. Skeneh. Fax any questions to Alfred Sanchez, (505) 766-9700, at least two days prior to have answers at the brownbag. The questions can cover Chapter 7, Chapter 11 and Chapter 13, as well as creditor questions and questions for the clerk. For more information, contact Alfred Sanchez, (505) 242-1979.

Board of Bar Commissioners DNA - People's Legal Services, Inc. Appointments

The Board of Bar Commissioners will make two appointments to the DNA - People's Legal Services, Inc., Board for two-year terms. Members wishing to serve on the board should send a letter of interest and brief resume by May 18 to Executive Director Joe Conde, State Bar of New Mexico, P.O. Box 92860, Albuquerque, NM 87199-2860; or fax to (505) 828-3765.

Paralegal Division BrownbagCLE

Bring a lunch and join the Paralegal Division for their monthly CLE from noon to 1 p.m., May 11 at the State Bar Center. Registration begins at 11:30 a.m. and the cost is $16 for attorneys and $15 for para legals, legal assistants and secretaries. The topic for this month's CLE is "Rules Governing Paralegal Services: Changes in the New Mexico Supreme Court Rules," presented by Leigh Anne Chavez, an attorney who is a paralegal studies instructor at TVI. For more information, contact Debi Shoemaker-Scott, (505) 243-1443.

Pro Hac Vice

The New Mexico Supreme Court has established a new rule for practice by non-admitted lawyers before state courts (Pro Hac Vice). The new Rule 24-106 NMRA, is effective for cases filed on or after Jan. 20, 2005. Attorneys authorized to practice law before the highest court of record in any state or territory wishing to enter an appearance, either in person or on court papers, in a New Mexico civil case should consult the new rule. This rule requires non-admitted lawyers to file a registration certificate with the State Bar of New Mexico, file an affidavit with the court and pay a nonrefundable fee of $250. Fees collected under this rule will be used to support legal services for the poor. For more information on the rule, a copy of the registration certificate and sample affidavit, go to www.nmbar.org. For questions about compliance with the rule, please contact Richard Spinello, Esq., Director of Public and Legal Services, State Bar of New Mexico, (505) 797-6050, (800) 876-6227, or rspinello@nmbar.org.

Prosecutors Section Annual Meeting

The Prosecutors’ Section of the New Mexico State Bar will hold its annual meeting from noon to 1 p.m., May 11 in the Social Suite of the Sheraton Old Town Hotel, 800 Rio Grande Boulevard NW, Albuquerque. Agenda items should be sent to MSanchez@da.state.nm.us. A pizza lunch will be provided.

Quality of Life Committee Hanging Out With the Bar

The Quality of Life Committee will be sponsoring Quality Time at the Hyatt Regency Tamaya Resort and Spa in Santa Ana Pueblo from 1 to 5 p.m., May 14. The event will be a chance to enjoy a “life outside the law.” Features include hors d’oeuvres, a cash bar, live music, backgammon, chess, checkers, trail rides and golf. Contact Victor Sizemore, (505) 867-1010, or e-mail sizelaw@aol.com, for more information.

Other Bars

Albuquerque Bar Association Pictorial Directory

The Albuquerque Bar Association’s Pictorial Directory will be submitted to the publisher soon. If you previously submitted a photograph to be included in the directory other than through Kim Jew Photography, please e-mail abqbar@abqbar.com or call (505) 842-1151 to confirm receipt.

NM Women’s Bar Association Mid-State Chapter Monthly Networking Luncheon

The New Mexico Women’s Bar Association’s next networking lunch will be from noon to 1:30 p.m., May 11 at Conrad’s in the La Posada Hotel, Albuquerque.
Members and visitors are welcome. Advance reservations are required. Lunch prices range from $6 - $11, and payment is made directly to the restaurant. Anyone interested in attending this meeting should R.S.V.P. to Rendie R. Moore, martren@eb-b.com.

OTHER NEWS

UNM Law Library
Spring Semester Hours
Hours through May 15:
Mon. – Thurs. 8 a.m. to 11 p.m.
Fri. 8 a.m. to 6 p.m.
Sat. 9 a.m. to 6 p.m.
Sun. noon to 11 p.m.

Reference:
Mon. – Thurs. 9 a.m. to 9 p.m.
Fri. 9 a.m. to 5 p.m.
Sat. noon to 4 p.m.
Sun. noon to 4 p.m.

Extended Exam Hours:
May 14 8 a.m. to 10 p.m.

Taxation and Revenue Department
Managed Audit Program
The New Mexico Taxation and Revenue Department is taking a closer look at individuals who legally should be filing New Mexico personal income tax returns as residents. There is a significant amount of income going unreported by people who live in New Mexico full time but claim their residence to be one of the seven states that does not have an income tax, despite the 185-day physical presence statute that went into effect in 2003. Attorneys may want to advise taxpayers who are concerned they should have previously filed resident New Mexico tax returns to take advantage of the Taxation and Revenue Department's Managed Audit Program. Taxpayers can avoid paying both penalty and interest if eligible for the program and if the assessment is paid within 30 days from the assessment date. Call (505) 827-0929 for more information about the Managed Audit Program.

Workers’ Compensation Administration
Brownbag Meeting
The Workers’ Compensation Administration will hold a brownbag meeting at noon, May 18 at the Workers’ Compensation Administration Headquarters, 2410 Centre SE, Albuquerque. Participants may also attend by videoconference from any of the administration’s field offices. Please call Margaret Padilla, (505) 841-6029 for more information.

CALL FOR NOMINATIONS
2005 ANNUAL AWARDS

Nominations are being accepted for the 2005 annual awards to recognize those who have distinguished themselves or who have made exemplary contributions to the State Bar in 2004 or 2004. Awards will be presented at the 2005 Annual Meeting, Sept. 23-24 at the Ruidoso Convention Center, Ruidoso. A letter of nomination for each nominee should be sent to:
Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; or faxed to (505) 828-3765.

Deadline for nomination submissions is June 17, 2005.

For a full description of each award, see the May 2 (Vol. 44, No. 17) Bar Bulletin.

1. Professionalism Award
2. Seth D. Montgomery Distinguished Judicial Service Award
3. Outstanding Judicial Service Award
4. Courageous Advocacy Award
5. Robert H. LaFollette Pro Bono Award
6. Distinguished Bar Service Award - Lawyer
7. Distinguished Bar Service Award - Nonlawyer
8. Outstanding Contribution Award
9. Outstanding Section/Committee Award
10. Outstanding Local Bar Award
11. Outstanding Program Award
12. Pioneer Award
13. Outstanding Young Lawyer of the Year Award
14. Outstanding Contribution to People with Disabilities Award
15. Quality of Life - Legal Employer Award
16. Quality of Life - Lawyer Award
2005 Leadership Training Institute

Applications Being Accepted

Participants will learn what it means to be a leader and how to communicate, motivate, inspire and succeed.

The Institute takes place over four sessions, August 12-13, September 1-2, September 29-30 and November 3-4, with all but one session being held at the State Bar Center in Albuquerque. Class size is limited through a competitive enrollment process. Topics covered include:

- team building
- leadership principles
- communications and media skills
- New Mexico Judiciary
- emotional intelligence
- strategic planning
- quality of life
- time management
- public service
- fundraising

All active New Mexico licensed lawyers are welcome to apply, deadline is June 20. Tuition is $350. Limited financial assistance and scholarships are available. For a complete Leadership Training Institute brochure and to apply, visit www.nmbar.org. For more information, contact Executive Director Joe Conte, (505) 797-6099 or jconte@nmbar.org.
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<td>Law of Easements: Legal Issues and Practical Considerations</td>
<td>Albuquerque Center for Legal Education of NMSBF</td>
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<td>10-11</td>
<td>Personnel Law Update</td>
<td>Albuquerque Council on Education in Management</td>
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<td>2005 Professionalism: Lawyers Concerned for Lawyers</td>
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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 Fé, NM 87504-0848 • (505) 827-4860

**EFFECTIVE MAY 4, 2005**

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**Response filed 4/20/05**

**Response filed 4/25/05**

**Response filed 4/18/05; Reply filed 4/25/05**

**Response filed 4/27/05**

**Response ordered; due 5/3/05**
**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 Fé, NM 87504-0848 • (505) 827-4860  
**EFFECTIVE MAY 4, 2005**

**CERTIORARI GRANTED AND SUBMITTED:**  
(Submission = date of oral argument or briefs-only submission)  
Submission Date

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OPINION

RICHARD C. BOSSON, CHIEF JUSTICE

{1} Fourteen years after the sale of a parcel of land in Edgewood, New Mexico, a dispute arose between the buyer, William Turner (Turner), and the sellers, the Bassetts, as to the ownership of associated water rights. Following a hearing, the district court granted summary judgment in favor of the Bassetts, finding in relevant part that the water rights had been properly severed from the land prior to its sale, and that even if the water rights had not been successfully severed, Turner’s action was precluded by New Mexico’s adverse possession statute, NMSA 1978, § 37-1-22 (1973). The Court of Appeals reversed, finding that the Bassetts had failed to sever the water rights, and that adverse possession of water rights cannot occur in New Mexico. On certiorari to this Court, the Bassetts challenge a portion of the Court of Appeals opinion, arguing that the water rights in question were severed prior to the land sale and did not transfer to Turner with the conveyance of land. In our examination of the severance issue, we agree with the district court and reverse the Court of Appeals. We also take this opportunity to clarify certain language in a previous opinion of this Court, Sun Vineyards, Inc. v. Luna County Wine Dev. Corp., 107 N.M. 524, 760 P.2d 1290 (1988), and limit its effect. We hold that the State Engineer’s permit to transfer location of water usage creates a rebuttable presumption of severance. Because Turner had no evidence with which to rebut that presumption, the presumption of severance holds.

BACKGROUND

{2} In December 1984, Turner entered into a real estate contract to purchase roughly 130 acres of land in Edgewood from the Bassetts. For many years prior to the sale, Ray Bassett, predecessor in interest to Carroll G. Bassett, Gordon R. Bassett, James N. Bassett, Bassett Brothers Water Sales Company (collectively referred to as the Bassetts), had irrigated 125 acres of the land with 312.5 acre-feet (AF) of water, or 2.5 AF/acre of licensed and vested (diversion) water rights from well E-87, located on the property. In 1974, Ray Bassett filed an Application for Permit to Change Place or Purpose of Use, Combine and Appropriate Underground Waters (1974 application). The application requested permission to combine water from well E-87 with water from two other wells, E-544 and E-1107, and to sever the water from the property. This application described the Bassetts’ plan to become a local water supplier in the Edgewood area by gradually converting their water use from irrigation to municipal and industrial applications. The application was approved in relevant part by the State Engineer, and a permit issued (1976 permit). The permit allowed the Bassetts to phase out irrigation on the property over time, while combining the water from well E-87 with water from other wells to provide water service to the growing Edgewood community.

{3} The permit required the Bassetts to file proof by December 15, 1976 that they were applying the water to beneficial use, as set forth in their application. The permit also required the Bassetts to furnish the State Engineer with data concerning the amount of water pumped for irrigation, the amount of land to be irrigated each season, and the metering of water diverted for non-irrigation...
purposes. In 1979, the Bassetts obtained a second permit from the State Engineer to enlarge the area in which the water could be used (1979 permit). This permit was subject to the same conditions as the earlier permit, including the requirement that the Bassetts submit proof that the water was actually applied to the new beneficial uses described in the application.

4 Starting in late 1979, the Bassetts filed a series of applications for an extension of time to apply the water to beneficial use. Ten applications, filed annually until 1988, chronicle the Bassetts’ gradual progress towards the transition from irrigation uses to supplying Edgewood community needs. The plan included the construction of the physical infrastructure necessary to connect the wells and deliver the water to the community, as well as monitoring the growth of the community and the anticipated need for water. The 1982 application for an extension of time states that “[a]ll irrigation has been stopped now” at each of the wells, including well E-87.

5 Thus, the Bassetts complied with the permit conditions that required them to meter non-irrigation uses and submit use information to the State Engineer. However, at the time of the January 1985 sale to Turner, the Bassetts were not yet applying the full permitted amount of water to beneficial use at the new locations, and had not yet completed the prescribed administrative procedure of filing proof to the State Engineer that the permitted water was applied to the new beneficial use. The Bassetts concede that they were not exercising their entire water right during the 1980s. Therefore, at the time of the land conveyance to Turner, the Bassetts had not fully complied with the conditions set forth in either the 1976 or 1979 permit from the State Engineer.

6 At the time of the real estate contract negotiations between the Bassetts and Turner, neither party discussed water rights. The Bassetts retained an easement to the well on the property and the right to rework the well, but importantly, they did not reserve water rights in the sale documents. Several years after the sale, Turner indicated that he was planning to develop a residential subdivision and did not intend to irrigate the property. Turner contemplated purchasing water for the subdivision from the Bassetts. In 1987, Turner submitted a petition for reclassification of land to the U.S. Department of Agriculture seeking to reclassify the property from “prime farm land” to “dry land.” In the petition, Turner states that “[n]o water rights transferred with the land” when he purchased it from the Bassetts in 1985. He also acknowledged in the 1987 petition that the property had once been irrigated, but that the water formerly applied to irrigation was no longer available because it had been severed from the land.

7 Turner became aware of a possibility that the Bassetts may not have successfully severed the water rights, when, in 1998, the Bassetts’ successor in interest, Hydro Source, Inc., sought to convey the full amount of water rights described in the 1976 permit to Estancia Basin Water Supply, L.L.C. Hydro Source filed a change of ownership form with the State Engineer for the rights in the 1976 permit and the property’s appurtenant irrigation water rights. Alerted to the possibility that his property might still have appurtenant water rights, Turner initiated an investigation, in which he was reminded that the Bassetts had not expressly reserved their irrigation water rights when they executed the warranty deed to Turner. In September 1998, Turner also filed a change of ownership of water rights with the State Engineer. In October 1998, Turner received a copy of a letter from the State Engineer to Carroll Bassett, noting that both parties had filed change of ownership of water rights for the same water, and requesting clarification.

8 Turner then filed the underlying quiet title suit. The district court granted summary judgment in favor of the Bassetts. Even though the Bassetts had not reserved the water rights in the conveyance documents, the court found that the water rights had been severed prior to the conveyance to Turner, and that even if the water rights had not been severed, the Bassetts had reacquired them through adverse possession. On appeal, the Court of Appeals reversed, finding that the water rights had not been severed prior to the conveyance, and that adverse possession of water rights cannot occur in New Mexico. The latter issue has not been appealed and is not before us. The sole issue on certiorari is whether the Bassetts’ water rights had been severed, and thus were no longer appurtenant to the property, by the time of Bassetts’ conveyance to Turner.

DISCUSSION

Standard of Review

9 The district court determined that there were no material facts in dispute. The Court of Appeals agreed, but found that the district court erred as a matter of law in concluding that the Bassetts had successfully severed the appurtenant water rights prior to the conveyance to Turner. We now review de novo that issue of law. Hasse Contracting Co. v. KBK Fin., Inc., 1999-NMSC-023, ¶ 9, 127 N.M. 316, 980 P.2d 641 (“Appellate courts review matters of law de novo.”).

Severance of Water Rights

10 In New Mexico, water that is applied to irrigation becomes appurtenant to the land on which it is used. “[A]ll waters appropriated for irrigation purposes . . . shall be appurtenant to specified lands owned by the person, firm or corporation having the right to use the water, so long as the water can be beneficially used thereon.” NMSA 1978, § 72-1-2 (1907). These water rights remain appurtenant to the land until they are severed. The requirements and procedures for the severance and transfer of appurtenant water rights are defined by state statutes and the administrative procedures of the State Engineer. See NMSA 1978, § 72-5-22 (1907); NMSA 1978, § 72-5-23 (1941),1 and 19.26.2 NMAC (2005).

11 In the case before us, the district court found that the water rights had been severed prior to the sale of the land. The court relied on two factors. First, the Bassetts had been issued a permit by the State Engineer to change the place and purpose of water usage, and second, the Bassetts had ceased irrigation of the land four years prior to the sale. Turner v. Bassett, 2003-NMCA-136, ¶ 11, 134 N.M. 621, 81 P.3d 564. Despite these undisputed facts, the Court of Appeals reversed, finding Sun Vineyards, 107 N.M.

1 These statutes are part of the New Mexico Surface Water Code, but our courts have applied these same laws to cases involving the transfer of groundwater. See Sun Vineyards, Inc., 107 N.M. at 527, 760 P.2d at 1293; cf. McCasland v. Miskell, 119 N.M. 390, 394, 890 P.2d 1322, 1326 (Ct. App. 1994) (noting, in a case involving the transfer of both irrigation well and ditch rights, that “[s]ection 72-5-23 sets out the mechanism for severing and transferring water rights from the lands to which they are appurtenant.”).

{12} The Court of Appeals interpreted Sun Vineyards as articulating a comprehensive test for determining whether a severance has occurred as a matter of law, and the appellate court concluded that the district court had misapplied the test. Id. “In Sun Vineyards, Inc., however, the Supreme Court specifically held that when a person claiming severance conveys property without reserving the water rights, that conveyance results in the discontinuation of the severance process.” Id. ¶ 14. Applying this test, the Court of Appeals concluded that the conveyance of land to Turner, lacking an express reservation of water rights, automatically discontinued the severance process because the Bassetts had not yet obtained a license. Id. “The deciding factor for determining whether severance has occurred is completion of the necessary administrative steps and procedures,” which culminates in the issuance of a license. Id. ¶ 16.

{13} The parties do not dispute that at the time of the land sale, the Bassetts had neither obtained a license from the State Engineer nor reserved water rights in the deed. Nonetheless, the Bassetts argue that the water was effectively severed from the property prior to the sale. The Bassetts had obtained a permit from the State Engineer which involved creating a detailed development plan, and then had progressed in implementing that plan towards the ultimate goal of supplying the water needs of the growing community of Edgewood. In making steady progress towards the approved goal, the Bassetts maintain that they have complied with all constitutional and statutory requirements for effecting a severance. See N.M. Const., art. XVI, § 3; NMSA 1978, § 72-12-2 (1931); § 72-5-22; § 72-5-23. Turner, on the other hand, analogizes this case to Sun Vineyards, and like the Court of Appeals, argues that the Bassetts’ failure to complete the State Engineer’s administrative requirements for licensure automatically caused the severance process to cease and the water rights to pass along with the land to Turner.

{14} In Sun Vineyards, the operator of a vineyard obtained a permit from the State Engineer to sever a fraction of the appurtenant water, spread it to other land, and thereby reduce the amount of water appurtenant to the original irrigated area. Sun Vineyards, 107 N.M. at 525, 760 P.2d at 1291. The vineyard operator then negotiated a sale of part of the original irrigated land. Id. Though the operator had a permit from the State Engineer for the severance and transfer of the fractional water rights, the operator had not yet obtained a license. Id. at 528, 760 P.2d at 1294. When the buyer discovered the irrigated land was being conveyed with only part of its original water rights, the buyer filed suit seeking to quiet title to the original water rights, as well as specific performance and damages resulting from a breach of contract. The district court held for the buyer, ordering the seller to convey the remaining portion of the water rights. Id. at 527, 768 P.2d at 1293.

{15} On appeal, this Court undertook a review of the record to determine whether there was sufficient evidence to support the district court’s decision. See Sun Vineyards, 107 N.M. at 526, 760 P.2d at 1292. This Court first analyzed the threshold issue of severance as a matter of law, and concluded that the water rights remained appurtenant to the land and passed to the buyer because a license had not issued and because the seller had not reserved the rights in the conveyance documents. Id. at 527, 760 P.2d at 1293. The second analysis centered upon the plaintiff’s contract claim. The warranty deed in Sun Vineyards stated that the land came “with water rights,” and the district court correctly determined that the purchaser relied on receiving the full amount of water originally appurtenant to the land. Id. at 528, 760 P.2d at 1294. The purchasers “had no knowledge prior to the purchase of the property that the water rights would be less than normal.” Id.

{16} As a result, this Court upheld the order granting specific performance of the contract plus contractual damages, and the buyer received the full duty of three acre-feet per acre. Id. In affirming specific performance, this Court observed that, although the seller had received a permit from the State Engineer for partial transfer of water rights, thereby effecting a severance, the actual transfer of those water rights had not yet vested because no license had yet issued. Id. at 527, 760 P.2d at 1293. Therefore, those water rights, severed but not yet transferred, were still subject to a court order for specific performance, based upon the reasonable contractual expectations of the buyer. See id. at 528, 760 P.2d at 1294.

{17} We observe that the case before us might have involved two issues, as Sun Vineyards did: a threshold legal issue of whether water rights were severed prior to the conveyance, and a separate contract or tort issue concerning what the parties were reasonably led to believe would result from the conveyance. The threshold legal issue focuses upon whether the water rights were appurtenant at the time of the conveyance. Analysis of the threshold issue centers upon the prior actions taken by the seller to sever the water rights, as seen through the administrative procedures set forth by the State Engineer. The separate contract or tort issue examines the expectations created by the parties to the land sale contract, and the civil liability of one party to the other that may result from those expectations. The State Engineer is not a party to the contract.

{18} The parties agree they did not discuss water rights at the time of the land sale negotiations, and neither party argues there was any writing or communication that constituted a mutual understanding regarding appurtenant water rights. Instead of an implied contractual understanding between the parties, this case is based upon the threshold legal issue of whether the Bassetts had done enough, according to requirements of the State Engineer, to sever their water rights prior to the sale of land to Turner.

{19} To more fully explore this issue, we consider the applicable statutes and agency regulations, the common practice of the State Engineer, and the policy implications of our decision upon the practice of severance in the State of New Mexico. The statutory procedures for severing and transferring water rights are set forth in Section 72-5-23:

All water used in this state for irrigation purposes, except as otherwise provided in this article, shall be considered appurtenant to the land upon which it is used, and the right to use it upon the land shall never be severed from the land without the consent of the owner of the land, but, by and with the consent of the owner of the land, all or any part of the right may be severed from the land, simultaneously transferred and become appurtenant to other land, or may be trans-
ferred for other purposes, without losing priority of right theretofore established, if such changes can be made without
detriment to existing water rights and are not contrary to conservation of water within the state and not detrimental to
the public welfare of the state, on the approval of an application of the owner by the state engineer. Publication of notice
of application, opportunity for the filing of objection or protests and a hearing on the application shall be provided as
required by Sections 72-5-4 and 72-5-5 NMSA 1978.

(Emphasis added.)

[20] In order to effect a severance, Section 72-5-23 requires consent of the landowner, and “approval of an application” by the State
Engineer. Both consent of the landowner and approval of the State Engineer are present in this case. As is clear from the Bassetts’
permit, the active review of an application by the State Engineer occurs during the permitting phase of the process. The proposed
severance is evaluated by the State Engineer to determine whether the changed use of water may result in adverse impacts to other
appropriators or may be detrimental to water conservation and the public welfare. Protests and objections are also submitted at this
initial point in the process.

[21] In fulfillment of the permit requirements, the Bassetts clearly described their plan to phase out irrigation and use their water
to meet growing municipal and industrial demand in the Edgewood area. In reviewing the application, the State Engineer consid-
ered the amount of water available, population projections for the area and associated water use, as well as return flow projections,
before approving the application for a total diversion of no more than 1570.7 AF/year. Thus, the State Engineer’s approval of the
application and issuance of a permit resulted from a detailed review of the possible impacts and projected benefits with respect to
the proposed use of the water. The Bassetts were in compliance with the conditions of the permit. By approving a plan to gradually
convert irrigation uses to municipal and industrial uses, the State Engineer knew the plan would take years before all the water
formerly used in irrigation would be fully committed to the new use. The Bassetts submitted annual applications for extensions of
time before and after the sale, as provided by the formal administrative procedures of the State Engineer. 19.26.2 NMAC (2005).
These applications were routinely granted.

[22] Consistent with the statute and with the Bassetts’ position, the State Engineer has acknowledged to this Court that “[u]nder the
typical transfer permit, the water right is automatically severed upon issuance of the permit, and the severance is not dependent upon
the application of beneficial use at the new location—the severance is complete upon issuance of the permit.” This interpretation
is supported by State Engineer Regulations, which state: “A permit from the state engineer is required to change the place and/or
purpose of use of all or any part of a water right.” 19.26.2.11(B) NMAC (2005) (emphasis added).

[23] The State Engineer’s position that the water right “is automatically severed upon issuance of the permit” is consistent with
the position the State Engineer took 16 years ago in Sun Vineyards. There, a district manager from the Office of the State Engineer
testified that “once an application is filed and approved the water rights are severed from the old location and become appurtenant to
the new location.” Sun Vineyards, 107 N.M. at 527, 760 P.2d at 1293. The Court nonetheless proceeded to characterize severance as
a process that could be nullified should the underlying land be sold prior to issuance of a license. Id. In the case before us, the
Court of Appeals relied upon this characterization to conclude that because the Bassetts failed to obtain a license, the appurtenant
water rights passed to Turner. Turner, 2003-NMCA-136, ¶ 15. Although that conclusion is proper under the facts of Sun Vineyards,
it overreaches when applied to cases that do not involve a contract or tort dispute.

[24] The holding in Sun Vineyards was correct. The promise of water in the language of the deeds and evidence of the buyer’s
reliance indicated the parties had intended a transfer of water rights, rather than a reservation. Further, it was clear that all of the
procedures necessary to the issuance of a license had not yet occurred. However, a bright line rule that a severance is interrupted
upon sale of the underlying land makes little sense when a contract or tort claim does not arise. Considering the statutes, regulations
and practice of the State Engineer, a better approach to the issue of severance is to recognize the issuance of a permit as giving rise
to a presumption that the land and water rights are no longer appurtenant. Without more, the conveyor of title to the land who has
acquired a permit need not express in the conveyance documents that which is already presumed as a matter of law: the land passes
fairly consistently applies the appurtenancy rule as a rule of construction.”).

[25] However, like all presumptions this, too, can be overcome. If the seller acts as if the land and water remain as one, if the seller
creates reasonable expectations in the buyer contrary to the presumption of severance, then those water rights remain within the
power of the court to order full relief to the parties, just as this Court did in Sun Vineyards. We clarify, however, that a post-sever-
ance conveyance of land, even in the absence of reservation of rights, does not nullify a severance. Individuals who hold water
rights, like the Bassetts, and follow the statutory and administrative procedures to effect a severance and initiate a transfer, may
convey the underlying land severed from its former water rights, without necessarily reserving those water rights to the seller in the
conveyance documents.

[26] We recognize nonetheless that the safer course for the prudent seller is to expressly reserve any such water rights in the con-
water rights, never severed by permit, passed to the buyer by contract without a reservation of rights). While a reservation in a
deed may be nothing more than a simple statement, however, a permit represents a severance application to the State Engineer that
describes the details of a plan to sever and transfer the water, a technical analysis by the State Engineer of the proposed severance,
evaluation of impairment issues, policy review for the propriety of the transfer, and a notice and comment period during which
others may protest the application. A permit is issued only after these hurdles are cleared.
{27} In contrast, the relative ease of reserving water rights in a conveyance document underscores how appropriate it is that we clarify *Sun Vineyards* by today’s action. A reservation of rights in a sale document would enable a landowner to complete severance and transfer proceedings, subject to the approval of the State Engineer. Recognizing, on the one hand, a contractual reservation as effectively severing water rights, while failing, on the other hand, to recognize a permit as accomplishing the same severance, produces an anomalous result. A reservation of rights that necessarily requires completion of the administrative process ought not have greater legal significance than acquiring the permit, which is an important step in the administrative process.

{28} We conclude that the severance statute, the applicable regulations, the general practice of the State Engineer, and the permit itself all support the view that the Bassetts presumptively severed their water rights from the property upon receipt of a permit from the State Engineer. Turner presented nothing to the district court that would rebut the presumption created thereby: that the land passed to Turner without those water rights. The district court properly disclaimed any jurisdiction over those water rights, given the absence of any need for power over those water rights to be able to accord relief to the parties.

{29} We also observe that reliance upon the issuance of a permit promotes both equity and predictability in land transactions. This approach prevents purchasers of land from claiming water rights for which they never bargained. As acknowledged by the Bassetts, prospective purchasers of land may obtain both license and permit information from the records of the State Engineer’s Office. Such an approach is also supported by statute and case law recognizing that both permitted and licensed water rights are alienable property rights. See NMSA 1978, § 72-1-2.1 (1991); *KRM, Inc. v. Caviness*, 1996-NMCA-103, ¶¶ 6, 7, 122 N.M. 389, 925 P.2d 9; *Clodfelter v. Reynolds*, 68 N.M. 61, 66, 358 P.2d 626, 631 (1961).

{30} The facts of this case bring into sharp relief the need for certainty regarding severances. As conceded by the parties, Turner was aware of the Bassetts’ water development activities, and even considered purchasing water from the Bassetts to supply his planned residential subdivision. Furthermore, the Bassetts were not in violation of their permit. They continued putting water to beneficial use in conformity with the plan approved by the State Engineer, and as described in their annual applications for extensions of time. The Bassetts note that under their approved plan to provide water to Edgewood, obtaining a license prior to the land sale to Turner would have been impossible, because in 1984, the Bassetts were not yet applying all the permitted water to beneficial use. A rule that automatically annuls the officially approved severance not only results in uncertainty as to the ownership of the water rights, but also emasculates the ability of the State Engineer to maintain control over the place and purpose of use of water as approved in the permit.

**CONCLUSION**

{31} For the foregoing reasons, we reverse the Court of Appeals and uphold the district court’s grant of summary judgment in favor of the Bassetts.

{32} IT IS SO ORDERED.

RICHARD C. BOSSON,
Chief Justice

WE CONCUR:
PAMELA B. MINZNER, Justice
PATRICIO M. Serna, Justice
EDWARD L. CHÁVEZ, Justice
OPINION

JONATHAN B. SUTIN, JUDGE

{1} These cases arose out of a melee at an apartment complex in Las Cruces, New Mexico, consisting of serious altercations between two groups of young men. One group consisted of Alex Medina (Victim) and his friends, and the other consisted of Defendant Juan Carlos Munoz, Defendant Hector Nicholas Garcia, and their friends. Munoz and Garcia fired shots from Munoz’s apartment at Victim’s vehicle as the vehicle was either leaving the area, or had left and was coming back to the apartment complex. A bullet hit and killed Victim. We affirm Defendants’ convictions.

PROCEDURAL BACKGROUND

{2} Based on uncertainty as to who fired the fatal bullet, Defendants were charged: in Count 1 of their indictments with felony murder or, alternatively, depraved mind murder, each a first degree murder charge, see NMSA 1978, § 30-2-1(A)(2), (3) (1994); in Count 2 with shooting at or from a motor vehicle resulting in great bodily harm, see NMSA 1978, § 30-3-8(B) (1993); in Count 3 with aggravated battery (deadly weapon), see NMSA 1978, § 30-3-5(A), (C) (1969); and in Counts 4 and 5 with aggravated assault (deadly weapon), see NMSA 1978, § 30-3-2(A) (1963). The jury was instructed on second degree murder and voluntary manslaughter as lesser offenses of Count 1.

{3} The jury found Defendants guilty of the crimes charged in Counts 2 through 5. The jury informed the court that it could not reach a verdict on the charge in Count 1 as to each Defendant. Based on the jury’s inability to reach a verdict on the first degree murder charges in Count 1, the court declared a mistrial as to each Defendant.

{4} As the State was preparing for a second trial on the first degree murder charges, Defendants entered no contest pleas to second degree murder. Defendants reserved their right to appeal. The district court entered judgments showing Defendants convicted of, and sentencing Defendants on, Count 1, second degree murder; Count 2, shooting at or from a motor vehicle (great bodily harm); Count 3, aggravated battery (deadly weapon); and Counts 4 and 5, aggravated assault (deadly weapon).

{5} On appeal, Munoz asks this Court to determine that his plea was not knowing, intelligent, and voluntary because he was not advised that the most serious charge he faced at retrial was voluntary manslaughter, not second degree murder. He claims that he should have been advised of this because the district court failed to properly poll the jury, resulting in an implied acquittal on the second degree murder charge. He asserts he should therefore be permitted to withdraw his plea to second degree murder. He claims ineffective assistance of counsel as the basis for this relief.

{6} In addition, Munoz appeals on the further grounds that: on double jeopardy grounds, his conviction of shooting at a motor vehicle resulting in death barred retrial on the murder charge; the court erred in excluding Victim’s blood alcohol content; and the court erred in admitting evidence of weapons that were not used in the commission of any crime.

{7} Garcia raises six issues on appeal, three of which are ones Munoz has also raised, namely: his convictions for shooting at a motor vehicle resulting in death and second degree murder violate double jeopardy; the court erred in excluding Victim’s blood alcohol content; and the court erred in admitting evidence of weapons that were not used in the commission of any crime. Garcia’s other appellate issues are that the district court: erred in excluding evidence of a prior altercation involving Victim; erred in excluding evidence of a
witness’s prior convictions; and erred by improperly admitting certain photos of Victim.

DISCUSSION

{[8] We have consolidated these two appeals, State v. Garcia, Docket No. 24,072, and State v. Munoz, Docket No. 24,065, for purposes of disposition of these cases on appeal. We discuss the facts material to Defendants’ appellate points under our separate discussions of the points.

Ineffective Assistance of Counsel—Munoz Only

{9} Garcia did not raise ineffective assistance of counsel on appeal. Munoz contends he did not receive effective assistance of counsel, because his counsel failed to advise him at the time of his plea to second degree murder that the highest degree of crime on which he could be retried was voluntary manslaughter. Underlying this contention is Munzo’s further assertion that, based on the district court’s failure in the first trial to poll the jury as to its deliberations on the second degree murder charge, there was an implied acquittal as to second degree murder and the State was legally precluded from retrying Munoz on the first degree murder charge under principles of double jeopardy.

{[10] Munoz’s point on appeal requires us to determine whether the district court was required to poll the jury in regard to its deliberations on second degree murder. We view this issue as dispositive on Munoz’s claim of ineffective assistance of counsel. The issue is one of law; we review issues of law de novo. See State v. Moore, 2004-NMCA-035, ¶ 12, 135 N.M. 210, 86 P.3d 635; State v. Galaz, 2003-NMCA-076, ¶ 4, 133 N.M. 794, 70 P.3d 784.

{[11} For his implied acquittal and double jeopardy arguments, Munoz relies on State v. Castrillo, 90 N.M. 608, 566 P.2d 1146 (1977), State v. Wardlow, 95 N.M. 585, 624 P.2d 527 (1981), and Rule 5-611(D) NMRA. We discuss Castrillo and Wardlow at the outset. We then recite in more detail what occurred at trial. Following that, we discuss the legal effect of what occurred in court.

{[12] In Castrillo, charges of first and second degree murder and voluntary manslaughter were, as in the present case, submitted to the jury. Id. at 610, 566 P.2d at 1148. The jury stated it was unable to reach a verdict, and the court declared a mistrial without inquiring into the jury’s deliberations. Id. at 610, 613, 566 P.2d at 1148, 1151. The defendant was retried and found guilty of second degree murder. Id. at 610, 566 P.2d at 1148. The defendant appealed on double jeopardy grounds. Id. The Castrillo Court noted that “[a] manifest necessity for the declaration of a mistrial is shown since the jury could not agree to at least one of the included offenses within the murder charge.” Id. at 613, 566 P.2d at 1151. However, the Court also noted that the record was “silent upon which, if any, of the specific included offenses the jury had agreed and upon which the jury had reached an impasse.” Id. The Court further noted that “[t]he record is clear . . . that the jury did not acquit the defendant on all offenses.” Id. The Court stated that its holding in State v. Spillmon, 89 N.M. 406, 553 P.2d 686 (1976), “dictates a dismissal upon double jeopardy grounds as to such offenses on which the record is unclear.” Castrillo, 90 N.M. at 613, 566 P.2d at 1151. The Supreme Court further stated:

[T]he record is not clear as to which of the included offenses the jury was considering at the time of its discharge. Without inquiry by the trial court into the jury’s deliberations on the greater, included offenses, no necessity is manifest to declare a mistrial as to those offenses and thus jeopardy has attached. Jeopardy did not attach to the offense of voluntary manslaughter which was the least of the included offenses. Had the jury reached a unanimous decision on that offense it could not have been in the posture it announced to the court.

Id. at 613-14, 566 P.2d at 1151-52.

{[13] In Spillmon, the jury deadlocked on first and second degree murder, and found the defendant guilty of attempted robbery and not guilty of burglary. 89 N.M. at 407, 553 P.2d at 687. No mistrial was declared. Id. The district court set the case for retrial on the murder charge and the defendants moved to dismiss on double jeopardy grounds. Id. Our Supreme Court held that: “to try these defendants again on the murder charge would constitute double jeopardy because the trial court concluded the proceedings without declaring a mistrial and without reserving the power to retry those issues upon which the jury could not agree. If a mistrial had been properly declared, . . . the State would be free to assert its claims before another jury.” Id. According to the Court, when the district court finds “there is a reasonable probability that the jury could not agree,” a manifest necessity exists to discharge the jury. Id. (internal quotation marks and citation omitted). In Spillmon, apparently because the district court failed to make such a finding and declare a mistrial, “the record [did] not disclose a ‘manifest necessity’ for the discharge of the jury and a final termination of the trial,” requiring our Supreme Court to hold that further proceedings were barred because the defendants had already been placed in “jeopardy.” Id. at 408, 553 P.2d at 688.

{[14] The Court in Castrillo seems to have equated the district court’s failure in Castrillo to inquire of the jury as to its deliberations with the court’s failure in Spillmon to make a finding that there was a reasonable probability that the jury could not agree, thus, in effect, reading Spillmon to require more of the court than mere acknowledgment of the jury’s announcement of deadlock. No inquiry having been made “into the jury’s deliberations on the greater, included offenses,” the Supreme Court in Castrillo determined that “no necessity is manifest to declare a mistrial as to those offenses and thus jeopardy has attached.” Id. at 613-14, 566 P.2d at 1151-52. The Castrillo Court held that jeopardy did not attach to the offense of voluntary manslaughter, which was the least included offense, and the Court remanded for retrial on voluntary manslaughter. Id. at 614, 566 P.2d at 1152. As in Spillmon, the Court in Castrillo “resolve[d] any doubt in favor of the liberty of the citizen.” 90 N.M. at 613, 566 P.2d at 1151 (internal quotation marks and citation omitted).

{[15] After Castrillo, the Supreme Court decided Wardlow, 95 N.M. 585, 624 P.2d 527, a 1981 case in which a charge of battery on a peace officer and the sole lesser included offense of simple battery were at issue. Our Supreme Court read Castrillo to “require[] that where a jury is deadlocked on a charge involving included offenses, the trial court must determine whether the jury has voted to acquit or convict the defendant on any of the lesser-included offenses.” Wardlow, 95 N.M. at 587, 624 P.2d at 529. In Wardlow, after being informed by the jury that it was deadlocked on the charge of battery on a peace officer, the court questioned the jury further. Id. at 586, 624 P.2d at 528. The foreman indicated “that there was a unanimous vote that there was no simple battery.” Id. The court sought
clarification, and the foreman replied that “[t]he vote is not unanimous for battery upon a peace officer.” *Id.* (internal quotation marks omitted). Thus, upon questioning the jury as to the lesser included charge of simple battery, the district court understood the jury to have “voted neither to acquit nor convict the defendant . . . but [to have] considered the charge inappropriate.” *Id.* at 587, 624 P.2d at 529. It was clear, however, that the jury deadlocked on the greater charge of battery on a peace officer. *Id.* On appeal, the Supreme Court read the circumstances to be that the jury considered the simple battery charge first, afterwards moving to the greater charge and indicating that “the true deadlock was between the option of finding Wardlow guilty on the greater offense or acquitting him, and that the jury did not have the intent to acquit Wardlow on the lesser offense.” *Id.* Thus, the Court held that manifest necessity for a mistrial was supplied through the jury’s inability to agree on a verdict and jeopardy did not attach. *Id.* at 587-88, 624 P.2d at 529-30.

{16} We realize that one might read *Castrillo* to require district courts to follow certain rules when a first degree murder charge and the lesser included charge of second degree murder are submitted to a jury and the jury indicates it is unable to reach a verdict on the greater charge. *Castrillo* states that “when a jury announces its inability to reach a verdict . . . the trial court [is] required to submit verdict forms to the jury to determine if it has unanimously voted for acquittal on any of the included offenses.” 90 N.M. at 611, 566 P.2d at 1149. *Castrillo* also states that “[a] trial court should not accept an announcement as to the jury vote on any included offense until the jury has carried its deliberations as far as possible.” *Id.* *Castrillo* further states that the district court must inquire into the jury’s deliberations on the greater, included offenses, for, without such inquiry, “no necessity is manifest to declare a mistrial as to those offenses and thus jeopardy has attached.” *Id.* at 613-14, 566 P.2d at 1151-52. Moreover, one might also understand the Supreme Court to have intended the words, “any of the included offenses,” “any included offense,” and “greater, included offense,” to have meant and included the first degree murder charge and the lesser included second degree murder charge.

{17} Nevertheless, we think it important to note that nothing in *Spillmon* indicates, and nowhere in *Castrillo* is it expressly stated, that the district court in either case was required to make its finding regarding deadlock beyond the first degree murder charges, if indeed the jury was deadlocked at that level. Further, nothing in the analyses in *Spillmon*, *Castrillo*, or *Wardlow* explains why a district court must inquire beyond the jury’s deliberations on first degree murder, assuming a deadlock at that level. In addition, in *Spillmon* and *Castrillo* the lower courts did not even inquire as to the jury’s first degree murder deliberations. Thus, based on the circumstances we discuss later in this opinion, and for the reasons that follow, we conclude that the district court in the present case was not required to inquire beyond the jury’s first degree murder deliberations.

{18} The district court submitted to the jury an instruction conforming to UJI 14-250 NMRA. The instruction, commonly referred to as a “step-down” instruction, required the jury first to address first degree murder, and decide whether Munoz was guilty; if unable to decide Munoz was guilty of that charge, the jury was required to address second degree murder; if unable to decide Munoz was guilty of that charge, the jury was required to address voluntary manslaughter and decide whether Munoz was guilty of that charge. The jury was also instructed that if it had reasonable doubt as to whether Munoz committed any of the crimes, the jury was to determine that Munoz was not guilty of that crime, and if the jury found him not guilty of all of the crimes, it must return a verdict of not guilty. *Id.*

{19} After submission of the jury instructions in the present case, the jury sent a note to the court stating, “We have deliberated and discussed our differences as to the charges in count one and [cannot] come to an agreement. We have come to an agreement on the [sic] counts two, three[,] four and five. How should we proceed?” The court sought input from counsel and then stated to counsel that it planned pursuant to Rule 5-611(D) to:

call the jury in and have them affirm that they’ve arrived at a verdict as to Counts 2, 3, 4 and 5 as to each defendant, and they are hung as to Count 1.

. . . [W]e’ll inquire where the jury stands with respect to each of the two forms of first-degree murder. If they’ve reached a unanimous agreement as to those, and they are not guilty, then the Court will inquire as to the status on second degree. If they unanimously agree not guilty as to that one, then the Court will inquire as to voluntary manslaughter. If they have not agreed as to either form of first-degree murder, that will end the inquiry, and the Court will declare a mistrial as to Count 1 entirely.

No party objected to this plan.

{20} The court called the jury in and confirmed that the jury had reached verdicts on Counts 2 through 5. The court ascertained that the jury was unable to reach a decision as to Count 1. The court then read the verdicts on Counts 2 through 5. The parties waived the polling of the jury on Counts 2 through 5. The court then announced it was going to declare a mistrial as to Count 1. The following then occurred:

[DEFENSE]: Did you inquire as to whether they had reached a unanimous --
THE COURT: I’m going to.
[DEFENSE]: Don’t we have to do that before you declare a mistrial?
THE COURT: I think, before we find out where they are on any given count, I have to declare the mistrial first.
[DEFENSE]: Okay. I’m sorry, Your Honor. (NOTE: Bench Conference concluded.)
THE COURT: Ladies and gentlemen, the Court has declared a mistrial as to Count 1.

I want to ask a few questions of you, . . . , as the foreperson.
As to Hector Nic[h]olas Garcia, was the jury able to reach a unanimous agreement as to first-degree murder, which is killing by an act greatly dangerous to others?

JUROR: No, sir.

THE COURT: Was the jury able to reach a unanimous agreement as to Hector Garcia as to felony murder, which is first-degree murder?
JUROR: No, sir.
THE COURT: As to the defendant Juan Carlos Munoz, was the jury able to reach a unanimous agreement as to first-degree murder, killing by an act greatly dangerous to others?
JUROR: No, sir.
THE COURT: As to Juan Carlos Munoz, was the jury able to reach a unanimous agreement as to felony murder, which is murder in the first degree?
JUROR: No, sir.
THE COURT: Counsel, is there any further inquiry?
[PROSECUTOR]: Not from the State, Your Honor.
[DEFENSE]: No, Your Honor.

At the conclusion, the State reserved the right to retry Defendants on Count 1, the felony murder and the deprived mind murder charges. The court permitted retrial in its order declaring a mistrial. The record does not reflect any objection by Munoz to the reservation of the right to retry him on Count 1 or to the court’s decision to permit retrial.

{21} We do not think that Castrillo or Wardlow requires the conclusion that the district court in the present case failed to properly poll the jury by failing to specifically inquire into the jury’s deliberations on the second degree murder charge. Nor do we think that these cases require a determination of acquittal on the second degree murder charge for failure to conduct such inquiry. The district court in Castrillo did not conduct inquiry into deliberations on any charge; therefore, there was no need for the court to analyze, and we do not believe it in that case analyzed whether, if it had inquired and determined a deadlock as to first degree murder, the court was required to continue its inquiry in regard to the jury’s deliberations on second degree murder. See Padilla v. State Farm Mut. Auto. Ins. Co., 2003-NMSC-011, ¶ 6, 133 N.M. 661, 68 P.3d 901 (indicating propriety of Court of Appeals distinguishing prior Supreme Court case when present case under consideration involves a different issue than the prior case or facts that distinguish the present case from the analysis in the prior case); Fernandez v. Farmers Ins. Co. of Ariz., 115 N.M. 622, 627, 857 P.2d 22, 27 (1993) (holding cases are not authority for propositions not considered); State v. Wenger, 1999-NMCA-092, ¶ 10, 127 N.M. 625, 985 P.2d 1205 (same), rev’d on other grounds sub nom. State v. Johnson, 2001-NMSC-001, 130 N.M. 6, 15 P.3d 1233. We do not, therefore, read Wardlow as locking in a rule that a failure to inquire as to second degree murder deliberations requires an acquittal on that charge. These cases did not, in our opinion, intend to require inquiry into the jury’s second degree murder deliberations under the circumstances here. See State v. Baca, 115 N.M. 536, 540, 854 P.2d 363, 367 (Ct. App. 1993) (stating that “[w]hile we are conscious of the controlling nature of Supreme Court precedent, see Alexander v. Delgado, 84 N.M. 717, 507 P.2d 778 (1973), we do not believe that the Supreme Court meant to expand the scope of [Rule] 11-405(B) [NMRA] in Baca[,]” and noting that the language in the Supreme Court’s Baca case on which the defendants relied “was not necessary to the court’s resolution of the issues in that case”).

{22} Analysis of this issue requires the conclusion that, in cases in which first and second degree murder charges are submitted to the jury, a district court need only inquire whether the jury has truly deadlocked on the greater offense of first degree murder. This is because when a jury is in deadlock on a single murder count containing first and second degree murder charges, as in the present case, it would appear to be logically inconsistent, if not a logical impossibility, for the jury to deadlock on the greater offense of first degree murder and acquit on the lesser included offense of second degree murder. {1} Thus, once the court has ascertained by inquiry of the jury that the jury was unable to reach a verdict on the first degree murder charge, we see no reason why the court should have to inquire any further down the line. Apparently, in the present case, the district court did not think it had to continue to poll the jury as to second degree murder. Under analysis, we hold that further inquiry was not necessary under manifest necessity or double jeopardy rationales.

{23} Further, to hold lack of further inquiry in this case to be reversible error would have the effect of encouraging defendants to knowingly sit by and allow a court to err by an incomplete jury inquiry. The effect would be to permit defendants to benefit by an implied acquittal when, if the defendants had objected at the time and permitted the court to cure the problem, the inquiry would have continued, and the jury surely would have indicated that it was deadlocked on second degree murder and a mistrial as to second degree murder would have been appropriate. Such a mischievous strategy on the part of a defendant undermines the administration of justice. Of course, defense counsel may simply be ignorant of the issue at the time of polling, permitting the court to err because of that ignorance. And, of course, appellate counsel for the defendants would no doubt raise ineffective assistance of counsel for failing to alert the court to the incomplete inquiry. Nevertheless, we do not see silence of defense counsel, whether ignorant or planned, as constituting ineffective assistance of counsel under these circumstances. The circumstances do not rise to a level of objectively unreasonable defense counsel performance or prejudice to Munoz to permit a determination of ineffective assistance of counsel. See Patterson v. LeMaster, 2001-NMSC-013, ¶ 17, 130 N.M. 179, 21 P.3d 1032 (setting out the “reasonableness” and “prejudice” prongs of the test for a prima facie case of ineffective assistance); see also Lytle v. Jordan, 2001-NMSC-016, ¶ 25, 130 N.M. 198, 22 P.3d 666 (setting out two components, whether defense counsel’s performance was deficient, and whether the deficient performance prejudiced the defendant).

{24} Another mischief could result from the rule Defendant advocates, which is demonstrated by what almost happened in Wardlow, i.e., the jury could unanimously think that the lesser included offense is simply inappropriate and could be encouraged to acquit on it, if required to state a position on it in response to a poll. For example, in the case of first and second degree murder and voluntary man-

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1 The logical inconsistency, if not impossibility, is shown by this example: Assume first degree murder is comprised of elements A, B, C, and D, and second degree murder, a pure lesser included offense, is comprised of elements B, C, and D. The jury states it is deadlocked on first degree murder. Deadlock means that one or more, but not all, jurors have voted to convict on first degree murder. This means that one or more jurors have found that the State proved A and B and C and D beyond a reasonable doubt. Those one or more jurors cannot, then, logically vote to acquit on second degree murder.
slaughter, the jury could unanimously be of the opinion that there was no sufficient provocation and be hung between first and second degree murder. If the inquiry were required to proceed beyond first degree murder and all the way down to voluntary manslaughter, there is the danger of an acquittal of voluntary manslaughter, which would then preclude conviction on the higher offenses even though each and every juror believes that a defendant is guilty beyond a reasonable doubt of one or the other higher offense.

{25} Rule 5-611(D) does not change our view. When a jury is instructed as it was in the present case, and it “cannot unanimously agree upon any of the offenses submitted,” Rule 5-611(D) requires that:

[T]he court shall poll the jury by inquiring as to each degree of the offense upon which the jury has been instructed beginning with the highest degree and, in descending order, inquiring as to each lesser degree until the court has determined at what level of the offense the jury has disagreed. If upon a poll of the jury it is determined that the jury has unanimously voted not guilty as to any degree of an offense, a verdict of not guilty shall be entered for that degree and for each greater degree of the offense.

{26} We first note that the committee commentary to Rule 5-611 states that paragraphs A, B, D, and E of the rule were derived from Rule 31 of the Federal Rules of Criminal Procedure and Rule 32 of the Colorado Rules of Criminal Procedure. We have reviewed those rules in their current state and with respect to our Rule 5-611(D) they are too different to assist in resolving the issues before us. It is apparent that Rule 5-611(D) was likely drafted, for the most part, based on the committee’s reading of Castrillo. See Rule 44 NMRA (Supp. 1978).

{27} We think it significant that Rule 5-611(D) requires the court to make inquiry only “until the court has determined at what level of the offense the jury has disagreed” after beginning “with the highest degree.” Rule 5-611(D). This is in conformity with our view of what should be required when the jury states it is deadlocked on a count including first degree murder and the jury has been instructed on the lesser included offense of second degree murder. That is, the court need inquire no further than first degree murder if that is the highest level of the offense at which the jury has disagreed.

{28} As we have analyzed Castrillo and the need or lack of need for further inquiry past first degree murder deliberations, we see no basis on which to invoke the last sentence of Rule 5-611(D) in the present case. Further, even if Castrillo were read as Munoz wants, Castrillo does not appear to have required the court to inquire whether the jury unanimously voted not guilty as to voluntary manslaughter, since the Court in Castrillo required retrial on that charge, holding that jeopardy did not attach to it as “the least of the included offenses.” 90 N.M. at 614, 566 P.2d at 1152.

{29} Based on the foregoing analyses, we hold that the district court in the present case did not err in the manner in which it polled the jury. The court’s poll was sufficient for it to conclude manifest necessity to declare a mistrial as to Count 1. Defendant could properly have been retried on first and second degree murder offenses. We therefore reject Munoz’s claim that he was denied effective assistance of counsel.

**Double Jeopardy—Both Garcia and Munoz**

{30} Under double jeopardy principles, Defendants assert that their convictions for shooting at a motor vehicle under Section 30-3-8(B) precluded the State from seeking a further conviction for first or second degree murder under Section 30-2-1. This issue was recently addressed adversely to Defendants’ contention in State v. Dominguez, 2005-NMSC-001, ¶¶ 15-16, ___ N.M. ___, 106 P.3d 563 (No. 28,119)(Jan. 27, 2005).

**Exclusion of Victim’s Blood Alcohol Content—Garcia and Munoz**

{31} The district court excluded a toxicology report showing Victim’s blood alcohol content (BAC) to be .245 percent at the time of his death. The court excluded the report on relevancy grounds, see Rule 11-402 NMRA, stating:

While [it] is scientifically or medically believed that over .08 may result in impairment of the ability to safely operate a vehicle, it is not relevant to an essential element in this case or to the defense.

As I understand the evidence, everyone was drinking, and the jury is certainly going to know that, and the Court feels that [that] evidence can be considered by the jury. The Court is of the opinion [the deceased’s BAC] doesn’t indicate whether someone is aggressive, passive, happy, sad, angry, et cetera. There [are] no criteria or scientifically established principle on that that I am aware of.

We review the exclusion of evidence under an abuse of discretion standard. See State v. Stampley, 1999-NMSC-027, ¶ 37, 127 N.M. 426, 982 P.2d 477.

{32} On appeal, Munoz asserts that the evidence would discredit the testimony of Victim’s friends, who, Munoz also asserts, essentially testified that they all had not drunk much. He also states that the evidence supports his claim of self-defense, putting together the following argument. Munoz first argues that an exception to Rule 11-404(A) NMRA against admission of character evidence to prove conformity on a particular occasion allows the defense to offer evidence of a “pertinent trait of character of the victim.” See Rule 11-404(A)(2). Munoz further argues that where the pertinent character trait of a victim goes toward proving an essential element of the defense, a defendant can prove specific instances of the victim’s conduct under Rule 11-405(B). From there, Munoz argues that when the defense is self-defense, a defendant can present a victim’s conduct that shows the defendant was reasonable in his apprehension of the victim and shows who was the first aggressor. Therefore, Munoz concludes, Victim’s character in this case constitutes an element of self-defense that properly can be proven by a specific instance of conduct. Thus, the toxicology report was “essential to prove self-defense” and was being offered “to counteract the [S]tate’s claim that a reasonable person in Mr. Munoz’[s] position would not have shot at [Victim]” and to show that because Victim was extremely intoxicated, Munoz was reasonable in his apprehension and, further, that Victim was the first aggressor. Garcia argues that the BAC of .245 percent was relevant to Victim’s state of mind and participation as first aggressor.
Under an abuse of discretion test, we cannot agree that the district court’s ruling was “clearly untenable or not justified by reason.” State v. Woodward, 121 N.M. 1, 4, 908 P.2d 231, 234 (1995) (internal quotation marks and citation omitted); State v. Litteral, 110 N.M. 138, 141, 793 P.2d 268, 271 (1990). Nor do we think the court’s ruling was “clearly against the logic and effect of the facts and circumstances of the case.” Woodward, 121 N.M. at 4, 908 P.2d at 234 (internal quotation marks and citation omitted); State v. Telles, 1999-NMCA-013, ¶ 12, 126 N.M. 593, 973 P.2d 845. Although Defendants contend that evidence of Victim’s .245 percent BAC would have tended to show that Defendants were reasonable in their apprehension and that Victim was the first aggressor, Defendants have not supplied authority to support this proposition. There undoubtedly is in many instances a correlation between alcohol and violence. However, as the district court observed, although it is clear that BAC may demonstrate impaired ability to drive a motor vehicle, a correlation between BAC and aggressiveness seems speculative unless tied more specifically to an individual’s history. As such, the probative value of the BAC evidence in this case is questionable at best. Cf. id., ¶ 14 (holding BAC of .05 percent not relevant in vehicular homicide case to show that the victim somehow contributed to the accident). Even if some relevance had been found, the district court could properly have determined that any slight probative value that the BAC evidence might have had was outweighed by its prejudicial effect. Cf. State v. Meadors, 121 N.M. 38, 48, 908 P.2d 731, 741 (1995) (upholding the district court’s limitation of cross-examination concerning the extent of the victim’s drug abuse, in light of its limited probative value and the prejudicial effect of the evidence). Further, we have held that specific instances of conduct are not admissible under Rule 11-405(B) to prove Victim was the first aggressor. See Baca, 115 N.M. at 540, 854 P.2d at 367.

Moreover, although Defendants were not permitted to introduce Victim’s BAC, evidence was presented to the jury indicating that Victim had been drinking prior to the shooting incident. For example, there was evidence that a thirty-pack of beer which was missing twenty-three cans was in Victim’s car, and that Victim and his three companions each had four to six beers before they arrived at the apartment complex. There was also evidence of Victim’s conduct. After Victim and his friends came to the apartment uninvited, they quickly engaged in a fight and seriously beat one of Munoz’s guests. Also there was evidence that, later on, Victim tried to punch Munoz and they scuffled; one of Victim’s friends had a tire iron in hand and also fought with Munoz. There was also evidence that Munoz and Garcia both saw Victim with a small caliber gun. According to some witnesses, at some point when a free-for-all erupted between the two groups, Victim tried to fire the gun into the crowd, but the gun jammed. The jury was aware of the evidence of Victim’s drinking and behavior occurring before Munoz and Garcia got rifles from Munoz’s apartment and Victim was back in his vehicle. As a result, we conclude that the exclusion of the BAC evidence did not prejudice Defendants. See State v. Wildgrube, 2003-NMCA-108, ¶ 11, 134 N.M. 262, 75 P.3d 862.

Finally, the evidence of Defendants’ series of shots at Victim’s vehicle is plentiful. This evidence, together with the abundance of other evidence before the jury regarding Defendants and Victim, persuades us that evidence of Victim’s BAC was not important to Defendants for the purpose of attempting to discredit Victim’s friends’ testimony. Admission of this evidence would have had a minuscule impact, if any at all, on Munoz’s or Garcia’s guilt or innocence. Defendants have not shown a reasonable probability that the inability to use this evidence to attempt to discredit witnesses contributed to their convictions. See State v. Baca, 1997-NMSC-045, ¶ 22, 124 N.M. 55, 946 P.2d 1066 (“If the court erred in denying the defendant use of the evidence, no relief is warranted unless the Defendant also shows a reasonable probability the ruling contributed to his conviction.”).

For all of the foregoing reasons, we hold that the district court did not err in excluding the evidence of Victim’s BAC.

Evidentiary Rulings Regarding Other Weapons—Garcia and Munoz

In the course of the trial, several witnesses testified about the presence of firearms at the scene. Apart from the testimony concerning the rifles in question and a Luger handgun that were present in Munoz’s apartment, witnesses also testified that additional firearms were contained in a truck owned by Munoz and parked in the vicinity. The weapons in Munoz’s truck were a Tech .22 and a .38 caliber revolver. Defendants objected on relevancy grounds to evidence regarding these two weapons. The court allowed the evidence. Later, when the jury submitted a question to the court, “Why were the handguns in the truck?” Defendants moved for a mistrial, asserting that the evidence created a false collateral issue. Defendants also asserted that the evidence concerning the presence of the weapons in the truck was improperly placed before the jury to attempt to show nothing more than Munoz was a “gun nut,” in order to inflame the jury. The motion for a mistrial was denied. Munoz asserts on appeal that the court erred in allowing this evidence—evidence that, according to Munoz, was in effect improper character evidence used by the State to inflame the jury. Garcia asserts on appeal that he was entitled to a mistrial as a result of admission of the evidence—evidence that according to Garcia, was neither relevant nor probative.

We review the district court’s decision to admit evidence under an abuse of discretion standard. See Stampley, 1999-NMSC-027, ¶ 37; Baca, 1997-NMSC-045, ¶ 22. An abuse of discretion relating to the admission of evidence is measured by whether the district court’s ruling was “clearly untenable or not justified by reason,” and by whether the ruling was “clearly against the logic and effect of the facts and circumstances of the case.” Woodward, 121 N.M. at 4, 908 P.2d at 234 (internal quotation marks and citation omitted); Telles, 1999-NMCA-013, ¶ 12. A decision to grant or deny a motion for a mistrial is reviewed for an abuse of discretion. See State v. Varela, 1999-NMSC-045, ¶ 28, 128 N.M. 454, 993 P.2d 1280 (stating that an “[a]buse of discretion exists when the trial court acted in an obviously erroneous, arbitrary, or unwarranted manner” (internal quotation marks and citation omitted)); State v. Simonson, 100 N.M. 297, 301, 669 P.2d 1092, 1096 (1983); State v. Burdex, 100 N.M. 197, 200, 668 P.2d 313, 316 (Ct. App. 1983).

We find no abuse of discretion in this case. One of the State’s witnesses testified, without objection, about the presence of one gun in Munoz’s truck. The defense then cross-examined the witness on that subject, eliciting testimony that he was unaware of any other firearms in the truck and that the witness had not seen either Defendant go to the truck during the altercations. When a separate witness began to testify about his discovery of weapons in the truck, did the defense raise any objection. Because “the horse was already out of the barn” in regard to at least one gun in Munoz’s truck, Defendants’ objections were untimely and failed to preserve...
the issue for review on appeal. *State v. Neswood*, 2002-NMCA-081, ¶ 18, 132 N.M. 505, 51 P.3d 1159 (holding an objection untimely when raised after the testimony has been heard, such that the issue would not be considered on appeal).

[40] Defendants did timely object to the admission of evidence concerning the .38 caliber revolver in Munoz’s truck. The State contends that the prejudicial effect of this evidence was slim to nonexistent. We agree. The jury had already heard a good deal of evidence concerning guns, including Munoz’s two rifles, a Luger, and a Tech .22. The testimony concerning the presence of a .38 caliber weapon in the glove box of Munoz’s truck cannot have had any prejudicial impact on the verdict. See *State v. Christopher*, 94 N.M. 648, 653, 615 P.2d 263, 268 (1980) (holding that the admission of testimony concerning the presence of a gun in the family home may have been inadmissible, but the evidence “was miniscule [sic] in relation to the overwhelming amount of evidence” properly before the jury, such that any error was harmless and the district court properly denied a motion for mistrial); *Burden*, 100 N.M. at 200, 668 P.2d at 316 (stating that “[e]rror in the admission of evidence is harmless if the evidence was not such that it could have substantially contributed to the conviction”). “Even if the testimony should not have been admitted, the district court acted well within the bounds of its discretion in determining that the evidence did not so taint the trial as to require a mistrial.” *State v. Foster*, 1998-NMCA-163, ¶ 24, 126 N.M. 177, 967 P.2d 852; see also *Varela*, 1999-NMSC-045, ¶ 28 (stating that the appellate court will not disturb the denial of a motion for mistrial absent an abuse of discretion).

**Exclusion of Evidence of a Prior Altercation—Garcia**

[41] Garcia contends that the district court erred in excluding evidence of a separate, earlier altercation at another location involving Victim and Munoz. We review the district court’s ruling for abuse of discretion. See *Stampley*, 1999-NMSC-027, ¶ 37; *Baca*, 1997-NMSC-045, ¶ 22.

[42] We observe that Garcia failed to make an offer of proof of the circumstances of an earlier altercation. See generally Rule 11-103(A)(2) NMRA (requiring a party to make an offer of proof in order to preserve error concerning the exclusion of evidence). This prevents us from evaluating the merits of Garcia’s claim of error on appeal. See, e.g., *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 district court properly excluded testimony).

[43] Even if the record were adequate, we believe the district court’s ruling was within its discretion. It appears that the admissibility of the evidence in question is controlled by Rule 11-404(B), the “prior bad acts” rule. Generally speaking, evidence of prior bad acts is subject to exclusion unless it bears on something other than propensity. See *State v. Niewiadowski*, 120 N.M. 361, 363-64, 901 P.2d 779, 781-82 (Ct. App. 1995) (observing that evidence of “other bad acts can be admissible if it bears on [an] issue . . . in a way that does not merely show propensity”); *State v. Jones*, 120 N.M. 185, 187, 899 P.2d 1139, 1141 (Ct. App. 1995) (cautioning that “courts must be careful in admitting other-bad-acts evidence because of its large potential for prejudice” and observing that such evidence may only be admitted “to show some proper purpose . . . that is not character or propensity”). In the course of the proceedings below, Garcia specifically argued that the evidence of the prior altercation should have been admitted because it tended to prove “that these people had the propensity . . . of getting into a fight that night.” Because evidence of prior bad acts for this purpose is subject to exclusion under Rule 11-404(B), the district court did not abuse its discretion in excluding the evidence.

[44] Garcia attempts to show error by contending that the evidence in question was admissible under Rule 11-404(B) as probative of motive, intent, knowledge, absence of mistake, and/or context. By this argument, we understand Garcia to suggest that the prior incident had some bearing on the issue of self-defense, as tending to establish that Victim was the first aggressor. However, evidence of the prior altercation was not admissible to show that Victim was the first aggressor. See *Baca*, 115 N.M. at 540, 854 P.2d at 367 (holding that specific incidents of a victim’s conduct are not admissible to show that the victim was the first aggressor).

[45] Finally, even though the district court found the evidence of the prior incident to be more prejudicial than probative, given the limited information that is available to this Court on appeal, we are not in a position to evaluate the district court’s assessment. See *State v. Rojo*, 1999-NMSC-001, ¶ 53, 126 N.M. 438, 971 P.2d 829 (“Where there is a doubtful or deficient record, every presumption must be indulged . . . in favor of the correctness and regularity of the [trial] court’s judgment.” (internal quotation marks and citation omitted) (alteration in original)); *State v. Brown*, 116 N.M. 705, 706, 866 P.2d 1172, 1173 (Ct. App. 1993) (same).

[46] For all of the foregoing reasons, we reject Garcia’s assertion of error as to the court’s exclusion of evidence of a prior altercation between Victim and Munoz.

**Exclusion of Evidence Concerning Prior Convictions—Garcia**

[47] Garcia asserts that the district court prohibited him from inquiring about the prior convictions of one of the witnesses for the State, Jeffrey Pate, and Garcia contends that he was improperly precluded from fully examining this witness about his motive for testifying.

[48] Although the record contains pretrial and sidebar exchanges concerning Garcia’s entitlement to information about the witness’s prior convictions, it is devoid of any indication that Garcia was prevented from any proper exploration of the witness’s criminal background or motive. In fact, the witness admitted that he had prior convictions when he took the stand. Because Garcia failed to object to the information provided, failed to make any offer of proof, and fails to cite to relevant portions of the record, Garcia’s claim of error is unreserved, unsupported by the record, and deficiently briefed. *Cf. Rojo*, 1999-NMSC-001, ¶ 53 (“Where there is a doubtful or deficient record, every presumption must be indulged . . . in favor of the correctness and regularity of the [trial] court’s judgment.” (internal quotation marks and citation omitted) (alteration in original)); *State v. Herrera*, 2004-NMCA-015, ¶¶ 8-9, 135 N.M. 79, 84 P.3d 696 (observing that “a defendant can waive fundamental rights, including constitutional rights,” and holding that a defendant waives the right to confrontation by failing to enter an objection); *Brown*, 116 N.M. at 706, 866 P.2d at 1173 (“[O]n a doubtful or deficient record, we presume regularity and correctness in the proceedings below.”).
Admission of Photographs of Victim—Garcia

Garcia challenges the admission of two photographs depicting Victim with his children, taken prior to his death, and three photographs of Victim’s condition after he received the fatal gunshot wound. The court admitted the former on the ground the State was entitled to humanize Victim and the latter for the purpose of showing the nature of the injury.

“A trial court has great discretion in balancing the prejudicial impact of a photograph against its probative value.” Mora, 1997-NMSC-060, ¶ 55. We review the admission of photographs under the abuse of discretion standard. State v. Pettigrew, 116 N.M. 135, 139, 860 P.2d 777, 781 (Ct. App. 1993). In this case, the photographs of Victim after death were used to show the nature of the injury, to explain the basis of the forensic pathologist’s opinion, and to illustrate the forensic pathologist’s testimony. It is well established that photographs may properly be admitted for such purposes, even if they are gruesome. See, e.g., Mora, 1997-NMSC-060, ¶¶ 54-55 (upholding the admission of photos of a child homicide victim on grounds they were illustrative); State v. Perea, 2001-NMCA-002, ¶ 22, 130 N.M. 46, 16 P.3d 1105 (holding that a potentially inflammatory photograph of a victim’s face was relevant and that its admission was well within the discretion of the district court), aff’d in part and vacated in part, 2001-NMSC-026, 130 N.M. 732, 31 P.3d 1006; Pettigrew, 116 N.M. at 139, 860 P.2d at 781 (holding that photos of a battered victim were relevant to depict the extent of the victim’s injuries and to illustrate a physician’s testimony, and that the admission of the photos was not an abuse of discretion); State v. Blakley, 90 N.M. 744, 748, 568 P.2d 270, 274 (Ct. App. 1977) (holding that a photo of the body of the victim at the scene was relevant and admissible because it “illustrated, clarified, and corroborated the testimony of various witnesses”). Accordingly, we perceive no abuse of discretion in the admission of photographs of Victim after receiving the fatal gunshot wound.

Garcia argues that admission of the portrait photographs of Victim prior to his death was error because Victim’s identity was not at issue and, therefore, there was no need to establish Victim’s identity by use of the photographs. Cf. State v. Baros, 87 N.M. 49, 50, 529 P.2d 275, 276 (Ct. App. 1974) (holding that the admission of a photograph of a homicide victim for the purpose of identification was within the discretion of the district court, and determining that a family photo excluded by the court as prejudicial that was inadvertently seen by two jurors was harmless error). However, we cannot conclude that the court abused its discretion in the present case by admitting the photographs of Victim when he was alive. There no doubt may be instances in which a photograph of a victim while alive can have no legitimate purpose than to inflame the passions of the jury against a defendant, with that likely effect. But Garcia points to no particular circumstances in his case, or to any particular aspect of the admitted photographs, that necessarily move the admission of the photographs from fair humanization of Victim to unfair prejudice inflation such that the court’s admission of the photographs constituted an abuse of discretion. Cf. State v. Webb, 81 N.M. 508, 510, 469 P.2d 153, 155 (Ct. App. 1970) (“The question of admissibility of photographic evidence, objected to as being inflammatory of the passions and prejudices of the jury, is largely one of discretion to be exercised by the trial court. Ordinarily, the trial court’s discretion thereon will not be disturbed on appeal.” (citations omitted)). Further, even if the admission of the photographs of Victim with his children was an abuse of discretion, we conclude that the error was harmless. See State v. Roybal, 107 N.M. 309, 312, 756 P.2d 1204, 1207 (Ct. App. 1988) (holding admission of challenged evidence is harmless error where the record contains other properly admitted evidence that independently establishes guilt). The photographic evidence is minuscule in comparison with the evidence supporting Defendants’ convictions, including the testimony of numerous eyewitnesses, experts, and investigators, as well as testimony that Garcia and Munoz each fired a rifle at Victim’s vehicle. Because the photos are not likely to have contributed to Defendants’ convictions, we conclude that reversible error was not committed. See Baros, 87 N.M. at 50, 529 P.2d at 276 (holding that the admission of a family photo was harmless error in light of the overwhelming evidence in support of the conviction).

CONCLUSION

We affirm the convictions of both Defendants, Garcia (Docket No. 24,072) and Munoz (Docket No. 24,065).

IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:
LYNN PICKARD, Judge
CELIA FOY CASTILLO, Judge
In this case, we must determine if the provisions of the New Mexico statute creating an uninsured employers’ fund (statute) apply prospectively or retroactively to the claims of Appellants Wegner and Mosqueda. We hold that the terms of the statute apply prospectively, and we affirm.

I. BACKGROUND

Wegner was injured on February 9, 1998. She timely filed her claim against her employer and was awarded compensation by orders entered in 1999 and 2001. Wegner’s employer was uninsured at the time of the injury, and no benefits have been paid. On July 18, 2003, Wegner filed a claim for payment from the uninsured employers’ fund under the statute.

Mosqueda’s case is similar. She was injured on April 6, 2000. A compensation order against the employer was issued in 2002. Mosqueda’s employer was uninsured at the time of her injury, and she has been paid no benefits. Mosqueda filed her claim against the uninsured employers’ fund on June 26, 2003.

Enacted by the legislature during the 2003 regular session, the statute is found in 2003 New Mexico Laws, Chapter 258, Section 1, and was compiled in NMSA 1978, § 52-1-9.1 (2003) (amended 2004), as part of the Workers’ Compensation Act (Act), NMSA 1978, §§ 52-1-1 to -70 (1929, as amended through 2004). The statute provides that the fund be administered by the workers’ compensation administration and directs the administration to establish rules to administer the fund. Section 52-1-9.1(A). Payments from the fund may be made for “workers’[] compensation benefits to a person entitled to the benefits when that person’s employer has failed to maintain workers’ compensation coverage because of fraud, misconduct or other failure to insure or otherwise make compensation payments.” Section 52-1-9.1(D). Although the initial appropriation to establish the fund was made by the legislature for fiscal year 2004, 2003 N.M. Laws, ch. 258, § 2, the terms of the statute require annual funding from employers in the form of a fee that is to be paid quarterly at a rate established annually by the administration. Section 52-1-9.1(B), (C). The rate has a cap but must be sufficient to generate enough income to meet payments from the fund for the next fiscal year. Id. Funding is also derived from fund income, reimbursements, penalties, or money otherwise allocated to the fund. Section 52-1-9.1(B), (C), (H), (J).

By operation of law, the statute became effective on June 20, 2003. N.M. Const. art. IV, § 23 (“Laws shall go into effect ninety days after the adjournment of the legislature enacting them, except general appropriation laws[.]”). The parties agree that Wegner and Mosqueda were injured before the effective date of the statute and that in both cases, supplemental compensation orders were entered prior to the effective date of the statute. Wegner and Mosqueda filed claims for payment from the fund and named the New Mexico Uninsured Employers’ Fund (Fund) as a defendant. Their cases were consolidated. The Workers’ Compensation Judge (WCJ) heard arguments on cross-motions for summary judgment and granted summary judgment in favor of the Fund on January 30, 2004. Wegner and Mosqueda appealed.

II. DISCUSSION

We must determine whether the WCJ erred in determining that the statute should be given prospective application only. Appellants make three arguments in support of reversal. First, they argue that public policy enunciated in the statute supports retrospective applicability. In this regard, Appellants also assert that the statute does not impair existing rights or create new obligations. We evaluate this contention, together with Appellants’ second argument: that the statute is procedural, not remedial, in nature and can therefore be applied retroactively. Lastly, Appellants argue that their claims against the Fund did not accrue until after passage of the statute in question and therefore should be covered by the statute. While we are sympathetic to Appellants and the fact that they have received no benefit coverage, we do not believe that the legislature intended the statute to apply to claims that accrued before the effective date of the statute.

A. Public Policy

Interpreting a statute is a question of law; therefore, our review is de novo. Meyers v. W. Auto, 2002-NMCA-089, ¶ 13, 132 N.M. 627 (filed March 2, 2005)
other participants not parties to this action.” This approach would have us evaluate the effective date of the statute in a piecemeal fashion,


know when its liability would begin. “We do not adopt an interpretation of a statute that leads to absurd results.”

legal consequences to events completed before its enactment, substantial rights are affected, and prospective application is generally

subsection must be considered in reference to the statute as a whole). If retroactive application of a newly enacted law attaches new

would cause an absurd result: there would be no speci-

Section 52-1-9.1(B), (H), we conclude that these new obligations can only begin after the date of enactment. Any other interpretation

675, 54 P.3d 79. Our goal is to give primary effect to the intent of the legislature. \textit{Id.} Generally, a statute is to be applied prospectively,

prospective application may be required by the New Mexico Constitution).

there is a question about the constitutionality of imposing penalties and requiring reimbursement based on events that predate enact-

668 (clarifying that if retroactive application of a statute results in attaching legal consequences to events completed before enactment,

proceedings to events completed before its enactment among all the payers of workers’ compensation benefits. We believe that the Fund

has the better argument. The statute is extensive in nature. It provides an additional remedy for those injured workers whose employers have not paid benefits as required by law. Section 52-1-9.1(C). In order for injured employees to recover under this new remedy, the statute creates a fund and sets out how it is to be administered. Section 52-1-9.1(A), (B). It establishes a mechanism for ongoing funding, places a cap on expenditures, and creates an incentive system that encourages employers to pay benefits under the Act. Section 52-1-9.1(B), (G), (H). Given the comprehensive nature of the statute and its effect on the entire workers’ compensation system, we see no compelling reason to deviate from the general rule and allow a claim for payment under this statute, regardless of accrual date. The statute affects not only workers but the entire workers’ compensation system. The statute also affects the public, to the extent that workers receiving benefits will not look to the welfare system for support.

11 In further reviewing the statute, we observe that the public policy language relied on by Appellants introduces Section 52-1-9.1(H); the actual content of the subsection, however, relates to penalty payments and reimbursement to the fund by uninsured employers. Payments to injured employees are addressed in Section 52-1-9.1(D), (E). Accordingly, it appears to us that this particular public policy announcement by the legislature is directed to employers and that it provides the basis for imposing penalties and reimbursement obligations on employers who do not provide the required benefits to injured employees.

B. Procedural Versus Remedial Statute

12 Appellants contend that the statute is procedural in nature because no rights or remedies are impaired or created and because the statute merely establishes a procedure that makes it easier for employees to receive the benefits to which they are entitled. Appellants point out that the rights of injured employees are not changed; these employees remain entitled to the same benefits they would have received had their employers been properly insured. Based on this, Appellants conclude that the statute should be applied retroactively.

13 We agree with Appellants that employees remain entitled to the same benefits they would have received had their employers been insured. Section 52-1-9.1(D), (E). However, the statute provides an additional remedy, under which employees may petition for these benefits. Section 52-1-9.1. Section 52-1-9.1(B) requires an uninsured employer to pay an uninsured employer’s fee on a quarterly basis. Section 52-1-9.1(H) requires an uninsured employer to reimburse the fund and pay penalties. The imposition of fees and the requirement to make reimbursements and pay penalties are new obligations imposed on employers by the statute. In reading the language of Section 52-1-9.1(B), (H), we conclude that these new obligations can only begin after the date of enactment. Any other interpretation would cause an absurd result: there would be no specific date from which to impose these obligations, and an employer would not know when its liability would begin. “We do not adopt an interpretation of a statute that leads to absurd results.” \textit{State v. Adam M.}, 1998-NMCA-014, ¶ 24, 124 N.M. 505, 953 P.2d 40.

14 In response, Appellants urge us to treat these quasi-criminal remedies as separate issues and deal with them another day, “between other participants not parties to this action.” This approach would have us evaluate the effective date of the statute in a piecemeal fashion, an approach we will not adopt. \textit{See State v. Rivera}, 2004-NMSC-001, ¶ 13, 134 N.M. 768, 82 P.3d 939 (directing that in interpreting a statute, an appellate court must look at a particular statute’s function within a comprehensive legislative scheme and that a statutory subsection must be considered in reference to the statute as a whole). If retroactive application of a newly enacted law attaches new legal consequences to events completed before its enactment, substantial rights are affected, and prospective application is generally required. \textit{See Landgraf v. USI Film Prods.}, 511 U.S. 244, 270 (1994) (stating that presumption against statutory retroactivity is based on the unfairness that results when new burdens are placed on persons after the fact); \textit{Swink}, 115 N.M. at 290, 850 P.2d at 993. Clearly, there is a question about the constitutionality of imposing penalties and requiring reimbursement based on events that predate enactment of the statute imposing the new obligations. \textit{See Gallegos v. Pueblo of Tesuque}, 2002-NMSC-012, ¶ 33, 132 N.M. 207, 46 P.3d 668 (clarifying that if retroactive application of a statute results in attaching legal consequences to events completed before enactment, prospective application may be required by the New Mexico Constitution).

15 We do not agree with Appellants’ characterization of the statute. As we explained in the preceding paragraph, the statute is sub-
stantive legislation that creates new duties, rights, and obligations. As such, the statute is to be applied prospectively. *Id.*; see *Consol. Freightways, Inc. v. Subsequent Injury Fund*, 110 N.M. 201, 204, 793 P.2d 1354, 1357 (Ct. App. 1990) (holding that new provisions of the Act “apply only to causes of action accruing after the effective date of the provision”). Further, we presume that the legislature, when it enacted the statute, was aware of our holdings in *Jojola* and *Consolidated Freightways* and how the effective date of an amendment to the Act is interpreted. *Herrera v. Quality Imps.*, 1999-NMCA-140, ¶ 8, 128 N.M. 300, 992 P.2d 313 (stating that the “[l]egislature is presumed to know of existing law when it enacts legislation” (internal quotation marks and citation omitted)).

### C. Claim Accrual

{16} Appellants argue that because no cause of action under the statute could accrue until after creation of the fund, their claims accrued after passage of the statute, and Appellants should be allowed to recover under the statute. We agree that any right to recover from the fund did not arise until after the effective date of the statute. The accrual date, however, depends on the event that triggers the right. Relying on *Jojola* and *Consolidated Freightways*, Appellants argue that the operable event is the passage of the statute. Our reading of these cases is otherwise.

{17} *Jojola* and *Consolidated Freightways* dealt with amendments to the Subsequent Injury Fund (SIF). In *Jojola*, we held that an amendment requiring the pre-injury filing of a certificate of preexisting impairment would only be applicable to causes of action accruing after the effective date of the amendment. 109 N.M. at 143-44, 782 P.2d at 396-97. The operative date in *Jojola* was the date of the subsequent injury, which is the same as the date of injury under the Act. *Id.* at 142-43, 782 P.2d at 395-96. Therefore, our holding essentially stated that the filing requirement would apply only to those cases wherein the injury occurred after the effective date of the amendment. *Id.* at 144, 782 P.2d at 397.

{18} In *Consolidated Freightways*, we reviewed the same amendment, requiring a certificate of preexisting injury, as well as another amendment, requiring the filing of a notice of claim ninety days before the actual filing of a claim against the SIF. 110 N.M. at 203, 793 P.2d at 1356. We saw no reason to apply different effective dates to the two amendments and reiterated our holding in *Jojola*: “[N]ew provisions of the Workers’ Compensation Act shall apply only to causes of action accruing after the effective date of the provision.” *Consol. Freightways*, 110 N.M. at 204, 793 P.2d at 1357. One of SIF’s arguments in that case was very similar to Appellants’ contention here: that the employer’s action against the SIF was not pending until the date the claim was actually filed—in that case, on May 16, 1988, which was two months after the amendment’s effective date. *Id.*. In *Consolidated Freightways*, we relied on *Jojola* and rejected SIF’s position that the date of claim filing is the same as the date of claim accrual and held that the date the claim was filed was “irrelevant to the prospective application of the amended provision.” *Consol. Freightways*, 110 N.M. at 204, 793 P.2d at 1357. Accordingly, we continue to rely on *Jojola* and *Consolidated Freightways* for the proposition that amendments to the Act shall apply only to “causes of action accruing after the effective date of the provision.” *Jojola*, 109 N.M. at 144, 782 P.2d at 397; see *Consol. Freightways*, 110 N.M. at 204, 793 P.2d at 1357.

{19} In the cases of Appellants, there is no dispute that the events upon which a claim against the fund would be premised occurred well before the effective date of the statute. The date of claim accrual in this case does not mean the date the new remedy was created by the statute. Rather, we look to the date of injury, which triggers the cause of action under the Act. Consequently, we agree with the Fund: a claimant is limited to an employee whose injury occurs after the effective date of the statute.

### D. Agency Interpretation of the Statute

{20} The Fund, in its answer brief, points to the regulations adopted by the workers’ compensation administration, arguing that the agency’s interpretation of the statute is entitled to deference by the courts. Specifically, 11.4.12.8.B(1) NMAC (2004) limits claims to “injuries or illnesses that arose from accidents or exposures occurring on or after June 22, 2003.” The workers’ compensation administration is directed to adopt rules to administer the fund pursuant to the provisions of the statute. Section 52-1-9.1(A). The first set of regulations governing the fund was adopted on October 15, 2003. The claims in this case were filed between three and four months before the regulations were promulgated. We have interpreted the statute such that the WCJ is affirmed; thus, there is no need to address this issue.

### III. CONCLUSION

{21} Based on the foregoing, we affirm the order of the WCJ dismissing Appellants’ claims against the Fund.

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

**CELIA FOY CASTILLO,**

Judge

WE CONCUR:

**JAMES J. WECHSLER,** Judge

**JONATHAN B. SUTIN,** Judge
OPINION

JONATHAN B. SUTIN, Judge

1. Charged with aggravated DWI and convicted of DWI, Defendant appeals on eight grounds. We affirm.

BACKGROUND

2. On January 27, 2001, Officer Christopher Williams was talking to another officer in the parking lot of a gas station when he saw a pick-up truck, while turning left at an intersection, cross left of the center of the street onto which he was turning, and almost strike another vehicle that was stopped in the lane reserved for traffic going the other direction. Officer Williams pursued Defendant and stopped him a short distance away when Defendant pulled into the parking lot of an apartment building.

3. The officer observed the following signs of intoxication: Defendant stumbled when exiting his vehicle, an odor of alcohol coming from Defendant, slurred speech, swaying, and one watery and bloodshot eye.

The officer learned that Defendant’s other eye was a prosthesis. The officer administered field sobriety tests including the one-leg stand and the walk-and-turn test. After the officer demonstrated and explained the one-leg stand he asked Defendant if he had any problems that would prevent him from performing the test, to which Defendant answered that he had been working on boilers all day. The officer nonetheless continued with the tests, concluded that Defendant was driving while under the influence of alcohol, placed him under arrest, and transported him to jail. At the jail, the officer administered a twenty-minute waiting period and then administered a breath alcohol content (BAC) test. Three breath samples were taken, the first was an insufficient sample, the second was .18, and the third was .17.

4. Defendant was charged with aggravated driving while under the influence of intoxicating liquor or drugs (aggravated DWI), pursuant to NMSA 1978, § 66-8-102(D) (2004). The case was tried to a jury. The jury was instructed on the charges of aggravated DWI and driving with a BAC of .08 or greater (DWI .08) as a lesser included offense of the aggravated DWI charge. Defendant was convicted of DWI .08. Additional facts will be detailed as necessary in the opinion.

DISCUSSION

5. Defendant raises eight arguments on appeal: (1) the district court erred in submitting to the jury an instruction that Defendant could be found guilty of DWI .08; (2) by not checking to see if there was anything in Defendant’s mouth, the officer did not administer the breath test according to New Mexico regulations, rendering the test results unreliable and inadmissible; (3) the district court erred in admitting the results of the BAC test because the State failed to make the required threshold showing that the machine used to test Defendant was reliable; (4) the court denied Defendant his right to confront the witnesses against him; (5) Defendant’s seizure was unreasonable and thus evidence obtained therefrom was inadmissible; (6) the State made improper comments during its cross-examination of Defendant, thus denying him a fair trial; (7) Defendant was prejudiced by cumulative error; and (8) the district court erred in denying Defendant’s motion for a directed verdict.

1. The District Court Did Not Err by Instructing the Jury on the Offense of DWI .08

6. Aggravated DWI can be committed in one of three ways: (1) driving with a blood or BAC of .16 or greater (DWI .16), (2) causing bodily injury to a human being while driving while intoxicated, or (3) refusing to submit to a chemical test. See State v. Meadors, 121 N.M. 38, 45, 908 P.2d 731, 738 (1995) (“[A]n offense is a lesser-included offense only if the defendant cannot commit the greater offense in the manner described in the charging document without also committing the lesser offense. Accordingly, the defendant should be fully
aware of the possible offenses for which he or she may face prosecution and should have ample opportunity to prepare a defense.

Thus, if we conclude that DWI .08 is a lesser included offense of aggravated DWI it will be dispositive of Defendant’s argument that he was not on notice of the charges against him. Whether a defendant is erroneously convicted of an uncharged lesser included offense is a question of law which we review de novo. See State v. McGee, 2002-NMCA-090, ¶ 7, 132 N.M. 537, 51 P.3d 1191.

¶ 9 Meadors sets forth the test for determining whether one offense is a lesser included offense of another. 121 N.M. at 41-47, 908 P.2d at 734-40. First, one must decide whether the stringent “strict elements” test is met. Id. at 42, 908 P.2d at 735. Under the strict elements test, one offense is “a lesser-included offense of another only if the statutory elements of the lesser offense are a sub-set of the statutory elements of the greater offense such that it would be impossible [to ever] commit the greater offense without also committing the lesser offense.” Id.

¶ 10 If the strict elements test is not met, then the court should turn to the “cognate approach” to determine whether one offense is a lesser included offense of another. Id. at 44, 908 P.2d at 737. The cognate approach was developed in Meadors, as a clarification of the earlier rule developed in State v. DeMary, 99 N.M. 177, 179, 655 P.2d 1021, 1023 (1982). Meadors, 121 N.M. at 45, 908 P.2d at 738. Under the cognate approach, a party is entitled to an instruction on a lesser included offense, even if the strict elements test is not met, when:

1. the defendant could not have committed the greater offense in the manner described in the charging document without also committing the lesser offense, and therefore notice of the greater offense necessarily incorporates notice of the lesser offense;
2. the evidence adduced at trial is sufficient to sustain a conviction on the lesser offense; and
3. the elements that distinguish the lesser and greater offenses are sufficiently in dispute such that a jury rationally could acquit on the greater offense and convict on the lesser.

Id. at 44, 908 P.2d at 737.

¶ 11 In the present case, no specific form of aggravated DWI was charged. The charge was essentially an open charge, which notified Defendant that he needed to prepare against all three forms of aggravated DWI. See State v. Stephens, 93 N.M. 458, 461, 601 P.2d 428, 431 (1979) (holding that an open charge of murder which did not specify the type or degree of murder nonetheless afforded proper notice to the defendant of the charges against him), overruled on other grounds by State v. Contreras, 120 N.M. 486, 903 P.2d 228 (1995); State v. Gurule, 90 N.M. 87, 91, 559 P.2d 1214, 1218 ( Ct. App. 1977) (holding that an indictment was not insufficient where it charged violation of one statute that could be committed in two ways).

¶ 12 Defendant argues that DWI .08 cannot be a lesser included offense under a strict elements test because aggravated DWI can be committed without committing DWI .08. It is true that one can commit aggravated DWI with a BAC less than .08, either by refusing to submit to a chemical test or by causing injury to a human. § 66-8-102(D)(2), (3). Thus, because the greater crime of aggravated DWI can be committed in such a manner that the lesser crime of DWI .08 is not committed, we agree with Defendant that the strict elements test has not been met in this case.

¶ 13 Romero provides support for the determination that DWI .08 was a lesser included offense in the present case under the cognate approach. See id. ¶ 14. In Romero, the greater offense with which the defendant was charged was burglary, of which one element is unauthorized entry. Id. ¶ 11. The lesser offense was criminal trespass, which could be committed by either entering or by remaining in a dwelling without permission. Id. ¶ 15. This Court determined that it was theoretically possible to commit the lesser crime without committing the greater crime, if the defendant had entered the dwelling with permission but remained without consent. Id. ¶¶ 15-16. Thus, we concluded that the strict elements test was not met. Id. ¶ 16. However, we further concluded that under the cognate approach, criminal trespass was a lesser included offense because the sole factual basis of the charge of criminal trespass was unauthorized entry, and under that theory the defendant could not have committed aggravated burglary without also committing criminal trespass. Id.

¶ 14 In the case at hand, it is the greater offense, aggravated DWI, which can be committed in more than one way. However, this Court’s reasoning in Romero applies. Under the evidence adduced at trial, the only factual basis for the aggravated DWI charge was DWI .16. Defendant nowhere presents an argument showing that he could not have had notice of DWI .08 as a lesser included offense. We conclude that the first prong of the Meadors cognate approach is met in this case because, under the offense in the charging document and the evidence adduced at trial, Defendant could not have committed the greater offense (DWI .16) without also committing the lesser offense (DWI .08). See Meadors, 121 N.M. at 42-43, 908 P.2d at 735-36.

¶ 15 The second and third prongs of the Meadors cognate approach are also met. The second prong requires sufficient evidence to convict Defendant of the lesser charge to be introduced at trial. Id. at 44, 908 P.2d at 737. As we discuss in greater detail later in this opinion, the BAC results of .17 and .18 are sufficient evidence to show that Defendant drove with a BAC greater than .08. The third prong of the Meadors cognate approach is that the elements distinguishing between the greater and lesser offenses were sufficiently in dispute at trial such that a rational jury could acquit on the greater charge but convict on the lesser charge. Id. Defendant introduced evidence intended to show that the BAC machine was unreliable, including that it had given a previous out-of-range result during a calibration check and that Defendant had chewing tobacco in his mouth which may have affected the results of the test. However, there was also evidence that showed that, after the out-of-range reading, the machine received maintenance which included calibration checks that indicated the machine was within range and functioning properly. Further, there was evidence that if Defendant had tobacco in his mouth, the machine would have given a reading of “interferant detected,” and that the machine did not give that reading. Under these circumstances, a rational jury could have concluded that Defendant’s BAC may have been less than .16 but greater than .08. Thus, the
third prong of the *Meadors* test is met in this case.

16. We conclude that all three prongs of the *Meadors* cognate approach test are met in this case. We hold that DWI .08 was a lesser included offense of aggravated DWI in this case, and that Defendant had notice of the lesser included charge of DWI .08.

b. Sua Sponte Amendment of the Charges

17. Defendant also argues that the district court erred by amending the pleadings sua sponte to include the offense of DWI .08. He claims that the charges were amended by the court at the close of evidence over his objection in violation of the rule that an amendment to the charge may not “impose an entirely new charge against a defendant after the close of testimony.” *State v. Roman*, 1998-NMCA-132, ¶ 9, 125 N.M. 688, 964 P.2d 852.

18. During cross-examination of the officer by defense counsel on the subject of the field sobriety tests, the court requested counsel for both parties to approach. Though the discussion at the bench is difficult to hear on the tapes submitted with the record, it is clear that the court addressed the issues of jury instructions. The State said that the jury instructions should include one on the charge of aggravated DWI, one on the charge of DWI .08 as a lesser included offense of aggravated DWI, and one on not guilty of DWI. The court then asked the State if it was amending the charge against Defendant and the State answered “Yes.” Nothing more on amending the charges was discussed at the bench conference. Later, after the close of evidence, Defendant objected to the jury instruction on the lesser included offense of DWI .08. At that time, the court stated that it considered the charge amended to conform to the evidence adduced at trial.

19. We fail to see how the amendment was sua sponte. During the questioning of the State’s first witness, the court asked the State to clarify whether the State’s request for the jury instruction of DWI .08 was also a motion to amend the charges. The State responded that it did seek to amend the charges and the court granted the State’s request at that time.

20. Moreover, even were the amendment in this case sua sponte or at the close of evidence, we would not find error. In *McGee*, we stated:

  *Meadors* starts with the accepted proposition that a trial court, upon the State’s request, may consider an uncharged offense if the statutory elements of the lesser crime are a subset of the statutory elements of the charged crime[.]. . . Simply put, a defendant is on constructive notice that he may have to defend against a lesser included, uncharged offense that satisfies the strict elements test.

*McGee*, 2002-NMCA-090, ¶ 9 (citation omitted). Similarly, a charging document containing only a greater offense gives constructive notice of an offense that is a lesser included offense under the cognate approach. *See Meadors*, 121 N.M. at 45, 908 P.2d at 739 (stating that under the cognate approach the defendant has notice of the charges against him when he cannot commit the greater offense in the manner described in the charging document without also committing the lesser offense). Based on these cases, we conclude that there is no need to amend a charging document to include a lesser included offense because notice of a lesser included offense is constructively given. Since amendment of the information was unnecessary, Defendant’s argument that amendment of the charges was error is without merit.

2. Admission of the BAC Test Results Was Not Error Even Though the Officer Did Not Inspect Whether Defendant Had Tobacco in His Mouth

21. At trial, Defendant testified that he had chewing tobacco in his mouth during the BAC test. Defendant argues that the BAC test was not administered in accordance with the Implied Consent Act, NMSA 1978, §§ 66-8-105 to -112 (1978, as amended through 2003) (the Act), and regulatory requirements because the officer did not “ascertain” whether Defendant had chewing tobacco in his mouth by looking in Defendant’s mouth with a flashlight. He also argues that because the requirements of the regulations were not met, he did not consent to the BAC test because consent is deemed given only if those requirements are met. Defendant argues that for these reasons the results of the BAC test were inadmissible.

22. The State argues that the fact finder may not have believed that Defendant had chewing tobacco in his mouth, that evidence was introduced that the machine would have given a reading of “interferant detected” if there was tobacco in Defendant’s mouth, and that the regulations did not require the officer to look in Defendant’s mouth. The State must show compliance with regulations governing breath alcohol testing in order to lay a proper foundation that the results of such tests are reliable and thus introduce the results into evidence. *State v. Gardner*, 1998-NMCA-160, ¶ 9, 126 N.M. 125, 967 P.2d 465. Similarly, in order for a defendant to have been deemed to have given his consent to a breath test under the Act, the State must comply with the regulations governing breath testing. *Id.* Thus, we view the issue as whether the State complied with the Act and the regulations in force at the time of Defendant’s BAC test. We hold that the State complied with its requirements under the Act and the regulations. Thus, Defendant was deemed to have consented to the test and the results were admissible.

23. We must interpret a regulation contained in the Administrative Code. We review the provision de novo, as we would a statute. *Cf. Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm’n*, 2003-NMSC-005, ¶ 17, 133 N.M. 97, 61 P.3d 806 (noting that the appellate courts normally defer to agency rulings on the meaning of a regulation if “it implicates agency expertise” but also noting that statutory interpretation is done de novo); *Old Abe Co. v. N.M. Mining Comm’n*, 121 N.M. 83, 90, 908 P.2d 776, 789 (Ct. App. 1995) (noting, while testing the constitutionality of a regulation, that we test regulations by the same standards with which we test statutes).

24. Defendant cites the current Administrative Code provision governing BAC tests, which reads:

  Two breath samples shall be collected and analyzed by certified Operators or Key Operators only, and shall be end expiratory in composition. Breath shall be collected only after the Operator or Key Operator has ascertained that the subject has not had anything to eat, drink or smoke for at least 20 minutes prior to collection of the first breath sample. If during this time the subject eats, drinks or smokes anything, another 20 minutes deprivation period must be initiated.
The regulation in effect at the time Defendant was tested, and therefore the regulation applicable in this case, reads:

Two breath samples shall be collected and/or analyzed by certified Operators or Key Operators only, and shall be end
expiratory in composition. Breath shall be collected only after the subject has been under continuous observation for at
least 20 minutes prior to collection of the first breath sample. If during this time the subject regurgitates or introduces any
foreign substance suspected of containing alcohol into his mouth or nose, another 20 minutes observation period must be
initiated.

Regulations Governing Blood and Breath Testing Under the New Mexico Implied Consent Act, 6 N.M. Reg. No. 3 at 272, 275 (Feb.
15, 1995).

This regulation did not require the officer to take affirmative steps to “ascertain” whether Defendant had anything in his mouth
before administering the BAC test. Id. The officer needed only to continuously observe Defendant for twenty minutes to determine
whether he “regurgitate[d] or introduce[d] any foreign substance suspected of containing alcohol into his mouth or nose.” Id. There was
testimony that the officer observed Defendant for twenty minutes and there was no testimony that Defendant regurgitated or introduced
any foreign object into his mouth during that time. We conclude that the State met its burden of showing that the test was conducted
in accordance with the applicable regulation.

3. Admission of the BAC Test Results Was Not Error Even Though There Had Been a Prior Out-of-Range Calibration
Test

Defendant contends his conviction should be reversed because the BAC test was performed on a malfunctioning machine and
the State failed to show that the “out-of-range” reading produced at an earlier date did not affect the reliability of the test. If a defendant
raises an issue as to the validity of a BAC test result, the State must make a threshold showing that the result was reliable in order for
the results to be admitted into evidence. See State v. Christmas, 2002-NMCA-020, ¶ 10, 131 N.M. 591, 40 P.3d 1035. Evidentiary
rulings are reviewed for an abuse of discretion. Id. ¶ 8. We conclude that the district court did not abuse its discretion in determining that
the State met its burden of making the required threshold showing of the reliability of the BAC test results. See id. ¶¶ 8-12.

At trial, the State called Julie Lucero, a forensic toxicologist who works for the State Laboratory Division, to testify regarding the
reliability of the Intoxilyzer 5000, commonly called the IR 5000, which was the machine used to test Defendant’s BAC. On cross-
examination, defense counsel raised the issue of the reliability of the IR 5000 by eliciting testimony that there was a test sample that
was out of range on January 11, 2001, and that the machine was sent for preventative maintenance on January 24, 2001.

Ms. Lucero described the maintenance performed and testified that, during the inspection, there was no problem with the IR 5000.
During the preventative maintenance, a calibration check was done, in which the machine produced readings within the guidelines set
by the State Laboratory Division. See Regulations Governing Blood and Breath Testing Under the New Mexico Implied Consent Act,
6 N.M. Reg. No. 3 at 278.

Defendant claims that, despite the within-range calibration check, the State failed to meet its burden of making a threshold showing
of validity because the State did not show the cause of the prior out-of-range reading, nor did the State explain how the problem
was corrected. The proper threshold showing of the validity of the BAC test is made when the State shows that it complied with the
regulations of the State Laboratory Division of the Department of Health. Gardner, 1998-NMCA-160, ¶ 11. Regulations required the
machine to be calibrated every seven days and the results of the calibration check to be within .01 grams of alcohol per 210 liters of
the target solution. Regulations Governing Blood and Breath Testing Under the New Mexico Implied Consent Act, 6 N.M. Reg. No. 3
at 278 (“Breath analysis instruments shall be field certified for proper calibration at least once in every seven-day period by a certified
key operator using a solution of ethyl alcohol authorized by the Scientific Laboratory Division. . . . A field certification is valid when
the results of the approved ethyl alcohol solution test is at target value + .01 grams per 210 liters.”).

Because the State showed that the IR 5000 was calibrated and functioning properly within the seven-day period prior to De-
fendant’s BAC test on January 27, 2001, we hold that the calibration requirements in the regulations were met and that it was not an
abuse of discretion for the district court to admit the results of the BAC test. Defendant’s arguments regarding the reliability of the
IR 5000 went to the weight of the evidence and not its admissibility, and the court properly let the issue go to the jury. See Gardner,

4. Defendant Did Not Preserve the Confrontation Clause Issue

Defendant argues that the district court refused to allow him to cross-examine the officer regarding the field sobriety tests af-
fter the State was afforded ample direct examination on those tests and that Defendant was therefore denied the right to confront his
accusers. During defense counsel’s cross-examination of the officer, he asked whether there was snow or ice on the ground where
Defendant stepped out of his vehicle. The officer testified that he did not look at the ground in that spot and that he did not remember
snow being there. Then the court asked counsel to approach the bench. During the bench conference, defense counsel was told that his
cross-examination of the officer on the subject of the field sobriety tests was becoming tedious. The State noted that it would object,
if necessary, on the grounds that questions had been asked and answered. Defense counsel stated he would have to continue. After the
bench conference, defense counsel questioned the officer on whether he remembered snow being on the ground. The State objected that
the question was asked and answered, and the court sustained the objection. No other questions were asked during cross-examination
on the subject of the field sobriety tests.

“The issue of denial of the right to confrontation may not be raised for the first time on appeal.” State v. Lucero, 104 N.M. 587,
590-91, 725 P.2d 266, 269-70 (Ct. App. 1986). In Lucero, the defendant did not make an objection at the time one would have been expected, and though he made an objection earlier, his objection was on the basis that there was no exception to the hearsay rule for the testimony elicited. Id. at 591, 725 P.2d at 270. The court found that the “defendant’s objection was not sufficiently specific to alert the trial court to the claimed constitutional error. . . . The court had no opportunity to reach the confrontation issue.” Id. (citations omitted).

In the present case, Defendant at no time alerted the district court that its ruling violated his right to confront the witnesses against him. Thus, we hold that Defendant failed to preserve his Confrontation Clause claim.

5. Defendant’s Seizure Was Not Unreasonable

Defendant claimed that his stop was unreasonable and filed a motion to suppress any evidence obtained as a result of the stop. The district court denied his motion. “We review the denial of a suppression motion to determine whether the trial court correctly applied the law to the facts viewed in the manner most favorable to the prevailing party.” State v. Brennan, 1998-NMCA-176, ¶ 10, 126 N.M. 389, 970 P.2d 161. “While we afford de novo review of the trial court’s legal conclusions, we will not disturb the trial court’s factual findings if they are supported by substantial evidence.” State v. Leyba, 1997-NMCA-023, ¶ 8, 123 N.M. 159, 935 P.2d 1171. An officer may stop a vehicle when he has “a reasonable, articulable suspicion that Defendant was violating traffic laws.” Brennan, 1998-NMCA-176, ¶ 11. “[A] reasonable suspicion may be a mistaken one.” Id. ¶ 12 (internal quotation marks and citation omitted).

Defendant argues that the officer could not see that Defendant’s vehicle had crossed left of the center of the roadway because there were gas pumps obstructing his view, it was dark, the distance was too great, there was no line marking the center of the roadway, and the officer was talking to another officer. However, the officer testified that he saw Defendant turning and believed that Defendant’s vehicle crossed left of the center of the roadway. Viewing the facts in the manner most favorable to the prevailing party, based on the officer’s testimony, we conclude that there was substantial evidence that he observed Defendant cross left of the center of the roadway. Crossing left of the center of a roadway is a traffic violation under either NMSA 1978, § 66-7-308 (1978), or NMSA 1978, § 66-7-313 (1978). That Defendant was not charged with violating either of these statutes is immaterial because our analysis only focuses on whether the officer articulated a reasonable suspicion that Defendant violated the statutes. See Brennan, 1998-NMCA-176, ¶ 10 (“The police may conduct investigatory stops where they have a reasonable, objective basis for suspecting a person is engaged in criminal activity.”). There was no unreasonable search or seizure and the district court did not err in denying Defendant’s motion to suppress.

6. There Was No Prejudicial Prosecutorial Misconduct or Denial of a Fair Trial

Defendant argues that his conviction should be reversed based on three comments by the prosecutor, which he claims were improper and prejudicial, and based on the district court’s failure to take measures to remedy the claimed prejudice from the comments.

Defendant essentially claims prosecutorial misconduct. When a timely objection is made to a claim of prosecutorial misconduct, we determine whether the trial court abused its discretion by denying a motion for a new trial based upon the prosecutor’s conduct, by overruling the defendant’s objection to the challenged conduct, or by otherwise failing to control the conduct of counsel during trial. The trial court’s determination of these questions will not be disturbed unless its ruling is arbitrary, capricious, or beyond reason. Our ultimate determination of this issue rests on whether the prosecutor’s improprieties had such a persuasive and prejudicial effect on the jury’s verdict that the defendant was deprived of a fair trial. State v. Duffy, 1998-NMSC-014, ¶ 46, 126 N.M. 132, 967 P.2d 807 (citations omitted).

a. The Prosecutor’s Reference to the Police Report

The first instance of claimed prejudicial error involved the prosecutor referring to the police report concerning Defendant’s arrest. Defendant testified at trial that he had a couple of beers at a bar earlier that night. During cross-examination, the prosecutor asked Defendant whether he initially told the officer that he had not had any beers. When Defendant responded by saying he did not tell the officer that he had not had anything to drink, the prosecutor said: “if I told you that it’s in the [police] report, that you told him that you had not been . . . .” At this point, defense counsel objected on the ground that the prosecutor did not testify whether Defendant told him that he had not been drinking. The court stated that the jury would remember the officer’s testimony and that the court was not going to make a decision on the objection. Moments later, the prosecutor asked Defendant, “You told the officer that you had been at your parent’s that night, right?” Defendant stated that he told the officer he was at the bar. The prosecutor then asked, “That’s not in the report, would that surprise you?” Defense counsel objected, stating, “he didn’t do the report.” The court sustained the objection before defense counsel finished his argument. On appeal, Defendant argues that the prosecutor’s comments were attempts to discredit Defendant and were improper and prejudicial because they gave a false impression of fact to the jury.

The district court did not abuse its discretion in failing to sustain Defendant’s first objection based on the court’s curative comment and Defendant’s failure to focus on an applicable evidentiary rule. Similarly, the district court did not abuse its discretion in sustaining Defendant’s second objection, which we interpret as falling under Rule 11-602 NMRA (requiring personal knowledge). Moreover, the prosecutor’s alleged improprieties in this case did not have “such a persuasive and prejudicial effect on the jury’s verdict that the defendant was deprived of a fair trial.” Duffy, 1998-NMSC-014, ¶ 46. We find no prejudicial effect on the jury’s verdict because the jury found that Defendant drove with an unlawful BAC, and any opinion as to Defendant’s credibility would not have a material bearing on that determination. Because the alleged misconduct could have no effect on the jury’s verdict, Defendant was not prejudiced or denied a fair trial.

Defendant further argues that even though his second objection was sustained, the prosecutor’s comments were so prejudicial that the court had a duty to give a curative instruction or take some other step to remedy the prejudice caused by the statement, relying on Enriques v. Cochran, 1998-NMCA-157, 126 N.M. 196, 967 P.2d 1136. In Enriques, a personal injury case, defense counsel made improper references to the defendant’s ability to pay a verdict against him, knowing full well that the defendant had insurance which
would likely cover the full amount of any award. *Id.* ¶¶ 132, 134. In *Enriquez*, this Court stated: “[t]he trial court did nothing in response to Plaintiff’s objections beyond instructing the jury to ‘ignore the last remark[,]’ . . . This single admonition, in the absence of other cautionary or corrective instructions, was insufficient to meet the false impression left by Counsel’s statement.” *Id.* ¶ 136.

[41] *Enriquez* is distinguishable from the case at hand on several grounds, the most compelling of which is that in *Enriquez*, the plaintiff asked for a curative instruction and the court refused. *Id.* ¶ 137. Here, Defendant did not request a curative instruction, but nonetheless appears to argue, based on our language in *Enriquez*, that the court had a sua sponte duty to give a corrective instruction. We decline to make such a rule. It is the duty of the complaining party to request a curative instruction. *State v. Sandoval*, 88 N.M. 267, 268, 539 P.2d 1029, 1030 (Ct. App. 1975). *Enriquez* is also distinguishable because there the district court found that the comment had a prejudicial effect and, in this case, there was no such prejudice. 1998-NMCA-157, ¶ 138. Defendant was not denied a fair trial on the basis of the references to the police report by the prosecutor.

b. The Prosecutor Stated, “I don’t see any [snow], do you see any?”

[42] The second claimed instance of prosecutorial misconduct occurred during cross-examination of Defendant after Defendant pointed out snow in a picture. The prosecutor responded: “I don’t see any [snow], do you see any?” Defense counsel objected, and the objection was sustained before defense counsel even stated a ground for the objection. The pictures were published to the jury.

[43] We will assume, without deciding, that this comment by the prosecutor was an improper comment on the evidence. See *State v. Reynolds*, 111 N.M. 263, 266, 804 P.2d 1082, 1085 (Ct. App. 1990) (“[T]here are restrictions on the prosecutor’s freedom to express an opinion to the jury[].”). We, nonetheless, see no abuse of discretion by the district court. The court’s actions in sustaining Defendant’s objection and publishing the pictures to the jury would have cured any prejudice from the prosecutor offering his own opinion on the evidence. Concluding that the district court’s actions were reasonable and that there was no prejudice, we hold that this instance of claimed prosecutorial misconduct did not deny Defendant a fair trial. See *Duffy*, 1998-NMSC-014, ¶ 46. Further, even assuming there were prejudice, we reiterate that there was no sua sponte duty on the part of the court to take any further action to remedy the prejudice as Defendant argues.

c. Reference to the Booking Sheet

[44] The final instance of claimed prosecutorial misconduct occurred after Defendant testified that he had a can of chewing tobacco with him when arrested and that the tobacco was listed on the booking sheet at the jail. During the State’s cross-examination of Defendant, the following colloquy took place:

Prosecutor: Did you have a can of Red Seal that night or Copenhagen?

Defendant: Red Seal.

Prosecutor: And you said you were booked with that?

Defendant: Yes, I was.

Prosecutor: May I approach your honor?

The Court: You may.

[unknown speaker]: Is that off the booking report?

Defense Counsel: That’s not off of the booking report. I’d object. I’d called the jail and had them bring it [over, the booking report it has his personal effects, it has a can of Red Seal in it. So if he’s going to show this he needs to . . .

The Court: If you are testifying Mr. Lindsey, why don’t you do it up here at the bench.

Defense Counsel: I’m sorry your Honor. I apologize. . . . My objection would be that that’s incomplete and if they are going to offer it they need to do the whole file.

The Court: Approach.

Defense Counsel: . . . and I object to all of it, it’s hearsay [inaudible] . . . it’s incomplete and it’s misleading [inaudible].

The Court: Before evidence closes in this case I want to see that report.

[45] Apparently after the close of evidence, defense counsel obtained the entire booking sheet from the jail and offered it into evidence. The court did not admit it into evidence, stating as the grounds for its ruling that evidence had already closed, he did not believe the jury had been misled about the booking sheet, and he did not believe that it would be proper to admit the booking sheet at the time because no one was available to authenticate it. Neither version of the booking sheet was shown to the jury; nor is either version included in the record on appeal.

[46] The only mention of the booking sheet in the presence of the jury was made by defense counsel and the State’s version of the booking sheet was not offered or introduced into evidence. Defendant failed to timely offer his version of the booking sheet. Under these circumstances, we see no error and Defendant has not alerted us as to how there was a violation of a rule of evidence. Finding no error, we reject Defendant’s argument that the district court had a duty to allow the booking sheet into evidence to correct the alleged prosecutorial misconduct. We hold that the court did not abuse its discretion in refusing to admit the full booking sheet into evidence.

[47] In conclusion, looking at all of the instances of claimed prosecutorial misconduct, both separately and together, we conclude that Defendant was not denied a fair trial.

7. There Was Not Cumulative Error

[48] Defendant claims that cumulatively the errors in his trial were so prejudicial as to require reversal. Cumulative error requires reversal of a defendant’s conviction when the cumulative impact of errors which occurred at trial was so prejudicial that the defendant was deprived of a fair trial[]. . . . The doctrine cannot be invoked if no irregularities occurred, or if the record as a whole demonstrates that a defendant received a fair trial[].

*State v. Martin*, 101 N.M. 595, 600-01, 686 P.2d 937, 942-43 (1984) (citations omitted). Given that, even assuming that there conceiv-
ably were errors in Defendant’s trial, we have found no prejudice and no cumulative error.

8. The District Court Did Not Err by Denying the Motion for Directed Verdict

{49} Defendant argues that the district court should have granted his motion for a directed verdict because there was insufficient evidence to convict him of DWI .08. Defendant argues that the jury must have believed that the results of the BAC test were unreliable because the jury did not convict him for aggravated DWI .16 even though the results of the tests were .17 and .18. He argues that, because the jury believed that the tests were unreliable, it could not have reasonably relied on the results of the BAC test at all. Further, he argues that the field sobriety tests alone cannot possibly show that Defendant had a BAC of .08 or greater.

{50} “The question presented by a directed verdict motion is whether there was substantial evidence to support the charge.” State v. Dominguez, 115 N.M. 445, 455, 853 P.2d 147, 157 (Ct. App. 1993).

In reviewing a claim of insufficient evidence, we determine whether there is substantial evidence of either a direct or circumstantial nature to support a verdict of guilty beyond a reasonable doubt with respect to every element of the crime charged. We view the evidence in the light most favorable to the verdict, resolving all conflicts and indulging all reasonable inferences in favor of the verdict. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The question on appeal is not whether substantial evidence would also have supported a verdict of acquittal, but whether substantial evidence supports the verdict rendered. State v. Caudillo, 2003-NMCA-042, ¶ 7, 133 N.M. 468, 64 P.3d 495 (internal quotation marks and citations omitted).

{51} Once the .17 and .18 BAC test results were admitted in evidence, the State had met the foundational requirements and the jury was required to determine if Defendant’s BAC was .16 or greater beyond a reasonable doubt in order to convict him of aggravated DWI. The jury acquitted Defendant of aggravated DWI. Yet the jury convicted him of DWI .08, presumably determining that reasonable doubt existed that the .17 and .18 readings were sufficiently accurate to convict for aggravated DWI, but that those readings were sufficiently accurate, beyond a reasonable doubt, to convict based on a BAC of .08 to .15. Evidence before the jury as to Defendant’s claimed tobacco use, as well as testimony indicating there was an allowable margin of error in BAC readings, gave the jury a rational basis on which to consider the BAC readings with some scepticism, yet also a rational basis on which to find the BAC readings probably indicative of a BAC somewhere between .08 and .15. Our cases indicate that a defendant’s contentions that a BAC test has been compromised in some manner goes to the weight of the evidence. See State v. Montoya, 1999-NMCA-001, ¶ 12, 126 N.M. 562, 972 P.2d 1153; Gardner, 1998-NMCA-160, ¶ 17. We conclude that it was not error to permit the jury to consider whether Defendant was guilty of DWI .08. Cf. State v. Baldwin, 2001-NMCA-063, ¶ 23, 130 N.M. 705, 30 P.3d 394 (stating that, in New Mexico, “a jury may reasonably infer that an excessive BAC reading relates back to the time of driving”).

CONCLUSION

{52} For the foregoing reasons, we affirm.

{53} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:
MICHAEL D. BUSTAMANTE,
Chief Judge
LYNN PICKARD, Judge
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Small defense litigation firm with outstanding client base seeks ambitious hardworking attorney with 1+ years of experience. Strong research, writing and people skills a must. Employment law experience a plus. Excellent compensation package. P.O. Box 65832, Albuquerque, NM 87193-5832.
Request For Proposals

The Fifth Judicial District Attorney's office is requesting proposals for one-year contracts that, pursuant to 1978 NMSA §13-1-150, may be renewed for up to four years. The term of the initial contract will be from July 1, 2005 to June 30, 2006. Only attorneys licensed to practice law in New Mexico will be considered for the following contracts:

GUARDIAN AD LITEM: Provides Guardian Ad Litem representation for children who are the subject of abuse or neglect proceedings or Family in Need of Court Ordered Services (FINS) proceedings, including proceedings for the termination of parental rights, adoption proceedings, or other proceedings designated by the court. McKinley County: 1 contract; San Juan County: 2 contracts.

RESPONDENT ATTORNEY: Provides representation of indigent respondents who are the subject of abuse or neglect proceedings or Family in Need of Court Ordered Services (FINS) proceedings, including proceedings for the termination of parental rights, or any other proceeding in which the court finds it necessary to appoint respondent custodian representation. McKinley County: 2 contracts; San Juan County: 4 contracts.

PROPOSAL INFORMATION: Complete details about the contract, duties, qualifications, and proposal submission are set forth in the Request for Proposal. The Request for Proposal for either contract in either county will be sent to you upon request by contacting: Weldon J. Neff, Court Administrator, Eleventh Judicial District Court, 103 So. Oliver, Aztec, NM 87410. Phone: 505-334-6151 Fax: 505-334-1940. PROPOSAL SUBMISSION DEADLINE IS JUNE 3, 2005.

Assistant District Attorney

The Fifth Judicial District Attorney’s office has immediate positions open to new as well as experienced attorneys in Roswell, Chaves County and Hobbs, Lea County. Salary will be based upon experience and the District Attorney Personnel and Compensation Plan with starting salary range of an Assistant District Attorney to a Senior Assistant District Attorney ($38,384.00 to $45,012.28) dependent upon experience. Please send resume to Floyd D. “Terry” Haake, District Attorney, 102 N. Canal Suite 200, Carlsbad, NM 88220 or email to thaake@da.state.nm.us.

Part Time Associate

Part time associate with potential for full time employment. Minimum 5 years experience required. Send resume, references and writing sample: 2019 Galisteo, Suite C3, Santa Fe, NM 87505.

Associate Attorney

Wanted for downtown Albuquerque law office: Associate attorney with at least three years experience. Benefits include paid health insurance, life insurance, short and long term disability. 401K plan available. Please send your resume and references to Civerolo, Gralow, Hill and Curtis, P.A., P.O. Box 887, Albuquerque, N.M. 87103.

Attorney

Albuquerque criminal defense attorney who handles many cases statewide is accepting resumes for one, or possibly two, associate attorneys with one to five years experience. Submit resume, references and, in particular, writing sample and salary request, to Billy R. Blackburn, 1011 Lomas Blvd. NW, Albuquerque, NM 87102. No phone calls please.

Full-Time Staff Attorney

The New Mexico Court Of Appeals is seeking applications for a full-time Assistant Staff Attorney position in the Prehearing Division. Regardless of experience, the beginning salary is limited to $44,019, plus generous fringe benefits. New Mexico Bar admission is required, and some practice experience is desirable. As one of sixteen staff attorneys, this position will require managing a heavy caseload of appeals on the Court of Appeals’ summary and non-summary calendars covering all areas of law considered by the Court. The position also requires extensive legal research and writing. Interested applicants should submit a completed New Mexico Judicial Branch Application for Employment, along with a letter of interest, resume, law school transcript, and short writing sample of no more than 5 pages to Joey D. Moya, Chief Staff Attorney, P.O. Box 2008, Santa Fe, New Mexico 87504, no later than 4:00 p.m. on Tuesday, May 31, 2005. To obtain an application for employment, please call 827-4875 or visit www.nmcourts.com and click on “Job Opportunities.” The New Mexico Judicial Branch is an equal opportunity employer.

Legal Secretaries

The law office of Miller Stratvert P.A. is accepting resumes from legal secretaries with a minimum of 5-7 years of litigation experience or commercial / transactional law experience. Candidates must possess excellent writing and proofreading skills, legal terminology proficiency, organizational skills, and MS Word/Outlook proficiency. Self-motivation and the ability to work with minimal supervision in a busy, fast-paced environment is a must. Firm offers competitive salary, excellent benefits and a positive work environment. Please fax resume to Firm Administrator at (505) 243-4408.

Request For Proposals Bond Counsel Services

San Juan County will accept sealed proposals until 4:00 p.m. (MST), May 13, 2005, at the Central Purchasing Facility, 213 South Oliver Drive, Aztec, NM 87410 for Bond Counsel Services- Request for Proposal No. 04-05-28 (Re-Issued). Specifications may be obtained or viewed by interested parties at the Central Purchasing Facility, or by calling (505) 334-4553. Specifications may also be obtained or viewed by accessing the San Juan County web page, www.sjcounty.net (select department listing, select Central Purchasing, select Current Bids and Proposals).

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Respondent Attorney

The Second Judicial District Court in Albu-querque, New Mexico, is accepting applica- tions for the position of Respondent’s Attorney. Attorney will represent respondents in child abuse and neglect cases in the Second Children’s Court Division. Caseload would be approximately four cases a month, with a one year contract. Compensation is on a per case, $40 per hour basis not to exceed established limits. Applicants must be licensed to practice law in New Mexico. Please submit your resume by May 31, 2005 to: Juanita M. Duran, Court Administrator, 400 Lomas NW, Albuquerque, NM, 87103. Envelopes are to be clearly marked on the outside “Respondent Attorney”.

Assistant Federal Public Defender

Legal Assistant
Full-time, small firm, prefer at least 3 years legal experience. Experience desirable in the areas of estate planning, asset transfer, probate, entity formation and/or defined compensation plans. Seeking mature reliable individual with professional attitude, excellent organizational skills and a commitment to quality work. Must have experience in utilizing WordPerfect and Microsoft Word. Please send cover letter with resume to: Lynda Lloyd, Legal Assistant, P.O. Box 3260, Albuquerque, New Mexico 87190. No telephone calls, please.

Paralegal
Modrall Sperling is seeking a full-time Corporate/Estate Planning Paralegal. The ideal candidate must possess exceptional computer skills and a minimum of 5 years of relevant experience. Please forward resume w/cover letter and salary requirements to: Administrative Office, P.O. Box 2168, Albuquerque, NM 87103. ATTN. B. Fi e r r o o r email to resumes@modrall.com.

Paralegal
Full-time paralegal needed for the downtown Albuquerque office of Lewis and Roca Jonzt Daw LLP. A minimum of five years’ experience is required. Primary practice areas include Medical Malpractice, Products Liability, Utility Law and Property/Water Law. Excellent writing and communication skills, computer proficiency and the ability to multi-task independently under deadlines are needed. Bachelor’s degree and ABA paralegal school preferred. We offer a competitive benefits package and salary. Please provide a detailed resume with cover letter and salary requirement by email to kgodwin@lrlaw.com or by fax to Office Manager at 505-764-5482. We are an Equal Opportunity Employer. Lewis and Roca does not discriminate on the basis of race, sex, sexual orientation, religion, national origin, color, age, disability or veteran status.

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New Mexico licensed attorney w/ Navajo Nation license seeks part-time or contract work for one year or less. (will be attending graduate school in fall) Enjoy research and writing. Interest / experience in health law (including mental health, disability, HIPAA), elder law; employment (ADA, EEOC), medical malpractice; federal / tribal law; administrative law/hearings; Social Security; FOIA. Would be interested in supporting civil trial work (have been second chair on criminal cases). Contact nmlawyer@ispwest.com.

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