Corrections to this opinion/decision not affecting the outcome, at the Court's discretion, can occur up to the time of publication with NM Compilation Commission. The Court will ensure that the electronic version of this opinion/decision is updated accordingly in Odyssey.

1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

Court of Appeals of New Mexico
Filed 10/22/2024 10:13 AM

Ramon J. Maestas
Chief Clerk

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,

4 v. **No. A-1-CA-40768**

5 **LONNIE GALLEGOS,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY**
8 **Douglas R. Driggers, District Court Judge**

9 Raúl Torrez, Attorney General
10 Santa Fe, NM
11 Emily Miller, Assistant Solicitor General
12 Albuquerque, NM

13 for Appellee

14 Bennett J. Baur, Chief Public Defender
15 Allison H. Jaramillo, Assistant Appellate Defender
16 Santa Fe, NM

17 for Appellant

18 **MEMORANDUM OPINION**

19 **WRAY, Judge.**

20 **{1}** Victim was shot and killed inside his place of business. His car was stolen and
21 later found with the license plate removed. Defendant was charged with murder,
22 contrary to NMSA 1978, Section 30-2-1 (1994), aggravated burglary, contrary to
23 NMSA 1978, Section 30-16-4(B) (1963), the unlawful taking of a motor vehicle,

contrary to NMSA 1978, Section 30-16D-1 (2009), and tampering with evidence, contrary to NMSA 1978, Section 30-22-5 (2003). The jury in Defendant's first trial could not reach a verdict on the murder charge but convicted Defendant of the remaining three charged crimes. A second trial on the murder charge ended in a mistrial due to a member of the jury conducting independent legal research. Defendant was sentenced on the first three convictions after the second trial. A third jury convicted Defendant of second degree murder. Defendant appeals on three grounds: (1) the convictions from the first trial should be reversed based on prosecutorial misconduct; (2) the sentencing on the first three convictions violated the right to allocution; and (3) sufficient evidence did not support three of Defendant's convictions. Because the district court did not inform Defendant of the personal right to speak before sentencing on the first three convictions, we reverse and remand for resentencing. Otherwise, we affirm.

DISCUSSION

{2} Because this is a memorandum opinion and the parties are presumed to know the factual background, we reserve presentation of factual details until they become necessary for our analysis.

I. Prosecutorial Misconduct

{3} Defendant argues that prosecutorial misconduct at the first trial requires a new trial on that jury's three convictions. Defendant identifies two broad categories of

misconduct: statements in closing argument and the admission of and testimony about a pair of gloves. We first consider closing argument.

A. Closing Argument

{4} Defendant contends that prosecutorial misconduct requires reversal because the State's comments in rebuttal closing argument at the first trial invaded a constitutional protection, were nearly the last thing the jury heard and were not disapproved by the district court, and were not invited by the defense. *See State v. Sosa*, 2009-NMSC-056, ¶ 26, 147 N.M. 351, 223 P.3d 348 (identifying the three factors used to review challenges to closing arguments: "(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"). We review preserved questions of prosecutorial misconduct for abuse of discretion and unpreserved questions for fundamental error. *Id.*; *see also State v. Sena*, 2020-NMSC-011, ¶ 34, 470 P.3d 227 ("The doctrine of fundamental error applies only under exceptional circumstances and only to prevent a miscarriage of justice." (internal quotation marks and citation omitted)). Our Supreme Court has explained that the "three factors are useful guides, but in the final analysis context is paramount." *Sosa*, 2009-NMSC-056, ¶ 34. We therefore set out in context the challenged portion of the State's rebuttal argument from the first trial.

{5} Throughout closing arguments, both parties noted the absence of the results of forensic testing. In the initial closing argument, the State, referencing Defendant's interview with police, commented as follows:

> All these tests taken, no fingerprints, though, right? No, no, no fingerprints, though, right? Ok. But, but no DNA either. No, no DNA. It could be that two shooters blasting at the place like one from here like a mafia movie going on something, right? No gunshot residues. Ok? He places himself in that building. He says, "I saw the body," ok? He says, "I was moving those guns." He says, "I'm wearing gloves." Ok? He says, "I took the vehicle." He says, "I took off the license plate." He says, "I dumped that license plate in the river." He says all that.

Very early in Defendant's closing, Defendant's counsel mentioned the State's reference to DNA evidence by stating, "But let's talk a little bit about when they—they theorize, 'oh I see, we're gonna say no DNA, no DNA' and they beat me to the punch. I get up here, of course, I'm gonna mention that. Because everything they've suggested to you in their argument that Mr. Gallegos did that is theoretical, right? It's highly circumstantial." Sometime later, Defendant's counsel stated the following:

> Let's talk a little bit about some of the things the State didn't give you, they didn't prove, which I would argue, and I'll argue, you know, that—toward the end I'll argue obviously, it's—it amounts to reasonable doubt. And reasonable doubt is something that you guys—you take the legal instruction, and you have to wrestle with that. You have to go back and deliberate. We'll go over some of the more important jury instructions in a moment. But the DNA, the prints and the guns—so they wanna say, "see, we don't have that evidence. We didn't put that into evidence, but he put himself there. He says—" Ok, so again, they wanna say what? "But he had gloves on." So rely on that statement. But when he says I did—I took my gloves off, don't rely on that. So what

> do you—off—Detective Cook admitted, "Yes, I did DNA testing. I took his DNA, I took [Victim's] DNA, we took DNA off the guns, and we sent it to the lab for testing it and we have those results." It's the State's burden to prove the case beyond and to the—beyond a reasonable doubt. They have to do that. And why don't you have those results? See, you will never know the test results of the DNA—the DNA that they, they took his DNA, presumably, they, they tested it against other items that they presume that he touched. Why don't you have those results? Why don't you have them? "Well, because you know, he, he, he put himself there." Yeah, but he also said somebody else was there. Now, I think one of you asked a question, what did you do to follow up on this, this other individual, this Luke or Lucas individual? He mentions more than one individual, but he talks about Lucas.

Multiple times during closing, Defendant's counsel warned the jury not to speculate and highlighted the DNA and other forensic evidence that the State had obtained but had not shared with the jury.

{6} In rebuttal, the State told the jury, "And defense counsel has insinuated about the due process rights violation. I—I hope he didn't insinuate the fact that whatever we have collected, what evidence was collected, what lab results was—were done has not been provided to him. If that—I hope that is not what he's insinuating." Defendant objected, and the district court responded, "You may continue." The State continued as follows:

> Thank you, you honor. Then he comes in here and he said—he said that you're not supposed to speculate, right? You're not supposed to speculate. But he's telling you to speculate as to what those lab reports, what is in there, right? That's what he's asking. Keep speculating as to what's in there. Maybe that that's something that's gonna exonerate his client, right? He's asking you to speculate at least to that. But then when

> you look at instruction number 13. "You are the judges—judges of the facts, your sole interest is to ascertain the truth from the evidence that is in this case." Your sole interest is to ascertain the truth from the evidence that is inside—in this case. The evidence that came from this box, the evidence that has been offered in—in evidence. That is where you're supposed to get your truth out of. Ok. You're not supposed to speculate.

The State encouraged the jury members to use their "common sense" to put together the evidence at trial and not use "documents that are not in evidence and speculate as to what's in there." For our discussion, we refer to the first comment, before the objection, as the insinuation comment and the second comments, the statements after the objection, as the speculation comments. On appeal, Defendant contends that (1) the insinuation comment implied that defense counsel lied during summation; and (2) the speculation comments improperly suggested that it would be "impermissible speculation for the jury to assume that [evidentiary] gaps would be exculpatory."

{7} Based on the *Sosa* factors and the context of the insinuation comment, we discern no abuse of discretion arising from the district court's overruling of Defendant's objection to the comment. *See id.* ¶¶ 26, 34. As to the first factor, Defendant identifies no specific constitutional protection that this comment invaded. *See id.* ¶ 26. As to the second factor, the insinuation comment was isolated and brief. *See id.* As to the third factor, the State's comment responded to Defendant's counsel's suggestion that Defendant did not know what the forensic results would have shown and that they might have been exculpatory. *See id.* Defendant's counsel

had stated, "We don't know" or "you don't know" what the results of forensic testing were—and those results might "have corroborated [Defendant's] statement." The insinuation comment clarified (1) any suggestion that the State had not disclosed the results to Defendant and (2) that Defendant knew the results of the testing. Based on all three *Sosa* factors and in the context of the trial and the jury's verdict, we conclude that the State's insinuation comment did not "materially alter[] the trial or likely confuse[] the jury by distorting the evidence, and thereby deprive [Defendant] of a fair trial." *See id.* ¶ 34. We turn then to the speculation comment.

{8} Because Defendant did not object to the State's continued comments related to speculation about the weight of the absent forensic evidence, we review those statements for fundamental error. *See id.* ¶ 26. Defendant argues that the first *Sosa* factor weighs in favor of error because the State's speculation comments invaded constitutional protections—the presumption of innocence and the State's burden of proof. According to Defendant, the State's failure to present forensic test results to the jury required the jury to draw an inference in favor of innocence, and the State's comments improperly (1) encouraged the jury not to factor the absent test results into the weight of the evidence; and (2) shifted the burden of proof to Defendant to provide the test results to the jury. Based on the record, we disagree. The State cautioned the jury against speculating about what the results would have shown had they been offered at trial and encouraged the jury to rely on the evidence the State

did offer. The jury was further instructed on the presumption of Defendant's innocence and the State's burden of proof. *Cf. Coffin v. United States*, 156 U.S. 432, 460-61 (1895) (declining to reach the question of whether the district court improperly limited the jury to considering only "the proofs" because the jury was not separately instructed to include the presumption of innocence among "the proofs"); *Territory v. Lucero*, 1896-NMSC-017, ¶ 10, 8 N.M. 543, 46 P. 18 ("The presumption of innocence is itself to be considered as evidence in favor of the defendants in every criminal case."). To the extent it would have been improper, the speculation comments did not suggest that Defendant should have produced evidence to show that the results were exculpatory. *See State v. Aguayo*, 1992-NMCA-044, ¶ 37, 114 N.M. 124, 835 P.2d 840 ("It is permissible to comment on a defendant's failure to produce witnesses if the comment is not one on the defendant's failure to testify."). The State's speculation comments therefore did not implicate the presumption of innocence or shift the burden of proof. Because the comments invaded no constitutional protection, the first *Sosa* factor does not support Defendant's argument.

{9} The second *Sosa* factor also does not support Defendant's assertion of prosecutorial misconduct. Defendant acknowledges that the speculation comments were isolated and brief, but points to the district court's overruling of the prior objection as a "stamp of judicial approval" on "the improper argument." *See Sena*,

2020-NMSC-011, ¶ 20 (discussing the impact of the district court's opinion of the comments (internal quotation marks and citation omitted)). We disagree. The district court ruled on a different objection to a different comment. Defendant's objection was that in making the insinuation comment, the State was not arguing about the facts. The district court overruled that objection. Defendant did not object to the State's later comments about the propriety of speculating about absent evidence. On this record, the district court put no "stamp of judicial approval" on the State's speculation comments. *See id.* (internal quotation marks and citation omitted).

{10} As to the third *Sosa* factor, the speculation comments directly addressed Defendant's closing argument. Defendant argues that the speculation comments were not invited by the defense because the State noted the absence of the DNA test results first. Viewing the arguments as they developed in context, we disagree. The State initially attempted to explain why the results were not necessary evidence. Defendant then, as we have described, pointed to those absent test results as potentially exculpatory evidence and warned the jury that the State was asking them to speculate about the evidence. In rebuttal, the State's arguments shifted to discuss how the jury should consider the absent evidence and to caution the jury not to speculate about what the test results were. The State contrasted Defendant's reliance on the absence of evidence to what the State asked the jury to do: "I'm not asking you to look into some documents that are not in evidence and speculate as to what

is in there. That that's not what I'm asking you to do. I'm asking you to bring that common sense back from home to here in this courtroom because that is what you're supposed to do and connect all this together." The State's speculation comments in rebuttal were in response to Defendant's argument in closing, and "[h]aving opened the door, Defendant cannot now split semantic hairs over the [State's] choice of words." *See Sosa*, 2009-NMSC-056, ¶ 39.

{11} For these reasons, we conclude that the State's speculation comments "fall[] short of fundamental error." *See id.* ¶ 35 ("As with any fundamental error inquiry, we 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.").

B. The Gloves Exhibit

{12} Defendant also points to the State's handling of evidence to demonstrate prosecutorial misconduct. At the first trial, the State offered a pair of gloves into evidence and State witnesses testified differently about where those gloves were found. In closing, regarding the gloves exhibit, the State commented, "We tried to confuse what gloves that we're talking about but that has been cleared—that was cleared through [Detective] Cook. Two gloves were found in the truck and this is it in the backpack." At the third trial, a State witness admitted that the testimony from the prior proceeding was incorrect. Defendant contends that the testimony from the

third trial, together with the testimony from the first trial and the State's comment in closing at the first trial about confusing the evidence all together "demonstrate[] the State's attempt to either fabricate evidence or demonstrate[] carelessness by the investigators and the prosecutors," which amounts to prosecutorial misconduct that requires a new trial. We disagree.

{13} "[T]he deliberate use of false evidence knowingly by a prosecuting officer in a criminal case constitutes a denial of due process of law if such evidence is material to the guilt or innocence of the accused." *State v. Hogervorst*, 1975-NMCA-028, ¶ 6, 87 N.M. 458, 535 P.2d 1084. We understand the State's argument in closing not to admit that the State tried to confuse the jury but instead as a restatement of Defendant's argument that the State had tried to confuse the jury, which was followed by the State's response to that argument—that the confusion was "cleared." More importantly, we cannot discern from Defendant's brief on appeal or the motion for new trial filed in the district court why the location of the gloves would be "material" to Defendant's guilt or innocence. *See id.* As a result, the evidence and the testimony about the gloves did not deny Defendant due process. *See id.*

II. The Right to Allocution

{14} Defendant next argues that the district court violated the right to allocution at the sentencing for the first three convictions. After the first trial, Defendant argued that sentencing should be postponed until after retrial on the murder charge in order

to preserve both Defendant's right to speak at sentencing and right to remain silent regarding the still-pending murder charge. Based on this argument, the State and the district court agreed to postpone sentencing. Before the second trial, at an August 30, 2022 hearing, the district court indicated that it had received a "mandate" from our Supreme Court regarding Defendant remaining in custody and that sentencing on the three convictions could no longer be delayed. The sentencing hearing took place on September 30, 2022, after the second trial ended in a mistrial. On appeal, Defendant argues that he was denied the right to allocute and "could not freely speak at his sentencing" because the murder charge remained pending. The State responds that the district court "allowed Defendant the opportunity to address the court prior to issuing a sentence," and therefore the right to allocate was not violated. We disagree with the State's view of the record.

{15} In the present case, the district court did not inform Defendant that he had a right to speak and instead invited defense counsel to "allocute on behalf of your client." Allocution has been described as "a peculiar right" because "[i]n a sense, it is the right to be advised of another right." *State v. Setser*, 1997-NMSC-004, ¶ 20, 122 N.M. 794, 932 P.2d 484 (internal quotation marks and citation omitted). Specifically, the district court "must give the defendant an opportunity to speak before pronouncing sentence for non[]capital felony convictions." *State v. Stenz*, 1990-NMCA-005, ¶ 16, 109 N.M. 536, 787 P.2d 455. Our Supreme Court has

explained that "[t]here is no substitute for the impact on sentencing which a defendant's own words might have if he chooses to make a statement." *Tomlinson v. State*, 1982-NMSC-074, ¶ 11, 98 N.M. 213, 647 P.2d 415 (alteration, internal quotation marks, and citation omitted). Because the district court did not tell Defendant that he had the opportunity to speak—which Defendant had the right to decline or assign to counsel—the resulting sentence for the three convictions from the first trial is invalid. *See id.* ¶ 12 (holding that the district court "must give *the defendant* an opportunity to speak *before* . . . pronounc[ing] sentence" and "[f]ailure to do so renders the sentence invalid" (first emphasis added)); *see also State v. Wing*, 2022-NMCA-016, ¶ 22, 505 P.3d 905 ("An allocution violation in New Mexico renders the sentence invalid, resulting in the remedy of reversal and resentencing without inquiry into the harm the violation may have caused."). *Cf. State v. Pothier*, 1986-NMSC-039, ¶ 26, 104 N.M. 363, 721 P.2d 1294 (rejecting an argument that the right to allocution was denied where the district court gave the defendants the opportunity to speak, "which their attorneys used").

III. The Sufficiency of the Evidence

{16} Last, Defendant challenges the evidence supporting three of the convictions: second degree murder, aggravated burglary, and unlawful taking of a motor vehicle. To review the sufficiency of the evidence, an appellate court "must view the evidence in the light most favorable to the guilty verdict, indulging all reasonable

inferences and resolving all conflicts in the evidence in favor of the verdict," in order to "determine[] whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Holt*, 2016-NMSC-011, ¶ 20, 368 P.2d 409 (emphasis, internal quotation marks, and citations omitted). We measure the sufficiency of the evidence against the law set forth in each of the relevant the jury instructions. *Id.*

{17} Defendant maintains that the State failed to prove at the third trial that Defendant was the person to commit the acts outlined in the jury instruction for second degree murder. *See* UJI 14-210 NMRA (requiring the state to prove that the defendant committed the acts that constitute second degree murder). We conclude, however, that sufficient evidence supported the jury's second degree murder guilty verdict. Defendant admitted that he entered Victim's place of business. Victim's wife testified that Victim went to the business around five forty-five in the afternoon. A neighbor heard multiple shots come from the place of business, he estimated, around five or five-thirty in the afternoon. Shortly after hearing the shots, the neighbor went outside to a patio area, exited the fence, and saw a man with a dog. The neighbor identified the man as Defendant. Trying to see more, the neighbor went back inside and upstairs, looked out of a window, and saw Defendant trying unsuccessfully to get inside a vehicle. Defendant and the dog again walked away and when the neighbor lost sight of them, he went back downstairs to the patio. The

neighbor heard noises "like somebody was throwing things" coming from next door. After listening and waiting for a minute or two, the sounds stopped, and the neighbor heard a car start. Looking over the fence, the neighbor saw the car pass and saw Defendant driving. The neighbor heard only one voice calling to a dog and from the time the shots were fired until the police arrived, at approximately 6:26 p.m., the neighbor saw no one else. Defendant admitted that he was in the business and in order to leave, he stepped over a body. Defendant describes this evidence as "weak" and points to the lack of DNA evidence or an eyewitness to the murder as well as Defendant's denial in the police interview that he murdered Victim. But we do not reweigh the evidence or substitute our view of the evidence for the jury's. *See State v. Clifford*, 1994-NMSC-048, ¶ 14, 117 N.M. 508, 873 P.2d 254 ("We review all of the evidence presented in the case and neither reweigh the evidence nor substitute our judgment for that of the jury." (citation omitted)). Instead, we conclude that the jury could reasonably infer from this evidence Defendant's guilt for second degree murder.

{18} Defendant also argues that the evidence at the first trial showed only that he "told police someone let him in the building," and therefore the State did not establish that Defendant entered the building "without authorization," as is required to prove aggravated burglary. *See* UJI 14-1632 NMRA (identifying the elements of aggravated burglary). The jury, however, was permitted to discount Defendant's

explanation. *See State v. Trujillo*, 2002-NMSC-005, ¶ 31, 131 N.M. 709, 42 P.3d 814 ("The fact[-]finder can reject the defendant's version of an incident." (internal quotation marks and citation omitted)). From other evidence at trial, the jury could reasonably infer that Defendant accessed the interior of the business by hopping a chain linked fence and causing the barbed wire to bend, moving a ladder, climbing to the roof, dropping into a courtyard area, and removing a piece of sheetrock from a wall. As a result, the evidence supported a further reasonable inference that Defendant was not authorized to be inside the building.

{19} Defendant also argues that at the first trial, the State failed to prove an element of unlawful taking of a motor vehicle, because in the police interview Defendant told law enforcement that he was given the keys to the car, suggesting that he had the owner's consent to take the vehicle. *See* UJI 14-1660 NMRA (identifying as an element of unlawful taking of a motor vehicle that the defendant took the vehicle "without the owner's consent"). Again, the jury was free to reject Defendant's evidence, *see Trujillo*, 2002-NMSC-005, ¶ 31, and the evidence admitted at the first trial supported a reasonable inference that Defendant took the keys from Victim. The neighbor's testimony about Defendant's movements was substantially the same at the first trial as at the third trial that resulted in the murder conviction, which we have already discussed. Notably, the neighbor additionally testified at the first trial that Defendant initially tried get into a red car but could not and went back inside

the building next door, and after the neighbor heard the sound of things being thrown around, Defendant drove away in a gray vehicle that belonged to Victim. Victim's wife testified that Victim kept the car keys on a key chain attached to his belt loop. From this evidence, the jury could infer that after Victim was killed, Defendant tried to leave in the red car but could not get in, returned to the building, rummaged around, located the keys on Victim, left the building again, and took the Victim's gray car. As a result, the conviction for unlawful taking of a motor vehicle was supported by the evidence at the first trial.

{20} Broadly, Defendant also offers two other reasons that the evidence was insufficient: (1) the State was not able to link the gloves to him; and (2) the date May 10, 2020, was on one of the investigating officer's lapel recordings but the neighbor testified that he saw Defendant on May 9, 2020. Defendant's counsel argued to the jury extensively during the first trial that the discrepancy about the gloves showed that law enforcement failed to investigate and that the State failed to prove Defendant's involvement beyond a reasonable doubt. Similarly in the third trial, Defendant's counsel noted the State's failure to explain the gloves. Also at the third trial, the officer testified that the date stamp on the lapel recording was May 10, 2020, but the officer also confirmed that he was dispatched on May 9, 2020. Each of these discrepancies were brought to the jury's attention, and it was for the jury to resolve conflicts in the evidence. *See State v. Lente*, 2019-NMSC-020, ¶ 54, 453

P.3d 416 (“Our review is limited to ensure that we do not intrude on the jury’s role to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.” (internal quotation marks and citation omitted)). We do not reweigh the evidence on appeal and instead, inquire only whether sufficient evidence was presented at trial to support the jury’s verdict. *See State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829 (noting a reviewing court’s obligation to scrutinize the evidence and supervise “the jury’s fact-finding function to ensure that, indeed, a rational jury could have found beyond a reasonable doubt the essential facts required for a conviction” (emphasis, internal quotation marks, and citation omitted)). As we have explained, in the present case, we conclude the evidence was sufficient based on the circumstantial evidence, Defendant’s admissions, and reasonable inferences from that evidence that the jury could have drawn. *See id.*

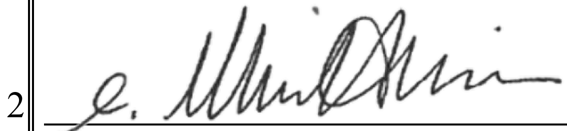
CONCLUSION

{21} We remand for resentencing on the first three convictions and otherwise affirm.

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

KATHERINE A. WRAY, Judge

WE CONCUR:



J. MILES HANISEE, Judge

SHAMMARA H. HENDERSON, Judge