IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

vs. **No. S-1-SC-40701**

TYJE GARRETT,

Defendant-Appellant.

STATE OF NEW MEXICO'S ANSWER BRIEF

Appeal from the Tenth Judicial District Court
Quay County, New Mexico
The Honorable Drew D. Tatum

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INTRODUCTION

Defendant shot Michael Arellano (Victim) twelve times, killing him. A jury subsequently found Defendant guilty of first-degree deliberate murder. Defendant now argues the evidence proved only voluntary manslaughter because Victim allegedly used a racial epithet and, according only to Defendant's testimony, threatened to kill his family. Defendant does not inform this Court that other witnesses testified no such thing occurred. Importantly, because the jurors were free to reject Defendant's version of the facts and it is well-established that insulting words alone, however vile, do not constitute sufficient provocation as a matter of law, Defendant's challenge lacks merit. Defendant next argues that, despite properly instructing the jury on deliberate intent, the district court committed fundamental error because it did not *sua sponte* modify the uniform jury instructions by adding "sufficient provocation"—the element distinguishing voluntary manslaughter from second-degree murder—as an essential element for first-degree murder. Because the given instruction accurately stated the elements of first-degree murder and nothing in the record shows that the jury was confused by the instruction, Defendant's argument fails.

Last, Defendant claims prosecutorial misconduct in closing argument warrants reversal. He appears to suggest the State engaged in misconduct by "picking out" the evidence presented at trial that supported the first-degree murder

conviction. Defendant argues that by failing to address testimony supporting acquittal, the State restricted the jury's ability to fully deliberate. Defendant provides no authority requiring the State to rebut its own case in closing argument. Defendant argues further that the State presented facts not in evidence; namely, that U.S. Route 54 is a "busy" highway and that the gunshot wounds on Victim's arms were "defensive" wounds. But the evidence presented supports a rational inference of each. Because Defendant misapprehends the prosecutor's role as advocate, and the proper scope of closing argument, Defendant's prosecutorial misconduct claim lacks merit.

FACTS AND PROCEDURAL HISTORY

On May 27, 2022, Victim's family gathered to celebrate the high school graduation of Arcelino Arellano, Victim's son. **[09/30/2024 CD 4:15:17-4:15:34; 3:32:39-3:34:17]** Because Arcelino's mother, Kirby Angel, did not attend, a second graduation party was held at her house the following day. **[*Id.*; *id.* 4:16:49-4:17:52]** There, as part of the festivities, Defendant had given his rifle to Arcelino to fire off three rounds into the air prior to Victim's arrival. **[*Id.* 4:21:01-4:21:35; 10/01/2024 CD 9:03:00-9:04:45]** Afterwards, Defendant returned the rifle to his truck. **[*Id.*; 09/30/2024 CD 4:23:17-4:23:43]** Victim, like most of the guests, arrived at the party as the sun was beginning to set, and what then transpired was contested at trial. **[*Id.* 4:26:10-4:27:29; 10/01/2024 CD 9:04:50-9:05:02]**

Victim spent most of the 28th with his brother, David Arellano, before leaving with other family to attend the party. **[09/30/2024 3:34:32-3:36:01]** David testified Victim did not consume any alcohol that day, which was corroborated by Arcelino's testimony that Victim did not appear intoxicated on the date of incident. **[*Id.* 3:39:02-3:40:22; 4:39:47-4:40:42]** Arcelino greeted Victim upon his arrival, and they entered the house together to get dinner. **[*Id.* 4:27:30-4:30:06]** In the kitchen, Victim and Defendant briefly exchanged greetings, and a tense silence followed. **[*Id.*]** Victim felt Defendant was looking at him "kind of funny," and asked if Defendant was alright. **[*Id.*]** Victim's tone was not confrontational or aggressive. **[*Id.* 4:41:00-4:41:30]** A "passive aggressive" conversation between them ensued and Victim left the house. **[*Id.*; *id.* 4:28:31-4:29:44]**

Subsequently, Defendant followed and apprehended Victim outside. **[*Id.*; 10/01/2024 CD 9:33:23-9:34:16]** Arcelino, his friend, Gabriel Chavez, and family friend, Debra Roybal, attempted to separate the two. **[*Id.*]** Defendant shoved Debra out of the way while Gabriel held back Defendant and Arcelino held back Victim. **[*Id.*; *id.* 9:11:22-9:11:51; 09/30/2024 CD 4:29:30-4:30:23]** They argued until Victim, seeing tears in Arcelino's eyes, disengaged and left the property with Debra. **[*Id.*; 10/01/2024 CD 9:33:23-9:36:49]** As they left, Debra heard Defendant shouting that, next time he saw Victim, he would shoot and kill Victim and would not feel bad about doing it. **[*Id.*]** The two bickered across the street from each other for twenty to

thirty minutes. **[*Id.*; *Id.* 9:43:00-9:43:57]** Debra testified that Victim never threatened to kill Defendant or Defendant's family. **[*Id.* 10:04:26-10:04:35]**

According to Debra, she was able to create some distance between the two men. **[*Id.* 9:43:00-9:43:57; 9:37:18-9:37:53]** Kirby's father, Andrew Angel, testified that he and Kirby succeeded in getting Defendant to return inside the house. **[*Id.* 10:53:10-10:54:57]** However, at some point afterwards, Andrew saw Defendant storm out of the house and into his truck. **[*Id.*]** Debra heard Defendant get into his truck as Kirby shouted and tried to stop him. **[*Id.* 9:43:00-9:43:57; 9:37:18-9:37:53]**

After having walked down the street, Victim called his brother, Daniel Arellano, to bring him home, though the nature of their conversation was unclear. **[10/01/2024 CD 9:37:55-9:38:18]** According to Debra, when Daniel answered the phone, Victim told him, "Shit's going down, bring the guns. We're gonna burn this motherfucker down." **[*Id.*]** However, Daniel testified that Victim only asked for a ride as he often did, told him where he was, and did not sound upset. **[*Id.* 10:09:30-10:10:32; 10:10:54-10:12:09]** Daniel testified he and a few family members left, dropped some off at their homes along the way, and continued towards Victim. **[*Id.* 10:12:09-10:12:48]** Additionally, Dena Crain, another family friend, testified that, when she spoke to Victim over the phone, he informed her that he was on his way and would be back home soon. **[09/30/2024 CD 4:00:12-4:00:28]**

Nevertheless, Defendant then drove past Victim and remained at the intersection "for a while" before turning his truck back around towards Victim. **[10/01/2024 9:06:42-9:07:32; 10:53:10-10:55:05]** Defendant exited the vehicle with his rifle and shot Victim twice from the truck.[1] **[10/01/2024 CD 9:06:42-9:07:32; 9:43:00-9:45:17; 9:46:11-9:48:00]** Defendant then stepped forward and continued to shoot Victim, who fell to the ground. **[*Id.*; *id.* 10:55:41-10:56:10]** Defendant approached, stood at Victim's feet, and shot him two additional times. **[*Id.*; *id.* 9:46:11-9:48:00]**

After, Defendant returned to his truck and fled the scene, speeding through a stop sign. **[*Id.*; *id.* 9:48:36-9:49:09; 9:17:34-9:19:49]** Matthew Klinger and his wife, who were passing through the area, saw Defendant drive through the intersection in front of them shortly before they discovered the bloodied Victim and called 911. **[*Id.*; St. Ex. 5, 7]** By his own admission, Defendant disposed of the rifle during his escape on property adjacent to Richard Cravy, who discovered it and told law enforcement. **[10/01/2024 CD 11:11:12-11:12:24; 10/02/2024 CD 4:14:06-4:15:34]** Defendant explained he intended on contacting the sheriff, and the reason

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[1] Witnesses differed in their accounts about the precise sequencing of the gunshots. **[*See, e.g*, 10/2/2024 CD 3:36:30-3:36:37 (Kirby heard three initial shots); 10/1/2024 CD 9:46:46-9:48:00 (Debra heard two)]** Additionally, while Debra testified Defendant "was shooting from where he was standing at the truck, kind of like, taking a step and shooting at [Victim]," **[*Id.*]** Defendant incorrectly states her testimony was that Victim stepped towards Defendant. **[BIC 6]**

he threw the rifle away was because he "did not want to have the firearm with [him]" when he did so. **[*Id.*]** Approximately thirty miles away, Defendant was captured at a gas station. **[St. Ex. 8]**

Meanwhile, Victim was brought to the hospital, where he was pronounced dead. **[10/01/2024 CD 2:22:03-2:22:24]** Office of the Medical Examiner forensic pathologist, Dr. Audra Kerwin, performed an autopsy on Victim. **[10/02/2024 2:07:58-2:09:10]** Dr. Kerwin observed twelve entrance wounds, some associated with exit wounds, and many associated with bullet fragments recovered inside the body during the autopsy. **[*Id.* 2:09:34-2:10:12]** Dr. Kerwin was unable to determine which particular gunshot wound caused Victim's death but did determine the manner of death was homicide. **[*Id.* 2:24:39-2:25:15]**

Defendant was charged with first-degree murder and tampering with evidence. **[1 RP 1-2]** Defendant and Kirby, his significant other and Arcelino's mother, testified on his behalf. **[*See generally* 10/02/2024 CD 3:21:58-4:31:37]** After the district court denied Defendant's motion for directed verdict, the State notified the Court it became aware that Kirby had a conversation with Defendant following the first day of trial. **[10/02/2024 CD 2:39:00-2:42:40]** The State moved to exclude her testimony for violating the court's witness sequestration order. **[*Id.*]**

During their conversation, Defendant told Kirby about how the State's witnesses testified up until that point. **[*Id.*]** Kirby also informed Defendant that she

received information from someone observing the trial about the testimony. **[*Id.*]** After hearing the recording, the district court expressed concern that, when Defendant told Kirby what witnesses had testified to, Kirby responded she would provide contrary testimony to discredit them. **[*Id.* 2:48:08-2:49:43]** The district court ultimately decided the violation of Rule 11-615 NMRA could be remedied by limiting Kirby's testimony to what was discussed in her pre-trial interviews, rather than exclusion. **[*Id.*; *id.* 2:58:40-3:00:31]**

Ultimately, the jury found Defendant guilty of first-degree murder and tampering with evidence. **[2 RP 459-461]** It found beyond a reasonable doubt that a firearm was discharged in the commission of the murder. **[*Id.*]** Defendant was sentenced to life imprisonment. **[2 RP 483-485]**

ARGUMENT

I. THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT FINDING DEFENDANT ACTED WITH DELIBERATE INTENT.

Defendant argues the evidence presented at trial was insufficient to support his murder conviction. **[BIC 9-29]** Though Defendant does not contest he killed Victim, relying on contrary evidence and a lack of direct evidence, he argues no rational jury could conclude he acted with the deliberate intent required. **[BIC 15-17 (asking this Court to "[c]onsider that fateful moment" where he alleges Victim insulted Defendant); 17-24 (arguing, *inter alia*, that because "[n]o one detailed [Defendant's] thoughts while driving," the jury could only have**

speculated)] Because the evidence was sufficient to reasonably infer deliberate intent to kill Victim, the jury was not required to accept Defendant's version of the facts, and his challenge to the sufficiency of the evidence fails.

A. Standard of Review

When considering a claim of insufficiency of the evidence, appellate courts "resolve[] all disputes of facts in favor of the successful party and indulges in all reasonable inferences in support of the prevailing party." *Las Cruces Prof'l Fire Fighters and Intern. Ass'n of Fire Fighters, Local No. 2362 v. City* 1997-NMCA-044, ¶ 12, 123 N.M. 329. This Court "will not reweigh the evidence nor substitute [its] judgment for that of the fact finder." *Id.* "The question is not whether substantial evidence exists to support the opposite result, but rather whether such evidence supports the result reached." *Id.* Substantial evidence is that which is acceptable to a reasonable mind as adequate support for a conclusion. *Id.*

B. Defendant improperly omits trial evidence that does not support his argument on the sufficiency of the evidence.

As an initial matter, Defendant fails to satisfy his burden in arguing that the evidence was insufficient to convict because he omits the evidence supporting the jury's verdict. *See Chavez v. S.E.D. Lab'ys*, 2000-NMCA-034, ¶ 26, 128 N.M. 768 ("[W]e review substantial evidence claims *only* if the appellant apprises the Court of all evidence bearing upon the issue, [including] both [evidence] that . . . is favorable and [evidence] that . . . is contrary to [the] appellant's position." (emphasis

added)), *aff'd in part, rev'd in part, and remanded* 2000-NMSC-034, 129 N.M. 794. Under Rule 12-318(A)(3) NMRA, "[a] contention that a verdict . . . is not supported by substantial evidence shall be deemed waived unless the summary of proceedings includes the substance of the evidence bearing on the proposition."

The purpose of the rule is to "fully apprise the reviewing court of the fact-finder's view of the facts and its disposition of the issues, and to help the court decide the issues on appeal." *Martinez v. Sw. Landfills, Inc.*, 1993-NMCA-020, ¶ 15, 115 N.M. 181. Thus, the rule "imposes a duty upon an appellant, who seeks to challenge findings adopted below, to marshal *all of the evidence in support of the findings* and then demonstrate that even if the evidence is viewed in a light most favorable to the decision reached below, together with all reasonable inferences attendant thereto, the evidence is insufficient to support the findings." *Maloof v. San Juan Cnty. Valuation Protests Bd.*, 1992-NMCA-127, ¶ 18, 114 N.M. 755 (emphasis added). The appellant's summary of the evidence should be thorough enough that neither the reviewing court nor the appellee has to supplement it. *See Martinez*, 1993-NMCA-020, ¶ 13. When an appellant does not set forth the substance of the evidence—both favorable and unfavorable—bearing on the jury's findings, the appellant violates this rule and is bound by those findings. *See McDonald v. Zimmer Inc.*, 2020-NMCA-020, ¶ 32 (holding that a defendant who fails to comply with Rule 12-318(A)(3) waives any sufficiency argument and all findings of fact are binding on appeal).

Defendant argues on appeal that he lacked the requisite deliberate intent to sustain a conviction for first-degree murder and is guilty only of voluntary manslaughter. **[*See generally* BIC 9-29]** Defendant argues that, prior to killing Victim, there were witnesses who heard Victim uttering racial slurs directed at Defendant.[2] **[BIC 18]** He notes, though various witnesses testified Defendant also used racial slurs, they could not remember which ones he used. **[*Id.*]** To contrast this point, he asserts that "no one forgot" the slurs allegedly used by Victim. **[*Id.*]** However, Defendant fails to mention that multiple witnesses testified *they had no recollection of Victim using any slurs at all.* **[10/01/2024 CD 9:13:05-9:13:15 (Gabriel did not remember what Victim said); 9:14:18-9:14:27 (same); 09/30/2024 CD 4:42:53-4:43:08 ("You don't remember your dad using racial slurs at all?" "No. I don't remember any of the dialogue.")]** Dena, who was on

[2] Defendant also acknowledges "mere insults are not adequate provocation for voluntary manslaughter," but asserts that this doctrine does not apply if the "words [are] meant to provoke," or when the words chosen were "the most awful ones." **[BIC 25]**

Defendant cites no authority for the proposition and is directly contradicted by well-established precedent. *Sells v. State*, 1982-NMSC-125, ¶ 7, 98 N.M. 786 ("[W]ords alone, however scurrilous or insulting, will not furnish adequate provocation to require submission of a voluntary manslaughter instruction."); *see also State v. Bashir*, S-1-SC-39389, dec. ¶ 15 (N.M. Nov. 13, 2023) (nonprecedential) (concluding use of racial epithets, as a matter of law, does not provide a basis for a provocation defense).

the phone with Victim in the moments leading up to, during, and after Defendant shot Victim, testified Victim did not utter any racial slurs. **[*Id.* 4:11:09-4:11:51]**

Additionally, the witnesses who testified that Defendant used slurs did not testify they "could not recall" which; they simply did not refer to which slurs were used. **[*Id.* 11:04:45-11:05:45 (stating Defendant used slurs, not claiming to have forgotten which ones, and not asked which ones); 11:08:46-11:09:03 (stating they called each other the "same names" without identifying what or claiming to have forgotten)]**

Defendant further argues the evidence was insufficient because, according to his own testimony, Victim threatened to kill both him and his family. **[BIC 4, 16 (references to his own testimony that Victim threatened to kill Defendant's family)]** However, Defendant fails to inform this Court of contrary evidence supporting the verdict: Debra testified Victim never threatened to kill Defendant or his family. **[10/01/2024 CD 10:04:25-10:04:35]** Though her testimony about threats uttered by Victim was somewhat unclear, **[*id.* 9:34:24-9:34:47]** she was absolute in her statement Victim did not threaten to kill anyone. **[*Id.* 10:04:25-10:04:35]** No one, besides Defendant himself, testified that his family was ever threatened.

Additionally, Defendant argues that "[n]o one testified . . . whether his anger subsided." **[BIC 5]** The assertion is contrary to testimony Defendant omits. Gabriel

testified Defendant appeared to have "calmed down for a few minutes" before getting into his truck. **[10/01/2024 CD 9:12:33-9:14:04]**

Finally, Defendant argues Victim "arrived at the party, drunk" and that Arcelino "confirmed [Victim] was drunk and belligerent." **[BIC 3, 17-18 (citing 09/30/2024 CD 4:28:45-4:29:15, where Arcelino makes no comment on drunkenness or belligerence)]** He fails to inform this Court that Arcelino repeatedly testified Victim did not appear intoxicated and Arcelino never described him as belligerent. **[9/30/2024 CD 4:39:50-4:40:29]** Further, he fails to reference that David, who spent the entire day with Victim prior to the party, testified Victim did not have anything to drink that day. **[09/30/2024 CD 3:39:30-3:40:21]** Nor does he reference Dena's testimony that she did not recall seeing him drink before leaving for the party. **[*Id.* 4:10:43-4:10:55]**

The above-mentioned omissions from the brief-in-chief provide this Court with ample reason not to disturb the jury's findings of fact on appeal. *See Mountain States Tel. & Tel. Co. v. Suburban Tel. Co.*, 1963-NMSC-120, ¶ 7, 72 N.M. 411 (recognizing that our appellate courts do not disturb findings of fact when the appellant's brief points to evidence contrary to the verdict without mentioning evidence supporting the verdict). This Court should therefore accept the jury's findings of fact and should consider only Defendant's remaining arguments. *See*

Central Market, Ltd., Inc. v. Multi-Concept Hospitality, LLC, 2022-NMCA-021, ¶ 10.

C. The evidence supported a rational inference that Defendant had the deliberate intent to take Victim's life.

To find Defendant guilty of first-degree deliberate murder, the State was required to present evidence to the jury that Defendant killed Victim with the deliberate intention to take away Victim's life.[3] **[2 RP 434]** It is uncontested Defendant killed Victim. **[10/02/2024 CD 4:08:24-4:08:53]** Defendant challenges the jury's finding that he had the requisite *mens rea* because, he asserts, he was sufficiently provoked into killing. **[BIC 25-29]**

A deliberate intention is rarely subject to proof by direct evidence and often must be inferred from the circumstances. *State v. Astorga*, 2015-NMSC-007, ¶ 60; *see also* UJI 14-201 NMRA ("A deliberate intention may be inferred from all of the facts and circumstances of the killing."). Substantial evidence of deliberation can include "earlier confrontation[s] . . . or other common areas of friction leading to violence," *State v. Tafoya*, 2012-NMSC-030, ¶ 52, fleeing the scene, or disposing of evidence. *State v. Smith*, 2016-NMSC-007, ¶ 20.

Here, the evidence shows Defendant acted with the deliberate intent to take Victim's life, rather than on a mere unconsidered rash impulse. Multiple witnesses

[3] Defendant incorrectly asserts deliberate intent is "defined [as] having a clear motive or being carefully crafted." **[BIC 18-19]**

testified that, prior to the murder, Defendant and Victim were engaged in a heated argument at Kirby's house. *See Tafoya*, 2012-NMSC-030, ¶ 52 (finding earlier confrontations or friction may support an inference of deliberation). **[*See, e.g.*, 10/01/2024 CD 9:33:23-9:36:49]** Debra testified that, during this argument, Defendant repeatedly threatened to kill Victim and stated he would shoot Victim and not feel bad about it. *Cf. State v. Cunningham*, 2000-NMSC-009, ¶¶ 29, 128 N.M. 711 (providing evidence that the defendant told the victim "I'll kill you, I'll shoot you, I don't care," before killing constituted substantial evidence of deliberate intent). **[*Id.*]** Witnesses testified that, after their heated argument at Kirby's house: (1) Victim was escorted across the street, and (2) even as distance was created between the two men, Defendant continued to shout that he would kill Victim. *See id.* **[*Id.*]**

Testimony revealed Defendant then got into his truck, drove past Victim, and stopped at the end of the road for a while, sitting in his truck. *See State v. Kramer*, S-1-SC-37807, dec. ¶ 47 (N.M. Sept. 9, 2021) (nonprecedential) (finding evidence the defendant had opportunity to deliberate his actions relevant to, though not dispositive of, sufficiency argument). **[10/01/2024 CD 9:43:00-9:44:38]** Defendant then made a U-turn, stopped in the middle of the road, exited the car with his firearm, and shot Victim twice.[3] *See State v. Robinson*, 1980-NMSC-049, ¶ 12, 94 N.M. 693 (finding testimony that "the defendant turned his car around a cul-de-sac, came back,

stopped his car, got out of his car and shot" the victim gave "rise to a strong inference of defendant's deliberate intent to kill"). **[*Id.*; *id.* 9:45:03-9:45:11]** He then approached Victim, now on the ground, stopped a foot away, and continued firing. *See State v. Riley*, 2010-NMSC-005, ¶ 20, 147 N.M. 557 (concluding shooting from varying distances supported a finding of deliberate intent), *overruled on other grounds by State v. Montoya*, 2013-NMSC-020, ¶ 54; *State v. Valenzuela*, S-1-SC-37415, dec. ¶ 19 (N.M. Nov. 16, 2020) (nonprecedential) (finding deliberate intent from evidence the defendant paused to comment about the victim before continuing to stab him). **[*Id.* 9:46:50-9:48:00]** Defendant shot Victim *twelve times*. *See State v. Duran*, 2006-NMSC-035, ¶ 9, 140 N.M. 94 (concluding the jury could draw rational inferences of deliberations from a large number of wounds—there, eight or nine); *State v. Thomas*, 2016-NMSC-024, ¶ 41 (finding large number of wounds sustained by the victim could indicate deliberation). **[10/02/2024 CD 2:09:37-2:10:10]** A firearms expert testified the rifle's firing mechanism required a deliberate pull of the trigger for each of the twelve shots. *See State v. Montoya*, S-1-SC-39534, dec. ¶ 11 (N.M. Dec. 11, 2023) (nonprecedential) (referring to manner of engagement with firearm's firing mechanism in finding deliberate intent). **[10/02/2024 CD 9:25:50-9:27:19]**

Then, by Defendant's own admission, after killing Victim, he got into his car and drove off before he was located at a gas station thirty miles away. *See Smith*,

2016-NMSC-007, ¶ 20 (providing fleeing provides substantial evidence of deliberation). **[St. Ex. 8; 10/02/2024 CD 4:14:29-4:15:19]** While fleeing the scene, he disposed of the rifle from his car window, miles away. *See id.* (providing disposing evidence provides substantial evidence of deliberation); *State v. Flores*, 2010-NMSC-002, ¶¶ 22-23, 147 N.M. 542 (same), *overruled on other grounds by State v. Martinez*, 2021-NMSC-002, ¶ 73. **[*Id.*; 10/01/2024 CD 11:18:36-11:20:33]** Though Defendant claimed he did so because he did not want the firearm with him when confronted by law enforcement and denied trying to hide the gun, the jury was not required to accept his version of the facts. *See State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438 (providing contrary evidence supporting acquittal does not provide basis for reversal).

Viewed in a light most favorable to the verdict and disregarding all evidence supporting acquittal, *id.*, the evidence supports the jury's finding of deliberate intent as required to sustain his first-degree murder conviction. Although Defendant argues that "[n]o one testified . . . whether his anger subsided," **[BIC 5]** the jury may make, and often must make, rational inferences of intent. The issue of deliberate intent, including whether Defendant acted on rash impulse, was a question for the jury. Because the jury's verdict was supported by substantial evidence, this Court should affirm.

II. THE DISTRICT COURT DID NOT COMMIT FUNDAMENTAL ERROR BY NOT ADDING A NEW ELEMENT TO MURDER.

Defendant next argues the district court committed fundamental error by not deviating from the elements of first-degree murder found in the uniform jury instructions and that the court should have added "sufficient provocation." **[BIC 30-40]** Though Defendant did not ask the district court to make sufficient provocation an element of first-degree murder, he nonetheless claims the failure to do so *sua sponte* confused the jury and diminished the State's burden of proof. **[*Id.*]** Because the record is devoid of evidence that the jury was confused by the given instruction and the instruction accurately states the law, Defendant's argument lacks merit. **[2 RP 434]**

A. Standard of Review

Because Defendant did not object to the jury instructions at trial, this issue is reviewed for fundamental error. *See State v. Benally*, 2001-NMSC-033, ¶ 12, 131 N.M. 258. To evaluate fundamental error, this Court first considers whether error occurred. *See State v. Ocon*, 2021-NMCA-032, ¶ 7. "For fundamental error to exist, the instruction must differ materially from the uniform jury instruction, omit essential elements, or be so confusing and incomprehensible that a court cannot be certain that the jury found the essential elements under the facts of the case." *State v. Caldwell*, 2008-NMCA-049, ¶ 24, 143 N.M. 792 (internal quotation marks and citation omitted). "Jury instructions cause confusion or misdirection when, through

omission or misstatement, they do not provide an accurate rendition of the essential elements of the crime." *Ocon*, 2021-NMCA-032, ¶ 7 (internal quotation marks and citation omitted).

B. The uniform jury instructions accurately set forth the requisite elements of first-degree murder.

Defendant argues the jury instructions were erroneous because they did not provide "sufficient provocation" as an essential element to first-degree murder. **[BIC 30-40]** However, first-degree murder is distinguished from its lesser-included offenses by the element of deliberate intent. *State v. Garcia*, 1992-NMSC-048, ¶ 21, 114 N.M. 269. A deliberate intent necessarily includes a lack of provocation by its very definition and thus first-degree murder does not require additional instruction. Logically, one cannot kill "as a result of careful thought and the weighing of the consideration for and against the proposed course of action," UJI 14-201, while lacking the "ability to reason [brought on by] a temporary loss of self-control." UJI 14-222 NMRA.

Then, in contrast to first-degree murder, second-degree murder "is the kind of killing . . . that, even though intentional, is committed on '[a] mere unconsidered and rash impulse,' *i.e.*, a rash or impulsive killing." *Garcia*, 1992-NMSC-048, ¶ 22. Here, the jury was correctly instructed that it could not find Defendant guilty of first-degree murder if it found he acted on rash impulse. Thus, because it *did* find Defendant guilty of first-degree murder after weighing the evidence presented at

trial, it necessarily made the factual finding that Defendant carefully considered whether to kill Victim and did so on more than mere rash impulse—to the exclusion of second-degree murder and voluntary manslaughter. *See id.* ¶¶ 21-22.

Given the above, Defendant's arguments about the element distinguishing second-degree murder from voluntary manslaughter—crimes of which he was not convicted—have no bearing on the validity of his conviction. *Cf. id.*, ¶ 21 (providing that intentional second-degree murder "does not have any element not included" in first-degree deliberate murder); *State v. Haynie*, 1994-NMSC-001, ¶ 4, 116 N.M. 746 ("[T]he elements of the lesser offense necessarily were proven to a jury beyond a reasonable doubt in the course of convicting the defendant of the greater offense."). Because the uniform jury instructions provide an accurate rendition of the elements of first-degree murder, Defendant fails to establish error, let alone fundamental error.

C. The first-degree murder uniform jury instructions are neither confusing nor incomprehensible.

The jury received UJI 14-201 verbatim, without modification except to fill in the placeholder brackets, so the instruction did not differ "materially" from the uniform jury instructions nor omit essential elements. **[2 RP 434]** To rise to fundamental error, Defendant must establish that the instructions were so confusing and incomprehensible that this Court cannot be certain that the jury found the essential elements of first-degree murder. *Caldwell*, 2008-NMCA-049, ¶ 24.

When this Court promulgated the uniform jury instruction for first-degree murders, it abandoned the use of the phrase "malice aforethought, either express or implied" which formerly served to distinguish first- and second-degree murder. This Court expressed that, when it made this change, it was "confident that the confusion raised by the terms 'express' and 'implied' malice w[ould] be eliminated." *State v. Hamilton*, 1976-NMSC-082, ¶ 29, 89 N.M. 746. This Court subsequently has "sa[id] what was there anticipated"—that juries would no longer be confused about the elements distinguishing first- and second-degree murder—"is now a reality." *State v. Noble*, 1977-NMSC-031, ¶ 16, 90 N.M. 360. The instructions the jury received have been described as "clear, unambiguous and remarkably free of legalese." *Id.*

Against the established "presumption that the [uniform jury] instructions are correct statements of law," *State v. Parish*, 1994-NMSC-073, ¶ 26, 118 N.M. 39, Defendant attempts to argue these clear and unambiguous instructions confused the jury. Defendant does not, and cannot, demonstrate that the jury was confused by the instructions. Here, the jury was accurately instructed on deliberate intent, as defined in UJI 14-201. **[2 RP 434]** The jury was accurately instructed that, if it found Defendant acted on an unconsidered and rash impulse, to deliberate and return a verdict on the lesser-included offenses of second-degree murder and voluntary manslaughter. **[2 RP 441-442]** The jury did not express any confusion in relation to the elements of first-degree murder, and its lack of inquiry suggests it understood

the instruction. *State v. Veleta*, 2023-NMSC-024, ¶ 29. Defendant's arguments fail because the jury was properly instructed on deliberate intent, and a reasonable juror would not have been confused by the given jury instructions. *See Cunningham*, 2000-NMSC-009, ¶ 14.

Even if, *arguendo*, the district court's use of the unmodified uniform jury instructions could constitute error, the instruction does not rise to the level of fundamental error because it is not "so confusing and incomprehensible that a court cannot be certain that the jury found the essential elements under the facts of the case." *Caldwell*, 2008-NMCA-049, ¶ 24 (internal quotation marks and citation omitted). Defendant's arguments on *Parish*, 1994-NMSC-073, misinterpret that case and his reliance on it is misplaced. In *Parish*, the instructional error claim was reviewed for reversible error, rather than fundamental error, because the defendant not only objected to the proffered instructions, he also tendered his own. *Id.* ¶¶ 3-4. Such objections were sufficient to preserve the error for this Court's general appellate review under Rule 12-216 NMRA. Defendant, on the other hand, made no objection and did not offer any curative instruction, and thereby, "essentially waived appeal on the jury instruction issue absent fundamental error." *Cunningham*, 2000-NMSC-009, ¶ 16. "Since *Parish* was properly decided under a reversible error standard, and not a fundamental error standard, it is not binding in this case." *Id.*

Defendant also cites *State v. Gonzales*, 2007-NMSC-059, ¶ 19, 143 N.M. 25 for the proposition that a "defendant need only point to evidence that supports elements of sufficient provocation" to be entitled to have the jury instructed on voluntary manslaughter as a lesser included offense. **[BIC 37]** But Defendant *did* receive such an instruction, and Defendant's claim is that a reasonable jury would be confused by the instructions they received. *Gonzales* does not address juror confusion in any capacity. Further, contrary to Defendant's explanation of the case, *Gonzales* did not review sufficient provocation or voluntary manslaughter at all, rather, it evaluated whether sufficient facts were there to support a preserved request for a self-defense instruction.[4] *Id.* ¶ 19.

Defendant's reliance on *State v. Benavidez*, 1980-NMSC-097, 94 N.M. 706, and *State v. Reynolds*, 1982-NMSC-091, 98 N.M. 527, are similarly inapposite, and would appear to directly undermine Defendant's argument. Defendant points to language in those cases to suggest that "failure to give an instruction is not harmless if jurors have not been given all legally relevant choices." **[BIC 32]** In both cases, the jury was instructed on first- and second-degree murder.[5] *Id.*; *Benavidez*, 1980-

[4] Even if it involved provocation as Defendant suggests, *Gonzales* analyzed a conviction for first-degree *felony* murder, an elevated form of second-degree murder, and not deliberate intent. *Id.* ¶ 7.

[5] In *Reynolds*, the jury was also instructed on self-defense. *Id.* ¶ 1.

NMSC-097, ¶ 2. Unlike here, neither case reviewed for fundamental error because those defendants requested voluntary manslaughter instructions, but were refused by the trial court. *Id.*; *Reynolds*, 1982-NMSC-091, ¶ 1.

The *Benavidez* and *Reynolds* Courts found reversible error where the juries returned guilty verdicts on first-degree murder but were not given a proper choice among possible verdicts due to the refused voluntary manslaughter instruction. *Id.* ¶¶ 11-12; *Benavidez*, 1980-NMSC-097, ¶ 5. This Court noted, in those cases, the "legally relevant choices" the jury must be instructed on were the choices the jury received here: to convict on first-degree murder, second-degree murder, voluntary manslaughter, or to acquit. *Id.* ("[T]he jury was not given the choice of finding that the defendant committed voluntary manslaughter."). Accordingly, this Court directed the trial courts, on retrial, to instruct the jury with the same instructions the jury received in this case. *Id.* ¶¶ 8-9; *Reynolds*, 1982-NMSC-091, ¶¶ 12-13. Because the jury was properly instructed on the relevant lesser-included charges, Defendant's reliance on *Benavidez* and *Reynolds* is unpersuasive.

There is no indication in the record that the jury was confused about how to apply the instructions, and as outlined above, the evidence was more than sufficient to support the jury's verdict. Accordingly, Defendant fails to establish "exceptional circumstances [that make] guilt [] so doubtful that it would shock the judicial conscience to allow the conviction to stand." *Cunningham*, 2000-NMSC-009, ¶ 13.

III. NO PROSECUTORIAL MISCONDUCT OCCURRED.

Next, Defendant argues the State engaged in prosecutorial conduct in its closing argument. The argument is problematic because it is unclear, offers limited references to the record, no application of the typical standard of review for claims of prosecutorial to specific facts, and limited citations to supporting authority—any of which might have provided guidance as to what the argument is. Nonetheless, what follows is undersigned counsel's best guess at what those arguments might be.

A. Standard of Review

Ordinarily, appellate review of alleged improprieties in closing argument is for an abuse of discretion. *State v. Sosa*, 2009-NMSC-056, ¶ 26, 147 N.M. 351. There are three factors that "must be evaluated objectively in the context of the prosecutor's broader argument and the trial as a whole" in determining error. *Id.* They are: "(1) whether the statement invades some distinct constitutional protection; (2) whether the statement is isolated and brief, or repeated and pervasive; and (3) whether the statement is invited by the defense." *Id.*

Where, as here, counsel fails to object, appellate review is limited to fundamental error. *Id.* To find fundamental error based on misconduct in closing argument, even where the prosecutor makes comments that are erroneous, this Court "must be convinced that the prosecutor's conduct created a reasonable probability that the error was a significant factor in the jury's deliberations in relation to the rest

of the evidence before them." *Id.* ¶ 35. "As with any fundamental error inquiry, [appellate courts] will upset a jury verdict only (1) when guilt is so doubtful as to shock the conscience, or (2) when there has been an error in the process implicating the fundamental integrity of the judicial process." *Id.*

B. The State did not add a nonexistent element to sufficient provocation by offering an example.

As early as opening statements, Defendant was clear that he sought to avoid a first-degree murder conviction by asserting sufficient provocation reduced his crime to voluntary manslaughter. **[09/30/2024 CD 3:16:45-3:17:18]** As Defendant later pointed out in his own closing argument, sufficient provocation can arise from "any action, conduct or circumstances which arouse . . . fear[.]" UJI 14-222 NMRA. **[2 RP 438; 10/03/2024 CD 9:50:48-9:52:13 ("We had fear . . . We had terror. We had extreme emotions.")]** Thus, argument rebutting Defendant's theory of defense—that his fear constituted sufficient provocation—would be highly relevant to discuss in closing. *State v. Chamberlain*, 1991-NMSC-094, ¶ 29, 112 N.M. 723 (not error to make remarks in closing that are relevant or offered to rebut the defendant's theory of the case). The statement that Defendant claims "add[ed] an element to provocation not based in law" **[BIC 45]** was as follows:

> Let's talk about how we would get to . . . voluntary manslaughter. The difference would be that the defendant would have ran over [Victim] after . . . [Victim] maybe said he was gonna kill him. That wasn't the case, that he acted in the rush of the moment and just ran him over. We

> don't have voluntary manslaughter . . . We have that knowing, considered, calculated decision from [Defendant].

[10/03/2024 CD 9:29:56-9:30:43] The uniform jury instruction for sufficient provocation provides that extreme emotions caused by the circumstances cause a "temporary loss of self control" and that it "is not sufficient if an ordinary person would have cooled off before acting." UJI 14-222. Therefore, contrary to Defendant's position on appeal, there is a temporal aspect to sufficient provocation.

Though it is improper for counsel to misstate the law, *State v. Armendarez*, 1992-NMSC-012, ¶¶ 10-11, 113 N.M. 335, wide latitude is permitted in closing argument, particularly when statements are made in response to the defendant's argument. *State v. Smith*, 2001-NMSC-004, ¶ 38, 130 N.M. 117. This Court reviews comments made in closing argument in the context in which they occurred so that it may gain full understanding of the comments and their potential effect on the jury. *Armendarez*, 1992-NMSC-012, ¶¶ 11-16 (concluding from context that the prosecutor's use of word "knowingly" in deliberate intent argument did not mislead or instruct the jury on applicable *mens rea*).

According to Defendant's testimony, he entered his truck intending to drive away from the scene because Victim made him fear for his life. **[10/02/2024 CD 4:04:57-4:06:27]** He claimed that when he stopped at the intersection past Victim and got out of his truck to confront Victim, it was because he feared for his and his

family's life. **[*Id.*; *id.* 4:29:20-4:29:58]** This became part of Defendant's argument for why he was sufficiently provoked. **[10/03/2024 CD 9:46:49-9:47:16; 9:50:05-9:51:35 (comparing Victim to rattlesnakes and coyotes which get shot when they threaten family of person with gun)]** The State's remarks were intended to demonstrate the inconsistency between Defendant's course of action and his claimed emotional state. To do this, the State offered an example of actions that would make sense for someone who claimed to be under such extreme fear. This is not error, let alone fundamental error. *See State v. Baca*, 1997-NMSC-045, ¶¶ 40-45, 123 N.M. 55 (providing that statements intended to provide "an illustration of the process one uses to weigh the considerations of a contemplated course of action" were not prosecutorial misconduct), *overruled on other grounds by State v. Belanger*, 2009-NMSC-025, ¶ 36, 146 N.M. 357.

Further, after these remarks, the State continued by explaining the step-down instructions. **[*Id.* 9:30:43-9:32:42]** The State explained that, while the jury could deliberate in whatever order or manner it wished, the jury was not to return a verdict for voluntary manslaughter unless it first found Defendant not guilty of first- and second-degree murder. **[*Id.*; 2 RP 440-441]** Given the State had already finished arguing the deliberate intent element, as it had expressly stated in its rebuttal, the State was not relying on "rampant speculation" to secure a conviction as Defendant suggests. **[BIC 46]**

In *Armendarez*, this Court considered a fundamental instructional error claim similar to the one argued here. 1992-NMSC-012, ¶¶ 10-15. Armendarez was convicted of first-degree murder. *Id.* ¶ 1. On appeal, he argued that the prosecutor had included an incorrect description of the law and that the State was attempting to "instruct" the jury and invade the province of the trial court. *Id.* ¶ 14. Rejecting that argument, this Court held the prosecutor was merely attempting to explain the law to the jury. *Id.* Furthermore, as here, the trial court gave the jury direct instructions on the elements of the crime, and this Court found that "the jury followed the written instructions and did not rely for its verdict on one very brief part of the State's closing remarks." *Id.* ¶ 13. The State's conduct fell well short of fundamental error. *Id.* ¶ 11.

Similarly, the State's closing remarks in this case did not constitute fundamental error. As with *Armendarez* and *Baca*, 1997-NMSC-045, the comments were a brief part of a lengthy closing argument, and were used merely to illustrate actions Defendant might have taken had he actually been fearful when he killed Victim. It is also worth noting that the district court gave the jury a clear and direct explanation of the law before deliberations began. The district court instructed the jury in the presumption of Defendant's innocence, the State's burden to prove guilt beyond a reasonable doubt, and the elements of the crime. Given the circumstances, "[i]n order to find prejudice to [D]efendant, [this Court] would have to accept that the jury took the comments made during closing and applied them to the case,

ignoring the written instructions." *Armendarez*, 1992-NMSC-012, ¶ 13. The comments were a very brief part of a lengthy closing argument.

Defendant relies solely *State v. Diaz*, 1983-NMCA-091, ¶ 18, 100 N.M. 210, for the proposition that it is "misconduct for [a] prosecutor to offer [an] underhanded way for [the] jury to disregard [a] defense even if it believed it meritorious." **[BIC 46-47]** But there, the prosecutor's conduct was quite different. The Court of Appeals held that the prosecutor told the jury that, even if it found that the defendant was intoxicated and unable to form intent, to disregard the defense and "send a message to the community[.]" *Diaz*, 1983-NMCA-091, ¶ 18; *see State v. Cooper*, 2000-NMCA-041, ¶ 14, 129 N.M. 172 ("Prosecutorial commentary that urges a jury to convict for reasons other than the evidence defies the law and undermines the integrity of a verdict."). Here, the prosecutor's example is properly construed as an attempt to illustrate the difference between sufficient and insufficient provocation by example—not an invitation to disregard the given instructions nor to convict for any reason other than the evidence.

Further, though the Court characterized the prosecutor's invitation to "send a message" as a misstatement of the law, it nonetheless found the statement not to constitute reversible error, reserving it for its cumulative error analysis. *Diaz*, 1983-NMCA-091, ¶¶ 18-19. Defendant makes no cumulative error argument in the present case, so the holding in *Diaz* is not instructive. Nor does Defendant apply the *Sosa*

factors to this alleged misconduct. The statements did not invade on a distinct constitutional protection, were made to rebut Defendant's claim that sufficient provocation arose from fear, and the remarks were brief. For all the above reasons, assuming for argument's sake that the prosecutor's sufficient provocation example was misconduct, it fell well short of what is necessary to reverse a conviction for fundamental error.

C. Defendant's omission of the context of the prosecutor's statements must be addressed.

"[C]ontext is paramount" in a review of statements made during closing arguments, *State v. Torres*, 2012-NMSC-016, ¶ 10, and thus, it is incumbent upon Defendant to provide that context when arguing prosecutorial misconduct. A review of Defendant's other assertions of prosecutorial misconduct in closing argument reveals that such comments were during made during the State's rebuttal argument, **[*Id.* (citing 10/03/2024 CD 9:56:59)]** Therefore, a proper analysis requires a review of Defendant's closing argument.

Defendant's closing argument started by dismissing testimony bearing on tampering with evidence. **[10/03/2024 CD 9:41:18-9:43:44]** Defense counsel referred to Defendant's testimony about how he feared law enforcement's response if he was armed and noted he could have done a better job at hiding the rifle if he intended to "prevent [his] apprehension, prosecution or conviction." NMSA 1978 § 30-22-5(A) (2003). **[*Id.*]** Presumably referencing racial profiling by the police,

defense counsel noted that "every black man is aware of what is happening." **[*Id.*]** Counsel then argued that there was enough evidence left at the scene of the killing that his disposal of the rifle could not have reasonably amounted to tampering. **[*Id.*]**

Then, as to the murder charge, defense counsel reminded the jury of what she told them in opening statements: that she was asking that they return a guilty verdict for voluntary manslaughter. **[*Id.* 9:43:44-9:45:25]** Counsel then stated that "memory is a strange thing" before recalling a memory she had driving with her mother 60 years prior when the two came across a scene where her father was found dead less than an hour earlier. **[*Id.*]** She used her personal anecdote to claim that "traumatic events like that are seared in your brain" and attack Victim's family for being unable to remember aspects of their conversations with Victim. **[*Id.*]**

Defendant's counsel asked the question, "Had [Defendant] remained there, who knows what would have happened?" **[*Id.* 9:45:43-9:47:10]** She told the jury that sufficient provocation was present based on "the three A's: alcohol, anger, and adrenaline." **[*Id.*]** Defendant's counsel said that Defendant did not want to admit he had been drinking but noted that "alcohol in any quantity lowers people's inhibitions . . . Add anger to that mix, and you have, already, a deadly combination." **[*Id.*]** Defendant's counsel submitted that, with this backdrop, Victim's threats directed "at

all those [racial slur]s," including his infant children[6], created sufficient provocation. **[*Id.*]**

Defendant's counsel argued that many people expect individuals who drink to not subsequently drive, but that they often do regardless "because anybody with alcohol in their system doesn't make good decisions." **[*Id.* 9:47:10-9:47:56]** Defendant's counsel asserted that people who have been drinking do not consciously "weigh things" before doing them. **[*Id.*]** Defendant's counsel then argued that the alleged threats made against his family, added with his lowered inhibitions from alcohol, "is provocation." **[*Id.*]** Defendant's counsel claimed "there was no time to cool off" because the time between Defendant getting into his car in the driveway to the time he shot and killed Victim "was probably a minute." **[*Id.* 9:51:35-9:52:13]** Defendant's counsel concluded by noting "both [were] intoxicated, meaning that [Defendant] was intoxicated, sufficiently that [witnesses] could detect it . . . That being said, that makes it that much harder to control that anger . . . We have alcohol, we have anger, we have an adrenaline rush. We have provocation. We have voluntary manslaughter[.]" **[*Id.* 9:52:46-9:53:48]**

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[6] As noted *supra*, I(B), the evidence before the jury that Defendant's family was threatened was introduced exclusively through Defendant's own testimony, which was contradicted by others. *See also State v. Stills*, 1998-NMSC-009, ¶ 35, 125 N.M. 66 (concluding evidence that the victim "threatened that her father would come from California to kill [the defendant], cursed at [the defendant], and pushed [the defendant]" was insufficient to warrant a voluntary manslaughter instruction).

D. The prosecutor did not promote an incorrect legal standard of deliberate intent or sufficient provocation.

Defendant claims that the State's comments about the evidence that showed he "had time to drive down the road" and "sit in his truck for a few minutes" constituted misconduct. **[BIC 43-44]** Defendant appears to argue that the argument amounted to a misstatement of law because it ignores the surrounding circumstances he asserts supported a finding of provocation and "unduly narrow[ed] the scope of evidence a jury must consider[.]" **[*Id.*]** While Defendant correctly notes that the statements he takes issue with occurred during the State's rebuttal, he omits any reference to the context in which the statements were made.

Because these statements occurred during rebuttal, the State had already completed its initial closing argument. There, the prosecutor noted that testimony of four different witnesses established Debra that Defendant "got into his vehicle, drove out of the driveway, [and] drove down the road where he stopped at or near" the truck stop. **[*Id.* 9:19:23-9:19:57]** The prosecutor observed that witnesses testified that, "once he was there, he turned around—he deliberately turned around to come back and confront [Victim]," taking his rifle with him. **[*Id.* 9:19:57-9:20:12]**

The State explained that Defendant had other options: "he had the ability to keep driving, to turn around, to stay at the house, but . . . he carefully considered what he was doing, and he took his firearm and shot [Victim] not once, not twice, but again, you heard from the defendant's own mouth, he fired his firearm twelve

times." **[*Id.* 9:20:12-9:20:41]** The State reminded the jury of testimony conveyed through a firearms expert that the rifle's firing mechanism required a deliberate pull of the trigger for each of the twelve shots. **[*Id.* 9:20:41-9:20:57]** The State acknowledged that the jury heard differing circumstances of how the killing happened but explained that deliberate intent could be inferred from the evidence, no matter which witness's explanation was correct. **[*Id.* 9:20:57-9:21:47]** The State pointed to Defendant's flight after killing Victim. **[*Id.* 9:21:47-9:22:02]**

The prosecutor read through the instructions, starting by reminding the jury that it was the State's burden to prove Defendant's guilt beyond a reasonable doubt. **[*Id.* 9:24:47-9:25:20]** The State continued with the elements of first-degree murder. **[*Id.* 9:25:20-9:27:00]** The State told the jury that Defendant admitted to knowingly killing Victim in New Mexico on May 28, 2022, and that the jury needed to consider all facts and circumstances surrounding the killing to determine his state of mind in doing so. **[*Id.*; *id.* 9:20:57-9:21:47]**

Given the context omitted by Defendant, it is clear that the State did not "weigh the evidence" for the jury or tell it "to ignore evidence it was required by law to objectively evaluate." **[BIC 44]** The State has the right to discuss the evidence and argue its application to the law. *See* UJI 14-104 NMRA. It is not improper for the State to comment on the evidence of Defendant's actions prior to the killing, nor is it improper to state that the evidence supports a conviction. *State v. Williams*, A-

1-CA-39912, mem. op. ¶ 22 (N.M. Ct. App. Oct. 30, 2023) (nonprecedential) ("[W]hile there are three separate statements that Defendant argues constitute misconduct, these statements are argument. . . . Defendant cannot prevent the jury from hearing the State talk about the evidence that was established at trial during closing simply because the State's doing so hurts Defendant's case.").

Defendant seems to further suggest that it is misconduct to "skip[] all the provocative circumstances" that supported his defense and to "truncate[] the evidence" when the State presents its rebuttal. **[BIC 44]** Defendant offers no supporting authority for that proposition and does not apply any of the *Sosa* factors in his analysis. *See Headley v. Morgan Mgmt Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339 (explaining that appellate courts do not review unclear or undeveloped arguments); *In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764 ("We assume where arguments in briefs are unsupported by cited authority [that] counsel . . . was unable to find any supporting authority."). The State's comments were proper argument based on the testimony presented, and thus, Defendant's claim of prosecutorial misconduct lacks merit.

E. The prosecutor did not invite speculation.

Defendant appears to make a virtually identical argument in his claim that the State encouraged the jury to speculate. He argues that the State's discussion of Defendant's actions prior to the killing, and its "sleight of hand" in presenting just

"a snippet of the record" encouraged the jury to speculate. **[BIC 45]** As established above, it was not error to highlight evidence supporting conviction; it was the prosecutor's obligation to do so. *See* Rule 16-303 NMRA, comm. cmt. 2 ("A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force."). The argument differs in Defendant's additional claim that the State "repeatedly conflated proving the intent element [of first-degree murder] with disproving sufficient provocation." **[*Id.*]**

The argument is somewhat unclear because *State v. Adonis*, 2008-NMSC-059, 145 N.M. 102 did not involve prosecutorial misconduct, and Defendant cites no other authority here. Rather, *Adonis* provided only that evidence that a killer had an opportunity to deliberate is insufficient on its own to find actual deliberation. *Id.* ¶ 22. As such, it would appear as though Defendant is suggesting that it was improper for the State to comment on his opportunity to deliberate.[7] But, as argued above as it related to sufficiency, while the opportunity to deliberate alone cannot prove actual deliberation, it nonetheless is relevant in proving it. *See Kramer*, S-1-SC-37807, dec. ¶ 47. (finding that opportunity to deliberate was relevant in review for actual deliberation).

[7] Defendant provides no record citations and quotes only two words ("could have") from the prosecutor's closing argument. **[*Id.*]** Earlier in the brief-in-chief, in Defendant's summary of proceedings, he provides a timestamp that does not contain the quoted language. **[*Id.* 20 (citing 10/03/2024 CD 9:18:40-9:28:25)]**

Further, ample evidence was introduced to support finding *actual* deliberation, which was argued throughout the State's closing argument. The State accurately informed the jury that they were not required to abandon common sense and should apply the facts to the law as provided by the district court's instructions. **[10/03/2024 9:25:00-9:25:45]** The State accurately informed the jury that deliberate intent may be inferred from all facts and circumstances surrounding the killing. **[*Id.* 9:25:45-9:27:12]** For these reasons, it is apparent that Defendant's claims that the State encouraged speculation is without merit.

F. The State's rebuttal of the intoxication defense was proper.

Defendant asserts that the State "incorrectly claimed [he] argued [he] was 'so intoxicated that he couldn't mean to kill' [Victim]." **[BIC 47]** A full review of the record, as summarized above, reveals otherwise. Defendant argued below that his consumption of alcohol reduced his inhibitions and made it so that he was unable to "weigh and consider the question of killing." UJI 14-201 (defining deliberate intent). **[*See generally id.* 9:45:43-9:53:48]**

The State, in response, asserted that Defendant was attempting "to have his cake and eat it, too." **[*Id.* 9:54:21-9:54:55]** The State noted that if Defendant's intoxication rendered him unable to form an intent to kill Victim, then, logically, that would mean Victim's intoxication likewise rendered him unable to form an intent to kill Defendant. **[*Id.* 9:54:31-9:54:49]** The State quickly moved on to its next point

and asked the jury to consider whether Defendant "was really so intoxicated he didn't know what he was doing[.]" **[*Id.* 9:54:58-9:56:22]** To illustrate that he was not, the State referred to his testimony that, during parts of his altercation with Victim, his infant "jumped up in the air, and [Defendant] was able to catch the baby and put the baby down." **[*Id.*]** The State noted that the evidence showed that Defendant "was able to drive 20 miles down the road" on U.S. Route 54 "without having an accident." **[*Id.*]** The State referred to Logan Police Department Chief Shaun Slate's lapel video, noting that Defendant did not have slurred speech and was able to both comprehend and follow the officer's instructions. **[*Id.*]** The State then noted that, according to Defendant's testimony, he was at a distance from Victim and still "able to aim a firearm . . . and shoot [Victim] twelve times, where *all twelve* rounds hit [Victim]." **[*Id.*]**

Given the context, especially considering that the State's comment about Victim's ability to form an intent to kill was brief and isolated, Defendant has not shown that this comment amounted to prosecutorial misconduct. Indeed, Defendant fails to engage altogether with the prosecutorial misconduct factors analysis this Court established in *Sosa*, 2009-NMSC-056, as it relates to this comment. The prosecutor's statement did not invade a distinct constitutional protection, was isolated and brief, and responded to Defendant's closing argument. *See id.* ¶ 26

(providing that alleged misconduct in closing statements requires analysis of these three factors).

Nor does Defendant offer any supporting authority for the proposition that it is error for the State to "devise[] a legal theory and proof burden to defeat [a defendant's] sufficient provocation defense and persuade the jury his defense was absurd." **[BIC 47-48]** As mentioned above, his sole citation to *Diaz*—which he fails to apply to the facts of this case—does not support a basis to find that the State's closing argument constituted misconduct. **[*Id.*]** There, the Court of Appeals found that the prosecutor told the jury that, even if it found that the defendant was intoxicated and unable to form intent, to disregard the defense and "send a message to the community[.]" *Diaz*, 1983-NMCA-091, ¶ 18; *see State v. Cooper*, 2000-NMCA-041, ¶ 14, 129 N.M. 172 ("Prosecutorial commentary that urges a jury to convict for reasons other than the evidence defies the law and undermines the integrity of a verdict."). Further, while the Court characterized the prosecutor's invitation to "send a message" as a misstatement of the law, it nonetheless found the statement not to constitute reversible error, reserving it for its cumulative error analysis. *Diaz*, 1983-NMCA-091, ¶¶ 18-19. Defendant makes no cumulative error argument in the present case, so the holding in *Diaz* is not instructive.

The alleged prosecutorial misconduct Defendant challenges here were arguments about the evidence, and did not urge the jury to convict for other, improper

reasons. It is neither misconduct nor error for the State to refer to facts in evidence to rebut arguments made in Defendant's closing argument. Rather, the very purpose of closing argument is to provide both parties with "an opportunity . . . to discuss the evidence and the law[.]" UJI 14-104. Because Defendant fails to establish how these statements constituted prosecutorial misconduct warranting reversal, his convictions should be affirmed.

G. The State did not introduce claims unsupported by the evidence.

Finally, Defendant argues that the State's closing argument contained two misstatements of fact, amounting to prosecutorial misconduct. First, Defendant complains of statements by the prosecutor that the injuries on Victim's arm were "defens[iv]e" wounds sustained "trying to protect himself" from Defendant's gunfire. **[BIC 48]** Defendant argues that, because Dr. Kerwin did not use the term herself, the State's comments "promote[d] unsubstantiated claims" that warrants reversal. **[*Id.*]** Second, Defendant argues that the State erred in suggesting that his ability to form a deliberate intent was not impaired by alcohol because he was able to drive 20 miles down U.S. Route 54, which the State described as a "busy highway." **[*Id.*]** Defendant argues that, because "[n]o evidence showed the road was busy," it was "highly prejudicial to the accused and cannot be justified[.]" **[*Id.* (quoting *State v. Cummings*, 1953-NMSC-008, ¶ 8, 57 N.M. 36)]**

As it relates to the State's use of the term "defensive wounds," this was an argument based on the evidence. *See State v. Lamure*, 1992-NMCA-137, ¶ 29, 115 N.M. 61 ("Comments on the evidence are not error or fundamental error."). Although Defendant asserts, without citing to the record as is required, *State v. Weber*, 1966-NMSC-164, ¶ 37, 76 N.M. 636, that "Dr. Kerwin did not identify entrance or exit wounds because she could not remember[,]" **[*Id.*]** the assertion is unsupported by the record.

Dr. Kerwin testified that she observed "a number of [external] injuries on the body consistent with gunshot wounds," including "somewhere in the range of twelve entrances, some of those [with] exits" and many "associated with retained bullet fragments." **[10/02/2024 CD 2:09:36-2:10:11]** The State introduced photographs of Victim's injuries, and Dr. Kerwin testified which wounds were entrance wounds and which were exit wounds. **[*Id.* 2:15:36-2:20:56 (**discussing location of entrance and exit wounds on Victim's forearms, as well as injuries to his chest, and abdomen**); St. Ex. 52 (**right arm**), 53 (**left arm**); 54 (**left flank**), 55 (**chest and abdomen**), 56 (**back of right arm**), 57 (**back of left arm**), 58 (**another angle of left arm**)]**

That Dr. Kerwin did not use the term "defensive" to characterize Victim's injuries does not make the prosecutor's comments based on something other than evidence. *See, e.g., People v. Churchill*, 2021 WL 12343282, op. ¶¶ 7, 21, 27 (Colo. Ct. App. Sept. 9, 2021) (nonprecedential) (where the medical examiner explicitly

declined to use the term "defensive wounds," it was still a reasonable inference that the "injuries were consistent with defensive-type wounds."). A prosecutor is allowed to discuss inferences that can be drawn from the evidence. *State v. Hernandez*, 1986-NMCA-040, ¶ 25, 104 N.M. 268; *State v. Duffy*, 1998-NMSC-014, ¶ 58, 126 N.M. 132, *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, ¶ 38, n.6. The term "defensive wound" is used to describe a "wound indicating an attempt to block an attack." *Defensive Wound*, Reverso English Dictionary, https://dictionary.reverso.net/english-definition/defensive+wound (last visited Aug. 8, 2025).

The State submitted to the jury its view that the evidence supported an inference that the gunshot wounds on Victim's arms were defensive. **[10/03/2024 CD 9:56:30-9:56:43]** It referred to Debra's testimony that Defendant initially fired at Victim twice, causing him to collapse to the floor before Defendant advanced towards Victim until he was standing at Victim's feet before firing the remainder of the shots. **[*Id.*]** The State's argument was that a reasonable inference could be drawn from this sequence of events that, when Defendant resumed firing at Victim, the entrance wounds subsequently inflicted on Victim's arms were incurred while Victim was attempting to block the additional gunfire. **[*Id.*]** It is uncontested that Defendant caused the numerous gunshot wounds on Victim, including those on the front and back of his arms. **[*Id.* 9:26:15-9:26:18]** Thus, this statement was neither

error nor fundamental error, much less "created a reasonable probability that the error was a significant factor in the jury's deliberations." *Sosa*, 2009-NMSC-056, ¶ 35 (internal quotation marks and citation omitted).

Defendant next claims that the State introduced facts not in evidence when it described U.S. Route 54—the road that Defendant drove on immediately after killing Victim—as a "busy" highway. **[10/03/2024 CD 9:55:36-9:55:44 ("He was able to drive 20 miles down the road on a busy highway, we know what 54 is like.")]** Given the State's clarification that "we know what 54 is like," it is not entirely clear whether the prosecutor truly intended to suggest that the highway was busy at the time, or whether the prosecutor intended to give context to the route taken. *See State v. Medema*, ___-NMCA-___, ¶ 28 (A-1-CA-39883, Mar. 3, 2025) (providing that there is no error when a prosecutor refers to facts that are common knowledge).

Still, there were facts in evidence that would give rise to a fair inference that the highway was busy on the date of incident. First, Dena testified that she was on the phone with Victim and heard when he was killed. **[09/30/2024 CD 4:00:28-4:01:24]** According to Detective Kenny Villareal with the New Mexico State Police, he obtained and reviewed Victim's phone logs from T-Mobile, which were admitted in evidence. **[St. Ex. 133; 10/01/2024 CD 2:50:22-2:50:46]** Det. Villareal explained that the logs indicated that Dina's phone call with Victim was at 9:42 p.m., and that

the first 911 call was made at 9:45 p.m. **[*Id.* 2:53:30-2:54:12; St. Ex. 133]** Multiple witnesses called 911 almost immediately after Defendant fled in his truck. **[St. Ex. 4-7]** Chief Slate testified that a drive from the cemetery to Logan, where he eventually located Defendant, takes between 20 and 25 minutes, depending on traffic. **[10/01/2024 CD 11:32:35-11:33:28]** Although Chief Slate stated he did not remember the exact time he encountered Defendant ("it wasn't too long after 10 o'clock"), the timestamp on his lapel video reveals that the encounter in Logan occurred at 10:24 p.m., approximately 40 minutes after Defendant left the cemetery in his truck. **[*Id.* 11:46:43-11:47:05; St. Ex. 8]** Given the time it took, it can be rationally inferred from the evidence presented that there was traffic along the way. Because it is not prosecutorial misconduct to make statements based on the evidence, there was no error in the State's remarks. *See Lamure*, 1992-NMCA-137, ¶ 29; *Hernandez*, 1986-NMCA-040, ¶ 25.

Even if these comments were erroneous, they did not constitute fundamental error. "Fundamental error occurs when prosecutorial misconduct in closing statements compromises a defendant's right to a fair trial[.]" *Sosa*, 2009-NMSC-056, ¶ 35. This Court "must be convinced that the prosecutor's conduct created a reasonable probability that the error was a significant factor in the jury's deliberations in relation to the rest of the evidence before them." *Id.* (internal quotation marks and citation omitted). Importantly, the district court instructed the

jury that "arguments by the lawyers are not evidence in this case . . . they are intended to help you understand the evidence." *See Benally*, 2001-NMSC-033, ¶ 21 ("We presume that the jury followed the instructions given by the trial court, not the arguments presented by counsel."). **[*Id.* 9:17:20-9:17:35]** When determining whether error in closing statements is fundamental, this Court employs a "presumption that the verdict was justified[.]" *Sosa.* 2009-NMSC-056, ¶ 37.

Defendant does not apply the *Sosa* factors to his claim that the alleged misstatements amounted to prosecutorial misconduct. Regardless, the prosecutor's comment did not invade any distinct constitutional protection. *Sosa*, 2009-NMSC-056, ¶ 38. Absent a constitutional violation, this Court looks at the length and repetition of the comment to determine whether it was so pervasive as to clearly distort the body of evidence before the jury. *Id.* Here, while the State explained why it believed the evidence supported an inference that the wounds were "defensive," the term was not repeated in the thirteen seconds it spent doing so nor at any point afterwards. **[10/03/2024 CD 9:56:30-9:56:43]** The State's reference to Route 54 as a "busy highway" was similarly only uttered once. **[*Id.* 9:55:36-9:55:44]**

Finally, while they were not invited by Defendant, the statements had no bearing on any element of the crimes charged. *See Sosa*, 2009-NMSC-056, ¶¶ 26, x (providing fundamental error requires a reasonable probability that the error was a significant factor in the jury's deliberations). While Defendant initially argues these

allegedly unsupported claims were used by the State "to prove elements" of the crime, Defendant does not assert which element or elements these were intended to prove, nor how they possibly could. **[BIC 48]** Nor does he argue these statements "created a reasonable probability that the error was a significant factor in the jury's deliberations in relation to the rest of the evidence before them." *Id.*; *see also Headley,* 2005-NMCA-045, ¶ 15 (undeveloped arguments). Whether Victim's wounds were sustained when he tried to protect his body (and thus, were "defensive" wounds) or otherwise is inconsequential to the elements of murder. The same is true of whether the road Defendant drove on was busy, had light traffic, or was vacant. Defendant does not argue otherwise. Further, if Defendant believed the prosecutor's statements were "so pervasive as to clearly distort the body of evidence," *see id.* ¶ 38, he had the opportunity to rebut them in his own closing argument—but did not. *See Diaz*, 1983-NMCA-091, ¶¶ 17-18 (considering the defendant's opportunity to answer the State's comments in prosecutorial misconduct analysis).

Under these circumstances, the State did not engage in prosecutorial misconduct because comments in closing argument, made without objection at trial, may be based on fair inferences from the evidence. *See Hernandez*, 1986-NMCA-040, ¶ 25. Alternatively, if this Court finds either or both comments were unsupported by the evidence, they, nonetheless, do not constitute fundamental error

because they did not "prejudice [D]efendant enough to deprive him of a fair trial." *State v. Gavin*, 2005-NMCA-107, ¶ 29, 138 N.M. 164.

CONCLUSION

First, substantial evidence presented at trial demonstrated that Defendant acted with deliberate intent to kill Victim. Second, the district court accurately instructed the jury on the elements of deliberate intent, which is not fundamental error. Third, the prosecutor's comments in closing argument, whether error or not, did not constitute fundamental error. Accordingly, this Court should affirm Defendant's convictions for first-degree murder and tampering with evidence.

Respectfully submitted,

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STATEMENT OF COMPLIANCE

The body of this document complies with the limitations of Rule 12-318(F)(3) NMRA because it contains 10,999 words, as calculated by Microsoft Word 365.

CERTIFICATE OF SERVICE

I certify that, on August 22, 2025, I filed a true and correct copy of the foregoing document electronically through the Odyssey E-File & Serve System, which caused opposing counsel to be served by electronic means.

/s/ Tyler Sciara
Tyler Sciara
Assistant Solicitor General