

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

STATE OF NEW MEXICO,
Plaintiff,

v.

No. D-101-CR-2023-00040

HANNAH GUTIERREZ,
Defendant.

**ORDER DENYING DEFENDANT'S
EMERGENCY MOTION FOR NEW TRIAL AND RELEASE**

THIS MATTER came before the Court on Defendant's Emergency Motion for New Trial and Release (the "Emergency Motion"), filed March 15, 2024. Having reviewed the briefing, considered oral argument, and being otherwise fully advised, THE COURT FINDS, CONCLUDES, AND ORDERS:

PROCEDURAL AND FACTUAL SUMMARY

1. The Court summarizes events pertinent to the resolution of the Emergency Motion.
2. On January 31, 2023, the State filed a Criminal Information against Defendant Hannah Gutierrez. In addition to other preceding amended charging documents, the State filed a Third Amended Criminal Information on June 22, 2023. The Third Amended Criminal Information became the operative charging document.
3. Through this operative criminal information, the State charged Defendant with the following counts:

Count 1 – Involuntary Manslaughter contrary to NMSA 1978, Section 30-2-3(B) (1994). *See* § 30-2-3(B) ("Involuntary manslaughter consists of manslaughter committed in the commission of an unlawful act not amounting to a felony[.]").

Alternative Count 1 – Involuntary Manslaughter contrary to NMSA 1978, Section 30-2-3(B) (1994). *See* § 30-2-3(B) (“Involuntary manslaughter consists of manslaughter committed . . . in the commission of a lawful act which might produce death in an unlawful manner or without due caution and circumspection.”).

Count 2 – Tampering with Evidence contrary to NMSA 1978, Section 30-22-5 (2003).

4. Following months of robust motion practice, on February 21, 2024, the Court empaneled a *petit* jury. Thereafter, the Court presided over a jury trial between February 22, 2024, and March 6, 2024.
5. Outside the presence of the jury, the Court held jury instruction conferences on March 5, 2024, and March 6, 2024. On both days, Defense requested a jury instruction such that the Court would instruct the jury that they must unanimously decide which act the Defendant committed vis-à-vis jury instructions on the involuntary manslaughter charges. The State objected to Defense’s position. Ultimately, the Court declined to provide the requested instruction after considering argument of counsel and proffered case law on jury unanimity. *See, e.g., State v. Godoy*, 2012-NMCA-084, 284 P.3d 410; *State v. Consaul*, 2014-NMSC-030, 332 P.3d 850. Also, the Court relied on standard unanimity language set forth in UJI 14-6008 NMRA and UJI 14-6002B NMRA. *See, e.g., UJI 14-6008 NMRA* (“In order to return a verdict, it is necessary that each juror agrees. Your verdict must be unanimous. . . .”).
6. Notably, Defense did not object to the presence of any “*and/or*” language in any proposed instruction during the conferences on either March 5, 2024, or March 6, 2024.

7. On March 6, 2024, the Court provided two primary instructions to the jury in relation to the involuntary manslaughter counts. In relation to Count 1, the Court instructed the jury as follows:

INSTRUCTION NO. 12

For you to find the defendant guilty of Involuntary Manslaughter in Count 1, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. Hannah Gutierrez endangered the safety of another by handling or using a firearm in a negligent manner;
2. Hannah Gutierrez should have known of the danger involved by Hannah Gutierrez's action;
3. Hannah Gutierrez acted with a willful disregard for the safety of others;
4. Hannah Gutierrez's act caused the death of Halyna Hutchins;
5. This happened in New Mexico on or about the 21st day of October 2021.

Jury Instructions, Instruction No. 12, filed Mar. 8, 2024; *see also id.* at Instruction No. 13 (setting forth instruction for lesser-included offense of Negligent Use of a Deadly Weapon).

8. In relation to Alternative Count 1, the Court instructed the jury as follows:

INSTRUCTION NO. 12A

For you to find the defendant guilty of Involuntary Manslaughter in Count 1, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. Hannah Gutierrez loaded live ammunition into a firearm intended to contain only inert ammunition, and/or Hannah Gutierrez failed to perform an adequate safety check of the ammunition she loaded into the firearm;
2. Hannah Gutierrez should have known of the danger involved by Hannah Gutierrez's action;
3. Hannah Gutierrez acted with a willful disregard for the safety of others;
4. Hannah Gutierrez's act caused the death of Halyna Hutchins;
5. This happened in New Mexico on or about the 21st day of October 2021.

Jury Instructions, Instruction No. 12A, filed Mar. 8, 2024.

9. After receipt of these instructions and others, the jury retired to deliberate. Thereafter, on March 6, 2024, the jury returned two general verdicts. As to Count 1 – Involuntary Manslaughter, the jury found the Defendant guilty. As to Count 2 – Tampering with Evidence, the jury found the Defendant not guilty. *See Verdict Forms*, filed Mar. 8, 2024.

10. On March 15, 2024, Defendant filed her Emergency Motion. In response, the State filed its Response to Defendant’s Emergency Motion for New Trial and Release on March 20, 2024. In reply, Defendant filed her Reply to State’s Response to Defendant’s Emergency Motion for New Trial and Release on March 27, 2024 (the “Reply”).
11. On March 29, 2024, the Court considered oral argument via Google Meet on the Emergency Motion. Defense Counsel Mr. Jason Bowles remotely appeared and argued on behalf of Defendant Gutierrez, who also appeared remotely and in custody. Special Prosecutor Ms. Kari Morrissey remotely appeared and argued on behalf of the State.
12. After considering argument, the Court denied Defendant’s Emergency Motion via verbal ruling. The Court now enters its written ruling in accordance therewith.

RULING

13. The Defendant’s Emergency Motion asserts that the New Mexico Supreme Court’s recently issued decision in *State v. Taylor*, 2024-NMSC-___, ___ P.3d ___ (S-1-SC-38818, March 14, 2024), necessitates a new trial—due to purported jury instruction error—in the instant action. Specifically, Defendant explains, “the [*Taylor*] Court criticized the use of and/or in listing various acts the jury could find committed by the defendants. The [*Taylor*] Court also noted that such drafting of the instructions could confuse the jury and lead to a non unanimous verdict on any particular act.” Def.’s Emergency Mot. ¶ 2. Further, Defendant argued, “[t]his is precisely the argument that Ms. Gutierrez Reed made in jury instruction arguments before this Court. These arguments were overruled and the State made the same instructional error in this case, using ‘and/or’ acts and allowing the jury to not be unanimous on any one particular act.” *Id.* at ¶ 3. The Defendant’s arguments are not well taken.

14. The Court denies Defendant’s Emergency Motion for five primary reasons. First, *State v. Taylor* does not entirely prohibit trial courts from using an *and/or* conjunction in jury instructions. Rather, the New Mexico Supreme Court held, and unique to the *Taylor* case, that “the presence of *and/or* in the all-important conduct element of the essential-elements instructions confused and misdirected the jury[,] and allowed it to make a finding of guilt on a legally inadequate basis.” *Taylor*, 2024-NMSC-____, ¶ 12; *see also id.* ¶ 2 (“The term *and/or* has proved singularly unsuited to formulating clear and effective jury instructions, to the degree that our trial courts would be well-served to avoid its use in jury instructions altogether.”). Further, the Court could not find, and Defendant fails to cite, anywhere in the jury-instructions-conference record where Defendant expressly objected to use of *and/or* in the jury instructions. *See generally State v. Benally*, 2001-NMSC-033, ¶ 12, 131 N.M. 258 (“The standard of review we apply to jury instructions depends on whether the issue has been preserved.”); *see also* Def.’s Reply.
15. Second, the *Taylor* Court ultimately reversed on the basis that use of *and/or* within the offending jury instruction in *Taylor* “allowed the jury to make a decision they were not allowed to make.” *Taylor*, 2024-NMSC-____, ¶ 20 (formatting altered) (citation and internal quotation marks omitted). Specifically, the jury in *Taylor* “was allowed to return guilty verdicts *solely* based on one or more of Defendants’ alleged CYFD violations. . . . [I]t is enough to point out that the jury, as instructed, could have convicted Defendants on the charged felony child abuse crimes for merely failing to obtain agency permission to transport the children to and from a nearby park. This technical violation of the agency’s policies could not support a stand-alone finding that Defendants placed the Victims in any ‘direct line of danger.’” *Id.* ¶ 20 (citation omitted).

16. Here, both conduct options within the *actus reus* component of the elements instruction of Jury Instruction 12A offered permissible fact-finding conclusions to the jury. Specifically, the jury was to consider whether Defendant “loaded live ammunition into a firearm intended to contain only inert ammunition, and/or Hannah Gutierrez failed to perform an adequate safety check of the ammunition she loaded into the firearm.” Jury Instructions, Instruction No. 12A, filed Mar. 8, 2024. In relation to the pertinent involuntary manslaughter charge, both of these conduct options described a potential “lawful act which might produce death in an unlawful manner or without due caution and circumspection.” § 30-2-3(B). Thus, unlike the jury in *Taylor*, the jury in the instant action was not instructed with a legally impermissible conduct component on which they could have rendered their verdict. *See, e.g., State v. Herrera*, A-1-CA-40025, mem. op. ¶¶ 8-9, 2022 WL 1025887 (N.M. Ct. App. Apr. 6, 2022) (nonprecedential) (finding no error with essential elements jury instruction wherein *and/or* appeared).
17. Third, the *Taylor* Court did not overturn precedent establishing that “where alternative theories of guilt are put forth under a single charge, jury unanimity is required only as to the verdict, not to any particular theory of guilt.” *Taylor*, 2024-NMSC-___, ¶ 21 (citation and internal quotation marks omitted); *see, e.g., State v. Godoy*, 2012-NMCA-084, ¶ 6, 284 P.3d 410 (“In fact, New Mexico case law contradicts Defendant’s argument and supports the State’s contention that, where alternative theories of guilt are put forth under a single charge, jury unanimity is required only as to the verdict, not to any particular theory of guilt.”); *State v. Salazar*, 1997-NMSC-044, ¶ 18, 123 N.M. 778 (“[W]e affirm the jury’s verdict, concluding that there is no requirement of jury unanimity on a single theory of first degree

murder where alternative theories of first degree murder are submitted and where substantial evidence exists in the record supporting at least one of the theories presented.”).

18. Rather, the *Taylor* Court distinguished the *State v. Godoy* decision, partially decided on the aforementioned proposition, as inapplicable to *Taylor* “in which one of the alternatives on which the jury is allowed to return a guilty verdict is legally inadequate.” *Taylor*, 2024-NMSC-___, ¶ 21 (citations omitted); *see also State v. Hice*, S-1-SC-39211, dec. ¶ 35, 2023 WL 8366050 (N.M. Dec. 4, 2023) (nonprecedential) (“Accordingly, while Defendant makes some sound arguments regarding our continued reliance on *Salazar*, we decline to overrule it in the absence of a persuasive stare decisis analysis.”).
19. Here, the Court provided Jury Instruction No. 12 in correspondence with Third Amended Criminal Information Count 1, and Jury Instruction No. 12A in correspondence with Third Amended Criminal Information Alternative Count 1. These jury instructions represent alternative theories of guilt in relation to the overarching charge of involuntary manslaughter. That is to say, Count 1 and Jury Instruction No. 12 reflect the theory that Defendant’s action on October 21, 2021 constituted unlawful conduct in and of itself (*i.e.*, Negligent Use of a Deadly Weapon contrary to NMSA 1978, Section 30-7-4(A)(3) (1993)), and this unlawful conduct resulted in a death. *See generally* Unlawful Act or Misdemeanor Manslaughter, 2 Wharton’s Criminal Law § 22:14 (16th ed. Sept. 2023 Update).
20. On the other hand, Alternative Count 1 and Jury Instruction No. 12A reflect the theory that Defendant’s action on October 21, 2021 constituted lawful conduct exercised without due caution or circumspection, and this conduct resulted in a death. *See generally* Criminal Negligence, 2 Wharton’s Criminal Law § 22:15 (16th ed. Sept. 2023 Update). Given that *Godoy* and *Salazar* remain controlling precedent, the Court does not find error in providing

separate jury instructions on alternative theories of guilt vis-à-vis involuntary manslaughter together with a general verdict form. *See Salazar*, 1997-NMSC-044, ¶ 33 (“The Defendant contends that various provisions of New Mexico uniform jury instructions and judicial rules require that the jury be unanimous on one of the alternative murder theories presented. We disagree.”).

21. Fourth, a key holding from *State v. Consaul*, 2014-NMSC-030, 332 P.3d 850, and reiterated by the *Taylor* Court is also not applicable to the instant action. Specifically, the *Taylor* Court reiterated its “teaching in *Consaul*, 2014-NMSC-030, ¶ 23, that ‘[w]hen two or more different or inconsistent acts or courses of conduct are advanced by the State as alternative theories as to how a child’s injuries occurred, then the jury must make an informed and unanimous decision, guided by separate instructions, as to the culpable act the defendant committed and for which he is being punished.’” *Taylor*, 2024-NMSC-____, ¶ 16.¹

22. Here, two conduct options—separated by *and/or*—were set forth in Paragraph 1 of Instruction No. 12A. Nonetheless, the options set forth in Paragraphs 1 of both Instruction No. 12 and Instruction No. 12A represent the same underlying criminally culpable conduct: *id est*, Defendant’s loading of live ammunition into a firearm. *Compare* Jury Instructions, Instruction No. 12A, filed Mar. 8, 2024 (“Hannah Gutierrez loaded live ammunition into a

¹ The New Mexico Supreme Court’s decision in *Hice* summarizes the jury instruction issue in *Consaul*. *Hice*, S-1-SC-39211, dec. ¶ 31 (“Defendant urges this Court to examine the alleged discrepancy between *Salazar* and *State v. Consaul*, 2014-NMSC-030, 332 P.3d 850. The defendant in *Consaul* was convicted of child abuse resulting in great bodily harm, but the jury did not specify whether this conviction was predicated on negligence or intentional actions. *Id.* ¶ 24. The *Consaul* Court explained that ‘[f]or negligent child abuse, the State told the jury that [the defendant] put [the child] to bed carelessly (tightly swaddled and placed face down on a pillow).’ *Id.* ‘For intentional child abuse, however, the [s]tate hypothesized that [the defendant] did not just put [the child] to bed carelessly, but that [the defendant] actually used a pillow or his hand to suffocate [the child] so he could not breathe.’ *Id.* Additionally, the prosecutor ‘invited the jury to convict [the defendant] of child abuse whether or not the jury agreed on what criminal act [the defendant] actually committed.’ *Id.* ¶ 25.”).

firearm intended to contain only inert ammunition, and/or Hannah Gutierrez failed to perform an adequate safety check of the ammunition she loaded into the firearm.”), *with id.* at Instruction No. 12 (“Hannah Gutierrez endangered the safety of another by handling or using a firearm in a negligent manner.”). Therefore, the jury instructions of the instant action are not akin to those of *Consaul*, in which the jury was presented with “alleged acts of criminally negligent child abuse and intentional child abuse rest[ing] on different and inconsistent theories as to what [the defendant] actually did.” *Consaul*, 2014-NMSC-030, ¶ 24; *cf. State v. Nichols*, 2006-NMCA-017, ¶ 16, 128 P.3d 500 (“We conclude that the jury instruction did not erroneously negate the unanimity required to convict Defendant of [Criminal Sexual Contact of a Minor]. While we do not know whether the jury unanimously agreed on which of the alternative means by which Defendant committed CSCM, we do know that the jury unanimously agreed that Defendant committed CSCM, which is the controlling inquiry.” (citation omitted)).

23. Fifth, the State’s position conveyed in its closing argument—over Defense Counsel’s objection—that the jury need not be unanimous as to which theory of guilt Defendant committed as long as their verdict was unanimous is consistent with the New Mexico Supreme Court’s holdings in both *Salazar* and *Consaul*.² As to *Salazar*, as discussed in greater detail above, Instruction No. 12 and Instruction No. 12A concern alternative theories of guilt where—as long as the jury unanimously agreed on their verdict—the jury need not have unanimously agreed on one of the alternative theories presented. *Cf. Salazar*, 1997-

² In the rebuttal portion of her closing argument, the Special Prosecutor stated, “And so, let me explain to you that 12 and 12A are alternatives. You must find . . . you must make a decision about guilt or innocence unanimously to the count . . . not to the alternatives. So, six of you can say, I think she’s guilty of 12 but not 12A. Another six of you can say, we think she’s guilty of 12A but not 12. Done. You’re done.” [3-6-24 FTR Courtroom 237 1:06:10 PM – 1:06:48 PM].

NMSC-044, ¶¶ 18, 42. Further, as to *Consaul*, Paragraphs 1 of Instruction No. 12 and Instruction No. 12A ultimately describe the same underlying criminally culpable course of conduct, despite their variant wording. *Cf. Consaul*, 2014-NMSC-030, ¶ 23.

24. Therefore, the Court concludes that the *Taylor* decision, and the reasoning set forth therein, does not warrant a new trial in the instant action. The Court denies all relief requested by Defendant.

CONCLUSION

IT IS THEREFORE ORDERED that the Defendant's Emergency Motion for New Trial and Release is hereby DENIED.

IT IS HEREBY ORDERED.


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MARY MARLOWE SOMMER
DISTRICT COURT JUDGE
DIVISION VIII

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the date of acceptance for e-filing a true and correct copy of the foregoing was e-served on counsel registered for e-service in this matter as listed below.

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