



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

No. S-1-SC-40328

JUDAH ELIJAH TRUJILLO,

Defendant-Appellant.

STATE OF NEW MEXICO'S ANSWER BRIEF

**APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT
SANTA FE COUNTY
HON. JUDGE MARY MARLOWE SOMMER PRESIDING**

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CITATIONS TO THE RECORD

The body of this brief exceeds the limit of 35 pages set forth in rule 12-318(F)(2) NMRA. Undersigned counsel certifies that this brief is written in Times New Roman, a proportionally spaced font, and that the body of this brief contains fewer than 11,000 words (specifically, 10,490). This word count was obtained using Microsoft Word 2016.

The digital audio recordings are playable with For The Record software. Citations to the recorded proceedings are in the form of [__-__-__ CD __:__:__]. The time and date stamp indicates the actual time of the day that the recording was made, not the elapsed time from the beginning of the recording.

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NATURE OF THE CASE

Defendant emphasized to the jury that Samuel Cordero (Victim) was shot from a “distant or indeterminable range”—not close, not intermediate. **[11-6-2023 CD 1:06:50-:07:01]** However, in the early morning hours of August 10, 2022, Defendant, when allegedly threatened by Victim, chose not run through the large open park with at least two paths to his nearby home when he had such “distance” between he and the 60-year-old Victim. **[RP 1, 46, 47, 83; 11-06-2023 CD 10:31:40-:46]** Instead, he pulled out a gun and shot Victim in the *back* of Victim’s head, while Defendant himself was allegedly faced away from Victim. Additionally, despite the “distance” between he and Victim, and that the two individuals were purportedly facing away from each other, Victim’s cell phone then “fell next to [Defendant’s] leg.” **[11-6-2023 CD 10:23:25-:31]** Defendant’s story, in these and in other ways, did not align with the overwhelming evidence of first-degree, willful and deliberate murder.

Defendant argues that the State did not prove “premeditation.” **[BIC 1]** However, the State only needed to prove deliberation. The State met its burden. The abundant circumstantial evidence supported the jury’s conclusion that Defendant’s story was inconsistent with the evidence supporting his deliberation prior to shooting and killing Victim. For the reasons set forth herein, the jury verdict should be upheld.

SUMMARY OF FACTS AND PROCEEDINGS

Defendant lied about his age when he signed up for a “Grindr” account—which is a dating app used to meet gay, bisexual, or transgendered men. [11-06-2023 CD 10:30:18-:23, 10:09:23-26] Defendant met Victim through his use of this app. [11-06-2023 CD 10:09:15-17] On August 9, 2022, Defendant and Victim messaged each other through the app. That conversation turned sexual, and Defendant agreed to meet up with Victim to have oral sex. [11-06-2023 CD 10:10:00-:11:33] Defendant gave Victim his home address and waited to hear back from Victim. [*Id.*]

The Early Morning Murder

In the dark early morning hours of the next day, August 10, 2022, Victim reached out to Defendant again via the Grindr app when he got off work at a nearby assisted living community. Victim messaged Defendant to see if he still wanted to meet. Defendant did, but informed Victim they could not meet at Defendant’s residence (the non-public original meeting location) because his mother and sister were there. [*Id.* 10:12:00-:12]

The non-public nature of the originally proposed meeting location was contrasted by Defendant’s testimony that “every single meet he went on in this app [he] made sure to do a public place whether that be the mall anywhere surrounded by people [because] it made [him] feel safer during these meetings.” [*Id.* 10:12:36-:48]. He stated that he had had approximately eight meetings during the time in

which he had the app, that each meeting was for oral sex, and that all eight meetings were in a public place—even if just at his grandmother’s apartment building. [*Id.* 10:13:01-:27] Defendant did also note that he only “mostly” met at public places. [*Id.* 10:32:17-:29]

The chosen alternate location on August 10, 2022, was Ragle Park. As it was after 2:00 a.m. in the morning, the park was closed and no one was about. [*Id.* 10:12:18-:28; 10:31:36-:57] Defendant got ready to go to the meeting place by putting on a jacket and sweats. [*Id.* 10:14:00-:05] Then he retrieved a firearm. [*Id.* 10:14:08-:10] The firearm that he retrieved was a Smith & Wesson which belonged to his mother’s boyfriend. [11-06-2023 CD 10:29:45-:57; St. Ex.’s 25, 26, 27, 28] At the time it was logged by the police (after the murder), the gun had a gunlock on it which went down through the barrel of the gun and came out the muzzle. [St. Ex. 26, 27, 28] Defendant testified that he had moved the gun from the master bedroom to the garage “earlier that week.” However, again, by the time it was logged by police, the gun had been moved back to the master bedroom closet in Defendant’s mother’s boyfriend’s residence (“Camino Capitan Residence”). [11-06-2023 CD 10:29:45-:57; St. Ex. 25] After moving the gun to the garage, and before the murder, Defendant Googled how to remove the gunlock on the gun and to push the magazine in—fully loading the gun—but not chambering a round. [*Id.* CD 10:41:16-:55] Prior to leaving for Ragle Park, Defendant put the loaded firearm in his jacket pocket. [*Id.*

10:14:39]

Defendant walked down his street, Camino Capitan, and entered the park through the wide park entrance at the end of the street. **[RP 1; 11-06-2023 CD 10:27:00-:49]** He walked around Ragle Park and found Victim under a gazebo near the parking lot associated with the park. **[RP 1; 11-06-2023 CD 10:15:30-:16:02; 10:27:45-:28:05]** This was the first time he had ever met Victim in person. **[11-06-2023 CD 10:28:48-:51]** Defendant testified that Victim was approximately 6 feet tall and appeared to weigh around 300 pounds. **[11-06-2023 CD 10:16:00-:17:02]** Defendant by contrast at the time of the murder was about 5 feet 5 inches and weighed about 160 pounds. **[11-06-2023 CD 10:16:21-:30]** Upon meeting, Victim suggested that the pair go over to one of the dugouts located at the park. **[11-06-2023 10:16:10-:15]**

Defendant refused to go to the dugouts with Victim. **[11-06-2023 10:17:17-:07]** During his testimony Defendant's stated reason was he thought Victim would rape him if he went with Victim to the dugout. **[Id. 10:18:24-:32]** Defendant's perception was that upon his refusal, Victim became angry with Defendant for not wanting to go to the dugout. **[Id. 10:18:52-:19:08]** Defendant testified that after he continued to refuse to go to the dugouts, or to move, Victim used his right hand to grab Defendant's left arm, but that Defendant pulled his arm away. **[Id. 10:19:43-:51]** According to Defendant, Victim then grabbed his arm again, same hand to same

arm; and Defendant stated this time he had to “peel” Victim’s hand off. [*Id.* 10:20:20-:46] Defendant said Victim next appeared to go for Defendant’s neck with Victim’s arm and Defendant pushed his arm away. Things then became “physical,” and Victim allegedly hit Defendant with his right fist to Defendant’s left jaw, which Defendant states, made him stumble. [*Id.* 10:22:10]

The Shooting And Aftermath

At this point in his narration, Defendant stood and demonstrated for the jury his belief of what transpired next.¹ [11-06-2023 CD 10:22:00- :15] After Defendant was punched in the “left cheek” he testified that he then “turn[ed] and kinda stumble[d]” to his right. [*Id.* 10:22:25-:35] Defendant said “and then basically. . . when I stumble[d] [to the right side] I pull out the firearm that is . . . in my right pocket of my jacket. I pull it out.” [*Id.* 10:22:37-:59] “I point the gun over my [left] shoulder like this and I kinda point it facing up and I just shoot one time” [*Id.* 10:23:00-:11]

He went on to testify that Victim’s phone subsequently fell “next to his left leg,” and he grabbed it and ran and never looked back. [*Id.* 10:23:27-:32] Defendant could not recall while testifying why he grabbed Victim’s phone, stating he did it because it “just fell next to [him]” and “it kinda was just in the moment.” [*Id.*

¹ The acting was not preserved as part of the record where only the testimony was preserved in the audio transcript.

10:35:10-:25] Defendant asserted that Victim was standing on one of the paths leading back to Defendant's residence. [*Id.* **10:23:45-:24:00]** Defendant offered no testimony as to why he could not take an alternate path to the Camino Capitan Residence. [**RP 1, 83]**

After Defendant shot Victim, he ran and then walked back to the Camino Capitan Residence; calling his mother on his way. [*Id.* **10:36:43-:37:06]** RING camera footage, the first of three from the Camino Capitan Residence entered into evidence, shows his mother walking out the front door fully dressed to greet him as he got back to the house. [**St. Ex. 55; 11-06-2023 CD 10:37:05-:13]** The footage goes on to show Defendant walking up to the Camino Capitan Residence swinging his arms down at his sides, and, then, as he approached the garage, the footage shows Defendant reach up and place or touch his arm across his chest. [**Comp. St. Ex. 55 00:12-:19 with BIC 6, 11]** Although Defendant's mother held the front door open for him for a few moments, Defendant did not appear, and his testimony was he went in through the garage of the home. [**St. Ex. 55 00:22-:25; 11-06-2023 CD 10:37:14-:26]**

A few minutes later a second RING camera recording shows Defendant, Defendant's mother, and Defendant's sister leaving the residence. [**St. Ex. 56]** Defendant holds the door open for his sister and then his mother as she locks the same. [*Id.*] Defendant appears calm and focused on his cell phone. [*Id.*] That same

recording shows that Defendant had changed his clothes to remove his sweatshirt, that he had grabbed a backpack, and that he was holding a clear plastic bag that had Victim's cell phone in it. **[St. Ex. 56]** They all get into a car and leave. **[Id.]**

GPS tracking coordinates, in addition to expert and Defendant's own testimony, established that as Defendant was driven by his mother to his grandmother's apartment. While the car was in motion, he threw Victim's cell phone out of the car window along Rodeo Road. **[RP 83; 11-06-2023 CD 10:36:00-:36:35]**

Extensive Testimony And Evidence Contradicts Key Points of Defendant's Story

Twenty-four witnesses testified for the State. Among the non-law enforcement witnesses who testified was the early morning dog walker who found Victim's body, facedown having fallen on his right arm, under the gazebo where Defendant had met and then shot him. **[11-02-2023 CD 09:14:09-:25:34; St. Ex.'s 1-3]** The crime scene photos introduced under this witness show that he found Victim laying facedown with the top of his head facing the parking lot of the park—away from the interior of the park. **[Id.; St. Ex. 45]**

Additional non-law enforcement witnesses included: (1) the mother of the Victim (who testified about her son and how he had not come home the night of the murder), (2) the citizen who found Victim's cell phone in the plastic bag along Rodeo Road while out on a walk, (3) a neighbor of Defendant's mother who provided police with three RING camera videos from his home at the end of Camino

Capitan and near the mouth of the park; (4) Defendant's step-dad (who testified to giving police the RING camera footage from the Camino Capitan Residence recorded on the night of the murder, that he normally stored his gun on a shelf in the master bedroom closet where police found it, and that the lock on the gun was found differently configured when the police found it to how he had left it), and (5) Defendant's former girlfriend who Defendant called at some point in the late hours of August 9th or 10th, purportedly after shooting Victim. [11-02-2023 09:45:41-:55:03, 10:50:40-:58:31, 01:14:55-:36:39, 02:46:34-03:32:58; 11-03-2023 CD 01:28:00-:36:34]

Among the twelve law enforcement officers who testified were several who collected evidence at the park and at Defendant's Camino Capitan Residence, who solicited and received the cell phone data from both Victim and Defendant's cell phones, who ran the ballistics on the bullet casing found at the scene and matched it to the Smith & Wesson gun found at the Camino Capitan Residence, and who took DNA evidence from the gun (the result of which came back inclusive because there was too little testable DNA). [11-02-2023 09:26:47-:45:41, 10:11:44-22:12, 10:59:16-11:20:34, 12:32:23-01:06:31, 01:07:20-:13:22, 01:39:04-:59:00, 02:19:17-:24:08, 02:25:37-:35:03, 02:36:04-:45:22; 11-03-2023 CD 08:48:02-:09:02:16, 09:03:16-:18:12, 09:23:12-:38:30, 10:01:27-:11:09] The lead detective, Rebecca Hilderbrandt, testified regarding the expansive investigation which took

place and led to Defendant's arrest. She spoke about the cell phone records obtained, including from Google and Grindr, and the evidence obtained from all the various sources (crime scene, Camino Capitan Residence, etc.) [11-03-2023 CD 10:12:02-:23:07, 01:54:44-02:19:24]

The State also called a forensic pathologist who testified that Victim died of a gunshot wound to the head. The bullet entered the back of Victim's head, traveled at an upward angle and exited Victim's forehead between his eyes. [11-03-2023 CD 01:43:30-44:08, 01:48:01-:16; St. Ex.'s 74, 75] She further testified that gunshot wounds indicators, found on the skin near the entry bullet wound, can help a medical examiner establish how far away a gun was when it was fired because there are characteristics of gunshot wounds at the different distances. She opined that range of fire generally falls into three "bins": contact, intermediate, and distant and/or indeterminant. [11-03-2023 CD 01:51:30-:52:15] In looking specifically at Victim's gunshot wounds, she opined that the gunshot in this case was fired from a distant and/or indeterminant distance, which means it was fired from "feet to more feet" away. [*Id.* 01:52:20-:25]

Jury Instructions

As noted in the Brief in Chief, the final jury instructions were not made a part of the record on appeal. [BIC 9] The State's proffered instructions are included, they do not include any draft jury instructions now implicated here on appeal. [RP 346-

403] Additionally, there is audio of not only the instructions at the time they were read to the jury, but also of the two on the record conversations counsel had with the district court leading to the final set of jury instructions—which contain insight into which jury instructions were proffered by which party. **[11-03-2023 CD 02:26:09-02:43:06; 11-06-2023 CD 10:45:59-11:39:10]** During the November 3, 2023, conversation between the parties and the district court regarding the instructions, Defendant told the Court that defense added step down instructions, but that “everything else is stock.” **[11-03-2023 CD 02:27:54-:57]** During that same November 3, 2023 discussion, the district court noted that one of the instructions proffered by Defendant, UJI 14-250 NMRA (2023),² had been withdrawn and so she would not give that instruction—giving counsel alternative instructions to review. **[Id. 02:40:15]**

During the November 6, 2023 conversation between the parties and the district court to finalize the instructions, the district court stated that the way it proceeds with instructions to get rid of duplicates is it “typically go[es] with the State’s [proposed instructions] on the standards and then any [instructions] that [the defense] want[s], that the State does not have” defense “submits” to the district court to be included. **[11-06-2023 CD 10:46:48-:47:01]** Following argument on adding

² The State is using the 2023 Version of the New Mexico Rules of Procedure which governed this trial.

the step down instructions of second-degree murder and voluntary manslaughter, the parties then met and came back—stating to the Court that they had reached agreement on the instructions and verdict forms. [*Id.* 11:31:28-:32:04] Specifically, to the district court’s questions as to whether the parties had agreed on this version and to the order of the version, both parties simultaneously responded with “Yes, Your Honor.” [*Id.*]

The district court then read through each instruction again with the parties and numbered the same. [11:32:14-:38:58] No objection was raised. [*Id.*] The court then instructed the jury. [*Id.* 12:28:42-:48:03] No objection was raised.

In fact, it was Defendant, in its pre-trial motion to exclude evidence of other crimes, wrongs, or acts pursuant to Rule 11-404(B) NMRA, who first argued that certain evidence that the State wished to use to establish motive was not proper because

motive . . . is specifically addressed in the uniform jury instruction used in the State of New Mexico which have been approved by the New Mexico Supreme Court. Uniform Jury Instruction (UJI) 14-5029 [NMRA]. Motive states: The state does not have to prove a [motive]. However, motive or lack of motive may be considered by you as a fact or circumstance in this case. You may give the presence or lack of motive such weight as you find it to be entitled . . . the [State’s evidence] does not purport with any requirement for motive under the New Mexico Uniform Jury Instructions meaning[.]

[RP 275]

After having been fully and properly instructed on all the proper elements of

first-degree murder, of second-degree murder, and of voluntary manslaughter, as well as receiving the proper step-down instructions on how to deliberate, the jury returned a guilty verdict for first-degree murder, a guilty verdict for tampering with evidence count, and a special verdict form tying the tampering with evidence conviction specifically to first-degree murder per the instructions. There was sufficient evidence to support each crime, and both convictions should be upheld.

ARGUMENT

I. THERE WAS SUFFICIENT EVIDENCE OF FIRST-DEGREE MURDER, WILLFUL AND DELIBERATE WHEN REVIEWING THE EVIDENCE IN FAVOR OF THE JURY'S VERDICT.

Twenty-five witnesses, including Defendant, testified over three days during Defendant's jury trial. Over 80 exhibits were entered into evidence including, but not limited to photographs, surveillance videos, and GPS data location maps. Defendant, himself, does not dispute going to Ragle Park on August 10, 2022, to meeting with Victim, to shooting Victim, or to taking and disposing of Victim's phone. On appeal, Defendant only suggests that the State did not sufficiently prove that he had deliberate intent in killing Victim. **[BIC 11]** Defendant's seeks this Court to "reverse for a new trial for jury to decide between second-degree murder or voluntary manslaughter." **[BIC 15]** As the State established all elements of first-degree murder, beyond a reasonable doubt, the convictions should be affirmed and the appeal dismissed through a dispositional order.

A. LEGAL STANDARD

This Court reviews a jury verdict “for sufficiency of the evidence[,] [determining] whether a rational fact-finder could determine beyond a reasonable doubt the essential facts necessary to convict the accused.” *State v. Garcia*, 2005-NMSC-017, ¶ 12, 138 N.M. 1. In reviewing the sufficiency of evidence used to support a conviction, this Court “resolve[s] all disputed facts in favor of the State, indulge[s] all reasonable inferences in support of the verdict, and disregard[s] all evidence and inferences to the contrary.” *State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438. “Contrary evidence supporting acquittal does not provide a basis for reversal because the jury is free to reject Defendant's version of the facts.” *Id.*

Indeed, a jury may convict based on “reasonable inferences” from the evidence. *See Garcia*, 2005-NMSC-017 ¶ 15 (“The evidence in the present case was sufficient to give rise to a reasonable inference that . . .”). “A reasonable inference is a conclusion arrived at by a process of reasoning which is a rational and logical deduction from facts admitted or established by the evidence.” *State v. Slade*, 2014-NMCA-088, ¶ 14 (internal citation and quotation marks omitted).

While jury instructions become the law of the case, this Court specifically looks to whether there was “sufficient evidence for a rational trier of fact to have found each of the essential elements of [the] crime beyond a reasonable doubt.” *Rojo*, 1999-NMSC-001, ¶ 20. In reviewing each essential element for sufficiency, this

Court “[does] not parse the testimony and view the verdict only in light of the probative value of individual pieces of evidence, nor [does this Court] evaluate the evidence to determine whether some hypothesis could be designed which is consistent with a finding of innocence.” *State v. Chavez*, 2024-NMSC-023, ¶ 44. (internal quotation marks, brackets, and citation omitted).

Finally, the evidence supporting the verdict as presented at trial does not have to be direct evidence but can also consist of circumstantial evidence. *See State v. Farrington*, 2020-NMSC-022, ¶ 46 (stating “[i]n challenging the sufficiency of evidence used to convict a defendant of a crime, [this Court] must determine whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction.”)

B. ANALYSIS

The jury rejected Defendant's version of the facts—as is well within their purview. Despite this, Defendant revives his argument from trial that “all the evidence . . . was in line with [Defendant’s] description of August 10, 2022.” **[BIC 5]** However, in reviewing each essential element of first-degree murder, under the jury instructions given in this matter, there was sufficient evidence for a rational trier of fact to have found each of the essential elements of first-degree murder beyond a reasonable doubt.

1. Stipulated Count 1 Jury Instructions.

To reach a conviction of first-degree murder, the jury here was instructed that the State needed to prove the following:

“For you to find the defendant guilty of first-degree murder by a deliberate killing as charged in Count 1, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant killed Samuel Cordero;
2. The killing was with the deliberate intention to take away the life of Samuel Cordero;
3. This happened in New Mexico on or about the 10th day of August, 2022.

A deliberate intention refers to the state of mind of the defendant. A deliberate intention may be inferred from all the facts and circumstances of the killing. The word deliberate means arrived at or determined upon as a result of careful thought and the weighing of the consideration for and against the proposed course of action. A calculated judgment and decision may be arrived at in a short period of time. A mere unconsidered and rash impulse, even though it includes an intent to kill is not a deliberate intention to kill. To constitute a deliberate killing the slayer must weigh and consider the question of killing and his reasons for and against such a choice.”

[RP 378; 11-06-2023 CD 12:32:54-:34:17] This instruction tracks the language of UJI 14-201 NMRA. The district court properly read and otherwise instructed the jury on each of the essential elements of first-degree murder. **[Id.]**

At Defendant’s request, the jury was also properly instructed on the lesser-included offenses of second-degree murder and voluntary manslaughter, and the jury received the associated instructions required to be read with these lesser-included

crimes. **[11-06-2023 CD 12:34:35-: 35:13; 12:35:58-:36:35]** The district court, in addition to reading the essential elements of each lesser-included crime, also included proper step-down instructions in between each lesser-included offense and at the conclusion of the murder count instructions. For example, between the crimes of first-degree murder and second-degree murder, the district court instructed “[i]f you should have a reasonable doubt as to whether defendant committed the crime of first-degree murder, you must proceed to determine whether the defendant committed the included offense of second-degree murder.”³ **[11-06-2023 CD 12:34:20-:35]** The district court then instructed on second-degree murder tracking the language of UJI 14-210 NMRA.

Toward the conclusion of the instructions, at Instruction No. 30, the district court instructed the jury as to the seven possible conclusions it could reach for Count 1 and then instructed the jury:

You must consider each of these crimes. You should be sure that you fully understand the elements of each crime before you deliberate further. You have the discretion to choose the manner and order in which you deliberate on the count. But you must return a unanimous verdict of not guilty on first degree murder before entering a verdict on second degree murder.

³ The district court also gave this instruction between the crimes of second-degree murder and voluntary manslaughter tailoring the language accordingly to state “If you should have a reasonable doubt as to whether defendant committed the crime of second-degree murder, you must proceed to determine whether the defendant committed the included offense of voluntary manslaughter.” **[11-06-2023 CD 12:35:18-:27]**

You'll first decide whether the defendant is guilty of the crime of first-degree murder. If you unanimously find the defendant guilty of first-degree murder, then that is the only form of verdict which is to be signed as to Count 1. If you unanimously find the defendant not guilty of first-degree murder, then you should sign only the not guilty form as to first-degree murder. If after deliberation you do not reach a unanimous verdict on first degree murder, you should not sign a verdict form for that crime and you should not proceed to reach a verdict on the remaining crimes. If you unanimously find the defendant not guilty of first-degree murder, you will then go on to a consideration of the crime of second degree murder.

If you unanimously find the defendant guilty of second-degree murder, then that is the only form of verdict which should be signed. But if you unanimously find the defendant not guilty of the crime of second-degree murder then you should sign only the non-guilty form. If after reasonable deliberation you do not reach a unanimous verdict on second degree murder, you should not proceed to reach a verdict on the remaining crime. If you unanimously find the defendant not guilty of second degree murder you will then go on to a consideration of the crime of voluntary manslaughter.

If you unanimously find the defendant guilty of voluntary manslaughter then that is the only form of verdict which should be signed. But if you unanimously find the defendant not guilty of the crime of voluntary manslaughter then you should sign only the not guilty form. If after reasonable deliberation you do not reach a unanimous verdict on voluntary manslaughter you should not sign a verdict for that crime.

You may not find the defendant guilty of more than one of the foregoing crimes. If you have a reasonable doubt as to whether the defendant has committed any one of the crimes you must determine that the defendant is not guilty of that crime. If you find the defendant not guilty of all the crimes in count 1 you must return a verdict of not guilty.

[11-06-2023 CD 12:44:35-:37:27]

After being properly instructed on the elements of first-degree, willful and

deliberate murder, the question before this Court is not whether the jury should have returned a guilty verdict for first-degree or second degree. [*C.f.* BIC 9-10] Rather, the question here is simply did the State present sufficient evidence of deliberation as defined for the jury. The evidence supports the jury’s conclusion.

2. There Was Sufficient Evidence of Deliberation.

In determining whether the State presented sufficient evidence of deliberation, this Court “[f]irst review[s] the evidence . . . with deference to the trial court’s resolution of factual conflicts and inferences.” *Slade*, 2014-NMCA-088, ¶ 15. Here, the State had to show that Defendant “arrived at or determined” to kill Victim “as a result of careful thought and weighing . . . for or against” the killing. UJI 14-201. To this end, the State sets forth a summary of the evidence presented to the jury addressing: (a) Defendant’s actions before the murder, (b) Defendant’s actions while at the park, and (c) Defendant’s actions after the murder.

a. Defendant Took Deliberate Steps To Ready Gun For Firing.

Defendant’s testimony was that he usually took a knife to sexual encounters and that he preferred public spaces. [11-06-2023 CD 10:13:00-:55] However, for this encounter, the evidence established that Defendant intentionally decided to take a gun and, originally, was going to meet Victim at the Camino Capitan Residence—not a public space. [*Id.* 10:12:00-:12]

The gun was not ready to use when Defendant first accessed it. Defendant

took proactive measures to make it operational—he found the keys to remove the lock from the gun, he Googled how to unlock the gun, he ensured the gun was loaded by popping in the magazine. **[Id. CD 10:41:16-:55]** The evidence also established that Defendant removed the gun from the master bedroom where it was kept and placed it in the garage—the same location he then returned to after the murder. **[Id. 10:29:45-:57; St. Ex. 25]** As he readied to leave for the meeting, he intentionally took the now unlocked and loaded, but not chambered, gun. **[Id. 10:14:08-:10, 10:14:39]**

b. Defendant's Actions At the Park Substantiate the Jury Finding of Deliberation—Defendant's Story of the Murder Contradicts The Evidence.

Once at the park, Defendant testified that he walked “around the park” until he saw Victim who was under the park’s gazebo. **[Id. 10:15:30-:16:02, 10:27:45-:28:05]** The evidence illustrates that the gazebo is located next to the parking lot of the park and otherwise shows the layout of the park between the Camino Capitan entrance and the gazebo. **[St. Ex. 1]** Based on his testimony, once at the park, Defendant followed a path that took him through the park, around a baseball field, and to the gazebo. **[11-06-2023 CD 10:15:30-:16:02; 10:27:45-:28:05]** One of many paths through the park. **[St. Ex. 1]**

Defendant then testified that Victim suggested they go to the dugouts for their sexual encounter and Defendant began to “fear for his life . . . that he would be

raped.” [11-06-2023 10:16:10-:15; 10:29:30-:42] In so testifying as to his fears, Defendant emphasized the size difference between he and Victim while downplaying the age of the Victim and the fully loaded gun in Defendant’s pocket. [11-06-2023 CD 10:16:21-:30]

Defendant went on to testify about the struggle that next occurred between Victim and Defendant when Defendant refused to go to the dugouts. [11-06-2023 10:17:17-10:22:10] Defendant reported that Victim became visibly angry and Victim grabbed his arm, but that Defendant was able to pull his arm free. Once free, there is no evidence that Defendant ran away. [*Id.*]

Instead, Defendant chose to remain and testified that next, Victim grabbed his arm again, but harder this time and—even though Victim was a much larger and purportedly angry man—Defendant was able to “peel” Victim’s fingers off his arm with no testimony as to any attempt by Victim to prevent him from freeing himself. [*Id.*] Instead, Defendant successfully freed himself again from the much larger Victim and, again, there was no evidence that Defendant turned and ran away. [*Id.*]

Rather, Defendant again chose to stay and he stated that Victim seemed to go for Defendant’s throat, but he was able to swipe away the arm of the larger man, but he again chose to stay in the situation. [*Id.*] The physical struggle between Victim and Defendant ended when Victim then allegedly punched Defendant in the left jaw and Defendant stumbled. [*Id.*]

On appeal Defendant asserts there “was no evidence whatsoever of a struggle.”

[BIC 13] Merrium Webster defines “struggle” as “to make strenuous or violent efforts in the face of . . . opposition. . . to tussle.” *Struggle*, Merium Webster Dictionary, <https://www.merriam-webster.com/dictionary/struggle>. Defendant’s position on appeal does not align with the evidence he presented to the jury.

[Compare BIC 4; 11-06-2023 10:17:17-10:22:10 with 11] Defendant testified there was a struggle between Victim and Defendant where, according to Defendant’s testimony, he had to defend himself against Victim several times, but at each point where he was able to free himself from Victim he chose not to run away to his nearby home.

The State noted for the jury there is no evidence of a wounded jaw and there was no foreign DNA on Victim—i.e. there was no evidence of contact. **[Id. 12:59:25-01:00:00]** However, Defendant’s version of the facts was properly considered by the jury as part of the evidence so Defendant’s abandonment of his theory from trial is inexplicable where he challenges sufficiency.

Perhaps the explanation lies in how the remainder of the evidence would operate to reasonably contradict Defendant’s rationale for not fleeing the area. He stated that Victim was standing between him and the Camino Capitan Residence, but according to the evidence, Victim was facing Defendant during this struggle and away from the parking lot. We know this because when Victim was shot, he was

facing *away* from Defendant and *towards* the parking lot. **[St. Ex. 1, 2, 3]** Assuming the posture of the two individuals, under Defendant's version of the facts, the evidence shows Defendant had the entire park open to retreat into and away from the alleged struggle. **[Id.]** The evidence also established that Victim was a sixty-year-old man who was about 6 feet tall and weighed 300 pounds and did not appear to be someone capable of running after Defendant should he have chosen to run away from the much older Victim. **[St. Ex. 5]** To the extent that Victim was standing between Defendant and the Camino Capitan Residence, the evidence is clear that there were multiple avenues between the gazebo and the Camino Capitan Residence. **[St. Ex. 1]** Victim could not have reasonably blocked Defendant leaving the scene. **[Id.]**

Turning to the murder itself, according to Defendant's testimony, Defendant stated when he was punched in the jaw it caused him to stumble and turn so his back was to Victim. **[Id. 10:22:25-:35]** As he was facing away from Victim, he pulled the loaded gun out of his pocket, and he aimed it over his shoulder and shot the gun one time. **[Id. 10:22:37-23:11]** The Victim's phone then "fell next to" Defendant's leg, and he grabbed the phone and ran home. **[Id. 10:23:27-:32]**

The jury heard this version of the murder in light of the evidence received earlier in the trial. The State's forensic pathologist testified that the bullet entered the back of Victim's head, traveled at an upward angle and exited Victim's forehead

between his eyes. [11-03-2023 CD 01:43:30-44:08, 01:48:01-:16; St. Ex.’s 74, 75]

She further testified that gunshot wounds leave certain characteristics which can be used to estimate the distance the bullet traveled before hitting a victim. She opined that range of fire here was classified as being from a distance of “feet to more feet.”

[*Id.* 01:52:20-:53:38] As Defendant states in his brief—this was not a close shot.

[BIC 6]

Therefore, the State’s evidence established Defendant was “feet to more feet” away from Victim when he shot him in the back of the head—highlighting the credibility of Defendant’s testimony as to how he shot Victim (as he stumbled close to the striking distance of Victim) and how he got Victim’s phone. Victim was facing the parking lot when he was murdered. He fell where he stood. [St. Ex. 2, 3] Defendant was, at least, multiple feet away from Victim and facing in toward the park (shooting over his shoulder)—and yet, Victim’s phone “fell next to” Defendant’s leg right after the shooting and he picked it up and ran.

On appeal, Defendant discusses one of the State’s theories at trial that Defendant went to Ragle Park to rob Victim that night and, when that did not pan out, he shot Victim. Defendant states that there was “no other evidence to suggest a robbery. [Victim’s] wallet and car keys were not taken[.]” [BIC 14] While this is technically a correct statement, potential inferences extrapolated from the facts would not be reasonable. Victim’s wallet was later recovered *in his car*—not on his

person which would have made it harder for Defendant to steal as Victim fell on top of his car keys when he was murdered. [St. Ex. 49]

Ultimately, there was sufficient evidence, that on the night of August 10, 2022, when Defendant found himself “feet to more feet” away from Victim, he chose not to flee the older man, but instead, he chose to pull out his loaded gun, which he had chambered at some point, and he shot Victim. Contrary to Defendant’s argument on appeal, he did not fire a shot over his shoulder “*as he was running away* because [Victim] had hit him and grabbed him [and because Defendant] feared he would be raped.” [BIC 13 (emphasis added)] Defendant’s testimony at trial was that he shot Victim *and then* ran away. Defendant also never tied the act of shooting Victim to Victim’s alleged assault upon him. Victim was, in fact, moving toward the parking lot when Defendant shot him.

c. After Shooting Victim, Defendant Demonstrates Consciousness of Guilt, But Lack Of Remorse For Deliberately Killing Victim.

i. Disposing of Victim’s Phone.

Defendant testified that after grabbing Victim’s phone and running with the phone to the Camino Capitan Residence, he proceeded to take it inside the residence and place it in a clear plastic bag. [St. Ex. 56] Defendant does not dispute that he subsequently threw the phone out the car window as he was traveling with his mother down Rodeo Road that morning. [RP 83; 11-06-2023 CD 10:36:00-:36:35]

ii. *No Demonstrable Remorse—Until Sentencing.*

Following the murder, Defendant appears on all surveillance videos to be calm, composed, and otherwise emotionless—as if nothing had happened. Defendant suggests the State downplayed his true demonstrated panic and fear which he alleges can be seen in the first RING video where he was “clutching his chest.” **[BIC 11]** To clutch something is to “hold [it] . . . usually strongly, tightly, or suddenly.” *Clutch*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/clutch>. The cited RING camera footage shows Defendant walking up to the Camino Capitan Residence with his arms swinging *down by his sides* until he approaches the garage and we see him move his arm to his chest. **[St. Ex. 55]** The video does not purport to show Defendant “clutching” his chest in a manner presenting panic or fear and the jury was free to draw whatever conclusions they did from that video. **[Id.]** For purposes of this appeal, all evidence is viewed in the light most favorable to the jury’s determination. *Rojo*, 1999-NMSC-001, ¶ 19. Defendant’s attempt to recast evidence on appeal is not proper. Minutes later the casual nature of his disposition is shown in the final two RING videos. **[St. Ex. 56, 57].**

This lack of remorse continued through sentencing and was remarked upon by the district court which only found him to be remorseful as he was about to be sentenced. **[02-05-2024 CD 10:51:16-:23]**

3. The Evidence Justified The Jury’s Conclusion That Each Element of First-Degree Murder Was Established Beyond a Reasonable Doubt.

Having summarized the evidence presented to the jury in light of the facts and circumstances of this case the State contends that there was sufficient evidence that on or about August 10, 2022, Defendant killed Victim with the deliberate intention to take away Victim’s life. *Slade*, 2014-NMCA-088, ¶ 15 (providing that once this Court reviews the evidence, the next step is for this Court to make a “legal determination of whether the evidence . . . could justify a finding by any rational trier of fact that each element of the crime charged has been established beyond a reasonable doubt”).

Defendant’s brief is virtually bereft of meaningful citation to the extensive evidence admitted at trial. **[BIC 7-15]** Defendant instead argues against sufficiency almost entirely in a theoretical sense by application of inapposite case law. **[*Id.*]** Here there were three days of testimony from twenty-five witnesses, including Defendant, and there were over 80 exhibits entered. While most of this evidence may be circumstantial, that does not detract from its sufficiency as it does not have to be direct evidence. *See Farrington*, 2020-NMSC-022, ¶ 46 (This Court looks to “whether substantial evidence of either a direct *or circumstantial nature* exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction.”) Defendant’s entire insufficiency argument hinges on his

suggestion that this Court should completely disregard the State’s evidence and override the jury’s sound judgment. *See State v. Cunningham*, 2000-NMSC-009, ¶30, 128 N.M. 711 (making clear that “the issue of deliberate intent [is] a question for the jury” and this Court “will not substitute [its] judgment for that of the trier of fact as long as there is sufficient evidence to support the verdict”)

Among those cases discussed by Defendant, his recitation of *State v. Adonis*, 2008-NMSC-059, 145 N.M. 102, **[BIC 11-12]** is distinguishable here where Defendant was never adjudicated to be incompetent—compared with the defendant in *Adonis* who was suffering from paranoid schizophrenia at the time of the murder in that case. *Id.* ¶ 2. Additionally, however, *Adonis* is distinguishable in that the murder in *Adonis* occurred when the defendant burst out of his residence and murdered the victim on the spot for parking in his parking spot. *Id.* ¶¶ 3-4. There was not the same length of time as occurred in this case where, here, Defendant went to the scene armed with a gun and, according to his own testimony, had multiple chances to leave the scene and did not do so before ultimately killing Victim.

While providing helpful insight into the proper review process for deliberation, the facts of *Slade*, 2014-NMCA-088, are distinguishable from the facts here. **[BIC 12]** The jury in *Slade* was instructed on attempted first-degree murder. In *Slade*, the Court of Appeals recognized that *it was possible* in “certain cases” for a “jury to reasonably infer from evidence presented that the deliberative process

occurred within a short period of time.” *Id.* ¶ 20. In those cases, the Court of Appeals went on to state that “evidence beyond the temporal aspect of the crime in order to find sufficient evidence of deliberation” would be required. *Id.* Examples of this “other evidence” from *Slade* could include “[a] large number of wounds, the evidence of a *prolonged struggle*, the evidence of the defendant’s attitude toward the victim, and *the defendant’s own statements* [.]” *Id.* ¶ 21 (emphasis added.).

Here, pursuant to Defendant’s version of the facts, there was a prolonged struggle—a struggle prolonged by Defendant’s failure or refusal to leave the park. **[C.f. BIC 13]** But even taking the event of a struggle out of consideration, Defendant’s testimony would still support a reasonable conclusion that he deliberated prior to shooting Victim. Some of the more pertinent examples of his testimony are that he did not just grab a pocketknife on the way out the door . . . he went through the process of moving a handgun to the garage, Googling how to unlock the gun, unlocking the gun, and loading the gun. He then went to the meeting armed with the loaded, but not chambered, gun—at some point chambering a round to be fired, he continued to remain at the park engaging in conflict with Victim even though no sex act would occur, and he then he shot Victim in the *back* of the head as Victim was leaving. **[C.f. BIC 13]** This was not a rash impulsive shot made in the spur of the moment—it was the deliberated act of killing following several points at which Defendant could have chosen otherwise.

Here, the State presented sufficient evidence, even if circumstantial, to the jury to support the jury's verdict of guilty of first-degree murder. The jury was properly instructed as to each element of first-degree murder and how to proceed through the lesser-included crimes analysis. The jury concluded that each element of first-degree, willful and deliberate murder was established beyond a reasonable doubt. Even though the events of August 10, 2022, took place over a relatively short time period, that in itself is not "dispositive where [as here] there is [other] evidence that [D]efendant weighed and considered the question of killing . . . despite how brief this consideration may have been." *State v. Martinez*, 2021-NMSC-012, ¶ 51; *accord Slade*, 2014-NMCA-088.

Ultimately, the jury heard all the evidence in this case, including the full testimony and argument of Defendant and the jury rejected Defendant's version of the facts by finding him guilty. *See Rojo*, 1999-NMSC-001, ¶ 19 (stating that this Court considers whether "a rational jury *could* have found beyond a reasonable doubt the essential facts required for a conviction" (internal quotation marks and citation omitted)); *State v. Sutphin*, 1988-NMSC-031, ¶ 21, 107 N.M. 126 ("The [jury] may reject [D]efendant's version of the incident."). Considering the evidence in the light most favorable to the verdict, there was sufficient evidence here to support the jury's verdict of first-degree murder, willful and deliberate.

II. THE JURY WAS PROPERLY INSTRUCTED ON FIRST-DEGREE

MURDER.

The full and complete jury instruction containing the essential elements of first-degree, willful and deliberate, murder was properly read to the jury. [11-03-2023 CD 02:26:09-02:43:06; 11-06-2023 CD 10:45:59-11:39:10] Additionally, the full and complete jury instructions containing the essential elements of second-degree murder and voluntary manslaughter were given in this matter. [*Id.*] The full and complete step-down instructions were given in this matter. [*Id.*] In other words, the jury was properly instructed on all essential elements relevant to the murder charge in this case.

Motive, as found in UJI 14-5029, is not an essential element of first-degree murder, second-degree murder, or voluntary manslaughter. *See* UJI 14-201; UJI 14-210; UJI 14-220 NMRA. Importantly here, Defendant not only stipulated multiple times to the use of this instruction but he cited to it in his pretrial motion practice and, while Defendant's proffered instructions were not preserved for the record, the context of the discussions surrounding the final set of jury instructions seems to support that the motive instruction was proffered by Defendant.

A. LEGAL STANDARD

This Court would first look to whether it was error to give the motive instruction and, if so, whether Defendant invited that error. In New Mexico, "[t]he doctrine of fundamental error cannot be invoked to remedy the defendant's own

invited mistakes.” *State v. Campos*, 1996–NMSC–043, ¶ 47, 122 N.M. 148. New Mexico courts “have consistently followed the ethical maxim that no party can profit by his own wrong.” *Proper v. Mowry*, 1977–NMCA–080, ¶ 69, 90 N.M. 710 (internal quotation marks and citations omitted). “A party may not be rewarded with a new trial when it invites jury instruction error and subsequently complains about that very error. *State v. Ortega*, 2014–NMSC–017, ¶ 34.

However, if the Court concludes that Defendant did not invite the error, it would then turn to a fundamental error analysis as Defendant likely proffered, but certainly stipulated to the use of the motive instruction below. “The standard of review we apply to jury instructions depends on whether the issue has been preserved . . . [if not preserved] we review for fundamental error.” *Cunningham*, 2000–NMSC–009, ¶ 8. Fundamental error only exists where there “has been a miscarriage of justice, [where] the question of guilt is so doubtful that it would shock the conscience to permit the conviction to stand, or if substantial justice has not been done.” *State v. Sutphin*, 2007–NMSC–045, ¶ 16, 142 N.M. 191. To determine whether there was fundamental error, a court must “review the entire record, placing the jury instructions in the context of the individual facts and circumstances of the case, to determine whether the [d]efendant’s conviction was the result of a plain miscarriage of justice.” *Id.* ¶ 18.

Here, there were no essential element missing from any of the instructions

given on the crimes with which Defendant was charged. Instead, the argument on appeal is that by adding the instruction on motive, the jury would have been “confused or misdirected.” **[BIC 16]**; *see also Cunningham*, 2000-NMSC-009, ¶ 14, 128 N.M. 711 (holding “that [this Court’s] task is to determine whether a reasonable juror would have been confused or misdirected by the jury instruction” (internal quotation marks and citation omitted)).

As this question of error also contends with a mandatory “Use Note” in the applicable UJI’s it is important to note that “[i]n the context of use notes, our courts have concluded that error resulting from the failure to follow mandatory use notes *does not* automatically result in reversal.” *See State v. Barber*, 2004-NMSC-019, ¶ 20, 135 N.M. 621, (agreeing generally that the failure to give a definitional instruction that is mandated by a use note is not fundamental error) (emphasis added). The “failure to give a mandatory instruction does not automatically require the reversal or modification of an otherwise valid conviction, but rather, it is the failure to give a mandatory instruction on the law essential for a conviction that constitutes reversible error.” *State v. Stalter*, 2023-NMCA-054, ¶ 12, *cert. denied*, *State v. Stalter*, 2023-NMCERT-008, ¶ 12. (internal quotation marks and citations omitted).

B. DEFENDANT STIPULATED TO THE MOTIVE INSTRUCTION MULTIPLE TIMES AND, OTHERWISE, SOUGHT IT TO BE INCLUDED IN THE JURY INSTRUCTIONS—IF THERE WAS ERROR, IT WAS INVITED ERROR.

1. Any Error Is Invited Error.

To the extent that the district court's instruction of the jury included instructions with use notes indicating they should not be given—that error would be invited error in this case. The State's proffered instructions in this matter did not include the instruction on motive, or any other instruction, which this Court has indicated through a use note should not be given. **[RP 346-403]** Defendant's proffered instructions were not made a part of the record except by reference throughout the audio recordings and other indications of defense theory found in the record. **[11-03-2023 CD 2:27:23-:43:06; 11-06-2023 CD 11:31:26-:39:10; RP 275]** The final instructions given to the jury, as discussed in the section above herein, fully and properly instructed the jury on all the essential elements of first-degree murder. While the motive instruction was given by the district court to the jury, it was not juxtaposed with the instructions associated with Count 1. Specifically, the essential elements of first-degree murder were given as Instruction No. 12. **[RP 378; 11-06-2023 CD 12:32:54-:34:17]** The essential elements of second-degree murder were given as Instruction No. 14 and those of voluntary manslaughter were Instruction No. 18. **[11-06-2023 CD 12:34:35-: 35:13; 12:35:58-:36:35]**

Following completion of the Count 1 instructions, and their associated

instructions, the district court instructed the jury on flight and then on motive as Instruction No.'s 25 and 26. *See* UJI's 14-5030 NMRA, 14-5029. The motive instruction tracked the stock instruction, and the district court therefore instructed "[t]he state does not have to prove motive. However, motive or lack of motive may be considered by you as a fact or circumstance in this case. You may give the presence or lack of motive such weight as you find it to be entitled." UJI 14-5029.

In this case where sufficiency of the evidence is tied to a great deal of circumstantial evidence, the motive instruction went to Defendant's legal theory that the State had presented no evidence of motive in particular. In fact, prior to trial, Defendant filed a motion to exclude evidence which included citation to the motive instruction as support for why his motion should be granted. **[RP 275]** Defendant stated in that pretrial motion that the motive instruction, UJI 14-5029, had "been approved by the New Mexico Supreme Court." *[Id.]*

On appeal, Defendant maintains this legal position that the "State did not present any evidence of motive or a plan." **[BIC 14]** However, despite his reliance upon, and stipulation to, the motive instruction at trial—Defendant now seeks to have the "Use Note" associated with the motive instruction substantiate his request to this Court for a new trial. This Court should not indulge Defendant's request because to the extent the instruction should not have been given, Defendant invited that error.

To highlight Defendant's invitation of this error, and the associated discord of Defendant's argument on appeal, Defendant argues here that the "district court had no discretion to give the *motive* instruction" because the "Use Note" associated with the motive instruction states "[n]o instruction on this subject shall be given." **[BIC 18]** In so arguing, however, Defendant focuses solely on the motive instruction but makes no mention of other "erroneous" instructions. **[BIC 16-18]** However, the context of the instructions indicates that Defendant proffered two other instructions at trial, in addition to motive, which contained the same "Use Note" as the motive instruction, but which more directly go to Defendant's trial theory:

UJI 14-5024 [NMRA]. Weighing conflicting testimony

You are not bound to decide in favor of the party who produced the most witnesses. The final test is not the relative number of witnesses, but in the relative convincing force of the evidence.

UJI 14-5030 Flight.

The flight of a person immediately after the commission of a crime, or after he has been accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding the question of his guilt or innocence. Whether or not defendants conduct amounted to flight, and if it did whether or not it shows a consciousness of guilt, and the significance to be attached to any such evidence, are matters exclusively for you to decide.

These instructions operated together with the motive instruction to underscore certain of Defendant's legal theories: (1) that the State had not produced any evidence of motive, (2) that just because Defendant fled the scene does not mean he

was guilty, and (3) that just because the State called 24 witnesses and Defendant alone testified in his case-in-chief doesn't mean the jury had to find for the State.

But Defendant does not address the district court's instruction as to flight or as to conflicting testimony—or how all of these were likely proffered by Defendant. **[BIC 16-18]** Only the motive instruction reasonably lends itself to Defendant's issue on appeal and so, alone, is the focus. As seen by the language of all three of these instructions, none of them include a “mandatory instruction on the law essential for a conviction[.]” *Stalter*, 2023-NMCA-054, ¶ 12. As a party “may not be rewarded with a new trial when it invites jury instruction error and subsequently complains about that very error” this matter should not result in a new trial. *Ortega*, 2014-NMSC-017, ¶ 34. To the extent that the district court instructing the jury on motive, or indeed on flight or conflicting testimony was error, it was error invited by Defendant in either proffering these instructions, in stipulating to their use multiple times, or both.

2. Any Error is Not Fundamental Error.

If this Court determines there was error, but that the error was not invited error, the State argues that there was also not fundamental error. The main question under a fundamental error analysis remains the same, has there “been a miscarriage of justice, [where] the question of guilt is so doubtful that it would shock the conscience to permit the conviction to stand, or if substantial justice has not been

done.” *Sutphin*, 2007-NMSC-045, ¶ 16. To determine whether there was fundamental error, a court must “review the entire record, placing the jury instructions in the context of the individual facts and circumstances of the case, to determine whether the [d]efendant’s conviction was the result of a plain miscarriage of justice.” *Id.* ¶ 18.

Here, there were no essential element missing from any of the instructions given on the crimes with which Defendant was charged. Instead, the argument on appeal is narrowed to Defendant’s claim that the motive instruction “confused or misdirected” the jury. **[BIC 16]** Defendant argues that the motive instruction: (1) commented on the evidence and (2) when the jury was unclear as to the difference between first-degree and second-degree murder, the motive instruction pushed them to go with first-degree murder. **[BIC 18]**

As to the first part of Defendant’s argument, Defendant seems to rely on the committee commentary found under UJI 14-5029 stating that “an instruction on motive amounted to a comment on the circumstantial evidence . . . and would constitute a comment on the evidence.” *Id.* comm. cmt. However, the Court of Appeals recently questioned similar committee commentary with respect to the alibi instruction and certiorari was subsequently quashed by this Court. *Stalter*, 2023-NMCA-054, ¶ 20 (stating “we are similarly skeptical of the committee commentary’s classification of the alibi jury instruction as an inappropriate comment on the

evidence). In *Stalter*, the Court of Appeals noted that “under well-established New Mexico law, an improper comment on the evidence is one that (1) contextualizes specific facts presented; (2) argues or hypothesizes on factual issues within the jury's purview to decide; or (3) otherwise makes a statement about the weight or credibility of evidence in the presence of the jury.” *Id.* ¶ 20.

Here, the motive instruction did not add to, or omit from, the essential elements of all the crimes reviewed by the jury, it did not contextualize “specific facts,” it did not “argue or hypothesize on factual issues,” and it did not make a “statement about the weight or credibility of evidence.” At most, the instruction merely told the jury that “motive” was not necessary to any of the crimes charged, but if the jury wanted to consider motive or lack of motive, they were able to do so.

To get from his committee commentary on the evidence claim to the remainder of his argument on jury confusion, Defendant takes illogical leaps. Defendant begins his argument with a discussion on the motive instruction and the committee commentary and then jumps, without reference, into a discussion on Instruction No. 12—the instruction on the essential elements of first-degree murder. Defendant then claims that when the district court referred the jury back to the jury instructions, following a juror question asking for clarification between a rash impulse and deliberate intention to kill, that “those instructions included the motive instruction, which told the jury the State did not have to prove motive.” **[BIC 18]**

Defendant then lands at his conclusion that “that instruction may well have been the reason the jury landed on first-degree murder.” [*Id.*] It is a mystery how the motive instruction would have operated to explain to the jury the difference between a rash impulse and deliberate intent to kill and, regardless, that is not the measure of fundamental error. The jury had the motive instruction before they came out with their question in the first place. More importantly, deliberate intent *was* defined for the jury and “motive” is not contained within that definition or, indeed, as part of any of the essential elements required for first-degree murder.

Importantly under a fundamental error analysis, the jury was properly instructed on all *essential elements* of first-degree murder, second-degree murder, and voluntary manslaughter. The instructions included the proper definition of deliberate intention as authorized by this Court. Further, the jury was properly instructed on how to proceed through the lesser included analysis. The jury also had sufficient evidence of the crime they ultimately convicted Defendant of—first-degree murder. Here, there has been no miscarriage of justice. The question of guilt is not so “doubtful that it would shock the conscience to permit the conviction to stand[.]” *Sutphin*, 2007-NMSC-045, ¶ 16. The jury’s verdict should be affirmed.

III. THE STATE NOT ONLY PROVED FIRST-DEGREE MURDER BEYOND A REASONABLE DOUBT—BUT ALSO THAT DEFENDANT TAMPERED WITH THE EVIDENCE.

The State responds to this issue on appeal to reiterate that because there was

sufficient evidence of first-degree murder, willful and deliberate, the jury's verdict as to both first-degree murder and as to tampering with evidence should be affirmed.

However, if this Court disagrees with the State as to the sufficiency of the evidence on the murder conviction this Court is otherwise able to affirm the tampering with evidence conviction, although the issue does present a unique question following this Court's decision in *State v. Radosevich*, 2018-NMSC-028, and the implementation of special verdict forms now used in tampering cases.

In this matter, the jury found Defendant guilty of tampering with Victim's cellular phone beyond a reasonable doubt and filled in the two required verdict forms for that conviction. **[RP 414-15]** But more importantly, the evidence as to the tampering with evidence charge was not disputed by Defendant's testimony—ie. he testified that he took Victim's phone, that he placed it in a clear plastic bag, and that he threw it out of a moving car later in the morning away from the crime scene. There was sufficient evidence to support the conclusion that Defendant tampered with evidence. As such, this Court can still affirm his tampering conviction. *See Radosevich*, 2018-NMSC-028, ¶ 30 (affirming a tampering conviction where there was sufficient evidence).

Here, as noted by Defendant, the jury made a specific determination that the tampering with evidence crime related to first-degree murder on a special verdict form, in addition to the broader language of "homicide" as found under the general

Count 2 verdict form also signed by the jury. **[RP 414-15]** This case presents a distinguishable question arising from *Radosevich*.

Here, as in *Radosevich*, there was sufficient evidence of the tampering crime. In *Radosevich*, this Court upheld the defendant's conviction as to tampering, but because the special verdict forms had not been instituted yet, the jury in that case had "made no finding beyond reasonable doubt of the level of the underlying crime." 2018-NMSC-028, ¶ 30. On remand this Court in that case instructed "the district court [to] amend the judgment and sentence to reflect a conviction and sentence for indeterminate offense tampering and resentence Defendant pursuant to the basic tampering penalties" in the sentencing statute. *Id.*

Here, the special verdict forms are now in usage and the jury properly completed the special verdict form which accompanied their determination as to the level of homicide they determined. **[RP 415]** This Court should uphold the jury's verdict as to tampering here as it was able to do for the jury's verdict in *Radosevich*. But if this Court sends this matter back to the district court with similar instruction as was given in *Radosevich*, this Court would be immediately lowering the level of the crime from a third-degree felony to a fourth-degree felony in a case with an express jury finding (and clear evidence) that Defendant tampered with Victim's cellular phone "related to the crime of homicide." **[RP 414]**

This lowering of the offense is highlighted by Defendant's requested result in

this case. Defendant asks this Court for a new trial to “decide between second-degree murder or voluntary manslaughter.” [BIC 15] Under a hypothetical scenario, if Defendant had been charged with second-degree murder, Defendant’s tampering with evidence sentence would be the same as it currently stands—a third-degree felony. *See* NMSA 1978, § 30-22-5 (2023). However, if Defendant is hypothetically and subsequently found guilty of voluntary manslaughter or even if he is acquitted, the tampering with evidence sentence would only then become a fourth-degree felony. The State contends then that this matter would require a slightly modified approach then that taken in *Radosevich*.

Because the jury already concluded that Defendant’s tampering with evidence conviction related to the crime of murder, beyond a reasonable doubt, and there is sufficient evidence to support that conclusion, the State requests that *if* this matter is remanded for a new trial on the murder charge, that this Court: (1) affirm the jury’s verdict as to tampering with evidence and (2) instruct the district court to, following the ultimate resolution of the murder charge, sentence Defendant for tampering with evidence accordingly.

IV. DEFENDANT SHOULD HAVE RECEIVED CREDIT FOR HIS PRESENTENCE CONFINEMENT TIME.

The State does not contest Defendant’s final issue on appeal. Per NMSA 1978, Section 31-18-15.3 (2023), when a serious youthful offender is detained in a juvenile

detention facility prior to trial, the time spent in the juvenile detention facility shall count toward completion of any sentence imposed.” Defendant should be given credit for his presentence confinement time. This Court should remand this issue alone to the district court for the limited purpose of amending Defendant’s judgment and sentence to give him credit for this time.

CONCLUSION

The jury verdicts finding Defendant guilty of first-degree murder and tampering with evidence should be affirmed and this matter remanded for the limited purpose of correcting Defendant’s judgment and sentence to provide Defendant with presentence confinement credit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2025, I filed the foregoing brief electronically through the Odyssey/E-File & Serve System, which caused counsel of record to be served by electronic means.

/s/ Serena R. Wheaton

SERENA R. WHEATON