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

2 Opinion Number: _____

Court of Appeals of New Mexico
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Mark Reynolds

4 **No. A-1-CA-41845**

5 **STATE OF NEW MEXICO,**

6 Plaintiff-Appellee,

7 v.

8 **ALFORD T. JOHNSON III,**

9 Defendant-Appellant.

10 **APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY**

11 **Daylene A. Marsh, District Court Judge**

12 Raúl Torrez, Attorney General

13 Santa Fe, NM

14 Meryl E. Swanson, Assistant Solicitor General

15 Albuquerque, NM

16 for Appellee

17 Bennett J. Baur, Chief Public Defender

18 Kimberly Chavez Cook, Appellate Defender

19 Santa Fe, NM

20 for Appellant

1 **OPINION**

2 **HANISEE, Judge.**

3 {1} Following a jury trial, Defendant Alford T. Johnson III was convicted of
4 shooting at a dwelling, contrary to NMSA 1978, Section 30-3-8(A) (1993);
5 aggravated assault with a deadly weapon, contrary to NMSA 1978, Section 30-3-
6 2(A) (1963); abandonment of a child, contrary to NMSA 1978, Section 30-6-1(B)
7 (2009); and criminal trespass, contrary to NMSA 1978, Section 30-14-1(B) (1995).

8 On appeal, Defendant argues that (1) the evidence of child abandonment presented
9 by the State was insufficient as a matter of law; (2) the State failed to prove that
10 Defendant shot at a dwelling; (3) Defendant’s convictions for shooting at a dwelling
11 and aggravated assault violate principles of double jeopardy; and (4) evidentiary
12 error and prosecutorial misconduct cumulatively deprived Defendant of a fair trial.
13 For the reasons discussed below, we affirm.

14 **BACKGROUND**

15 {2} On the evening of January 13, 2023, Defendant left his home to take a walk
16 around his neighborhood. A bit thereafter, James Moore (Victim), observed a
17 trespasser in his backyard initially on his home security cameras. Victim went
18 outside, approached and tried engaging with the trespasser, who said nothing and
19 continued toward the front of Victim’s property, hopping over a gate and departing
20 from the front of Victim’s property. When Victim began walking back toward his

1 home, he heard gunshots coming from the side of his property, prompting him to run
2 inside and ask his wife to call the police.

3 {3} Shortly thereafter, Defendant was stopped nearby on foot at the intersection
4 of Largo Street and Kayenta Drive by police responding to Victim's call. Defendant
5 was wearing a dark hoodie, khaki pants, and a beanie hat, all of which matched the
6 description of the person described to police by Victim's wife. Police detained
7 Defendant, and a search of his person revealed a firearm, one empty fifteen-bullet
8 magazine, and a second such magazine holding thirteen bullets. Defendant told
9 police the firearm was for his protection while he was on a walk and admitted that
10 he was intoxicated. Defendant also informed police that his five-year-old son, M.J.,
11 was alone and asleep at his house.

12 {4} Victim was brought to the location where Defendant was being held and
13 Victim identified Defendant as the person he had encountered on his property. From
14 there, police took Victim back to his home, asked for his home security footage, and
15 began searching the property for evidence of bullet casings. Police eventually found
16 seventeen bullet casings on the road in front of Victim's home, an impact location
17 on Victim's pool house, and were later made aware by Victim of an impact location
18 on Victim's "shop." Video security footage revealed sparks where bullets struck the
19 pavement in front of Victim's home and outside the exterior gate.

1 {5} Defendant was charged with shooting at a dwelling, aggravated assault with a
2 deadly weapon, abandonment of a child, two counts of criminal trespass and
3 negligent use of a deadly weapon. The jury found Defendant guilty of all charges
4 but for a single count of criminal trespass that the State dropped the morning of trial.
5 This appeal followed.

6 **DISCUSSION**

7 {6} Defendant makes several assertions of error on appeal that we address in the
8 order raised.

9 **I. There Was Sufficient Evidence of Child Abandonment**

10 {7} Defendant asserts that there was insufficient evidence to support his
11 conviction for child abandonment under Section 30-6-1. In his argument, Defendant
12 maintains that the State failed to show that he put his child at risk and urges this
13 Court to define “risk of harm” as it appears in the annotations of Section 30-6-1(B),
14 which as the jury was instructed required it to find in pertinent part that “[a]s a result
15 of [D]efendant leaving or abandoning [M.J.], [M.J.] was without proper parental care
16 and control necessary to prevent harm to [him]” and that “the circumstances exposed
17 [M.J.] to a risk of harm.” More specifically, Defendant suggests that in doing so, this
18 Court be guided by the standard for civil negligence in the context of child neglect,
19 and not that with which the jury was instructed to establish Defendant’s potential
20 criminal culpability, as the statutes are otherwise identical. Defendant raises this

1 issue for the first time on appeal, as the record reflects that he did not request a jury
2 instruction defining “risk of harm.” Our standard of review as applied to jury
3 instructions depends on whether an issue has been preserved, and if it has not been
4 preserved, we review for fundamental error. *State v. Benally*, 2001-NMSC-033,
5 ¶ 12, 131 N.M. 258, 34 P.3d 1134.

6 {8} Defendant points to *State ex rel. Children, Youth and Families Department v.*
7 *Heather S.*, 2025-NMSC-002, 563 P.3d 821, which addresses the civil abuse and
8 neglect “risk of harm” element under NMSA 1978, Section 32A-4-2(G)(2) (2018,
9 amended 2025) with a two-part test. *See Heather S.*, 2025-NMSC-002, ¶ 29.
10 Defendant claims that under the standard for civil neglect, there is insufficient
11 evidence to support his conviction of child abandonment.¹ Unable to agree that such
12 analysis is legally sound in the criminal context, which is geared toward the punitive
13 consequences of child abandonment rather than the immediate safety of a child that
14 has been abandoned, we analyze Defendant’s claim under Section 30-6-1(B). *See*
15 *State v. Vigil-Giron*, 2014-NMCA-069, ¶ 60, 327 P.3d 1129 (“[A]ppellate courts

¹In *Heather S.*, our state Supreme Court defined “risk of harm,” stating, “[T]he child must be subjected to circumstances that create a serious risk to the child’s mental or physical health and safety. A serious risk is one that is likely to result in important or dangerous consequences for the child.” 2025-NMSC-002, ¶¶ 35, 36. It is not clear to us that even were this the standard applicable to this case the result would be different given evidence that Defendant left M.J. alone and engaged in the acts committed against Victim, evidence suggesting that in so doing Defendant created a serious risk to the physical health and safety of M.J. that likely could have resulted in dangerous consequences to M.J.

1 will not consider an issue if no authority is cited in support of the issue and . . . given
2 no cited authority, we assume no such authority exists.”).

3 {9} Accordingly, the applicable test to determine sufficiency remains “whether
4 substantial evidence of either a direct or circumstantial nature exists to support a
5 verdict of guilt beyond a reasonable doubt with respect to every element essential to
6 a conviction.” *State v. Sutphin*, 1988-NMSC-031, ¶ 21, 107 N.M. 126, 753 P.2d
7 1314. “A reviewing court must view the evidence in the light most favorable to the
8 state, resolving all conflicts therein and indulging all permissible inferences
9 therefrom in favor of the verdict.” *Id.* This Court “does not weigh the evidence and
10 may not substitute its judgment for that of the fact[-]finder so long as there is
11 sufficient evidence to support the verdict.” *Id.* Where “a jury verdict in a criminal
12 case is supported by substantial evidence, the verdict will not be disturbed on
13 appeal.” *Id.*

14 {10} The jury was instructed that in order to find Defendant guilty of child
15 abandonment, the State was required to prove beyond a reasonable doubt, in
16 pertinent part, that “[D]efendant left or abandoned [M.J.]” and that “[a]t the time that
17 [D]efendant left or abandoned [M.J.], the circumstances exposed [M.J.] to a risk of
18 harm.” Defendant argues that the State failed to show that he left M.J. under
19 circumstances that placed him at risk, likening the instant facts to those of *State v.*
20 *Stephenson*. See 2017-NMSC-002, ¶¶ 1-2, 389 P.3d 272 (holding there to have been

1 insufficient evidence to conclude that a mother who left her child in his locked
2 bedroom for the night did so under circumstances where that child might have or did
3 suffer neglect). We disagree.

4 {11} Here, just as in *Stephenson*, the State is not required to show that Defendant
5 left M.J. without the intent to return, but rather whether there was sufficient evidence
6 for a reasonable juror to conclude that Defendant intentionally left M.J. at a time
7 when and under circumstances where M.J.’s well-being was at risk of harm. *See id.*

8 ¶ 17. Defendant contends that he intended to take a “[five-] to [ten]-minute walk”
9 after putting M.J. to sleep and had he not been arrested, he would have returned
10 home before M.J. awoke. Defendant also argues that the State presented no evidence
11 that M.J. had a history of waking up in the middle of the night or that dangerous
12 circumstances in Defendant’s home presented a “particular risk of harm over a short
13 period of time.” Defendant’s argument is unsound.

14 {12} While the State points out that Defendant was a mile away from his home
15 where M.J. was sleeping at the time of his arrest, the State also points out that
16 Defendant put himself in a position by which he could have been unable to let anyone
17 know that M.J. was home alone without care. This Court acknowledges that “the
18 Legislature did not intend to criminalize conduct creating a mere possibility,
19 however remote, that harm may result to a child.” *Id.* ¶ 28 (internal quotation marks
20 and citation omitted). However, the facts of this case do not present mere possibility,

1 as was the case when the child in *Stephenson* was put to bed for the night in a room
2 near where his parents slept, but rather what actually happened—Defendant left his
3 five-year-old alone while he traipsed through the neighborhood intoxicated, armed,
4 and intending to cause criminal mischief, and therefore put M.J. at a risk of harm, as
5 M.J. was alone in Defendant’s home with no adult present or able to return to resume
6 caretaking responsibilities.

7 {13} Our state’s Supreme Court recognized in *Stephenson* that “to uphold [the
8 d]efendant’s conviction could potentially criminalize parents’ actions every single
9 time they tuck[ed] their children into bed and harm befalls their children at night
10 through some unfortunate accident, which we refuse to do.” *Id.* Such a circumstance
11 stands in stark contrast to Defendant’s choice to criminally trespass while armed and
12 intoxicated and fire multiple bullets in the direction of Victim and his house, which
13 foreseeably placed M.J.’s well-being at risk should Defendant himself have been
14 shot by Victim—or arrested, as he was. We conclude, then, that there was sufficient
15 evidence that supports Defendant’s conviction for child abandonment.

16 **II. There Was Sufficient Evidence that Defendant Shot at a Dwelling**

17 {14} Defendant’s next contention is that the State failed to prove that he shot “at”
18 a dwelling, asserting that under the State’s theory, Defendant was shooting only at
19 Victim and not at his home. In arguing that there is insufficient evidence to support
20 his conviction for shooting at a dwelling, Defendant claims that the State did not

1 present sufficient evidence that he intentionally shot at Victim’s home and
2 analogizes the facts here to those in *State v. Comitz*. See 2019-NMSC-011, ¶ 18, 443
3 P.3d 1130 (determining that the defendant intentionally targeted individuals and not
4 the house behind them, and therefore trial evidence was insufficient to support
5 conviction of felony murder predicated on the felony of shooting at a dwelling). The
6 State asserts that the facts here are distinguishable from those of *Comitz*, while also
7 stating that the evidence presented at trial was sufficient to convict Defendant of
8 shooting at a dwelling, and we agree. *See id.*

9 {15} We apply the same standard of review stated previously regarding sufficiency
10 of the evidence. We address Defendant’s argument here in two parts: first, as the
11 facts of this case relate to *Comitz*; and second, the element instruction given to the
12 jury.

13 {16} Defendant’s assertion that the facts of the case before us are similar to that of
14 *Comitz* and consequently warrant the same outcome is flawed. See 2019-NMSC-
15 011. In *Comitz*, days after a physical altercation regarding a narcotic debt between
16 the defendant and his friend’s stepson, the defendant—along with armed friends—
17 returned to his friend’s home armed with a handgun, shooting to death one victim
18 and injuring two others. *Id.* ¶¶ 2-8. Despite evidence a dwelling was behind the
19 direction to which many bullets were fired, our Supreme Court concluded that the
20 State failed to prove that the defendant committed the predicate felony of shooting

1 at a dwelling, and that evidence showed that “the goal of [the d]efendant and his
2 companions was to shoot *at* the [victims], not *at* the house.” *Id.* ¶ 18. Our Supreme
3 Court noted the absence of “bullet trajectory evidence” to demonstrate aim at the
4 dwelling, rather than the victims. *Id.* ¶ 22. There is a very stark contrast between
5 those facts and the facts of this case.

6 {17} Our view of the instant facts is that they are more akin to those of *State v.*
7 *Arrendondo*. See 2012-NMSC-013, 278 P.3d 517 (holding that when a jury
8 considered evidence of bullets entering a home and the trajectory of those bullets,
9 they could reasonably infer that the defendant intentionally shot at a dwelling). Here
10 the State, as in *Arrendondo*, presented evidence supporting the conclusion that
11 Defendant intentionally shot at Victim’s home. See *id.* ¶¶ 36-37. For example, the
12 hail of gunfire Defendant fired hit a pool house on one side of the house and a shop
13 on the opposite end of the property. Victim testified that the damage to the shop was
14 found “roughly fifteen [feet] up from the outside level” and that he heard bullets
15 “whizzing through the trees” that stood between Defendant on one side and Victim
16 and his house on the other. Unlike in *Comitz* but similar to *Arrendondo*, these facts
17 indicate that Defendant fired from the street indiscriminately toward Victim’s home.

18 {18} Here, the jury was instructed that in order to find Defendant guilty of shooting
19 at a dwelling, the State was required to prove beyond a reasonable doubt that, in
20 pertinent part, “[D]efendant willfully shot a firearm at a dwelling” and “knew that

1 the building was a dwelling.” *See* UJI 14-340 NMRA. The crime of shooting at a
2 dwelling or occupied building is substantively defined as “willfully discharging a
3 firearm at a dwelling or occupied building.” Section 30-3-8(A). The evidence
4 supports a finding that Defendant willfully shot his firearm at a dwelling and had
5 knowledge that it was a dwelling because of his interaction with Victim, as required
6 by Section 30-3-8(A), and by the elements instruction. Viewing the evidence “in the
7 light most favorable to the guilty verdict and indulging all reasonable inferences and
8 resolving all conflicts in the evidence in favor of the verdict,” we conclude that the
9 State presented sufficient evidence to prove that Defendant shot at a dwelling. *See*
10 *Comitz*, 2019-NMSC-011, ¶ 16.

11 **III. Defendant’s Convictions Do Not Result in a Double Jeopardy Violation**

12 {19} Defendant’s third contention is that his convictions for shooting at a dwelling
13 and aggravated assault resulted in double jeopardy. Defendant argues that although
14 he fired multiple shots, the conduct of shooting at a dwelling and the aggravated
15 assault cannot be separated, making the conduct unitary. The State contends that
16 Defendant’s conduct was not unitary, evidenced not only by the gunshots hitting
17 opposite sides of Victim’s property but also by the number of shell casings recovered
18 near Victim’s home and their relation to the missing bullets from two clips found on
19 Defendant’s person.

1 {20} “Appellate review of a claim that multiple punishments have been imposed
2 for the same offense in violation of the Fifth Amendment prohibition against double
3 jeopardy presents a question of law which we review de novo.” *State v. Sena*, 2020-
4 NMSC-011, ¶ 43, 470 P.3d 227. Defendant contends that he was unconstitutionally
5 subjected to multiple punishments for the same conduct under two different statutes.
6 *See Swafford v. State*, 1991-NMSC-043, ¶ 9, 112 N.M. 3, 810 P.2d 1223 (describing
7 double description cases). The *Swafford* Court provided a two-part analysis for
8 evaluating such “double description” challenges. *Id.* ¶ 25. The first part of the
9 analysis asks “whether the conduct underlying the offenses is unitary, i.e., whether
10 the same conduct violates both statutes.” *Id.* If it is established that the conduct is
11 unitary, we then move to the second part of the analysis, which focuses on the
12 statutes in question “to determine whether the legislature intended to create
13 separately punishable offenses.” *Id.*

14 {21} “When determining whether [the d]efendant’s conduct was unitary, we
15 consider whether [the d]efendant’s acts are separated by sufficient indicia of
16 distinctness.” *State v. DeGraff*, 2006-NMSC-011, ¶ 27, 139 N.M. 211, 131 P.3d 61
17 (internal quotation marks and citation omitted). “Conduct is unitary when not
18 sufficiently separated by time or place, and the object and result or quality and nature
19 of the acts cannot be distinguished.” *State v. Silvas*, 2015-NMSC-006, ¶ 10, 343 P.3d
20 616. “Distinctness may also be established by the existence of an intervening event,

1 the defendant’s intent as evinced by his or her conduct and utterances, the number
2 of victims, and the behavior of the defendant between acts.” *State v. Barrera*, 2001-
3 NMSC-014, ¶ 36, 130 N.M. 227, 22 P.3d 1177 (internal quotation marks and citation
4 omitted). “The proper analysis is not what a reasonable jury could have concluded
5 but whether there are ‘sufficient facts in the record’ to support distinct conduct which
6 would defeat a double jeopardy claim.” *State v. Phillips*, 2024-NMSC-009, ¶ 41, 548
7 P.3d 51 (quoting *State v. Sanchez*, 1996-NMCA-089, ¶ 11, 122 N.M. 280, 923 P.2d
8 1165).

9 {22} As the State argues, “Defendant’s intent was not limited to assaulting
10 [Victim]—Defendant also intended specifically to shoot the dwelling,” and we
11 agree. There are sufficient facts in the record to support distinct conduct. The jury
12 was presented with Victim’s testimony and video evidence from Victim’s security
13 camera system showing Defendant walking then running from Victim toward
14 Victim’s front gate. Defendant is shown scaling the gate and is depicted running in
15 a northeasterly direction on Railroad Street toward Largo Street. Victim testified that
16 he did not follow Defendant off the property, and the video shows him instead
17 turning and walking back toward his house. Seconds later, three flashes of light can
18 be seen coming from the area where Defendant ran down Railroad Street. Defendant
19 testified that he believed those flashes were gunfire ricocheting off of Railroad Street
20 toward the front gate, which was the last place Defendant interacted with Victim.

1 The trajectory of those shots was not in the direction of the home, but in the location
2 near where Defendant interacted with Victim last.

3 {23} Separately, Victim testified that he heard bullets “whistling through the trees”
4 and that “he was concerned that he might get shot” as he was sprinting into his house.
5 And evidence was presented that two of Defendant’s shots impacted structures on
6 extreme opposite sides of Victim’s property. For example, the impact on the pool
7 house supports a bullet traveling in a northwesterly direction, while the gunfire down
8 Railroad Street toward the gate supports bullets traveling in a southwesterly
9 direction. This indicates that Defendant intended to shoot not only at Victim but also
10 separately at his home and other structures.² See *Herron v. State*, 1991-NMSC-012,
11 ¶ 15, 111 N.M. 357, 805 P.2d 624 (providing that a change in the defendant’s intent
12 supports distinct conduct); cf. *State v. Demongey*, 2008-NMCA-066, ¶ 16, 144 N.M.
13 333, 187 P.3d 679 (stating that there was no evidence indicating that the defendant
14 rethought his actions or ceased his actions and then reformulated his intent).

15 {24} The jury was free to reject the State’s theories as to Defendant’s conduct, but
16 we will not substitute our judgment for that of the finder of fact. See *State v.*

²This case is similar to a memorandum opinion filed by this court last year, in which the defendant shot bullets through both the front and rear windows of his own truck. See *State v. Andazola*, A-1-CA-39763, mem. op. (N.M. Ct. App. Apr. 20, 2023) (nonprecedential). In *Andazola*, we wrote that the “fact that the second shot was fired in the opposite direction indicates that [the d]efendant had a different objective and intent in discharging his firearm the second time.” *Id.* ¶ 16.

1 *Rodriguez*, 2006-NMSC-018, ¶ 3, 139 N.M. 450, 134 P.3d 737. As this conduct is
2 not unitary, we need not evaluate whether the Legislature intended to create
3 separately punishable offenses. *See State v. Torres*, 2018-NMSC-013, ¶ 21, 413 P.3d
4 467 (“When unitary conduct is the basis for multiple convictions, we must attempt
5 to determine whether the Legislature intended to punish the crimes separately.”
6 (alterations, internal quotation marks, and citation omitted)). Therefore, we hold that
7 Defendant’s convictions for both shooting at a dwelling and aggravated assault do
8 not violate double jeopardy.

9 **IV. Defendant’s Unpreserved Claims of Error Did Not Result in Plain Error**

10 {25} Defendant’s final contention is that several unpreserved evidentiary errors and
11 prosecutorial misconduct cumulatively deprived him of a fair trial. Specifically,
12 Defendant contends that (1) his attorney did not object to improper testimony
13 regarding uncharged acts at the Smith house and addressing the ultimate issue by
14 asserting he committed abandonment and substantiating the case agent’s charging
15 decisions; (2) prosecutorial misconduct in closing argument requires reversal; and
16 (3) cumulatively, evidentiary error and misconduct require reversal for a new trial.
17 We review unpreserved evidentiary matters for plain error, *see State v. Montoya*,
18 2015-NMSC-010, ¶ 46, 345 P.3d 1056, and unpreserved claims of prosecutorial
19 misconduct for fundamental error. *See State v. Trujillo*, 2002-NMSC-005, ¶ 52, 131
20 N.M. 709, 42 P.3d 814.

1 {26} The doctrine of plain error, arising from our Rules of Evidence, applies
2 specifically to evidentiary matters and permits a court to “take notice of a plain error
3 affecting a substantial right, even if the claim of error was not properly preserved.”
4 Rule 11-103(E) NMRA. “To find plain error, the Court must be convinced that
5 admission of the testimony constituted an injustice that created grave doubts
6 concerning the validity of the verdict.” *Montoya*, 2015-NMSC-010, ¶ 46 (internal
7 quotation marks and citation omitted). “[I]n determining whether there has been
8 plain error, we must examine the alleged errors in the context of the testimony as a
9 whole.” *Id.* (omission, internal quotation marks, and citation omitted).

10 **A. Uncharged Acts at the Smith House and the Police Officers’ Testimony**

11 {27} At trial, Paula and Ken Smith (Mr. Smith and Mrs. Smith) testified regarding
12 events that happened to them the same night that Defendant was arrested. Mrs. Smith
13 testified that she was woken up by someone trying to enter her bedroom by rattling
14 the bedroom doors from the exterior of the home in her backyard. Mrs. Smith stated
15 that “[i]t was terrifying” and that she immediately went to find her husband across
16 the hall to alert him that someone was trying to enter their home, and then called the
17 police. Mr. Smith testified that he went out the front door of the home and noticed
18 someone walking on his driveway. Mr. Smith stated that the trespasser was wearing
19 a black hoodie and was about five feet, ten inches tall. Mr. Smith tried engaging with

1 the trespasser, who told Mr. Smith that he was “lost” and eventually left the Smiths’
2 property.

3 {28} Defendant argues that all testimony brought by the Smiths was evidence of
4 uncharged conduct that could serve no other purpose than propensity under Rule 11-
5 404(B) NMRA, and that because the State dismissed the original Count 4 (trespass
6 at the Smiths’ home), defense counsel had not reviewed an amended information or
7 jury instructions before the State’s case-in-chief. Defendant also argues that
8 testimony by Officers Lin and Standley constitutes plain error because it bore on the
9 “ultimate issue” of child abandonment.

10 {29} We note that “Rule 11-404(B) is a rule of inclusion, not exclusion, providing
11 for the admission of all evidence of other acts that is relevant to an issue in trial,
12 other than the general propensity to commit the crime charged.” *State v. Phillips*,
13 2000-NMCA-028, ¶ 21, 128 N.M. 777, 999 P.2d 421 (internal quotation marks and
14 citation omitted). Evidence of a prior bad act is admissible “if it bears on a matter in
15 issue, such as intent, in a way that does not merely show propensity.” *State v.*
16 *Sarracino*, 1998-NMSC-022, ¶ 22, 125 N.M. 511, 964 P.2d 72 (internal quotation
17 marks and citation omitted). “If evidence of prior acts is relevant and admissible for
18 a purpose other than proving a defendant’s propensity to commit a crime, the
19 probative value of evidence must outweigh its prejudicial effect.” *State v. Hnulik*,
20 2018-NMCA-026, ¶ 28, 458 P.3d 475.

1 {30} The State offered the Smiths' testimony as "circumstantial evidence that was
2 relevant to the non[]propensity issues" and not to confirm evidence of Defendant's
3 alleged other acts. Although the incident at the Smiths' home did not lead to trial,
4 the State argues that their testimony was relevant to the identity of the Defendant
5 and for rebutting Defendant's "claim that he was simply out for an innocent walk
6 when he encountered police." The State also contends that admission of the Smiths'
7 testimony was not unduly prejudicial as the Smiths did not affirmatively state that
8 the trespasser who entered their property was Defendant, nor that the trespasser was
9 armed with a weapon or committed any acts of violence on their property. We agree
10 with the State.

11 {31} Moving to the testimony of both Officers Lin and Standley, we are not
12 persuaded that either officer gave their opinion as to the ultimate issue in the case. It
13 is undisputed by the parties that "it is improper for a law enforcement officer to give
14 his opinion as to the ultimate issue in [a] case." *See State v. Ashley*, 1997-NMSC-
15 049, ¶ 19, 124 N.M. 1, 946 P.2d 205. Neither officer was asked to reach a legal
16 conclusion or offered a legal conclusion as to whether Defendant committed the
17 crime of child abandonment, but rather each testified to the information gathered
18 from the investigation such as what they were told by Defendant about where M.J.
19 was at the time he was arrested. The jury was free to reject both the testimony of
20 Officers Lin and Standley as the jury had other evidence to make its determination

1 of Defendant’s guilt as to the child abandonment charge, such as the lapel footage
2 and testimony from M.J.’s mother. *Cf. Lopez v. Heesen*, 1961-NMSC-122, ¶ 28, 69
3 N.M. 206, 365 P.2d 448 (“Opinion evidence on an ultimate issue of fact does not
4 attempt or have the power to usurp the functions of the jury, and this evidence could
5 not usurp the jury’s function because the jury may still reject these opinions and
6 accept some other view.”). To the extent the officers’ testimony could be viewed as
7 answering any of the ultimate questions, we are not “convinced that admission of
8 [such] testimony constituted an injustice that created grave doubts concerning the
9 validity of the verdict[s]” after considering “the testimony as a whole.” *Montoya*,
10 2015-NMSC-010, ¶ 46 (internal quotation marks and citations omitted).

11 {32} We hold that it was not plain error to admit the testimony of the Smiths and
12 Officers Lin and Standley without objection from the defense at trial.

13 **B. Prosecutorial Misconduct**

14 {33} Defendant next argues that statements made by the State during closing
15 argument constitute prosecutorial misconduct warranting reversal, specifically when
16 the State asked the jury “not to hold it against” the State when it failed to present
17 forensic evidence, and rather only rely on what was presented to the jury throughout
18 the trial.

19 {34} When no claim of prosecutorial conduct was raised at trial, we review for
20 fundamental error. *See State v. Allen*, 2000-NMSC-002, ¶ 95 128 N.M. 482, 994

1 P.2d 728. While we find no error in the statement by the State during closing
2 argument, we will explain why even if the comment were erroneous, it falls short of
3 fundamental error. *See State v. Sosa*, 2009-NMSC-056, ¶ 35, 147 N.M. 351, 223
4 P.3d 348.

5 {35} Fundamental error occurs when prosecutorial misconduct in closing
6 statements compromises a defendant’s right to a fair trial, and we will reverse a
7 conviction despite defense counsel’s failure to object. *See State v. Rojo*, 1999-
8 NMSC-001, ¶ 55, 126 N.M. 438, 971 P.2d 829. In order to find fundamental error,
9 we must be convinced that the prosecutor’s conduct created “a reasonable
10 probability that the error was a significant factor in the jury’s deliberations relative
11 to the other evidence before them.” *DeGraff*, 2006-NMSC-011, ¶ 22. In order to
12 determine whether Defendant was deprived of a fair trial, this Court “review[s] the
13 comment in context with the closing argument as a whole . . . so that we may gain a
14 full understanding of the comments and their potential effect on the jury.” *State v.*
15 *Fry*, 2006-NMSC-001, ¶ 50, 138 N.M. 700, 126 P.3d 516 (internal quotation marks
16 and citation omitted). “[T]he general rule is that an isolated comment made during
17 closing argument is not sufficient to warrant reversal.” *Sosa*, 2009-NMSC-056, ¶ 29,
18 147 N.M. 351, 223 P.3d 348 (internal quotation marks and citation omitted).

19 {36} Upon reviewing the record, we conclude that the State’s closing argument
20 when analyzed as a whole did not deprive Defendant of a fair trial. We conclude that

1 the State’s statements regarding the absence of testing connecting the seventeen
2 casings to Defendant’s firearm was not the primary focus of the State’s closing
3 argument, and we therefore cannot say that it impacted the jury’s verdict. As
4 Defendant points out, the State reiterates its argument that Defendant’s gun and
5 magazines would have held thirty-one rounds fully loaded, which was consistent
6 with the seventeen casings and fourteen live rounds found on him when stopped by
7 the police. Further, as the State attests, some of the statements made in closing
8 argument by the State regarding the seventeen casings were in response to
9 Defendant’s closing argument. We cannot conclude that the State’s comments
10 during closing argument significantly altered the trial or confused the jury. *See id.*
11 ¶ 34 (“[T]he common thread running through the cases finding reversible error is
12 that the prosecutor[’]s comments materially altered the trial or likely confused the
13 jury by distorting the evidence, and thereby deprived the accused of a fair trial.”).

14 {37} With the evidence presented by the State at trial considered as a whole, as well
15 as the minimal prejudicial effect of its comments during closing argument, we hold
16 that Defendant has not shown fundamental error.

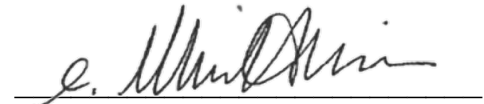
17 {38} Because we found no evidentiary error nor prosecutorial misconduct, we need
18 not address Defendant’s claim that together those claims require reversal.

19 **CONCLUSION**

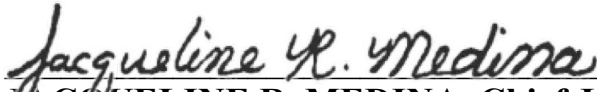
20 {39} For the reasons set forth above, we affirm.

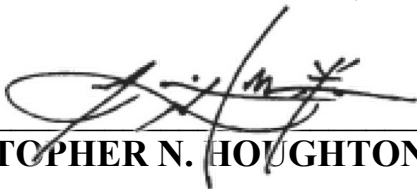
1 {40} IT IS SO ORDERED.

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3


J. MILES HANISEE, Judge

4 WE CONCUR:

5 
6 JACQUELINE R. MEDINA, Chief Judge

7 
8 KRISTOPHER N. HOUGHTON, Judge