



1 unconstitutional both facially and as applied to him under the Second Amendment  
2 to the United States Constitution. Neither of these arguments are preserved.

3 {2} While preservation is not a barrier to a facial challenge, *see State v. McDuffie*,  
4 1987-NMCA-077, ¶ 13, 106 N.M. 120, 739 P.2d 989 (stating that even though the  
5 issue was not preserved in the trial court, the “defendant’s claim that the statute  
6 creating an offense is unconstitutional may be raised for the first time on appeal since  
7 it is jurisdictional”), this Court has already determined that Section 30-7-16(A)(1) is  
8 not facially unconstitutional. *State v. Romero*, \_\_\_-NMCA-\_\_\_, ¶ 18, \_\_\_ P.3d \_\_\_  
9 (A-1-CA-41601, Apr. 16, 2025), *cert. denied*, 2025-NMCERT-007 (S-1-SC-40906).  
10 *Romero* is dispositive of Defendant’s facial challenge.

11 {3} As for Defendant’s as-applied challenge, his failure to preserve the issue  
12 precludes our review of the merits of his claim. *See State v. Aranda*, 1980-NMCA-  
13 130, ¶ 10, 94 N.M. 784, 617 P.2d 173 (“Where the alleged unconstitutional character  
14 of a statute concerns a matter of evidence, rather than the offense itself, the  
15 constitutional question cannot be raised for the first time on appeal.” (alteration,  
16 internal quotation marks, and citation omitted)); *State v. Gutierrez*, 2020-NMCA-  
17 045, ¶ 29, 472 P.3d 1260 (“In a facial challenge to a statute, we consider only the  
18 text of the statute itself, not its application; whereas, in an as-applied challenge, we  
19 consider the facts of the case to determine whether application of the statute even if  
20 facially valid deprives the challenger of a protected right.” (alterations, internal

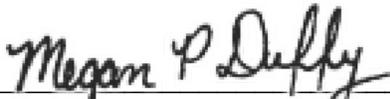
1 quotation marks, and citation omitted)), *rev'd on other grounds*, 2023-NMSC-002,  
2 523 P.3d 560. Defendant argues on appeal that Section 30-7-16 is unconstitutional  
3 as applied to him because he was “convicted of only non-violent offenses.” The  
4 district court was not given an opportunity to consider whether Defendant’s previous  
5 convictions were nonviolent or to render any factual findings as to Defendant’s  
6 dangerousness. *See Romero*, \_\_\_-NMCA-\_\_\_, ¶ 17 (concluding the district court’s  
7 unchallenged factual findings were conclusive as to the defendant’s dangerousness).  
8 By failing to preserve his as-applied claim, Defendant failed to create a record with  
9 factual support for his contention that he is not a dangerous or violent felon. *See*  
10 *Gutierrez*, 2020-NMCA-045, ¶ 29. Defendant relies solely on assertions, rather than  
11 evidence, and we cannot assume that his unsupported assertions are accurate. Even  
12 if we could substitute Defendant’s assertions for evidence, we would not do so  
13 because that would be unfair to the State, which had no opportunity to present  
14 evidence on this subject in the district court due to Defendant’s failure to raise his  
15 constitutional challenge there. For these reasons, we decline to consider Defendant’s  
16 as-applied challenge in this appeal.

17 **CONCLUSION**

18 {4} We affirm.

1 {5} IT IS SO ORDERED.

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MEGAN P. DUFFY, Judge

4 WE CONCUR:

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J. MILES HANISEE, Judge

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ZACHARY A. IVES, Judge