

**STATE V. ARMENDARIZ**

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**STATE OF NEW MEXICO,**  
Plaintiff-Appellee,  
**v.**  
**TOMMY ARMENDARIZ,**  
Defendant-Appellant.

No. 33,579

COURT OF APPEALS OF NEW MEXICO

December 10, 2014

APPEAL FROM THE DISTRICT COURT OF CIBOLA COUNTY, Camille Martinez  
Olguin, District Judge

**COUNSEL**

Gary K. King, Attorney General, Santa Fe, NM, M. Victoria Wilson, Assistant Attorney General, Albuquerque, NM, for Appellee

Jorge A. Alvarado, Chief Public Defender, David Longley, Assistant Appellate Defender, Albuquerque, NM, for Appellant

**JUDGES**

CYNTHIA A. FRY, Judge. WE CONCUR: JONATHAN B. SUTIN, Judge, LINDA M. VANZI, Judge

**AUTHOR:** CYNTHIA A. FRY

**MEMORANDUM OPINION**

**FRY, Judge.**

{1} Defendant appeals from his conviction for voluntary manslaughter following a jury trial. The sole issue Defendant raises on appeal is whether the district court committed

reversible error when it refused to give a self-defense instruction to the jury. This Court issued a calendar notice proposing to reverse. The State has filed a memorandum in opposition in response to this Court's notice of proposed disposition. Having given due consideration to the State's arguments therein, we reverse Defendant's conviction.

{2} In this Court's notice, we proposed to conclude that Defendant had presented sufficient evidence to warrant the giving of a self-defense instruction. See *State v. Brown*, 1996-NMSC-073, ¶ 34, 122 N.M. 724, 931 P.2d 69 (providing that a defendant is entitled to jury instructions on his theory of the case if there is evidence to support the instruction and that failure to give such an instruction is reversible error); *State v. Rudolfo*, 2008-NMSC-036, ¶ 17, 144 N.M. 305, 187 P.3d 170 (stating that an instruction on self-defense requires that "(1) the defendant was put in fear by an apparent danger of immediate death or great bodily harm, (2) the killing resulted from that fear, and (3) the defendant acted reasonably when he or she killed"). We noted that Defendant's testimony that he thought the victim had a knife, that the victim made stabbing motions and lunged at him, and that he was scared was sufficient to warrant a self-defense instruction. [CN 3]

{3} In response, the State argues that Defendant admitted he did not see a knife and was never sure that the victim was armed [MIO 2], and that the door was between Defendant and the victim at the time of the alleged stabbing motion [MIO 5]. To the extent the state relies on these facts to argue that the evidence does not show that the defendant was actually in danger of immediate great bodily harm or death by the intruder, we point out that the standard is not one of actual danger, but an apparent danger. See *id.*

{4} Moreover, to the extent the State asks this Court to hold, as a matter of law, that neither Defendant's fear nor his response was reasonable, the cases that the State cites in support of its argument do not lead us to that conclusion. Rather, in *State v. Duarte*, 1996-NMCA-038, ¶ 10, 121 N.M. 553, 915 P.2d 309, this Court affirmed the district court's refusal to give a defense of another instruction holding that, because "[t]here was no evidence . . . upon which a reasonable person could base a fear that anything more than a battery was about to take place[.]" the defendant's use of deadly force was not reasonable as a matter of law. In *Rudolfo*, 2008-NMSC-036, ¶ 18, our Supreme Court held that the defendant was not entitled to a self-defense instruction because his use of force was not reasonable when he shot at the victim's van as the victim was driving away. The Supreme Court held that "[i]t is important to view the circumstances at the time the deadly force was used by the defendant and not at some earlier point." *Id.* Finally, in *State v. Lopez*, 2000-NMSC-003, ¶¶ 24-26, 128 N.M. 410, 993 P.2d 727, our Supreme Court held that there was insufficient evidence "to support a finding that [the d]efendant killed in fear or a finding that he acted reasonably in killing" where the victim pulled a knife and the defendant stabbed the victim fifty-four times and crushed his skull. In contrast, here, Defendant testified that the victim lunged at him and made a stabbing motion and Defendant stabbed back. Thus, unlike *Duarte*, *Rudolfo*, and *Lopez*, Defendant's action was proportionate to the threat he perceived and was an

immediate response. As a result, we conclude that Defendant presented enough evidence to warrant an instruction on self-defense.

**{5}** Accordingly, for the reasons stated above and in this Court's notice of proposed disposition, we reverse and remand for further proceedings consistent with this opinion.

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

**CYNTHIA A. FRY, Judge**

**WE CONCUR:**

**JONATHAN B. SUTIN, Judge**

**LINDA M. VANZI, Judge**