

**STATE V. BERRES**

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**STATE OF NEW MEXICO,  
Plaintiff-Appellee,  
v.  
ISABEL BERRES,  
Defendant-Appellant,**

NO. 34,729

COURT OF APPEALS OF NEW MEXICO

December 3, 2015

APPEAL FROM THE DISTRICT COURT OF BERNLAILLO COUNTY, Jacqueline D.  
Flores, District Judge

**COUNSEL**

Hector H. Balderas, Attorney General, Santa Fe, NM, for Appellee

Jorge A. Alvarado, Chief Public Defender, Sergio J. Viscoli, Appellate Defender, Santa Fe, NM, for Appellant

**JUDGES**

M. MONICA ZAMORA, Judge. WE CONCUR: LINDA M. VANZI, Judge, J. MILES HANISEE, Judge

**AUTHOR:** M. MONICA ZAMORA

**MEMORANDUM OPINION**

**ZAMORA, Judge.**

{1} Defendant appeals her metropolitan court conviction for battery against a household member, appealing first to the district court, which affirmed in on-record proceedings, and then to this Court. Unpersuaded by Defendant's docketing statement,

we issued a notice of proposed summary disposition, proposing to affirm. Defendant has responded to our notice with a memorandum in opposition. We remain unpersuaded and affirm.

**{2}** On appeal, Defendant argues that it was reversible error to omit the essential element that Defendant did not act in self-defense to the jury instruction for battery on a household member. [DS 26; MIO 25-29] Second, Defendant argues that the district court erred by excluding her testimony about Mr. Berres' controlling character and specific instances of his conduct, the absence of which Defendant argues prevented her from meaningfully developing her claim of self-defense. [DS 22-23, 26; MIO 29-32] The notice proposing affirmance expressed our belief that the district court's memorandum opinion was thorough in its recitation of the facts and accurate in its analysis of those facts under the law, and proposed to adopt it.

**{3}** Regarding the jury instruction issue, we specifically proposed to agree with the district court that the error was not preserved and that there was no fundamental error. In response to our notice, Defendant contends that her issue was preserved by the State, when the prosecutor asked whether it would be appropriate to include a self-defense element in the instruction for battery against a household member. [MIO 20, 26-27] The district court's opinion, which we proposed to adopt, addressed this fact and concluded that Defendant failed to preserve argument relating to the jury instructions. [RP 109] We agree. In response to the prosecutor's comment about the instruction, the metropolitan court stated that including a self-defense element in the battery instruction would be unnecessary because there would be a separate self-defense instruction. [MIO 20; RP 109] Defense counsel made no objection, made no argument about the law suggesting this can be reversible error, and agreed with the instructions as given. [RP 109] We agree with the authorities upon which the district court relied in rejecting the claim that Defendant's objection was preserved. [RP 109] We also note that permitting Defendant to withhold objection and argument, then claim the matter was preserved on appeal and receive the benefit of a lower standard for error would encourage the kind of sandbagging and gamesmanship for which our courts have expressed disdain. See *State v. Nguyen*, 2008-NMCA-073, ¶ 22, 144 N.M. 197, 185 P.3d 368 (refusing to permit the defendant from benefitting from a procedure to which he did not object, and even encouraged, on grounds that it would encourage sandbagging and gamesmanship).

**{4}** Defendant's remaining arguments apply to the reversible error standard and do not establish fundamental error, for the reasons we discussed in our notice and as the district court discussed in its memorandum opinion. [RP 110-12]

**{5}** Regarding Defendant's second claim of error, in the metropolitan court's exclusion of Defendant's testimony regarding Mr. Berres, our notice proposed to adopt the relevant portion of the district court's opinion in its entirety. We added our observation that Defendant's docketing statement was particularly vague about the evidence Defendant would have liked the metropolitan court to admit and for what purpose. We observed that the district court's review of the trial proceedings indicated

that Defendant made no proffer of the evidence, but that Defendant questioned Mr. Berres about his threats to send Defendant to jail or have her deported. [RP 112] In light of the district court's assessment of this portion of the trial proceedings, we expressed confusion about Defendant's assertion that the excluded evidence related to Mr. Berres's character and specific instances of his conduct [DS 23], and that this evidence would have shown that on the day in question Mr. Berres was acting in conformity with his violent tendencies. [RP 112] We asked that Defendant respond to our notice with clarification about what evidence she sought to admit, why she argued it was relevant to her claim of self-defense, and how all these matters should be deemed preserved. To the extent that Defendant preserved an argument about Defendant's violent character, we specifically asked her to explain why the district court's reliance on *State v. Armendariz*, 2006-NMSC-036, ¶ 17, 140 N.M. 182, 141 P.3d 526, *overruled on other grounds by State v. Swick*, 2012-NMSC-018, ¶ 31, 279 P.3d 747, is misplaced or otherwise not controlling. [RP 114-15]

{6} In response to our notice, Defendant agrees with this Court that she did not advance specific instances of past violent conduct of which she was aware that could have been admitted to show her fear of Mr. Berres. [MIO 30] She also acknowledges that she did question Mr. Berres about his threats concerning deportation and jail. [Id.] Defendant seems to contend that her testimony about Mr. Berres's threats of deportation and imprisonment should have been admitted as generally relevant to establishing Defendant's state of mind and that Mr. Berres was the first aggressor and had a motive to be one, notwithstanding other rules and case law that would exclude such evidence. *See, e.g., Armendariz*, 2006-NMSC-036, ¶ 17 (stating that "evidence of specific instances of a victim's prior violent conduct may not be admitted to show that the victim was the first aggressor when the defendant is claiming self-defense"); Rule 11-403 NMRA ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

{7} We are not persuaded that Defendant sufficiently developed this argument, based on her inability to clarify what evidence was wrongfully excluded. Also, we are not persuaded that whatever testimony Defendant might have given would be admissible under *Armendariz* or would survive a Rule 11-403 balancing test, for the reasons thoroughly discussed in the district court's opinion. [RP 114-17] We see no abuse of discretion in the exclusion of Defendant's testimony.

{8} For the reasons stated above, we affirm Defendant's conviction for battery against a household member.

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

**M. MONICA ZAMORA, Judge**

**WE CONCUR:**

**LINDA M. VANZI, Judge**

**J. MILES HANISEE, Judge**