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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico
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No. A-1-CA-42327

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

CHRISTOPHER ANTHONY WADE,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Lucy Solimon, District Court Judge

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OPINION

YOHALEM, Judge

{1} Defendant Christopher Anthony Wade appeals his convictions for one count of voluntary manslaughter with a firearm, contrary to NMSA 1978, Section 30-2-3(A) (1994), and NMSA 1978, Section 31-18-16 (2022); two counts of tampering with evidence (Counts 3 and 4), contrary to NMSA 1978, Section 30-22-5 (2003); one count of conspiracy to commit tampering with evidence (Count 5), contrary to NMSA 1978, Section 30-28-2 (1979), and Section 30-22-5; and one count of attempted bribery of a witness (Count 6), contrary to NMSA 1978, Section 30-28-1 (1963, amended 2024) and NMSA 1978, Section 30-24-3 (1997). On appeal from his conviction for voluntary manslaughter, Defendant argues that the district court's improper exclusion from evidence of both Victim's blood alcohol concentration (BAC) and a pathologist's expert testimony that Victim's BAC likely caused Victim to behave aggressively, violently, and irrationally just before his death, denied Defendant his right to call witnesses to support his self-defense claim. Defendant also challenges the district court's exclusion of a second expert's virtually identical expert opinion testimony based on late disclosure of that witness six days before trial, in violation of the court's scheduling order. As to his remaining convictions for tampering with evidence, conspiracy, and attempted bribery, Defendant claims that

the State presented insufficient evidence to support each conviction. We reverse Defendant's conviction of attempted bribery and otherwise affirm.

PROCEDURAL BACKGROUND

{2} We begin with a brief procedural background to help clarify confusion about the record applicable to each issue on appeal.

{3} Defendant was tried twice. At his first trial, in September 2023, Defendant was charged with first-degree murder, with step-down instructions to the jury on second-degree murder and voluntary manslaughter; two counts of tampering with evidence; one count of conspiracy to tamper with evidence; and one count of attempted bribery. Defendant was convicted of tampering and conspiracy to commit tampering with evidence, and of attempted bribery, but was acquitted of first-degree murder. The jury at the first trial was unable to reach a verdict on either second-degree murder or voluntary manslaughter. The district court, therefore, declared a mistrial on those two lesser included charges. Defendant was tried again in January 2024, solely on the second-degree murder and voluntary manslaughter, and was convicted of voluntary manslaughter with a firearm.

{4} Defendant appeals the convictions from both his first and second trial. The applicable record for his convictions of two counts of tampering with evidence, one count of conspiracy to tamper with evidence, and one count of attempted bribery is limited to the first trial. Defendant's appeal from his conviction of voluntary

manslaughter, however, challenges both the district court's ruling excluding Dr. Sperry's expert testimony as a forensic pathologist at the first trial—a decision which also applied to the second trial—and the exclusion of Dr. Peterson's expert testimony as a forensic toxicologist at his second trial. We understand Defendant to appeal (1) the district court's decision granting the State's motion in limine at the first trial, excluding both Victim's BAC and Dr. Sperry's expert testimony regarding the impact of Victim's BAC on his behavior; *and* (2) the district court's exclusion of both Dr. Sperry's and Dr. Peterson's similar expert testimony, as well as Victim's BAC at the second trial. We address each issue in turn.

I. The District Court Did Not Abuse Its Discretion in Excluding Dr. Sperry's Expert Testimony

{5} In granting the State's motion in limine at Defendant's first trial, the district court excluded both Victim's blood test results at autopsy, showing Victim's BAC as 0.139, and Dr. Sperry's proposed expert testimony tying Victim's BAC to what Dr. Sperry claimed would have been highly aggressive, violent and irrational behavior by Victim just prior to his death. We first clarify the basis for the district court's decision excluding this evidence, addressing Defendant's argument that the basis for its exclusion was the district court's improper application of the Sixth Amendment's Confrontation Clause, U.S. Const. amend. VI, to protect the State's (rather than the accused's) right to cross-examination. We then affirm the district court's grant of the motion in limine under Rules 11-702, 11-402, and 11-403

NMRA and the continued application of that ruling at Defendant's second trial to exclude Victim's BAC and Dr. Sperry's and Dr. Peterson's testimony.

A. Defendant's Confrontation Clause Argument

{6} Defendant claims that the district court granted the State's motion in limine and excluded both Victim's BAC and Dr. Sperry's expert testimony based solely on what Defendant argues is the court's misunderstanding of the Sixth Amendment's Confrontation Clause, U.S. Const. amend. VI. Defendant states in his opening brief, "The [district c]ourt was clear in its ruling that it excluded Dr. Sperry on Confrontation Clause grounds."

{7} We do not agree that the district court's exclusion of Victim's BAC and Dr. Sperry's testimony was based on the district court's misapplication of the Confrontation Clause to protect the State's rights, rather than the rights of the accused. The record plainly shows that the district court's exclusion of both Victim's BAC, at both trials, and Dr. Sperry's testimony at both trials was expressly based on the State's motion in limine and supporting brief, which argued for exclusion under Rules 11-702, 11-402, and 11-403. Because we affirm the district court's exclusion of both Victim's BAC and Dr. Sperry's testimony under Rules 11-702, 11-402, and 11-403, we do not address Defendant's Confrontation Clause argument. *See Allen v. LeMaster*, 2012-NMSC-001, ¶ 28, 267 P.3d 806 (observing that "courts exercise

judicial restraint by deciding cases on the narrowest possible grounds and avoid reaching unnecessary constitutional issues").

B. Rules 11-702, 11-402, and 11-403 Support the District Court's Exclusion of Both the Toxicology Report and Dr. Sperry's Expert Testimony

1. Standard of Review

{8} We review the admission or exclusion of scientific expert opinion testimony and other scientific evidence at trial for an abuse of discretion. *See State v. Alberico*, 1993-NMSC-047, ¶ 58, 116 N.M. 156, 861 P. 2d 192 ("[T]he admission of expert testimony or other scientific evidence is peculiarly within the sound discretion of the trial court and will not be reversed absent a showing of abuse of that discretion."). "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the trial court abused its discretion by its ruling unless we can characterize it as clearly untenable or not justified by reason." *State v. Rojo*, 1999-NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829 (internal quotation marks and citation omitted).

2. Relevant Principles of Law

{9} Rule 11-702, the rule of evidence that governs the foundation that must be laid for the admission of expert testimony, requires the trial court to act as a gatekeeper, determining before admitting expert testimony that the scientific theory expressed or scientific methodology or technology applied to arrive at a conclusion is valid, reliable, and relevant to help the jury reach accurate results. *See State v.*

Fuentes, 2010-NMCA-027, ¶ 23, 147 N.M. 761, 228 P.3d 1181 (recognizing that the prerequisites for admitting expert testimony under Rule 11-702 are "(1) experts must be qualified; (2) their testimony must assist the trier of fact; and (3) their testimony must be limited to the area of scientific, technical, or other specialized knowledge in which they are qualified." (internal quotation marks and citation omitted)). Our Supreme Court described the role of the district court as follows: "When scientific evidence is employed as a means of obtaining or analyzing data, the trial court must determine whether the scientific technique is based upon well-recognized scientific principle and whether it is capable of supporting opinions based upon reasonable probability rather than conjecture." *Alberico*, 1993-NMSC-047, ¶ 47. It follows that, if a scientific opinion is not based on valid, reliable science, it is not relevant or probative of a fact in issue, and it will not assist the jury in reaching a fair decision. *See id.* ¶ 54.

{10} If the evidence is found to meet the requirements of Rule 11-702 for scientific validity and reliability, the district court must then determine whether it also meets the requirement for relevance under Rule 11-402, and, if the court concludes the evidence is at least marginally relevant, whether its probative value substantially outweighs the danger of prejudice. *See Alberico*, 1993-NMSC-047, ¶ 55 ("Even if the expert testimony passes muster under Rule [11-]702, it must still be material to the particular case to be admissible under Rule [11-]401, and even if relevant (that

is, material and probative), the scientific evidence may be excluded if its prejudicial effect substantially outweighs its probative value under Rule [11-]403.").

{11} An evidentiary hearing outside the presence of the jury is often required to enable the court to decide whether expert testimony concerns scientific, technical, or other specialized knowledge with a reliable basis. *See Fuentes*, 2010-NMCA-027, ¶¶ 26-27 (acknowledging hearings with expert testimony about the validity and reliability of the scientific theory or methodology may be required).

{12} As the proponent of the expert testimony, Defendant bears the burden to establish the validity, reliability, and relevance of the scientific evidence offered. *See State v. Anderson*, 1994-NMSC-089, ¶ 14, 118 N.M. 284, 881 P.2d 29 (stating that the party seeking to admit expert testimony bears the burden of showing that the expert is qualified, that the expert's testimony will assist the trier of fact, and that the expert will "testify only as to scientific, technical[,] or other specialized knowledge with a reliable basis." (internal quotation marks and citation omitted)); *see Fuentes*, 2010-NMCA-027, ¶ 24 (same).

3. Application of Law to the Expert Testimony

{13} In this case, Defendant identified Dr. Sperry at Defendant's first trial as an expert witness the defense intended to call to support Defendant's claim that he had acted reasonably, in self-defense, when he shot Victim in the chest. Defendant described Dr. Sperry as a pathologist who would testify that, based on Victim's BAC

of 0.139 as measured in Victim's toxicology report at autopsy, that it was likely that Victim behaved in a highly aggressive, violent, irrational manner just prior to his death.

{14} Defendant provided virtually no information about Dr. Sperry's proposed testimony, apart from his conclusion about Victim's behavior. When the defense identified Dr. Sperry as a potential witness, no information was provided on the scientific theory or methodology Dr. Sperry used. Even after the State filed its motion in limine, seeking to exclude both Victim's BAC and Dr. Sperry's testimony as to the impact of Victim's BAC on his behavior, arguing it had not been shown to be scientifically valid or reliable, and would be more prejudicial than probative under Rules 11-702, 11-402, and 11-403, Defendant did not provide the district court with any information about the scientific methodology or theory supporting Dr. Sperry's expert opinion, did not file an expert affidavit, and did not seek a hearing where the defense could provide testimony on Dr. Sperry's theory and methodology. Defendant did not even provide the district court with the report Dr. Sperry had prepared for disclosure to the State in discovery. It was the State that informed the court in its motion in limine, without objection or correction from Defendant, that Dr. Sperry's report stated that Dr. Sperry intended to testify that Victim's BAC would have impacted his behavior such that Victim would have been "unable to

listen to reason, would become physically and verbally very violent very quickly, and that the violence would persist until something else stopped the fight."

{15} At the September 8, 2023 hearing, and at its continuation on September 11, 2023, the State argued, in relevant part, that Dr. Sperry's proffered testimony about Victim's behavior was neither scientifically valid or reliable under Rule 11-702, and that neither Victim's BAC, nor Dr. Sperry's testimony was relevant to prove Victim's behavior. If the court found the BAC evidence to be marginally relevant, the State argued it was more prejudicial than probative, relying on Rule 11-403.

{16} Because the defense failed to offer any evidence concerning Dr. Sperry's methodology, the parties' arguments focused on this Court's opinion in *State v. Garcia*, 2005-NMCA-042, 137 N.M. 315, 110 P.3d 531. In *Garcia*, this Court upheld the district court's exclusion of a toxicology report showing the BAC of a murder victim at autopsy to be 0.245 percent at the time of his death. *Id.* ¶¶ 31-36. In *Garcia*, as in this case, the victim's BAC was offered to show that the victim behaved aggressively and violently at the time of his death. *Id.* ¶¶ 32-33. The defendant in *Garcia* argued that admission of the victim's BAC was essential to support his self-defense claim: that a reasonable person in the defendant's position would have used deadly force. *Id.* ¶ 32. This Court in *Garcia* quotes with approval the district court's decision explaining its exclusion of the BAC evidence:

> While it is certainly scientifically or medically believed that over .08 may result in impairment of the ability to safely operate a vehicle, it is not relevant to an essential element in this case or to the defense.
>
> As [the court] understand[s] the evidence, everyone was drinking, and the jury is certainly going to know that, and the [c]ourt feels that that evidence can be considered by the jury. *The* [*c*]*ourt is of the opinion the deceased*'s *BAC doesn't indicate whether someone is aggressive, passive, happy, sad, angry, et cetera. There is no criteria or scientifically established principle on that that* [*the court* is] *aware of.*

Id. ¶ 31 (emphasis added) (alterations omitted).

{17} This Court affirmed, holding that the district court did not abuse its discretion in excluding evidence claiming a correlation between a person's BAC and their behavior as speculative, rather than scientifically reliable, and as either irrelevant or if marginally relevant, then more prejudicial than probative by stating:

> There undoubtedly is in many instances a correlation between alcohol and violence. However, as the district court observed, although it is clear that BAC may demonstrate impaired ability to drive a motor vehicle, a correlation between BAC and aggressiveness seems speculative unless tied more specifically to an individual's history. As such, the probative value of the BAC evidence in this case is questionable at best. . . . Even if some relevance has been found, the district court could properly have determined that any slight probative value that the BAC evidence might have had was outweighed by its prejudicial effect.

Id. ¶ 33 (citation omitted).

{18} Defendant attempts to distinguish *Garcia*, arguing that *Garcia* addressed the admission of a victim's BAC when the BAC is unaccompanied by an expert's explanation of its relevance to how the victim behaved. We are not persuaded. To

support the admissibility of Victim's BAC with expert testimony, Defendant had to show the district court, in the exercise of the court's gateway function, that the expert's opinion that a person's behavior could be predicted from their BAC is scientifically valid and reliable. Otherwise, both the BAC itself and the expert's testimony are properly excluded as irrelevant to prove how Victim behaved. *See Alberico*, 1993-NMSC-047, ¶ 54.

{19} We briefly address Defendant's argument that the defense failed to make a showing that Victim's BAC and Dr. Sperry's testimony were valid, relevant and reliable because the district court failed to give Defendant an opportunity to make that showing. We do not agree that Defendant lacked a full opportunity to address the admissibility of its expert's testimony. As we have already noted, the burden to establish the validity, reliability and relevance of the defense's scientific expert evidence was on Defendant. *See Fuentes*, 2010-NMCA-027, ¶ 24. Defendant could have responded to the State's motion in limine by providing the court with Dr. Sperry's report, or providing an affidavit or testimony from Dr. Sperry or other experts describing his methodology, and offered studies or testimony supporting the validity and reliability that methodology and of his opinion derived from that methodology. Defendant did not do any of these things. Defendant's sole request to the court was to continue the hearing on the State's motion in limine from September 8 until September 11, 2023, to give Defendant more time to prepare its response to

the State's motion in limine. The district court granted that request. Defendant never offered evidence of any sort or asked the court to schedule time for further hearing.

{20} Defendant also argues that although the defense did not offer evidence on the validity and reliability of Dr. Sperry's testimony, Defendant offered evidence that satisfied the exception to the exclusion of this testimony mentioned in *Garcia*, and supported its argument with this Court's decision in *State v. Maples*, 2013-NMCA-052, 300 P.3d 749. *Garcia* acknowledges "[t]here undoubtedly [is] in many instances a correlation between alcohol and violence." 2005-NMCA-042, ¶ 33. *Garcia* concludes that when a person's BAC is accompanied by historical evidence of that person's pattern of behavior while intoxicated, the person's level of intoxication as represented by their BAC becomes a relevant predictor of their behavior. *See id.* In this case, Defendant relied on a police report of a May 2022 incident involving Victim as the historical evidence of Victim's behavior that the defense claims satisfied *Garcia*'s requirement for evidence of prior behavior while intoxicated. The record shows, however, that the May 2022 police report was excluded from evidence by the district court as irrelevant. It was irrelevant because, as the State pointed out without contradiction from Defendant, it does not support Defendant's claim that Victim was intoxicated during that incident. We, therefore, do not agree with Defendant that the *Garcia* exception, allowing evidence of a person's BAC when a history of the person's behavior *while intoxicated* establishes

a pattern of past behavior that allows prediction of future behavior *while intoxicated* applies to this case.

{21} Because Defendant did not present any evidence from Dr. Sperry or other experts establishing the scientific validity and reliability of using a person's BAC alone to predict how they would behave, *Garcia* is dispositive here. The district court did not abuse its discretion in relying on *Garcia*'s holding that, in the absence of examples of the person's past behavior when intoxicated, any prediction of behavior from a person's BAC is not scientifically valid or reliable, and is, therefore, not relevant to prove that Defendant acted reasonably in his own defense when he shot Victim. *See id.* We also agree with the district court's exclusion of both Victim's BAC and the expert testimony connecting Victim's BAC to his behavior as irrelevant under Rule 11-402, and as more prejudicial than probative under Rule 11-403. Unreliable scientific testimony is irrelevant to prove any fact in issue and Dr. Sperry's testimony might well have confused the jury or prejudiced their view of Victim. *See Alberico*, 1993-NMSC-047, ¶ 54.

C. The District Court's Exclusion of Both Defendant's BAC and Dr. Peterson's Expert Testimony at Defendant's Second Trial Based on Late Disclosure Is Not Reversible Error

{22} At the second trial, in addition to stating that the defense was reserving its right to appeal the exclusion of Dr. Sperry as an expert witness, Defendant identified Dr. Peterson, the toxicologist who performed Victim's blood test at autopsy, as an

additional expert witness, offering Dr. Peterson's testimony both to establish the foundation for the admission of Victim's BAC results and to explain the relationship between Victim's BAC and Victim's behavior prior to his death. The State argued for the exclusion of both Victim's BAC and Dr. Peterson's testimony for the reasons of lack of scientific reliability and relevance relied on by the district court to exclude Dr. Sperry's nearly identical testimony, as well as arguing that Dr. Peterson's testimony also should be excluded as a sanction for Defendant's failure to identify Dr. Peterson as an expert witness within the disclosure deadlines set by the district court in its scheduling order. Defendant listed Dr. Peterson as an expert witness six days before trial, many weeks after the scheduling deadline, giving the State no opportunity to interview her before trial. The argument on the exclusion of Dr. Peterson's testimony concluded on the day trial was set to begin. The district court excluded both Victim's BAC and Dr. Peterson's testimony, stating that Dr. Peterson was disclosed too late in violation of the court's scheduling order and without time to allow the State to interview her.

{23} Defendant argues that the exclusion of Victim's BAC and Dr. Peterson's testimony at the second trial based on violation of the court's scheduling order denied Defendant his Sixth Amendment right to present a defense. Defendant relies on our Supreme Court's recent decision in *State v. Garcia*, 2025-NMSC-030, ¶ 32, 578 P.3d 1073, which requires district courts to analyze the propriety of defense

witness exclusion under the factors articulated in *McCarty v. State*, 1988-NMSC-079, ¶¶ 9-10, 107 N.M. 651, 763 P.2d 360.

{24} We disagree and explain. Defendant concedes that he was offering Victim's BAC and Dr. Peterson's expert testimony for the same purpose that he offered Victim's BAC and Dr. Sperry's expert testimony in the first trial: to prove to the jury that Victim's behavior had been so irrational, aggressive, and violent that it justified Defendant's use of deadly force. The district court had already correctly ruled at the first trial that both Victim's BAC and the expert testimony offered for the same purpose were inadmissible under Rules 11-702, 11-402, and 11-403. The court had left that decision in place. Our review of the record shows that the part of the decision excluding both the BAC and the expert testimony applied to both Dr. Sperry's testimony and Dr. Peterson's similar testimony when offered at Defendant's second trial. Both the BAC and Dr. Peterson's testimony were, therefore, inadmissible. Our Supreme Court's opinion in *Garcia*, 2025-NMSC-030, does not require the weighing of the *McCarty* factors when the evidence excluded for late disclosure is otherwise inadmissible:

> [W]e emphasize that for a balancing test to meet Sixth Amendment standards, it must begin with a presumption against exclusion of *otherwise admissible* defense evidence. No other approach adequately protects the right to present a defense.

Id. ¶ 43 (emphasis added) (internal quotation marks and citation omitted). The Rules of Evidence apply to a defendant; a defendant does not have either a Sixth

Amendment or Fourteenth Amendment right to defend with evidence that is inadmissible.

{25} To the extent the district court failed to state this basis for its exclusion of Victim's BAC and Dr. Peterson's testimony at the second trial, our doctrine affirming the district court if it is right for any reason applies. *See State v. Vargas*, 2008-NMSC-019, ¶ 8, 143 N.M. 692, 181 P.3d 684 ("Under the 'right for any reason' doctrine, we may affirm the district court's order on grounds not relied upon by the district court if those grounds do not require us to look beyond the factual allegations that were raised and considered below." (internal quotation marks and citation omitted)). The parties fully argued the admissibility of the BAC and Dr. Peterson's testimony under Rules 11-702, 11-402, and 11-403. Defendant had an opportunity to respond to the State's argument and again offered no expert testimony establishing the admissibility under Rule 11-702. Because Victim's BAC and Dr. Peterson's expert testimony were inadmissible for the same reasons the district court excluded Dr. Sperry's expert opinion testimony, even though Dr. Peterson could lay the foundation for admission of blood test results if those results had been shown to be relevant, the district court's exclusion of this evidence without review of the *McCarty* factors was correct as a matter of law.

II. Sufficiency of the Evidence

{26} In reviewing for sufficiency of the evidence on appeal, we determine "whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Baroz*, 2017-NMSC-030, ¶ 9, 404 P.3d 769 (internal quotation marks and citation omitted). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* (internal quotation marks and citation omitted). "In reviewing whether there was sufficient evidence to support a conviction, we resolve all disputed facts in favor of the [s]tate, indulge all reasonable inferences in support of the verdict, and disregard all evidence and inferences to the contrary." *Id.* (internal quotation marks and citation omitted). Under this deferential standard, "material facts may be proved by inference." *State v. Cotton*, 1990-NMCA-025, ¶ 12, 109 N.M. 769, 790 P.2d 1050. "However, evidence supporting a criminal conviction must be based on logical inference and not upon surmise or conjecture." *Id.*

{27} We consider each of Defendant's challenges to the sufficiency of the evidence beginning with his two convictions for tampering with evidence.

A. Counts 3 and 4: Tampering with Evidence

{28} Defendant challenges his conviction for Count 3—tampering with evidence by hiding or disposing of the shotgun—and Count 4—tampering with Facebook

electronic data. We look to the jury instructions to determine what the jury was required to find in order to convict Defendant for tampering with evidence. *See State v. Holt*, 2016-NMSC-011, ¶ 20, 368 P.3d 409 ("The jury instructions become the law of the case against which the sufficiency of the evidence is to be measured." (alterations, internal quotation marks, and citation omitted)).

{29} To convict Defendant of tampering with the evidence by hiding or disposing of the shotgun involved in this case, the jury instruction required the State to prove beyond a reasonable doubt that Defendant (1) "hid or disposed of a shotgun," and (2) "[b]y doing so, [D]efendant intended to prevent the apprehension, prosecution, or conviction of himself for the crime of murder." Both the act of "hiding or disposing" of the shotgun, and Defendant's intent in doing so must be proved in order for the jury to convict of tampering with evidence.

{30} In this case, there was testimony by multiple eye witnesses to the shooting of Victim that Defendant shot Victim with a homemade shotgun that had no stock and was put together with what appeared to be red duct tape. Defendant admitted that he took the shotgun with him as he fled the scene of the shooting as a passenger with another friend in their car, and that he wrapped the shotgun in some spare clothes from his trunk and put it in the friend's backseat. Defendant testified that he brought the shotgun to someone named Nickole's home. On June 10, 2022, internet searches from Defendant's phone revealed that Defendant searched the phrase "no murder

weapon no case" and read an article posted on a law firm's website entitled, "Is finding the murder weapon that important?" Following Defendant's arrest, law enforcement conducted a search of Nickole's home and did not discover the shotgun.

{31} Defendant argues that this evidence is insufficient to establish either that he hid or disposed of the shotgun or that he did so with the intent to avoid arrest or prosecution. We do not agree. First, as to the sufficiency of the evidence to prove that Defendant hid the shotgun, we acknowledge, as Defendant argues, that a jury cannot "infer that an overt, intentional act of hiding [or disposing of] the weapon took place based solely on the fact that the police never found the weapon." *See State v. Guerra*, 2012-NMSC-027, ¶ 16, 284 P.3d 1076. We do not agree with Defendant, however, that the police not finding the shotgun was the sole basis for the jury's conviction in this case. The jury was entitled to rely on Defendant's testimony admitting he took the shotgun with him as he fled the scene of the shooting, that he concealed it in clothes, and that he took it to Nickole's home, where, knowing that law enforcement was investigating the shooting and looking for him, he avoided arrest for several days. This testimony, together with law enforcement's failure to find the shotgun in their search of Nickole's home, is sufficient to allow a jury to reasonably infer that Defendant "hid or disposed of [the] shotgun," the first element of tampering with evidence.

{32} As to Defendant's intent to avoid arrest, prosecution, or conviction by hiding or disposing of the shotgun, the second element of tampering with the evidence, we agree with the State that Defendant's web searches for information about whether he could avoid prosecution or conviction if the murder weapon could not be found is sufficient evidence from which to infer his intent to hide or dispose of the shotgun so law enforcement could not seize it, in the hope that "no murder weapon no case" would be true. "[I]ntent is subjective and is almost always inferred from other facts in the case, as it is rarely established by direct evidence." *State v. Cunningham*, 2000-NMSC-009, ¶ 27, 128 N.M. 711, 998 P.2d 176 (internal quotation marks and citation omitted).

{33} We turn next to Defendant's conviction for tampering with evidence by hiding Facebook electronic data. We continue to rely on our previous discussion of the elements of the crime of tampering. Defendant argues that the State failed to prove that he hid any evidence on his Facebook account relevant to law enforcement's investigation of Victim's death. We do not agree. Defendant admitted in his trial testimony that he deactivated a portion of his Facebook account during the time he was in Nickole's home where he was plainly staying to avoid arrest. Defendant testified that he deactivated his Facebook account because he was being harassed, and told not to hide evidence from the police. The jury, however, was not required to find his testimony credible or accept his version of the facts. *See State v. Telles*,

2019-NMCA-039, ¶ 21, 446 P.3d 1194 ("The jury is free to disregard a defendant's testimony if it finds that the defendant is not credible."

{34} Even if the we assume that the evidence that Defendant deactivated his Facebook account during the period he knew law enforcement was looking for him was not enough to create an inference that Defendant did so to hide or dispose of evidence to protect himself from arrest or prosecution, the State presented additional evidence involving Defendant's communication with a third person (labeled in his phone as "Mama"). Mama advised Defendant to destroy his cell phone devices and "get rid of all text messages to everyone" in order to avoid arrest and prosecution. Defendant responded with a cell phone message agreeing to do as Mama advised just before he deleted his Facebook account from his phone. This evidence is sufficient to support the jury's finding that Defendant deactivated the account with the intention of avoiding "apprehension, prosecution, or conviction." *See Cunningham*, 2000-NMSC-009, ¶ 27.

B. Count 5: Conspiracy to Tamper with Evidence

{35} Defendant next claims that substantial evidence does not support his conviction of Count 5 (conspiracy to tamper with evidence). To prove conspiracy the State was required to prove beyond a reasonable doubt that "[D]efendant and another person by words or acts agreed together to commit tampering with

evidence," and that "[Defendant] and the other person intended to commit tampering with evidence."

{36} "A conspiracy is defined as a common design or agreement to accomplish an unlawful purpose or a lawful purpose by unlawful means." *State v. Herrera*, 2024-NMCA-025, ¶ 9, 544 P.3d 260 (internal quotation marks and citation omitted). "In order to be convicted of conspiracy, the defendant must have the requisite intent to agree and the intent to commit the offense that is the object of the conspiracy." *State v. Trujillo*, 2002-NMSC-005, ¶ 62, 131 N.M. 709, 42 P.3d 814 (internal quotation marks and citation omitted). "The criminal agreement is the gist of the crime of conspiracy." *State v. Carrasco*, 1997-NMSC-047, ¶ 39, 124 N.M. 64, 946 P.2d 1075. "An overt act is not required and the crime of conspiracy is complete when the felonious agreement is reached." *State v. Torres*, 2018-NMSC-013, ¶ 50, 413 P.3d 467 (internal quotation marks and citation omitted).

{37} The State relied primarily on State's Exhibit 113, which is the transcription of two text message exchanges with Mama. The conversation between Defendant and Mama on June 10, 2022, read in relevant part:

Mama: "If you're Gina Day you didn't do it then stick to"

Mama: "Gonna say"

Mama: "You need a new phone n destroy this one"

The next day, on June 11, 2022, a second conversation reads as follows:

Mama: Keep all the pics but get rid of all text messages to everyone. They can get all you text messages that's why I wanted you to get rid of the phone. Or reset it clean it out.

Defendant: Ok I will

Mama: Please

Mama: After you do that use a substitute way of talking.

Mama: A Call text app.

Mama: Write everything down out your phone. need them reset it then use a text app.

Defendant: Ok.

{38} These communications, on their face, show that Mama instructed Defendant to destroy his phone, by texting him to delete "all text messages to everyone," or "reset it clean it out." The reasonable inference based on the timing of the messages—in the days following the shooting—is that Mama was requesting that Defendant "commit tampering with evidence" by destroying incriminating communications that law enforcement ("they") would try and obtain for purposes of prosecution. And Defendant plainly agreed to Mama's requests, texting, "Ok I will," and later, "Ok."

{39} These multiple communications, which occurred across two days, also show Defendant and Mama "intended to commit tampering with evidence." The clarity of Defendant and Mama's messages to each other sufficiently supports an inference of shared intent, even though action was left to Defendant. But there was far more

evidence the jury could have relied upon. Contemporaneously, Defendant "hid or disposed" of the murder weapon, fled from law enforcement, deactivated his Facebook account, and drafted a handwritten letter directing his roommate Audree to bribe eye witnesses into testifying falsely. Defendant points out that he never destroyed his phone or deleted text messages from it. But completion of the object of the conspiracy was not required for the jury to have found Defendant guilty of conspiracy. *See State v. Armijo*, 1931-NMSC-008, ¶ 7, 35 N.M. 533, 2 P.2d 1075 ("It is quite possible for [the defendants] to have conspired to commit [larceny], without having committed, the larceny."). To the extent Defendant argues his lack of tampering with the phone shows a lack of intent to do so, the jury was free to reject that theory. They could have instead relied on his use of a new phone and his installation of "Text Free: Call & Texting App," an encrypted texting app designed to hide his identity as evidence that he intended to follow-through on his agreement with Mama, but that he was arrested before he could delete messages from his old phone. Substantial evidence supports Defendant's conviction of Count 5, conspiracy to commit tampering with evidence.

C. Count 6: Attempt to Commit Bribery

{40} Finally, Defendant claims that the evidence is insufficient to support his conviction of Count 6, attempt to commit bribery. In order to prove attempt to commit bribery, the State was required by the jury instruction to prove beyond a

reasonable doubt that Defendant "began to do an act which constituted a substantial part of the bribery of a witness but failed to commit the bribery of a witness." The jury instruction stated that bribery of a witness consisted of two things: (1) that "Nickole Swisher and/or Izaac Reyes-Ruiz were likely to become witnesses in a criminal jury trial," and (2) that "[Defendant] knowingly offered to give money to Nickole Swisher and/or Izaac Reyes-Ruiz for purpose of causing Nickole Swisher and/or Izaac Reyes-Ruiz to testify falsely or to abstain from testifying to any fact in the criminal jury trial." The jury was instructed that an attempt to commit the crime of bribery of a witness required proof beyond a reasonable doubt that: (1) "[D]efendant intended to commit the crime of bribery of a witness"; and (2) "[D]efendant began to do an act which constituted a substantial part of the bribery of a witness but failed to commit the bribery of a witness."

{41} The evidence supporting attempted bribery of a witness is a document Defendant wrote on note paper while he was sitting alone in the backseat of Nickole's car outside her house on the third day following Victim's death. The document was discovered in the search of the car by law enforcement following Defendant's arrest that same day. It is undisputed that the document was neither sent nor received by the person addressed in the document—Audree. The relevant portion of the document, which was introduced into evidence as State's Exhibits 99-101, states as follows:

> Audree[:] I NEED you to go talk to Isaak and Nickole. Take a pregnancy test that says positive. Love[,] put on the absolute biggest show ever & tell them you are pregnant. Explain to them that I am an excellent father & that my youngest son has heart disease. Tell them you can't possibly lo[]se me & raise your first child alone. . . . Explain to them they can[]not get in absolutely any trouble for changing their statement about me shooting him. All he has to say is he doesn't remember or recall me shooting him. The case will be dismissed. Please please show them the clip. Nickole will show you. They WILL NOT get in trouble. We will also pay them both 5 grand each & $2500 upfront. He has to & must absolutely refuse to testify.

{42} Although Defendant's statement of his intent to participate in the payment of the two eyewitnesses in return for their refusing to testify or to testify falsely is likely sufficient to support the intent element of attempted bribery, the evidence is not sufficient to support the second element of attempted bribery: that "Defendant began to do an act which constituted a substantial part of the bribery of a witness," the overt act requirement of bribery of a witness. The overt act required to prove an attempt to commit a felony must be an act undertaken in part execution of the intent to commit the crime. *See State v. Green*, 1993-NMSC-056, ¶ 21, 116 N.M. 273, 861 P.2d 954. Mere preparation to commit the crime is not enough. *See State v. Lopez*, 1969-NMCA-115, ¶ 3, 81 N.M. 107, 464 P.2d 23, *overruled on other grounds by State v. Ruffins*, 1990-NMSC-035, ¶ 17, 109 N.M. 668, 789 P.2d 616.

{43} This Court has adopted the explanation by the Kansas Supreme Court in its opinion in *State v. Bereman*, 276 P.2d 364, 365 (Kan. 1954), of the distinction between preparation to commit a crime and the overt act required to convict for an

attempted crime. This Court in *State v. Stettheimer*, 1980-NMCA-023, ¶ 25, 94 N.M. 149, 607 P.2d 1167, quotes *Bereman*, 276 P.2d at 365, as follows:

> In order that there may be an attempt to commit a crime, whether statutory or at common law, there must be some overt act in part execution of the intent to commit the crime. The act must reach far enough toward the accomplishment of the desired result to amount to the commencement of the consummation. It must not be merely preparatory, and it need not be the last proximate act to the consummation of the offense attempted to be perpetrated. However, it must approach sufficiently near to it to stand either as the first or some subsequent step in a direct movement toward the commission of the offense after the preparation or solicitation is made. Slight acts done in furtherance of that design will constitute an attempt. No definite rule can be laid down by which an act might be characterized as overt in any particular case. The general principle of law concerning attempts must be applied in each case as nearly as it can with a view to substantial justice.

In other words, there must be evidence of "an active effort to consummate the crime," to convict a defendant of an attempt. *State v. Trejo*, 1972-NMCA-019, ¶ 12, 83 N.M. 511, 494 P.2d 173.

{44} This Court in *Cotton*, 1990-NMCA-025, considered these requirements in a case involving solicitation to commit bribery of a witness. Although the defendant was not charged with attempted bribery, the opinion distinguishes the crime of solicitation from the crime of attempted bribery of a witness under circumstances similar to those here. The defendant drafted a letter to his wife soliciting her as an intermediary, asking her to attempt to bribe a witness. *Id.* ¶ 5. The letter was not mailed or received by the defendant's wife—it was seized from defendant's car

before being sent. *Id.* ¶ 6. In the course of determining whether the defendant was guilty of solicitation, *Cotton* discusses the difference between solicitation of bribery and attempted bribery, explaining that solicitation and attempt "are analytically distinct in their elements because solicitation[,] unlike attempt, is in the nature of preparation to commit an offense, rather than an act or acts in furtherance of the offense attempted." *Id.* ¶ 24. This Court holds that mere solicitation of an intermediary to bribe a witness, even had the defendant's wife received the letter requesting her help in bribing a witness, is merely preparation to bribe a witness and not enough of an overt act to constitute an attempt to bribe a witness. *See id.* ¶ 26 ("[M]ere solicitation is not enough of an overt act to constitute an attempt."); *id.* (citing committee commentary to UJI 14-2817 NMRA).

{45} Defendant's document in this case, which was drafted to solicit the help of an intermediary in bribing a witness but was never sent to the intermediary, is not sufficient under *Cotton* to prove that Defendant took the substantial step beyond solicitation of an intermediary toward completion of the bribery required to constitute an attempted crime. Indeed, here Defendant, much like the defendant in *Cotton*, did not even commit solicitation of an intermediary. We therefore reverse Defendant's conviction of attempted bribery.

CONCLUSION

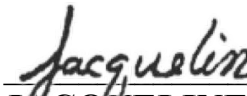
{46} We remand for resentencing in light of our reversal of Defendant's conviction for attempted bribery. We otherwise affirm.

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



JANE B. YOHALEM, Judge

WE CONCUR:



JACQUELINE R. MEDINA, Chief Judge



KRISTOPHER N. HOUGHTON, Judge