


Mark Reynolds

COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,
Plaintiff-Appellee,

v.

No. A-1-CA-41294

ALIKA ARISUMI,
Defendant-Appellant.

Appeal from Twelfth Judicial District Court, County
of Otero, Honorable Angie K. Schneider, District
Court Judge, Case No. D-1215-CR-2019-00542
(Pilot Project Case)

BRIEF IN CHIEF

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STATEMENT REGARDING TRANSCRIPT OF PROCEEDINGS

Pursuant to Rule of Appellate Procedure 12-318(A)(1)(b), Mr. Arisumi states that the proceedings were recorded on audio tape. Citations in this brief in chief are to the tape monitor log.

STATEMENT REGARDING COMPLIANCE WITH RULE OF APPELLATE PROCEDURE 12-318(F)(3)

Pursuant to Rule of Appellate Procedure 12-318(G), Mr. Arisumi hereby states that this brief in chief was prepared using a proportionally-spaced typeface. The brief contains 9947 words, using the word count feature of Google Docs, Version 79.0.

ISSUES PRESENTED FOR REVIEW

Defendant-Appellant Alike Arisumi presents five issues.

First, Mr. Arisumi sought to introduce a document to show his intent and his understanding of the intent of the other parties—his wife, Faith Arisumi, and the buyer, Jodette Miller—at the time of the vehicle sale at issue. He acknowledged that because the agreement was not signed, it was not a valid contract. The trial court excluded it, precluding Mr. Arisumi from presenting this evidence in support of his defense that he believed the seller took over the car payments and that he did not have fraudulent intent. Did the trial court’s refusal to allow Mr. Arisumi to present this evidence infringe on his right to present a defense?

Second, after the prosecutor elicited testimony that Ms. Miller suffered “extreme hardship” caused by Mr. Arisumi’s actions, Mr. Arisumi objected that the emotional testimony had no probative value, it was unfairly prejudicial, and inadmissible.¹ The district court overruled the objection and refused to instruct the jury to disregard the

¹ Although Mr. Arisumi does not concede that there was extreme hardship, the prosecutor characterized Ms. Miller’s suffering as “extreme hardship.” 3/9/23 at 4:04:27 to 4:04:56 PM.

question and answer. Was the district court's refusal to exclude and to instruct the jury an abuse of discretion?

Third, at sentencing the court announced a three-year term of probation, but in the written judgment the term of probation was five years. There was no sentencing hearing at which this term of probation was announced; nor was there any stipulation that the three-year term announced at sentencing was the result of a mistake. Was the two-year increase in Mr. Arisumi's term of probation reversible error?

Fourth, at sentencing, the court imposed restitution of \$8400, whereas the evidence showed \$4275 as the amount of the victim's out of pocket payments for the car. Although the court allowed Mr. Arisumi's attorney thirty days to object, he did not do so. Was the restitution order fundamental error?

Fifth, in the event the Court were to rule that neither Issue #1 nor Issue #2 presents a claim warranting reversal and a new trial, the question arises whether the cumulative impact of those errors unjustifiably tipped the scale against Mr. Arisumi, depriving him of the right to a fair trial?

SUMMARY OF THE PROCEEDINGS

A. Summary of nature of dispute and overview of undisputed and disputed facts.

There are nine key undisputed facts: (1) Mr. Arisumi bought a 2008 Ford Escape from Timothy Brock for \$7000; (2) Mr. Arisumi financed this purchase through a credit union loan; (3) three years later, Faith Arisumi's Facebook page displayed an advertisement for the sale of the vehicle, describing the payment terms as follows: "\$4000 OBO. . . . Willing to consider payments under certain conditions;" (4) Ms. Miller contacted Faith Arisumi, whom she knew previously from church, and agreed to purchase the vehicle; (5) when Ms. Miller took possession of the car, she did not pay \$4000; instead, she made a downpayment of \$300, and agreed to make monthly payments of \$275 each; (6) Ms. Miller failed to make all of the monthly payments on a timely basis, and fell behind on or missed multiple payments; (7) after Ms. Miller violated the payment terms verbally agreed to, Mr. Arisumi notified the police that the Ford Escape would be repossessed; (8) the vehicle was repossessed from Ms. Miller; (9) at the time of repossession, Ms. Miller had paid \$4275 in payments.

In dispute were the following three principal factual issues: (1) whether the parties agreed that (a) Ms. Miller would assume the payments Mr. Arisumi owed on the vehicle by paying \$275 per month until paid in full, or (b) she would pay no more than \$4000; (2) whether Mr. Arisumi had fraudulent intent when he sold the car to Ms. Miller; and (3) whether Mr. Arisumi made a promise to Ms. Miller that he had no intention of keeping and/or misrepresented a fact to her intending to deceive or cheat her.

B. Summary of the proceedings in the district court.

This is a direct appeal from a conviction in the Twelfth Judicial District Court, Otero County, New Mexico, Case No. D-1215-CR-2019-00542.

Defendant-Appellant Alike Arisumi was charged with two third-degree felonies, including fraud, in relation to the sale of a 2008 Ford Escape. R.P. 1-2. A jury trial was held in Otero County in March 2023. R.P. 192. Mr. Arisumi was sentenced to six years in prison, with three years suspended. R.P. 290-95.

C. Jurisdiction.

A judgment and sentence was entered on June 6, 2023. R.P. 290-95. On June 16, 2023, Mr. Arisumi filed a timely notice of appeal. R.P. 296-303.

D. Statement of the Case and Facts.

i. Indictment.

On November 12, 2019, a grand jury indicted Mr. Arisumi on two counts. R.P. 1-3. In Count 1, the grand jury alleged that Mr. Arisumi, with fraudulent intent, sold, transferred, removed, concealed or disposed of a 2008 Ford Escape, the value of which was more than \$2500, upon which a security interest, chattel mortgage or other lien of encumbrance has attached or been retained, without the written consent of the holder, Loco Credit Line, on or about May 17, 2018, contrary to NMSA 1978, Section 30-16-18 (2006). R.P. 1 (Count 1).

In Count 2, the grand jury also alleged that Mr. Arisumi, by any words or conduct, made a promise he had no intention of keeping and/or misrepresented a fact to Ms. Miller, intending to deceive or cheat her; and because of the promise and/or misrepresentation and Jodette Miller's reliance on it, Mr. Arisumi obtained \$4725, which belonged to

someone other than him, on or about May 18, 2018, contrary to NMSA 1978, Section 30-16-6 (1987, as amended 2006).

Mr. Arisumi entered a not guilty plea to Counts 1 and 2 of the indictment. R.P. 35-37.

ii. Prosecution's motions in limine.

The State filed a motion in limine, requesting the court to restrict Mr. Arisumi from referring to an unsigned contract at trial. R.P. 72-75. The prosecution argued that it should be not admitted into evidence because there was no signed contract between the parties and “[a]n unsigned contract has no relevance to the allegations of this case.” R.P. 73, ¶¶ 6-7. It also argued that “[t]o allow mention of an unsigned contract or attempt to introduce such a document will confuse and mislead the jury.” R.P. 73, ¶ 8.

Further, the prosecution contended that “[a]n unsigned contract is hearsay in that it is being offered to prove the matter asserted in the contract, *i.e.*, that the terms of the unsigned contract was what the defendant and the victim agreed to.” R.P. 73, ¶ 9.

Under the order the prosecution requested, Mr. Arisumi's defense at trial would be curtailed in three ways: (1) he would be restricted from "mention[ing] the unsigned contract in any facet of the trial," R.P. 73; (2) he would be restricted from "produc[ing] the contract as a purported exhibit," R.P. 73; and (3) he would be restricted from "asking any question of any witness that implies that such a contract exist[s]." R.P. 73.

In response, Mr. Arisumi argued that the unsigned contract reflects what both he and Faith Arisumi understood the agreement to be at the time of the sale. R.P. 77, ¶¶ 1, 3, 5. He argued that the offer was always "\$4000 in cash up front or assume the payments on the vehicle—a total of approximately \$6200." R.P. 77, ¶ 1. He also observed that Faith Arisumi had given the keys of the vehicle to Ms. Miller without obtaining her signature on the contract. R.P. 77, ¶ 2.

Mr. Arisumi argued that he believed the prosecution mis-stated that purpose for which the contract would be introduced. R.P. 77, ¶ 3. He observed that he "does not claim that an unsigned contract is valid as such; it however reflects [his] understanding of the agreement," R.P.

78, ¶ 5, and “it reflects [Mr. Arisumi’s] understanding of the agreement between the parties.” R.P. 77, ¶ 3.

Mr. Arisumi noted that Ms. Miller repeatedly fell behind in her payments on the vehicle and Mr. Arisumi had the right to repossess the vehicle. R.P. 77-78, ¶ 4. Mr. Arisumi argued that Ms. Miller “wanted to have the vehicle without paying full price and without making timely payments as agreed.” R.P. 78, ¶ 6.

Mr. Arisumi also contended that “Faith Arisumi failed to sell the vehicle on the terms agreed to by the parties.” R.P. 78, ¶ 7. He intended to introduce the unsigned agreement at trial to show “the terms upon which [he] had instructed Faith Arisumi to sell the vehicle.” R.P. 78, ¶ 7. He further contended that Faith Arisumi “failed to insist upon [Ms. Miller’s] signing the contract before giving possession of the vehicle to [her].” *Id.* He argued that Faith Arisumi’s failure to obtain Ms. Miller’s signature at that juncture “in no way vitiates the writing as displaying [his] understanding of the terms of the sale.” R.P. 78, ¶ 7. Mr. Arisumi “vigorously denie[d] having created this contract recently.” R.P. 78, ¶ 8.

At a hearing on the motion, the court granted the motion. 12/17/21 at 8:04:41 AM. The court also issued a written order granting the motion. R.P. 139. Although the order prepared by the prosecutor, and signed by the trial court, states that Mr. Arisumi did not contest this motion, *See* R.P. 139, this is not what Mr. Holmes stated at the hearing. He clarified that although the unsigned agreement was “not to show that there was a written contract or the terms of the agreement,” 12/17/21 at 8:03:58 AM, it could be relevant depending on what is presented at trial. The allegations in Counts 1 and 2 required the prosecution to show Mr. Arisumi’s intent and knowledge at the time of the sale of the vehicle. *See* R.P. 1-2 (indictment), 272-73 (essential elements jury instructions).

The exclusion of this unwritten agreement to show Mr. Arisumi’s intent and knowledge at the time of the sale is addressed below in Issue #1.

The prosecution also filed another motion in limine, requesting that the Court order Mr. Arisumi to refrain from mentioning criminal charges in Faith Arisumi’s background. R.P. 100-01. Faith Arisumi had been criminally charged with lying about domestic violence, and

committing perjury. R.P. 100. The prosecution offered to place Faith Arisumi in a pre-prosecution diversion program under which she could avoid a conviction for perjury. R.P. 100. In its motion in limine, the prosecution argued that because it had allowed Faith Arisumi to enter a pre-prosecution diversion program and avoid a conviction, the matter could not be brought up by Mr. Arisumi during Faith Arisumi's testimony at trial. R.P. 100. At the hearing on the motion, Mr. Holmes acknowledged that because Faith Arisumi had not been convicted, he had no intention of mentioning it at trial. 12/17/21, 8:03:01 to 8:03:46 AM. The court granted the State's second motion in limine. R.P. 138.

The court's decision with respect to this motion in limine is not at issue in this appeal.

iii. Jury trial.

On October 24, 2022, there was a brief trial that ended in a mistrial during opening statements. R.P. 183; Oct. 24, 2022 at 1:48:53 PM to 2:15:06 PM. The second jury trial, which is the subject of this appeal, was held March 9, 2023 to March 13, 2023. R.P. 192.

(a) Timothy Brock.

Timothy Brock testified that he became acquainted with Mr. Arisumi when they were both pastors at the same church in Alamogordo. 3/9/23 at 2:12:18 to 2:17:08 PM; R.P. 203-04. Mr. Brock sold a Ford Escape to Mr. Arisumi for \$7000 in 2015. 3/9/22, 2:19:34 PM.

(b) Officer Kerry Jerret.

Kerry Jerret, a police officer with the Alamogordo Police Department was on duty, when Ms. Miller came into the police station to file a police report about her purchase of the 2008 Ford Escape from Mr. Arisumi. 3/9/23 at 2:25:16 to 2:25:42 PM; R.P. 201-10. Officer Jerret read from State's Exhibit #3, which was the Facebook post from Faith Arisumi listing the blue 2008 Ford Escape, with 118,000 miles, for sale for \$4000 or best offer, and "willing to consider payments under certain conditions." 3/9/23 at 2:27:01 PM. Ms. Miller showed Officer Jerret several photocopies of personal checks she had issued for payment on the car. 3/9/23 at 2:28:41 PM.

One day later, Officer Jerret testified that Mr. Arisumi told him that he needed to report the repossession of a vehicle. 3/9/23 at 2:45:20 PM. While Mr. Arisumi was reporting the repossession, Officer Jerret heard over the air from dispatch that Ms. Miller was reporting that her car had been stolen. 3/9/23 at 2:45:39 to 2:46:10 PM.

Officer Jerret explained how repossession is reported: “[P]eople will get behind on their payments, a car will be repoed. People come to notify the police department that a repo is going to take place at this address. So if we get a call to respond there, we’re going to have an idea of what’s going on” 3/9/23 at 2:47:42 PM.

(c) Officer Mauricio Puente.

Officer Mauricio Puente testified that when he responded to a call regarding a possibly stolen car, Jodette Miller named Mr. Arisumi as a suspect. 3/9/23 at 3:21:14 to 3:23:08 PM; R.P. 208-10. She gave him Mr. Arisumi’s phone number; Officer Puente called Mr. Arisumi; and Mr. Arisumi told him that the car had been repossessed. 3/9/23 at 3:23:26 PM. Officer Puente met with Mr. Arisumi, who provided him with a copy of the title to the vehicle, and a repossession order. 3/9/23 at 3:23:50 PM. The title indicated that Mr. Arisumi was the owner the

vehicle, and the lien holder was LOCO Credit Union. 3/9/23 at 3:24:33 PM. Mr. Arisumi also provided him with a repossession letter. 3/9/23 at 3:24:56 PM. when prompted by the prosecutor to compare State's Exhibit #9 and State's Exhibit #10, Officer Puente testified that the two documents were similar, but one had a logo of the LOCO Credit Union, and the other did not. 3/9/23 at 3:36:50 to 3:28:16 PM. Officer Puente seized the Ford Escape from Mr. Arisumi. 3/9/23 at 3:32:27 PM.

(d) Jodette Miller.

Jodette Miller called Faith Arismumi in response to the Facebook ad. 3/9/23 at 3:41:17 PM; R.P. 210-15. She met with Faith Arisumi and Mr. Arisumi, whom she knew from Mountain View Church, where she is a member and was an associate pastor. 3/9/23 at 3:41:35 to 3:42:39 PM. She said that she was attracted to this vehicle because the sellers were willing to consider payments under certain conditions, and listed it at \$400 OBO. 3/9/23 at 3:45:22 to 3:45:42 PM.

She testified that they agreed on \$4000, with \$300 down, and \$275 per month. 3/9/23 at 3:47:20 to 3:47:48 PM. She took possession of the car, believing it was hers. 3/9/23 at 3:51:01 PM. She put new tires on it, and after it collided with an elk, some body repair work was done on teh

vehicle. 3/9/23 at 3:51:14 PM. She testified that she did not know that LOCO Credit Union had a lien on the vehicle. 3/9/23 at 3:51:43 PM.

She testified that Mr. Arisumi insisted that she have full insurance coverage on the vehicle until it was fully paid off, to protect himself. 3/9/23 at 3:53:25 PM. She testified that he told her he had to be on the insurance card until the vehicle was paid off. 3/9/23 at 3:53:25 PM. She acknowledged that several payments were late, and he told her he had to incur bank fees as a result. 3/9/23 at 3:54:50 PM.

Ms. Miller could not recall how much she owed on the car. 3/9/23 at 3:54:26 to 3:55:24 PM. Her records showed that, in total, she made the initial payment and subsequent monthly payments totalling \$4275. 3/9/23 at 3:56:25 PM. She asked Mr. Arisumi for the title after she made what she believed was the last payment, but he said there was more owed on the car. 3/9/23 at 3:59:23 PM. Then she went to LOCO credit union and the police. 3/9/23 at 3:59:39 PM.

After she noticed that the vehicle had been taken from a surgeon's office, she reported it as stolen. 3/9/23 at 4:10:20 PM.

In the presence of the jury, the prosecutor asked Mr. Miller, “Without a car at the surgeon’s office, how did you manage to get home?” 3/9/23 at 4:03:21 PM. She answered that she had to wait at the surgeon’s office, and “had to wait for about, and I don’t want to say longer than an hour, about an hour to get a cab. We had to get a cab and then we had to get car seats to put the grandkids in the cab.” 3/9/23 at 4:03:21 PM.

Mr. Holmes immediately objected, on grounds that it was not probative and was extremely prejudicial: “[T]o paint it out that we had to wait an hour, we had grandkids, we had to actually go get car seats and then we had to get a cab. What does that have to do with anything about whether or not there was an attempt to deceive, cheat?” 3/9/23 at 4:03:52 PM.

According to the prosecutor, the evidence was relevant because it showed (1) that Ms. Miller suffered, and (2) that Mr. Arisumi’s actions caused her extreme hardship and harm. 3/9/23 at 4:04:27 to 4:04:56 PM. No explanation was given as to how her suffering and “extreme hardship” was relevant in any to any of the essential elements of either Count 1 or Count 2, or even that this evidence made it more likely that

one or more of those elements was proved. There was no explanation by the prosecutor as to how this question and answer were probative of any factual issue before the jury.

The court overruled the objection. 3/9/23 at 4:03:57 to 4:06:46 PM. The only reason the judge gave was that “she’s described the family and the need and the stuff that they’ve gone through.” 3/9/23 at 4:04:57 PM. The court also said it was “not going to tell [the jurors] to disregard any of it.” 3/9/23 at 4:04:57 PM.

This is addressed in Issue #2 below.

On cross-examination, Ms. Miller testified that she had possession and use of the car from approximately May of 2018 to August of 2019. 3/9/23 at 4:08:48 PM. She testified that Faith Arisumi was the person she was dealing with mainly. 3/9/23 at 4:09:42 to 4:10:27 PM. She testified that she believed the agreement was for payments totaling \$4000. 3/9/23 at 4:15:58 to 4:16:22 PM. She did not recall any discussion about taking over the loan that Mr. Arisumi had on the car. 3/9/23 at 4:16:22 PM. She testified that in January 2019, when she first learned of the loan on the car with LOCO Credit Union, she did not follow up with anybody. 3/9/23 at 4:19:57 PM.

(e) *Faith Arisumi.*

Faith Arisumi testified that she could not recall whether she or Mr. Arisumi posted the ad on Facebook, but it was posted on her Facebook page. 3/9/23 at 4:39:03 PM; R.P. 215-24. She spoke with Ms. Miller initially, and then the conversations switched to Ms. Miller talking with Mr. Arisumi about the vehicle. 3/9/23 at 4:42:43 PM. She recalls that Ms. Miller agreed to provide post-dated checks up front, in the amount of \$275 per month. 3/9/23 at 4:43:16 to 4:43:32 PM. There was a \$300 downpayment. 3/9/23 at 4:47:13 PM.

(f) *William Guthrie.*

William Guthrie, who was in the towing business, testified that Mr. Arisumi contacted him about towing a repossessed vehicle. 3/10/23 at 10:18:43 AM; R.P. 224-26. He also testified that Mr. Arisumi showed him a repossession order, with the logo of the LOCO Credit Union, which was important to Mr. Guthrie. 3/10/23 at 10:25:39 to 10:25:52 AM.

(g) Deanna Schlensig.

Deanna Schlensig, an employee of the LOCO Credit Union testified that Mr. Arisumi mentioned to her at one point during the pendency of his car loan, that the car had been sold. 3/10/23 at 11:23:20 AM. She told him that he is not allowed to sell the vehicle until it was paid off, and she advised him to seek legal counsel. 3/10/23 at 11:23:47 to 11:26:15 AM.

She recalls someone coming in to the credit union identifying herself as the person to whom Mr. Arisumi had sold the vehicle. 3/10/23 at 11:27:45 to 11:28:21 AM. She testified that the repossession order without the LOCO logo was Mr. Arisumi taking steps to dissociate the documents from the credit union. 3/10/23 at 11:37:18 AM.

She testified that she has heard of deals where the buyer of a vehicle being paid off takes over the payments. 3/10/23 at 11:46:16 to 11:46:39 AM. She provided Mr. Arisumi with a repossession form. 3/10/23 at 11:56:22 AM. She testified that LOCO credit union has one repossession form that has the LOCO logo, and another repossession form that lacks the LOCO logo. 3/10/23 at 11:57:10 to 11:57:39 AM.

During a lunch recess, 3/10/23 at 12:00:48 to 1:17:59 PM, the parties and the trial judge conferred about an objection lodged by the prosecution about the value of the car. 3/10/23 at 12:00:21 PM. In response, Mr. Holmes observed that a big issue in the case was the understanding of the agreement. 3/10/23 at 12:02:39 PM. He noted that valuation of a vehicle depends on many factors. 3/10/23 at 12:03:32 PM. The judge sustained the objection. 3/10/23 at 12:04:26 PM.

(h) William Lewandowski.

William Lewandowski, a special agent with the district attorney's office, testified that he interviewed Mr. Arisumi. 3/10/23 at 1:40:17 PM; R.P. 235-39. According to Mr. Lewandowski, Mr. Arisumi told him that the vehicle was sold for \$4000. 3/10/23 at 1:40:17 PM. He later told Mr. Lewandowski that because payments were made, the amount was for the full amount of the loan. 3/10/23 at 1:40:38 PM. He said that Mr. Arisumi told him that he created the logo for the repossession order. 3/10/23 at 1:42:15 PM.

(i) Directed verdict motion.

After the State rested, the parties addressed Mr. Arisumi's directed verdict motion. R.P. 239 (Mar. 10, 2023 at 2:27:39 to 2:36:52 PM). Mr. Holmes emphasized that Faith Arisumi was involved in negotiations with Ms. Miller regarding the terms of the agreement. 3/10/23 at 2:27:39 to 2:33:58 PM. The trial court denied the directed verdict motion. 3/10/23 at 2:36:53 PM; R.P. 239.

Ms. Miller was re-called as a witness by Mr. Arisumi, R.P. 241-42 (3/10/24 at 3:22:08 to 3:34:27 PM), and testified that that she continued to message Faith Arisumi for several months after the purchase of the vehicle, and she confirmed that these messages were about the vehicle. 3/10/23 at 3:24:28 to 3:24:51 PM. There were conversations between Ms. Miller and Faith Arisumi about the agreement. 3/10/23 at 3:25:42 PM. On cross-examination by the prosecutor Ms. Miller testified that Mr. Arisumi was the primary negotiator and payments were decided between her and him. 3/10/23 at 3:34:08 to 3:34:20 PM.

When the trial resumed on March 13, 2023, the district court reaffirmed its finding as to the sufficiency of the evidence. R.P. 247 (Mar. 13, 2023 at 9:55:41 AM). The court read the instructions to the

jury. R.P. 247 (Mar. 13, 2023 at 9:59:54 to 10:15:20 AM); *see also* R.P. 254-78.

(j) *Jury instructions.*

The jury was instructed that in order to return a guilty verdict on Count 1, it must find that the State proved beyond a reasonable doubt, *inter alia*, the following three essential elements:

(1) Essential Element #1—that Mr. Arisumi “*knowingly and with intent to defraud*, sold, transferred, removed, concealed, or in any manner disposed of a 2008 Ford Escape,”

(2) Essential Element #2—that Mr. Arisumi “*knew* that Loco Credit Union held a security interest or other lien or encumbrance on the vehicle,” and

(3) Essential Element #3—that Mr. Arisumi “did not have the written consent of LOCO credit union,” R.P. 272 (emphases added).

The jury was instructed that in order to return a verdict of guilty on Count 2, it must find that the State proved beyond a reasonable doubt, *inter alia*, the following three essential elements:

(1) Essential Element #1—that Mr. Arisumi “by any words or conduct, made a promise he *had no intention* of keeping and/or misrepresented a fact to Jodette Miller, *intending to deceive or cheat* Jodette Miller or another,”

(2) Essential Element #2—that “[b]ecause of the promise and/or misrepresentation and Jodette Miller’s reliance on it, [Mr. Arisumi] obtained a 2008 Ford Escape and/or \$4725,” and

(3) Essential Element #3—that “[t]he vehicle and/or money belonged to someone other than the defendant.” R.P. 273 (emphases added).

After closing arguments, R.P. 247-48 (3/13/23 at 10:05:27 to 10:50:03 AM), the jury deliberated and reached a verdict after approximately one hour and fifteen minutes. R.P. 248 (Mar. 13, 2023 at 10:52:23 to 12:08:34 PM). The jury found Mr. Arisumi guilty on Counts 1 and 2 of the indictment. R.P. 249 (Mar. 13, 2023 at 12:09:18 AM). *See also* R.P. 279-80.

iv. Sentencing and notice of appeal.

The district court held a sentencing hearing, *see* R.P. 287-88 (April 27, 2023 at 12:00:45 to 4:14:24 PM), in which it imposed a sentence of three years for each count, to run consecutively, for a total of six years in prison, with three years are suspended contingent on successful completion of *three years of supervised probation* upon release from prison. 4/27/23 at 3:59:41 to 4:02:11 PM.

On June 6, 2023, the district court filed its judgment and sentence. R.P. 290-95. In conflict with the oral pronouncement of sentence on April 27, 2023, the written judgment states that the term of probation is *five years*. R.P. 292.

The discrepancy between the oral pronouncement of three years of probation and a written judgment changing the period to five years is addressed in Issue #3 below.

Mr. Arisumi was also ordered to pay restitution in the amount of \$8400, R.P. 292, even though Count 2 alleged that he wrongfully obtained \$4275 that belonged to someone else. R.P. 1-2. Although the judge invited Mr. Holmes to file a pleading addressing the restitution amount, no such pleading was filed: “So you’ll have the additional three

years for the restitution, \$8400. I'll order that. However, Mr. Holmes, you'll let me know if we need to go back and revisit that. I'll give you 30 days to file a motion on the restitution, okay?" 4/27/23 at 4:08:11 to 4:08:23 PM.

The discrepancy between the evidence of \$4275 in damages and a restitution order of \$8400 is addressed in Issue #4 below.

A notice of appeal was timely filed on June 16, 2023. R.P. 296-303.

SUMMARY OF ARGUMENT

There are three grounds for reversing the conviction, and two grounds for vacating the sentence.

First, the trial court infringed on Mr. Arisumi's right to present a defense when it ruled that he could not introduce an unsigned agreement to show his intent and his understanding of the intent of the parties at the time of the sale of the vehicle. This violation of Mr. Arisumi's constitutional right warrants reversal and retrial with instructions to allow Mr. Arisumi to present competent evidence of his intent at the time of the sale and his understanding of the nature and terms of the agreement.

Second, the trial court erred in allowing a line of question and answer that lacked any probative value and posed a danger of unfair prejudice to Mr. Arisumi. This violation of the rules of evidence and denial of a fair trial warrants reversal and retrial with instructions to prohibit the prosecution from inflaming the passions of the jury through irrelevant evidence.

Third, the district court erred in imposing a probation term of five years in the written judgment and sentence, after orally announcing a three-year term of probation at the sentencing hearing. This error warrants vacating the sentence and remanding with instructions to enter a written judgment that coheres with the orally-pronounced probation term of three years.

Fourth, the district court fundamentally erred when it imposed restitution of \$8400, when the evidence showed the victim's out of pocket payments for the car did not exceed \$4275. Although trial counsel failed to object, this fundamental error warrants vacating the sentence and remanding with instructions to impose restitution that is commensurate with the actual damages suffered by the victim.

Fifth, even if the Court were to rule that neither Issue #1 nor Issue #2, when considered in isolation, warrant reversal, the cumulative effect of these trial errors unjustifiably tipped the scale against Mr. Arisumi, depriving him of the right to a fair trial.

ARGUMENT

- 1. The trial court infringed on Mr. Arisumi's right to present a defense when it prevented him from introducing evidence of a written, unsigned contract showing his understanding of the agreement at the time of the sale.**

A. Standard of review.

The district court's order infringing on Mr. Arisumi's right to present a defense implicates the constitutional right to present a defense, and is reviewed on appeal under a *de novo* standard. *See State v. Belanger*, 2009-NMSC-025, ¶ 8, 146 N.M. 357 (*de novo* review applies to issue implicating right to fair trial); *State v. Neal*, 2007-NMSC-043, ¶ 15, 142 N.M. 176 (applying *de novo* review to district court's application of law to facts where constitutional issue is at stake); *State v. Martinez*, 2021-NMSC-002, ¶ 25 (citing *Belanger* and *Neal*).

- B. Because Mr. Arisumi's state of mind was at the center of the trial, he needed the unsigned agreement to bolster his defense that he had no fraudulent intent.**

The State's motion in limine to preclude Mr. Arisumi from referring to an unsigned contract at trial was erroneously granted by the trial court. R.P. 72-75; R.P. 139. In Mr. Arisumi's response to the motion, he observed that the written contract was created at the time of

the sale and reflects his understanding of the parties' intent at the time, and that even though it was unsigned, it was nevertheless relevant to his state of mind. R.P. 77, ¶¶ 1, 3, 5.

Mr. Arisumi believed that the offer was always that Ms. Miller would pay \$4000 in cash up front or assume the payments on the vehicle. R.P. 77, ¶ 1. He also observed that Faith Arisumi had given the keys of the vehicle to the alleged victim without insisting that the buyer sign the contract. R.P. 77, ¶ 2. Mr. Arisumi argued that the prosecution mis-stated the purpose for which the unsigned agreement would be introduced. R.P. 77, ¶ 3. He noted that Ms. Miller repeatedly fell behind in her payments on the vehicle and Mr. Arisumi had the right to repossess the vehicle even if the sale price was \$4000. R.P. 77-78, ¶ 4. Mr. Arisumi acknowledged that the unsigned contract is not a valid contract, R.P. 78, ¶¶ 5, 7, and argued that Ms. Miller "wanted to have the vehicle without paying full price and without making timely payments as agreed." R.P. 78, ¶ 6.

Mr. Arisumi also contended "Faith Arisumi failed to sell the vehicle on the terms agreed to by the parties." R.P. 78, ¶ 7. He also argued that she "failed to insist upon [Ms. Miller's] signing the contract

before giving possession of the vehicle” to her. R.P. 78, ¶ 7. He contended that her actions did not “vitiat[e] the writing as displaying [his] understanding of the terms of the sale.” R.P. 78, ¶ 7.

These arguments go to the heart of the factual issues in dispute at trial. The agreement, even if unsigned, is an indication of what Mr. Arisumi intended and what he believed Faith Arisumi and Ms. Miller agreed to.

A criminal defendant has a fundamental due process right to present a defense. This right is protected in both the United States Constitution, *see Washington v. Texas*, 388 U.S. 14 (1967), and the New Mexico Constitution, *see State v. Rosales*, 2004-NMSC-022, ¶7, 136 N.M. 25. *See also State v. Campbell*, 2007-NMCA-051, ¶ 14 (exclusion of evidence is reversible error where it “may have made a potential avenue of defense unavailable” to the defendant).

In *Campbell*, this Court noted that a defendant seeking “relief because an avenue for his defense was foreclosed by an evidentiary ruling must show that he was prejudiced by the ruling.” 2007-NMCA-051, ¶ 14 (citing *State v. Wright*, 1972-NMCA-073, 84 N.M. 3); *see also State v. Montoya*, 2014-NMSC-032, ¶ 15.

The exclusion of this evidence precluded him from showing the jury his understanding at the time of the sale. His intent and knowledge were at issue in Essential Elements #1 and #2 of Count 1. *See* R.P. 272. His intent was also at issue in Essential Element #1 of Count 2. *See* R.P. 273. Although the unsigned agreement was not a valid contract, he needed it to show his understanding of what Ms. Miller agreed to and what he believes Faith Arisumi had negotiated with Ms. Miller. *See* R.P. 78, ¶ 7.

This meets the standard under *Campbell—viz.*, that “an avenue for [Mr. Arisumi’s] defense was foreclosed by an evidentiary ruling” because it “may have made a potential avenue of defense unavailable to the defendant.” 2007-NMCA-051, ¶ 14.

Even though Mr. Arisumi consistently acknowledged that the unsigned agreement was not a valid contract, he never intended it to be offered as a valid contract. His intent in introducing it was to show the jury a document created contemporaneously with the inception of the agreement for sale of the 2008 Ford Escape.

The prosecution argued—and Mr. Holmes conceded—that the unsigned agreement did not prove the intent of Faith Arisumi or Ms. Miller at the time of the sale. R.P. 73; R.P. 77, ¶ 3. Of course, their intent was not an element of either offense at issue, although his intent was. The excluded document showed what he intended and also what he believed Ms. Miller had agreed to. Of course, the prosecution was entitled to offer evidence in support of its theory that he had fraudulent intent and she had agreed to pay no more than \$4000, but Mr. Arisumi had a constitutional right to offer evidence to show his intent, even if the State disagreed. *See Campbell*, 2007-NMCA-051, ¶ 14. The prosecution had the opportunity to cast doubt and attempt to rebut Mr. Arisumi's theory of the case. This is the purpose of the trial. But it was unfair to prevent Mr. Arisumi from introducing probative evidence of his intent and knowledge.

The prosecution's arguments against the admission of this document went to the weight of it, not its admissibility. This writing of Mr. Arisumi's own intent and his understanding of the agreement is probative of his intent and knowledge. It is directly relevant to this central issue. If the jury believed that it was an accurate indicator of

Mr. Arisumi's intent, then it would have been duty bound to return a not guilty verdict.

The trial court's exclusion of this evidence violated Mr. Arisumi's constitutional right and warrants reversal. On retrial, the district court should be instructed to allow Mr. Arisumi to present this and other competent evidence of his intent at the time of the sale and his understanding of the nature and terms of the agreement.

2. The trial court allowed the prosecutor to inflame the jurors' passion through irrelevant evidence, unfairly prejudicing Mr. Arisumi.

A. Standard of review.

The district court's refusal to exclude unfairly prejudicial evidence with no probative value is reviewed for an abuse of discretion. *See, e.g., Davila v. Bodelson*, 1985-NMCA-072, ¶ 12, 103 N.M. 243. An abuse of discretion is found when the trial court's decision is contrary to logic and reason. *See id.*

This Court has noted that "[w]e recognize that while the standard of appellate review governing rules entrusted to the trial court's discretion is deferential, it does not require us to affirm." *State v. Jordan*, 1993-NMCA-091, ¶ 19; *see also State v. Ferguson*,

1990-NMCA-117, ¶ 5, 111 N.M. 191. The scope of this Court’s review “depends in part on the particular nature of the question the trial court was called upon to answer.” *Ferguson*, 1990-NMCA-117, ¶ 5.

There were three questions presented to the trial court: (1) what was the probative value, if any, of Ms. Miller’s suffering and “extreme hardship” as a result of the repossession; (2) what was the danger of unfair prejudice to Mr. Arisumi;l and (3) die the danger of unfair prejudice substantially outweigh the probative value. The question for this Court is whether the decision to admit this evidence over Mr. Arisumi’s timely objection is contrary to logic and reason. *Davila*, 1985-NMCA-072, ¶ 12.

The prosecutor claimed the probative value was that it showed Ms. Miller’s suffering, extreme hardship, and harm that resulted from the delays, cost and inconvenience of taking a cab, and searching for car seats for her grandchildren after the car was repossessed. 3/9/23 at 4:04:27 to 4:04:56 PM.

B. Rule 11-403 NMRA provides for exclusion of evidence if its probative value is substantially outweighed by a danger of unfair prejudice.

Rule 11-403 NMRA provides as follows: “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice.” When the probative value of evidence is weighed against the danger of unfair prejudice, courts look at whether the evidence “serves a legitimate purpose” and weigh this legitimate purpose “against the jury’s tendency to use the evidence illegitimately.” *State v. Ruiz*, 1995-NMCA-007, ¶ 12, 119 N.M. 515.

The probative value of the evidence is determined by examining the factual issues to which the evidence is relevant, if there are any. *State v. Otto*, 2007-NMSC-012, ¶ 15, 141 N.M. 443.

The Rules of Evidence set forth a two-fold test for relevance: “Evidence is relevant if (A) it has any tendency to make a fact more or less probable than it would be without the evidence, and (B) the fact is of consequence in determining the action.” Rule 11-401 NMRA. Generally, “[w]hatever naturally and logically tends to establish a fact in issue is relevant.” *McNeill v. Burlington Resources Oil & Gas Co.*, 2008-NMSC-022, ¶ 14; *see also Wright v. Brem*, 1970-NMCA-030, ¶ 19,

81 N.M. 410.

Where the evidence is not relevant to any element of the charges brought against a criminal defendant, this Court has found it to have no probative value. *See State v. Maxwell*, 2016-NMCA-082, ¶¶ 15-16. In *Maxwell*, a defendant sought to introduce financial statements that had been prepared at the victim's request. This Court explained as follows:

Defendants fail to explain how [victim's] recollection of whether he requested the account statements was relevant or would have impacted anything in the case. . . . [S]uch a purported gap in [victim's] memory *is not relevant to any element of any of the charges* against Defendants. Defendants argue that the reason for [a defendant's] proposed testimony was to show why he had prepared the statements. The reason behind the production of the account statements is also *not relevant to any element of any of the charges* brought against the Defendants.

Maxwell, 2016-NMCA-082, ¶ 15 (emphases added).

In *Otto*, the New Mexico Supreme Court's Rule 403 analysis included identifying the specific factual issues that the evidence in question was relevant to: "The evidence was highly probative to show lack of mistake or accident. Without the evidence of uncharged acts, the jury was much more likely to believe that what happened . . . was a mistake or accident that only occurred because Defendant was asleep. There was no other evidence available to rebut this potential inference."

2007-NMSC-012, ¶ 15, 141 N.M. 443. The *Otto* Court concluded that the evidence was properly admitted “to show absence of mistake or accident—a ‘legitimate non-character use of the evidence.’” *Id.* (quoting *Jordan*, 1993-NMCA-091, ¶ 16).

In *Jordan*, this Court explained that the evidence was properly admitted because the State intended to offer the testimony to explain why the victim’s father questioned her and to counter Defendant’s theory that the victim’s father had encouraged a false accusation. That is what the State did at trial.” 1993-NMCA-091, ¶ 16. The *Jordan* Court found this to be a legitimate evidentiary purpose.

In both *Otto* and *Jordan*, New Mexico’s appellate courts carefully examined the purpose for which the evidence was being introduced, including an analysis of the relevance of the evidence. As the discussion below shows, the evidence of Ms. Miller’s suffering and “extreme hardship” was not relevant to any essential element of either Count 1 of Count 2. It follows as a matter of logic and reason that its minimal probative value was easily outweighed by the danger of unfair prejudice, making it inadmissible.

C. The prosecution was allowed to admit evidence with zero probative value.

During Ms. Miller's testimony, the prosecutor asked her to tell the jury how she suffered due to the repossession of the car. 3/9/23 at 4:02:21 PM. Then he asked her, "Without a car at the surgeon's office, how did you manage to get home?" 3/9/23 at 4:03:21 PM. Ms. Miller provided the emotional details elicited by the question: "We had to wait for about, and I don't want to say longer than an hour, about an hour to get a cab. We had to get a cab and then we had to get car seats to put the grandkids in the cab." 3/9/23 at 4:03:21 PM.

Mr. Holmes immediately objected, and the attorneys approached the bench for a sidebar. 3/9/23 at 4:03:52 to 4:03:57 PM. Mr. Holmes explained the basis for his objection, observing that "[i]t is hardly probative; I say zero probative value. But it's extremely prejudicial. I mean, to paint it out that we had to wait an hour, we had grandkids, we had to actually go get car seats and then we had to get a cab. What does that have to do with anything about whether or not there was an attempt to deceive, cheat?" 3/9/23 at 4:03:52 PM. The answer is that it had no relevance to anything. It did not pertain to any essential element of either Count 1 or Count 2.

The prosecutor claimed that “the entire episode, connecting all the dots, you have *a victim that has suffered* not only because of being defrauded and having a vehicle repossessed, in our view, illegally repossessed, but *it caused extreme hardship*. I think all of that is relevant for a victim to testify to *the harm that occurred to her*.” 3/9/23 at 4:04:27 to 4:04:56 PM (emphases added).

The court’s attempt to justify the introduction of this testimony over the Rule 403 objection lacked coherence: “Well, I think she’s described the family and the need and the stuff that they’ve gone through, so I’m not going to tell [the jury] to disregard any of it, but move on.” 3/9/23 at 4:04:57 PM. The trial court failed to articulate any relevance to this evidence. Ms. Miller’s family, her needs, and her hardships may be relevant at sentencing. But the jury was charged with determining only whether the prosecution proved beyond a reasonable doubt the essential elements of Counts 1 and/or 2. *See* R.P. 272 and 273.

i. No probative value as to Count 1.

Ms. Miller's transportation needs and the impact of the repossession on her transporting herself and her grandchildren is not relevant to any of the essential elements of Count 1.

In Count 1, the grand jury alleged that Mr. Arisumi, with fraudulent intent, sold, transferred, removed, concealed or disposed of a 2008 Ford Escape, the value of which was more than \$2500, upon which a security interest, chattel mortgage or other lien of encumbrance has attached or been retained, without the written consent of the holder, Loco Credit Line, on or about May 17, 2018, contrary to NMSA 1978, Section 30-16-18 (2006). R.P. 1 (Count 1).

The essential elements of Count 1 are as follows: (1) Essential Element #1—that Mr. Arisumi “knowingly and with intent to defraud, sold, transferred, removed, concealed, or in any manner disposed of a 2008 Ford Escape,” R.P. 272; (2) Essential Element #2—that Mr. Arisumi “knew that Loco Credit Union held a security interest or other lien or encumbrance on the vehicle,” R.P. 272; and (3) Essential Element #3—that Mr. Arisumi “did not have the written consent of LOCO credit union,” R.P. 272.

With respect to Essential Element #1, Ms. Miller's suffering and hardship as a result of the repossession while she was at a doctor's office is not probative of any fact needed for the jury to determine whether or not the prosecution proved this element beyond a reasonable doubt. Neither the manner in which she suffered nor her "extreme hardship," 3/9/23 at 4:04:27 PM, could possibly assist the jury in determining whether or not Mr. Arisumi "knowingly and with intent to defraud, sold, transferred, removed, concealed, or in any manner disposed of a 2008 Ford Escape." R.P. 272 (Essential Element #1 of Count 1).

Nor is the manner in which Ms. Miller transported her grandchildren after the repossession probative of the factual issue whether Mr. Arisumi "knew that Loco Credit Union held a security interest or other lien or encumbrance on the vehicle." R.P. 272 (Essential Element #2 of Count 1).

Similarly, it does not make it more or less likely that Mr. Arisumi had or lacked "the written consent of LOCO credit union." R.P. 272 (Essential Element #3 of Count 1).

Because none of these essential elements are made more likely by this evidence, it is not relevant to Count 1, and lacks any probative value.

ii. No probative value as to Count 2.

Similarly, Ms. Miller's actions after the repossession are not at all relevant to or probative of the essential elements of Count 2.

In Count 2, the grand jury alleged that Mr. Arisumi made a promise he had no intention of keeping and/or misrepresented a fact to Ms. Miller, intending to deceive or cheat her; and because of the promise and/or misrepresentation and Ms. Miller's reliance on it, Mr. Arisumi obtained \$4725, which belonged to someone other than him, on or about May 18, 2018. R.P. 1-2.

The jury instructions as to the essential elements for Count 2 are as follows: (1) Essential Element #1—that Mr. Arisumi “by any words or conduct, made a promise he had no intention of keeping and/or misrepresented a fact to Jodette Miller, intending to deceive or cheat Jodette Miller or another,” R.P. 273; (2) Essential Element #2—that “[b]ecause of the promise and/or misrepresentation and Jodette Miller's reliance on it, [Mr. Arisumi] obtained a 2008 Ford Escape and/or

\$4725,” R.P. 273; and (3) Essential Element #3—that “[t]he vehicle and/or money belonged to someone other than the defendant.” R.P. 273.

Ms. Miller’s transportation headache and inconvenience resulting from the repossession does nothing to assist the jury in determining whether or not Mr. Arisumi “made a promise he had no intention of keeping and/or misrepresented a fact to Jodette Miller, intending to deceive or cheat [her] or another.” R.P. 273 (Essential Element #1 of Count 2).

Mr. Holmes precisely identified the reason for the objection: “What does that have to do with anything about whether or not there was an attempt to deceive, cheat?” 3/9/23 at 4:02:57 PM.

Similarly, Ms. Miller’s suffering and “extreme hardship” were not probative of whether or not Mr. Arisumi obtained a 2008 Ford Escape and/or \$4275 because of her reliance on the promise referred to in Essential Element #1. R.P. 273 (Essential Element #2 of Count 2).

Finally, this evidence lacked any probative value to show the vehicle belonged to someone other than Mr. Arisumi. R.P. 273 (Essential Element #3 of Count 2).

Ms. Miller’s suffering and “extreme hardship” after repossession had no probative value as to any of the six essential elements that the jury was required to find in order to return a guilty verdict.

iii. Ms. Miller’s testimony posted a danger of unfair prejudice.

Eliciting Ms. Miller’s testimony about her suffering and “extreme hardship” served only one purpose—to inflame the passions of the jury, provoke hostility against Ms. Arisumi, and arouse sympathy for Ms. Miller. But this is not a legitimate purpose. *See State v. Stanley*, 2001-NMSC-037, ¶ 17, 131 N.M. 368 (“‘Unfair prejudice’ within its context means undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” (citing Advisory Committee’s Note on Fed. R. Evid. 403, 28 U.S.S.C.A.N. 860)). The New Mexico Supreme Court in *Stanley* explained: “Evidence should be excluded as unfairly prejudicial in the sense of being too emotional if it is best characterized as sensational or shocking, provoking anger, inflaming passions, or arousing overwhelming sympathetic reactions, or provoking hostility or revulsion or punitive impulses, or appealing entirely to emotion against reason.” 2001-NMSC-037, ¶ 37 (quoting 1 Christopher B. Mueller and Laird C.

Kirkpatrick, Federal Evidence § 94 (2d ed. 1987)).

Highlighting for the jury that Ms. Miller was forced, as a result of Mr. Arisumi's actions, to wait an hour or so for a cab at a doctor's office with two young grandchildren, and then needing to get car seats for them—could easily pose the litany of dangers that Rule 403 was designed to protect against:

- Provoke hostility or anger against Mr. Arisumi,
- Arouse sympathy for Ms. Miller,
- Provoke punitive impulses, and
- Appeal entirely to emotion against reason.

See Mueller and Kirkpatrick, *supra*; Stanley, 2001-NMSC-037, ¶ 17.

The trial court erred in overruling Mr. Holmes's objection and refusing to instruct the jury to disregard Ms. Miller's irrelevant and inflammatory testimony. This violation of the rules of evidence warrants reversal and retrial.

3. The district court erred in imposing a probation term of five years in the written judgment and sentence, after announcing a three-year term of probation at the sentencing hearing.

A. Standard of review.

The legal error of imposing a probation term in the written sentence that is two years longer than the probation term announced orally at sentencing is a legal error reviewed *de novo*. See *State v. Ballard*, 2012-NMCA-043, ¶ 47 (reviewing *de novo* the issue of the sentencing court's authority to alter the length of probation), *rev'd on other grounds in State v. Olsson*, 2014-NMSC-012, ¶ 47.

B. The Court lacked the authority to increase Mr. Arisumi's probation term to five years in Mr. Arisumi's absence.

The district court erred in imposing a probation term of five years in the written judgment and sentence, after announcing a three-year term of probation at the sentencing hearing. This Court observed in *State v. Stejskal*, 2018-NMCA-045, ¶ 14, that “[b]ecause a defendant has a constitutional right to be present when he is sentenced, if there is a variance between the oral pronouncement of sentence and the written judgment of conviction, the oral sentence generally controls.” (Quoting *United States v. DeMartino*, 112 F.3d 75, 78 (2nd Cir. 1997) (citation

omitted).) After the April 27, 2023 sentencing hearing, the district court did not hold any hearing at which it announced any increase in the probation term.

Accordingly, it was error for the court to arbitrarily increase the probation term without holding a hearing which Mr. Arisumi could attend. This error warrants vacatur of the sentence and remand with instructions to enter a written judgment that coheres with the orally-pronounced probation term of three years.

- 4. The district court fundamentally erred when it imposed restitution of \$8400, when the evidence showed the victim's out of pocket payments for the car did not exceed \$4275.**

A. Standard of review.

The district court's imposition of restitution that is double the amount of the victim's claimed harm is reviewed on appeal under the fundamental error standard of review because trial counsel did not preserve the error in the district court. *See State v. Stalter*, ¶ 38 ("Defendant concedes this issue is not preserved, and we therefore review for fundamental error."). Fundamental error exists "to prevent the miscarriage of justice." *Id.*

B. The restitution order was fundamentally erroneous.

Under New Mexico law, restitution is to be made by an offender to “the victims of his criminal activities.” NMSA 1978, § 31-17-1(A). The term “victim” means the person who suffered “actual damages as a result of the defendant’s criminal activities.” Section 31-17-1(A)(1). The term “actual damages” means “all damages which a victim could recover against the defendant in a civil action arising out of the same facts or event, except for punitive damages and damages for pain, suffering, mental anguish and loss of consortium.” Section 31-17-1(A)(2).

The purpose of restitution is to “make whole the victim of the crime to the extent possible.” *Matter of Contempt of Maestas*, 2022-NMCA-057, ¶ 37 (quoting *State v. Lack*, 1982-NMCA-111, ¶ 12, 98 N.M. 500).

The district court fundamentally erred when it imposed restitution of \$8400, when the evidence showed the victim’s out of pocket payments for the car did not exceed \$4275. *See* 3/9/23 at 3:56:25 PM (Ms. Miller testifying she paid Mr. Arisumi \$4275 for the car). There was no evidence showing that she suffered damages in the amount of \$8400.

Ordering Mr. Arisumi to pay approximately twice the amount of actual damages is contrary to Section 31-17-1. It is fundamental error because it has neither legal nor factual support; it is a miscarriage of justice.

This fundamental error warrants reversal and remand with instructions to impose restitution that is no greater than the amount of actual damages.

5. The cumulative effect of the errors in Issues #1 and #2 unjustifiably tipped the scale against Mr. Arisumi, depriving him of a fair trial.

Cumulative error is an appellate issue that does not require assertion in the trial court to merit relief on appeal. *See generally State v. Martin*, 1984-NMSC-077, ¶¶ .

Under this well-established doctrine, reversal is required where “the cumulative impact of errors which occurred at trial was so prejudicial that the defendant was deprived of a fair trial.” *Martin*, 1984-NMSC-077, ¶ 17 (citing *State v. Vallejos*, 1974-NMCA-009, 86 N.M. 39). The doctrine is rooted in the appellate court’s “responsibility . . . to insure that a person convicted of a crime has a fair trial. *Martin*, 1984-NMSC-077, ¶ 17 (citing *State v. Gomez*, 1965-NMSC-128, ¶ 9, 75

N.M. 545). The New Mexico Supreme Court emphasized in *Martin* that New Mexico's appellate courts "must reverse any conviction obtained in a proceeding in which the cumulative impact of irregularities is so prejudicial to a defendant that he is deprived of his fundamental right to a fair trial." 1984-NMSC-007, ¶ 17 (citing U.S. Const. Amend. VI, XIV; N.M. Const. Art. II, § 14).

Even if the Court were to rule that neither issue #1 nor issue #2, when considered in isolation, warrants reversal, the cumulative effect of these trial errors unjustifiably tipped the scale against Mr. Arisumi, depriving him of the right to a fair trial.

The jury was not allowed to see a document showing how Mr. Arisumi understood the agreement. It was not permitted to read what he wrote about the terms of the vehicle sale. Even though the agreement was unsigned, and as such as not a valid contract, it would have shown the jury his intent, his belief as to the terms of the agreement, and what he believed Faith Arisumi and Ms. Miller agreed to. At the same time, the jury was given testimony from Ms. Miller as to how she suffered and how she experienced "extreme hardship." This inflammatory testimony, devoid of any probative value, likely provoked

hostility and anger against Ms. Arisumi while arousing sympathy for Ms. Miller.

By shielding the jury from evidence of Mr. Arisumi's intent and belief at the time of the sale, while provoking anger against him and sympathy for Ms. Miller, the court's orders in combination had the effect of skewing the trial toward the State, and depriving Mr. Arisumi of a fair trial. Consequently, the conviction should be reversed.

CONCLUSION AND REQUEST FOR ORAL ARGUMENT

Mr. Arisumi respectfully requests the Court to reverse the conviction and remand for retrial for the reasons stated in Issues #1, #2 and #5. In addition, Mr. Arisumi respectfully requests the Court to vacate the sentence of probation for the reasons stated in Issue #3 and to vacate the restitution order for the reasons stated in Issue #4.

Mr. Arisumi also respectfully requests oral argument, where Court and counsel may engage in constructive dialog about any matters not adequately addressed in the parties' briefs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief in chief was served on the Criminal Appeals Division, Attorney General's Office, State of New Mexico, through the Odyssey electronic filing system and/or email, on the 3rd day of October 2023.

/s/ Scott M. Davidson

SCOTT M. DAVIDSON