

THIRD JUDICIAL DISTRICT COURT
COUNTY OF DONA ANA
STATE OF NEW MEXICO

FILED
3rd JUDICIAL DISTRICT COURT
Dona Ana County
10/6/2025 8:48 AM
BERNICE A. RAMOS
CLERK OF THE COURT
Robert Segura

STATE OF NEW MEXICO,
Plaintiff,

v.

No. D-307-CR-2023-01613
Judge James B. Foy

BRAD JUSTIN LUNSFORD,

Defendant.

**ORDER GRANTING DEFENDANT'S FIRST AMENDED MOTION
FOR NEW TRIAL AND REQUEST FOR IMMEDIATE RELEASE**

THIS MATTER having come before the Court on March 21, 2025 for a hearing on the Defendant's First Amended Motion for New Trial Based on Improper Juror Substitution (hereafter "the Defendant's First Motion" or "the defendant's first motion"). The State was represented by Mr. John Duran and Ms. Greer Staley. The defendant was present and represented by Mr. Matt Chandler. The Court having heard the argument of counsel and having read the defendant's first motion, the State's Response to Defendant's First Motion (hereafter "The response to First Motion" or "the response to first motion") and the Defendant's Reply to State's Response to Defendant's First Motion for New Trial (hereafter "The Defendant's Reply to State Response to First Motion" or the defendant's reply to state's response to first motion"),

FINDS AS FOLLOWS:

1. This Court has jurisdiction over the parties and the subject matter of this cause.
2. The issue of immediate release has been resolved.
3. The defense argues that Court improperly substituted seated jurors 15 and 16, who were alternate jurors. Jurors 15 and 16 should have been dismissed prior to deliberations by the twelve chosen jurors. Further, the Court removed jurors 11 and 12 who were regular jurors who should not have been dismissed. Due to improper substitution of alternate

jurors instead of allowing the actually picked jurors to deliberate in this case. The Defendant was convicted and should not have been. Seated Juror 11 signed an affidavit that stated he would have acquitted the Defendant for the crime charged.

4. The defense argued that pursuant to New Mexico Rules of Criminal Procedure 5-605, and 5-614, the common law of New Mexico and the United States and New Mexico's Constitution. A new trial is warranted if a miscarriage of justice resulted. See State v. Griffin, 117 NM 745, 877 P2d. 551, (NMSC 1994). NMRCr.Pr 5-605 addresses the use of jurors and alternate jurors and specifies the order and priority of each. Alternate jurors shall replace jurors when jurors are unable to perform their duties. An alternate juror who does not replace a regular juror shall be discharged. NMCr.Pr. 5-605(C). The New Mexico Constitution Article II, Section 14 and the Sixth Amendment to the United States Constitution affords the Defendant "a trial by a fair and impartial jury."
5. The Court finds substituting in alternate jurors instead of regularly selected juror is plain error. The question is whether doing so effected the substantial rights of the defendant. See State v. Hill, 2008—NMCA—117, 144 NM 775, (NMMCA 2008). Put another way, was the defendant prejudiced by the error and was it harmless beyond a reasonable doubt?
6. The State argued in its response the Defendant's challenge to the composition of the jury was waived or unpreserved. The Court announced in open Court what jurors were to deliberate and the defense was silent at that time. Because the defense did not raise the issue promptly, they cannot claim error at this time. The prosecution further argues that the Court's mistake was a clerical error. Seated jurors were excused and replaced by alternate jurors before deliberations and that any member of the jury was impartial the

verdict was valid. In essence inadvertent dismissal does not equal grant of a new trial.

See *State v. Rosario*, 319 A2d. 1096, (2024); *McCumber v State*, 2024 WL 5058725, --- S.W.3d. ---, (Tx.Ct.App., 2024). *Hodge v Commonwealth of Kentucky*, 17 S.W.3d. 824, (Ky., 2000).

7. The substitution of alternate jurors in place of actually picked jurors was inadvertent. The Court received a juror list that was incorrect in naming alternates as seated jurors. The Court followed that list erroneously. The Court requested its law clerk to double check the jurors who were to be seated. They reviewed the erroneous juror list and so this court wrongfully and erroneously seated as jurors who would deliberate in the case two alternates and two seated jurors were erroneously sent home and did not deliberate.
8. One juror who should have deliberated signed an affidavit and stated that he would have found the defendant not guilty. Although this is not dispositive, it is a factor the Court will consider in deciding this motion.
9. In its reply, the defense argued the replacement of regular seated jurors with alternates absent a hearing with the defense present presents a basis to grant a new trial. The defense also argues restructuring the jury selection process outside the defendant's presence by substituting two alternate jurors in place of two regularly seated jurors without a hearing denied the Defendant of a fair trial.
10. This Court believes the Federal Plain Error standard applies. The error has to be plain on its face, it has to be error, and the error must prejudice the defendant and the error has to affect the defendant's substantial rights. Does the error seriously effect the fairness, integrity and public reputation of the judicial proceedings? If yes, then a new trial shall be granted. If no, then a new trial shall be denied. See *United States v. Capeheart*, 2023

WL 4286725 (10th Cir. June 30,2023). New Mexico follows the same standard. See State v. Muller, 2022—NMCA—024. State v. Hill, 2008—NMCA—021. State v. Torres, 2005—NMCA—070.

11. In this case there is plain error. Did the plain error cause prejudice and infect the fairness or the integrity of the proceedings? The Plain Error is the Court having two alternate jurors deliberate in place of two seated jurors. The mistake was unintentional but occurred never the less.
12. The Court believes the error prejudiced the defendant affecting his substantial rights. The juror who should have been seated and was not specified that it was his belief that the Defendant was not guilty. The juror was unequivocal in his belief. A verdict must be unanimous and this Court's error albeit unintentional makes the Court believe the Defendant was prejudiced. The prejudice to the Defendant is two-fold. First a juror who should have been seated and would have acquitted the defendant was replaced by an alternate juror. This gives the Court pause but is not dispositive on the issue of prejudice. Secondly, this Court next looked at the evidence presented in this case and concluded the Defendant's actions could be construed by a reasonable juror to be justified given the circumstances. The juror's unequivocal belief that the Defendant was not guilty is reasonable. The Court believes the evidence presented would have allowed a reasonable juror to believe that the Defendant was not guilty and so the seated juror's affidavit bears weight and shows prejudice.
13. The Court comes to this decision with difficulty but this Court has listened to evidence presented and argument made in at least thirty contested pre-trial and post-trial motions with responses and replies and except for some post-trial motions, the Court ruled

thereon. The Court has listened to eight days of testimony, Voir Dire inclusive. The Court is intimately familiar with the facts presented in this case by both the prosecution and the defense. As a result, the Court can determine in earnest the strength of the prosecution's case. It is the opinion of this Court that the Plaintiff's case is not a strong case based upon the facts presented.

14. The Court does not make this determination lightly. What it boils down to for this Court is that although a jury could find guilt and did find guilt beyond a reasonable doubt, this judge based upon the evidence presented believes the case presented was weak in proof that Mr. Lunsdord was not justified in the force used against Mr. Eze given all the surrounding facts and circumstances of this case.

15. Given this Court's vast experience in the criminal law, both as an elected District Attorney, who tried cases on behalf of the prosecution for almost seven years and an attorney who engaged in criminal defense at both the state and federal levels for approximately twenty-five years. Lastly, as a state district court judge, who has handled criminal cases for at least seven years, this Court remains steadfast in the belief that the State's proof that the defendant was not justified in killing the decedent was weak at best. With that belief, the Court can understand the position of acquittal from the juror who should have been seated, but was not due to this Court's error.

16. The basis for this Court's belief regarding weak proof regarding nullification of justification or excuse is as follows. The defendant was anonymously called to an alleged shoplifting committed by the decedent. As he has for all the years he has acted as a police officer, the defendant attended to his obligation to investigate that call. Unlike

most shoplifting calls, the suspect remained on site after the defendant arrived to investigate the shoplifting allegations made by the shop clerk.

17. The decedent was a passenger in a vehicle that the defendant approached after learning the alleged shoplifter remained on site. The decedent was lawfully detained for suspicion of shoplifting. During the course of that detention, the decedent lied about his identity to the point to where after the third attempt to figure out the decedent's identity, the officer could not. It was clear to the Court the decedent shoplifted and was concealing his identity up to the point where Officer Arbogast arrived to back up the defendant.
18. At that point, this Court believes there was probable cause to arrest the decedent for shoplifting and concealing his identity. The defendant had every right to take the decedent into custody. Had that occurred without incident we would not be here today. Instead, the decedent resisted the lawful commands of the police officer to exit the vehicle. While in the vehicle, the decedent armed himself with a pocketknife. The pocketknife was retrieved without incident but the decedent continued to disobey the lawful commands of the defendant. The defendant told the decedent that his exit from the vehicle was an order not a request. To no avail, the police had to force him from the vehicle, thereafter the decedent continued to resist the officer's lawful commands, and the altercation continued.
19. The decedent was a well-built male who in essence was able to hold off arrest. In the opinion of this Court, the decedent was besting both officers in the struggle. The struggle started as the decedent was removed from the vehicle. It continued as all moved outside the vehicle towards the back passenger portion between the vehicle and the gas pumps. At that point Officer Arbogast tried to do a suplex type takedown of the decedent and

failed. The decedent ended up on top of and facing Officer Arbogast. Officer Arbogast was lying with his back to the ground. Officer Arbogast hit his head and was unable to assist in the arrest of the decedent at that point. The scuffle continued with the decedent on top of, facing Arbogast, and the defendant behind and unable to maintain control of the decedent. During the altercation, the defendant said the decedent attempted but was unsuccessful in disarming Arbogast's firearm. That is a fact disputed by the State. It is undisputed that the decedent disarmed and then controlled Arbogast's Taser. At that point, the defendant moved off the decedent stepped to the side and while yelling "Taser, Taser, Taser" shot the decedent in the head immediately killing him.

20. It is this Court's belief that once the decedent disarmed Arbogast and controlled Arbogast's Taser, the officer was justified in using deadly force. The Court believes this because a Taser is a deadly weapon when used by someone fully trained in how to use it lawfully. There is no doubt a Taser is a deadly weapon when in the possession of someone who is untrained. This Court has believed since the beginning of use of Tasers in 1980's and 1990's that a Taser is a deadly weapon. In fact, the Taser was present at over one-thousand, five-hundred deaths. A deadly weapon can cause death or great bodily harm. A Taser can do both.
21. Secondly, the jury had to decide whether the defendant's actions were reasonable under the circumstances. In this case, this Court believes that once the defendant armed himself to the detriment of both the defendant and Arbogast, he did so at his peril. Deadly Force was justified with a firearm when Mr. Eze possessed Arbogast's Taser. Objectively any police officer placed in a situation where a civilian possesses a taser that can quickly be

used against him and others including other officers in peril is justified in using deadly force. As a result, the state's case is weak in this Court's opinion.

22. A valid question to this Court would be why did you not simply direct a verdict in this cause? The Court did not for two reasons. First, whether a Taser is a deadly weapon is a fact question for the jury to decide. Second, whether the officer acted in a reasonable manner as any objectively reasonable officer would have, given the circumstances is also a fact question. Although it was not argued directly, there was an outstanding question of fact about defendant's actions being subjectively reasonable and not objectively reasonable as required for justifiable homicide.
23. This Court believes the State's case on proof beyond a reasonable doubt that the force used was not objectively reasonable was weak. One of the jurors who should have deliberated but for the Court's error says the defendant is not guilty. This juror did not deliberate. Even though new trials are not favored, the Court in its discretion can grant a motion for new trial. If there is prejudice and it is harmless the conviction will stand.
24. One of the ways to determine whether there is prejudice is to determine if the results of the proceeding would have been different if the actual jurors were not replaced, inadvertently. Since the Court believes the state's case regarding objective use of deadly force was weak, and a juror who should have deliberated says they would have acquitted, the Court believes its error caused the defendant prejudice.
25. Since the Court has found Plain Error and Prejudice this Court must determine whether the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. United States v Capeheart, 2023 WL 4286725 (10th Cir. June 30, 2023). This Court believes the error involving improper juror substitution seriously affected the

fairness and integrity of the Court proceeding in this instance for the same reasons it prejudiced the defendant.. The error was not harmless beyond a reasonable doubt.

IT IS THEREFORE ORDERED, the Defendant's First Supplemental Motion for New Trial Based upon Improper Jury Substitution is GRANTED.

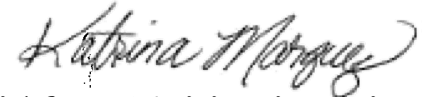
Respectfully Submitted,



JIM FOY
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing to be mailed/delivered/e-filed to the parties of record this 6 day of October, 2025.



Katrina Morque
Trial Court Administrative Assistant