



1 1978, Section 30-3-18 (2009); and battery against a household member, contrary to  
2 NMSA 1978, Section 30-3-15 (2008). Defendant argues (1) there was insufficient  
3 evidence to support his conviction for criminal damage to the property of a  
4 household member; (2) it was plain error for a police officer to testify to Defendant's  
5 credibility, and (3) there was prosecutorial misconduct. For the following reasons,  
6 we vacate the criminal damage to the property of a household member conviction  
7 and affirm Defendant's remaining convictions.

## 8 **BACKGROUND**

9 {2} The following facts were presented to a jury. In March 2020, an officer  
10 responded to a residence in reference to a domestic dispute in Jal, New Mexico.  
11 Upon his arrival at the residence, the officer first spoke with Defendant who was  
12 standing outside. When the officer asked Defendant what happened earlier that  
13 evening, Defendant responded that nothing at all had happened. Defendant had an  
14 odor of alcohol on his person and, when asked, stated that he had been drinking.  
15 Defendant's knuckles were red, and he had scratches on his neck. The officer asked  
16 Defendant where the scratches came from, and Defendant stated he had gotten into  
17 an argument.

18 {3} The officer then entered the residence and spoke with Defendant's wife  
19 (Victim). According to the officer, Victim was extremely distraught; it looked like  
20 she had been crying, and the inside of the residence was in disarray with broken

1 items. The officer documented injuries he saw on Victim with his lapel camera.  
2 Victim had a black eye, bumps on the back of her head, and bruises that, according  
3 to Victim, she sustained after being struck by Defendant. The officer observed a  
4 broken television and Victim’s broken eyeglasses. Victim told the officer that she  
5 had scratched Defendant on his neck while trying to defend herself. After speaking  
6 with Defendant and Victim, the officer placed Defendant under arrest.

7 {4} At trial, Victim testified that Defendant punched her and broke her glasses,  
8 which cost two to three hundred dollars. She also testified that Defendant punched  
9 and broke the television. The State referred to the broken glasses and television  
10 during closing argument as evidence of the criminal damage to property.

11 {5} Pertinent to the vouching issue raised by Defendant on appeal, Defendant  
12 highlights various portions of the officer’s testimony. While testifying about his  
13 observations leading up to Defendant’s arrest, the officer testified, “I believe[d] that  
14 [Defendant was] not telling the whole truth.” The officer also testified that the  
15 injuries he observed on Victim and Defendant were consistent with what Victim told  
16 him and “not consistent” with what Defendant told him. Given his observations and  
17 conversations with Victim and Defendant, the officer testified, “I determined that  
18 [Defendant] was a primary aggressor in an event of domestic violence.”

19 {6} Further, Defendant highlights that the officer’s decision-making process—  
20 and his “primary aggressor” determination—were testified to again on redirect

1 examination. Defendant also notes some statements by the officer elicited during  
2 defense counsel’s cross-examination relating to Victim possibly returning to her  
3 mother’s place in Arizona as a “safe haven.”

4 {7} Finally, Defendant highlights that, during closing argument, the State stated:

5 You were also going to get to hear from the officer who heard both of  
6 these stories and then went in and looked around and made his own  
7 determinations. You heard all of that. You got to see for yourself  
8 [Victim]’s injuries the night of from the point of view of [the officer].

9 {8} The jury convicted Defendant of false imprisonment, criminal damage to the  
10 property of a household member under \$1,000, and battery against a household  
11 member. This appeal followed.

## 12 **DISCUSSION**

### 13 **I. The Evidence Was Insufficient to Convict Defendant of Criminal Damage** 14 **to Property of a Household Member**

15 {9} Defendant argues that the evidence is insufficient to support his criminal  
16 damage to property conviction. Specifically, Defendant asserts that—in order to  
17 convict him of criminal damage to property—the jury was instructed that it had to  
18 find that he intentionally damaged “real property” and the only evidence of damage  
19 to property the State presented was that of damage to personal property. The State  
20 concedes that the jury was only instructed on a theory of criminal damage to real  
21 property but, nonetheless, contends that the elements of the crime are not limited to  
22 real property.

1 {10} Directing this Court to the jury instruction for criminal damage to property of  
2 a household member, UJI 14-318 NMRA, the State contends that the four different  
3 types of bracketed property identified in the jury instruction—real, personal,  
4 community and jointly owned—“are not each themselves essential elements” but  
5 rather “alternative ways by which the same essential elements may be satisfied.” The  
6 State next contends that the apparent erroneous selection of the “real property”  
7 alternative, instead of the “personal property” alternative, in the instruction given to  
8 the jury is analogous to the jury being instructed on “an additional nonessential  
9 element.” Building on this contention, the State argues that we should test the  
10 sufficiency of the evidence against the elements of the statute and not against the  
11 jury instructions actually given—essentially that we should ignore that the jury  
12 instructions were limited to the “real property” alternative. The State, however, cites  
13 no authority for the idea that where, as here, there was an apparent clerical error in  
14 the instructions, the sufficiency of the evidence is nevertheless tested against the jury  
15 instructions that *should* have been given, without the clerical error. *See, e.g., State*  
16 *v. Vigil-Giron*, 2014-NMCA-069, ¶ 60, 327 P.3d 1129 (providing that “appellate  
17 courts will not consider an issue if no authority is cited in support of the issue and  
18 that, given no cited authority, we assume no such authority exists”). Further, we have  
19 case law providing that the sufficiency of the evidence is tested against the jury  
20 instructions actually given at trial. *See State v. Garcia*, 2021-NMSC-019, ¶¶ 22-24,

1 488 P.3d 585 (providing that appellate courts “review[ing] for sufficiency of the  
2 evidence consider[] all of the evidence in support of conviction under the alleged  
3 erroneous jury instruction” and “do not evaluate the sufficiency of the evidence for  
4 instructions that were not given to the jury”; and concluding that insufficient  
5 evidence supported the conviction under purportedly erroneous jury instructions  
6 without deciding whether there was instructional error (internal quotation marks and  
7 citations omitted)). We accordingly do not find the State’s argument persuasive in  
8 this case.

9 {11} “[W]e apply a substantial evidence standard to review the sufficiency of the  
10 evidence.” *State v. Chavez*, 2009-NMSC-035, ¶ 11, 146 N.M. 434, 211 P.3d 891.  
11 “The relevant question is whether, after viewing the evidence in the light most  
12 favorable to the prosecution, any rational trier of fact could have found the essential  
13 elements of the crime beyond a reasonable doubt.” *Id.* (alteration, internal quotation  
14 marks, and citation omitted). This review is highly deferential to the jury’s verdict,  
15 but it is “the independent responsibility of the courts to ensure that the jury’s  
16 decisions are supportable by evidence in the record, rather than mere guess or  
17 conjecture.” *State v. Slade*, 2014-NMCA-088, ¶ 14, 331 P.3d 930 (internal quotation  
18 marks and citation omitted).

19 {12} Under our Rules of Criminal Procedure, the district court is required to  
20 instruct the jury on “all questions of law essential for a conviction of any crime

1 submitted to the jury.” Rule 5-608(A) NMRA. The State’s theory of criminal  
2 damage to property was that Defendant damaged personal property of Victim, a  
3 household member. As noted above, UJI 14-318 identifies four different types of  
4 property in brackets. In addition, the directive in use note 4 of the instruction states  
5 to “[u]se only the applicable bracketed element established by the evidence.” The  
6 State presented evidence that Defendant damaged personal property belonging to the  
7 Victim, but the jury was instructed on damage to real property not personal property.

8 {13} The State presented the jury with evidence of damage to eyeglasses and a  
9 television, neither of which are real property<sup>1</sup>. Moreover, the State concedes that it  
10 did not present evidence of criminal damage to real property. Assessing the evidence  
11 in light of the jury instructions given, *see Garcia*, 2021-NMSC-019, ¶ 22, we  
12 conclude that Defendant’s conviction for criminal damage to property of a  
13 household member under \$1,000 is not supported by substantial evidence.

14 **II. The Officer’s Testimony Did Not Amount to Plain Error**

15 {14} Defendant contends the officer repeatedly commented on his credibility and  
16 guilt, and that this testimony was prejudicial. Further, Defendant asserts that the

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<sup>1</sup>“Real property” is defined as “[l]and and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land,” *Real Property, Black’s Law Dictionary* (12th ed. 2024), whereas “personal property” is defined as “[a]ny movable or intangible thing that is subject to ownership and not classified as real property.” *Personal property, Black’s Law Dictionary* (12th ed. 2024).

1 officer testifying to his determination that Defendant was the “primary aggressor”  
2 was—in effect—commenting on the “ultimate issue” of the case. The State responds  
3 that (1) the officer did not directly comment on another witness’s testimony, but  
4 instead testified that he did not think Defendant had provided the “whole” truth; and  
5 (2) the State did not encourage or elaborate on an answer relating to whether the  
6 officer thought Defendant was a credible witness. Both parties agree, as do we, that  
7 these issues were not preserved by a timely objection, so we review only for plain  
8 error.

9 {15} The doctrine of plain error, arising from our Rules of Evidence, applies  
10 specifically to evidentiary matters and permits a court to “take notice of a plain error  
11 affecting a substantial right, even if the claim of error was not properly preserved.”  
12 Rule 11-103(E) NMRA. We will reverse for plain error only where we find that there  
13 is “(1) error, that is (2) plain, and (3) that affects substantial rights.” *State v. Hill*,  
14 2008-NMCA-117, ¶ 21, 144 N.M. 775, 192 P.3d 770 (internal quotation marks and  
15 citation omitted). To find plain error, the Court “must be convinced that admission  
16 of the testimony constituted an injustice that created grave doubts concerning the  
17 validity of the verdict.” *State v. Montoya*, 2015-NMSC-010, ¶ 46, 345 P.3d 1056  
18 (internal quotation marks and citation omitted). “Further, in determining whether  
19 there has been plain error, we must examine the alleged errors in the context of the  
20 testimony as a whole.” *Id.* (text only) (citation omitted).

1 {16} Our plain error review requires us first to determine whether there was error  
2 in admitting the testimony. *See Hill*, 2008-NMCA-117, ¶ 21. Testimony that  
3 comments directly on the credibility of witnesses where credibility is pivotal  
4 amounts to plain error in some circumstances. *See State v. Lucero*, 1993-NMSC-  
5 064, ¶¶ 15-17, 22, 116 N.M. 450, 863 P.2d 1071 (Where “credibility was a pivotal  
6 issue,” admission of a doctor’s testimony that commented directly upon the  
7 credibility of the complainant, named the perpetrator in a way that “was tantamount  
8 to saying the complainant was telling the truth,” and testified that the cause of the  
9 complainant’s symptoms “was in fact sexual molestation” amounted to plain error);  
10 *State v. Alberico*, 1993-NMSC-047, ¶ 85, 116 N.M. 156, 861 P.2d 192 (“[D]irect  
11 testimony regarding the credibility or truthfulness of the alleged victim of sexual  
12 abuse” is “expressly prohibit[ed].”); *State v. Garcia*, 2019-NMCA-056, ¶¶ 12, 16,  
13 450 P.3d 418 (determining that it was plain error to admit credibility testimony when  
14 credibility was “a pivotal issue in [the] case” and a witness “repeatedly commented,  
15 both directly and indirectly, upon [the v]ictim’s truthfulness, identified [the  
16 d]efendant as [the v]ictim’s molester numerous times based solely on [the v]ictim’s  
17 statement of events, and repeated in detail [the v]ictim’s statements regarding the  
18 sexual abuse”).

19 {17} As to the “primary aggressor” testimony, we are not persuaded that this  
20 amounted to the officer giving his opinion on the ultimate issue in the case. *See State*

1 v. *Ashley*, 1997-NMSC-049, ¶ 19, 124 N.M. 1, 946 P.3d 205. (“[I]t is improper for  
2 a law enforcement officer to give his opinion as to the ultimate issue in [a] case.”).  
3 The officer was not asked to testify to a legal conclusion and did not offer one as to  
4 whether Defendant committed the crimes of battery against a household member or  
5 false imprisonment.<sup>2</sup> Instead, he testified to the information and observations he  
6 gathered during his investigation, including what he was told by Defendant and  
7 Victim, and that he placed Defendant under arrest upon a determination that  
8 Defendant was the “primary aggressor.” The jury was free to reject this  
9 determination. *Cf. Lopez v. Heesen*, 1961-NMSC-122, ¶ 28, 69 N.M. 206, 365 P.2d  
10 448 (“Opinion evidence on an ultimate issue of fact does not attempt or have the  
11 power to usurp the functions of the jury, and this evidence could not usurp the jury’s  
12 function because the jury may still reject these opinions and accept some other  
13 view.”). Nevertheless, even assuming without deciding that the officer’s testimony  
14 was error, we hold that this testimony did not amount to plain error.

15 {18} Despite the officer’s testimony that he determined Defendant was the  
16 “primary aggressor” and that he did not believe Defendant was telling the whole  
17 truth, the jury had other evidence to make its determination as to Defendant’s guilt  
18 on the charges, such as Victim’s testimony, the officer’s lapel recording, and

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<sup>2</sup> Having reversed the criminal damage to property conviction based on insufficient evidence we do not consider it here.

1 photographs of Victim’s injuries. Further, the officer did not comment directly on  
2 the credibility of Victim or intrude upon the jury’s function as arbiter of the  
3 witnesses’ credibility. *See State v. Smith*, 2024-NMCA-068, ¶¶ 8, 9, 556 P.3d 988  
4 (examining the nature of the challenged credibility testimony, in light of the  
5 evidence as a whole, in undertaking a plain error review). The jury’s function to be  
6 the arbiter of the witnesses’ credibility here remained intact by way of Defendant’s  
7 testimony, Victim’s testimony, lapel camera footage, and other photographic  
8 evidence.

9 {19} In light of the testimony of the witnesses and the various forms of physical  
10 evidence corroborating Victim’s testimony and calling into question the veracity of  
11 Defendant’s testimony, we are not convinced that admission of the officer’s  
12 statements constituted an injustice that created grave doubts concerning the validity  
13 of the verdict. *See Montoya*, 2015-NMSC-010, ¶ 46 (“[I]n determining whether there  
14 has been plain error, we must examine the alleged errors in the context of the  
15 testimony as a whole.” *Id.* (text only) (citation omitted).

16 **III. The State’s Conduct Was Not Fundamental Error**

17 {20} Defendant asserts that “the [State] committed misconduct by eliciting and  
18 focusing on testimony that indicated guilt was already determined by [the officer].”  
19 The State responds that the officer’s testimony regarding the determinations he made  
20 while investigating the domestic dispute did not rise to the level of fundamental

1 error. Both parties agree, as do we, that this issue was not preserved by a timely  
2 objection.

3 {21} When an issue of prosecutorial misconduct has not been properly preserved  
4 by a timely objection at trial, we have discretion to review the claim on appeal for  
5 fundamental error. *State v. Trujillo*, 2002-NMSC-005, ¶ 52, 131 N.M. 709, 42 P.3d  
6 814. “Prosecutorial misconduct rises to the level of fundamental error when it is so  
7 egregious and had such a persuasive and prejudicial effect on the jury's verdict that  
8 the defendant was deprived of a fair trial.” *State v. Allen*, 2000-NMSC-002, ¶ 95,  
9 128 N.M. 482, 994 P.2d 728 (internal quotation marks and citation omitted).

10 {22} With regard to closing arguments, the State highlighted evidence that was  
11 persuasive as to Defendant’s guilt. The State also emphasized that the jury should  
12 make its own determination in the final moments of closing argument. We conclude  
13 that the State’s articulation of the officer’s testimony does not rise to the level of  
14 fundamental error by having such a persuasive and prejudicial effect on the jury’s  
15 verdict as to deprive Defendant of a fair trial.

16 **CONCLUSION**

17 {23} For these reasons, we reverse the criminal damage to the property of a  
18 household member conviction and affirm on all other grounds.

1 {24} IT IS SO ORDERED.

2   
3 JACQUELINE R. MEDINA, Chief Judge

4 WE CONCUR:

5   
6 JENNIFER L. ATTREP, Judge

7   
8 ZACHARY A. IVES, Judge

1 **IVES, J. (concurring, writing separately).**

2 {25} I concur fully in the opinion of the Court. I write separately only to spotlight  
3 again, as this Court did in *State v. Sivils*, 2023-NMCA-080, ¶¶ 28-31, 538 P.3d 126,  
4 the apparent tension between binding precedents on the question of whether the  
5 sufficiency of the evidence should be measured against the actual essential elements  
6 of the offense charged or instead against the incorrect instructions given to the jury.  
7 Because this is “a question of constitutional magnitude that arises often on appeal,”  
8 *id.* ¶ 32, it seems to me that New Mexicans deserve an answer. But the answer they  
9 deserve is one based on careful consideration of briefs that grapple with the relevant  
10 precedents. Such briefs were not filed in this case, and, based on the briefs we have  
11 here, I believe this Court’s handling of this appeal is an appropriate one. I hope that  
12 soon a different appeal will present a good opportunity to answer the question.

13   
14 \_\_\_\_\_  
**ZACHARY A. IVES, Judge**

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16 \_\_\_\_\_  
**ARTREP, J., concurs.**