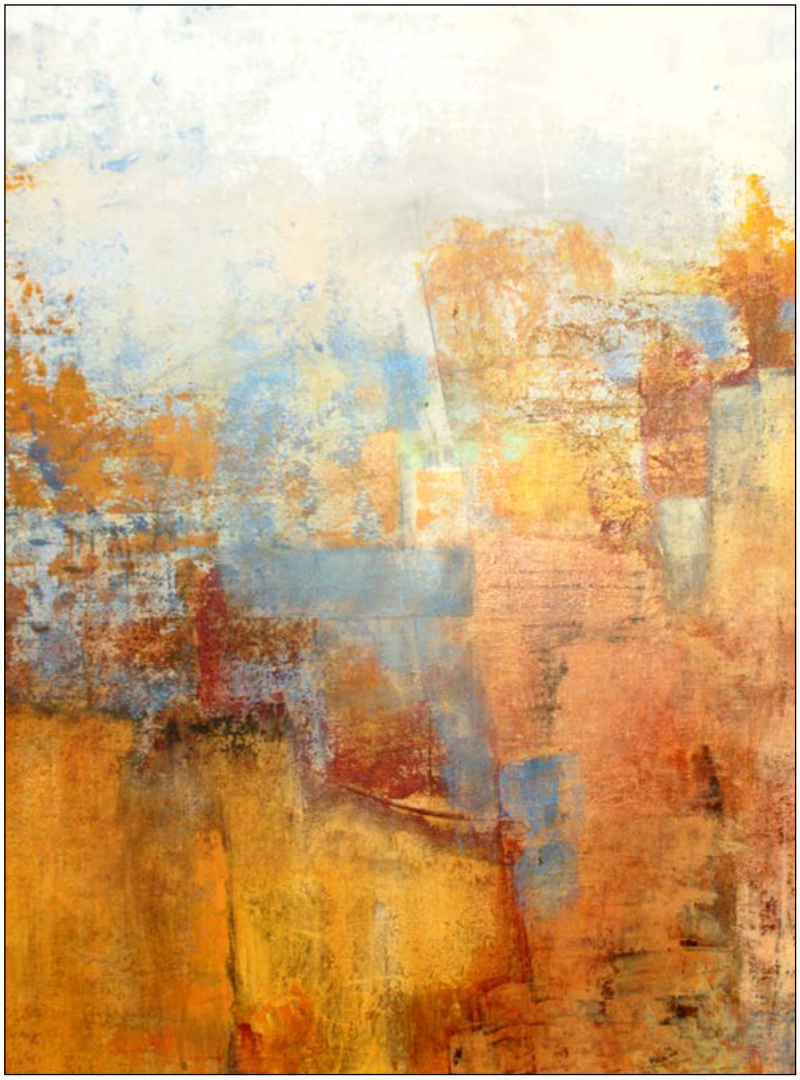
Official Publication of the State Bar of New Mexico

Bar Bulletin

January 12, 2022 • Volume 61, No. 1



Here and Now, by Linda Holland (see page 5) www.lindahollandstudio.com

Inside This Issue

Sutin Welcomes Our Newest Associates

John A. Dragovits is a member of the Firm's commercial group where he focuses his practice on tax and real estate law. He most recently served as a legal extern in the City of Albuquerque's Consumer Financial Protection Initiative. Prior to that, John was a legal intern for the IRS Taxpayer Advocate Service and New Mexico Legal Aid's low income taxpayer clinic. In both roles, he guided taxpayers through their issues with the tax code.

Alex G. Elborn is an associate attorney in the firm's litigation group. His practice centers primarily on commercial litigation, employment law, and probate matters. Prior to joining Sutin, Alex worked for two years in the New Mexico Public Defender's Office. There he managed a caseload of more than 100 matters, working to determine the best case outcomes for his clients and conducted trials as first-chair counsel. He writes and speaks in Spanish.

Jessica R. Martin is a seasoned litigator whose practice focuses on commercial litigation. In her most recent position, she served as Assistant Trial Attorney for the New Mexico Public Defender's Office. She also worked for the New Mexico Immigrant Law Center as an immigration attorney for more than six years. Jessica frequently speaks on immigration law and its consequences on children and families. She is fluent in Spanish.

Albuquerque

SUTIN THAYER & BROWNE LAWYERS

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New Mexico's Business Lawyers®
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State Bar of New Mexico
Est. 1886

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www.sbnm.org

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About Cover Image and Artist: Linda Holland layers and blends color, intuitively responding to shades and textures which evoke patinas of urban and natural realms. Gesture and motion flow from martial arts and musical rhythms. Her abstract sculptures and paintings have been featured in numerous solo and two-person shows in New Mexico as well as juried regional group exhibits. In addition to corporate and private collections, several of her works have been selected for state, municipal and university art collections. For more information, visit www.lindahollandstudio.com.

Notices

Court News

New Mexico Supreme Court

Rule-Making Activity

To view recent Supreme Court rule-making activity, visit the Court's website at https://supremecourt.nmcourts.gov/. To view all New Mexico Rules Annotated, visit New Mexico OneSource at https://nmonesource.com/nmos/en/nav.do.

Supreme Court Law Library

The Supreme Court Law Library is open to the legal community and public at large. The Library has an extensive legal research collection of print and online resources. The Law Library is located in the Supreme Court Building at 237 Don Gaspar in Santa Fe. Building hours: Monday-Friday 8 a.m.-5 p.m. Library Hours: Monday-Friday 8 a.m.-noon and 1-5 p.m. For more information call: 505-827-4850, email: libref@nmcourts.gov or visit https://lawlibrary.nmcourts.gov.

Third Judicial District Court

Announcement of Vacancy

A vacancy on the Third Judicial District Court will exist as of Jan. 1 due to the retirement of Judge Marci Beyer effective Dec. 31, 2021. Applications were due Dec. 20, 2021. The Third Judicial District Court Judicial Nominating Commission will meet at 9 a.m. on Jan. 19 to interview applicants for the position at the Third Judicial District Court, 201 W. Picacho Ave., Las Cruces, NM 88005. The Commission meeting is open to the public, and anyone who wishes to be heard about any of the candidates will have an opportunity to be heard. Consistent with the governor's recent mask mandate, all attendees of the meeting of the Third Judicial District Court Judicial Nominating Commission will be required to wear a face mask at all times while at the meeting regardless of their vaccination status.

Proposed Changes to the Rules Governing Judicial Nominating Commissions

The New Mexico Supreme Court's Equity and Justice Commission's subcommittee on judicial nominations has proposed changes to the Rules Governing New Mexico Judicial Nominating Commissions. These proposed changes will be discussed and voted on during the upcoming meeting of the Third Judicial District Court Judicial Nominating Commission at 9 a.m. on Jan. 19 at the Third Judicial District courthouse 201 W. Picacho Ave., Las Cruces, NM 88005. Email Beverly Akin at akin@law.unm.edu for a copy of the proposed changes. Consistent with the governor's recent mask mandate, all attendees of the meeting of the Third Judicial District Court Judicial Nominating Commission will be required to wear a face mask at all times while at the meeting regardless of their vaccination status.

Bernalillo County Metropolitan Court-Criminal Division

Announcement of Applicants

Eight applications were received to fill the vacancy in the Bernalillo County Metropolitan Criminal Court due to the retirement of the Hon. Judge Henry A. Alaniz effective Dec. 31, 2021. The Bernalillo County Metropolitan Criminal Court Nominating Commission will convene at 9 a.m., Jan. 25, to interview applicants for the position at the Metropolitan Courthouse, located at 401 Lomas NE, Albuquerque, N.M. The names of the applicants in alphabetical order are: **Tonie Jessica Abeyta**, **Steven Gary Diamond**, **Veronica Lee Hill**, **Mari Luz Martinez**, **Claire Ann McDaniel**, **Rebecca Obenshain O'Gawa**, **Nina Aviva Safier**, and **Juan Carlos Scarborough**. Consistent with the governor's recent mask mandate, all attendees of the meeting of the Bernalillo County Metropolitan Court Judicial Nominating Commission will be required to wear a face mask at all times while at the meeting regardless of their vaccination status.

Judicial Nominating Commission Proposed Changes to the Rules Governing Judicial Nominating Commissions

The New Mexico Supreme Court's Equity and Justice Commission's subcommittee on judicial nominations has proposed changes to the Rules Governing New Mexico Judicial Nominating Commissions. These proposed changes will be discussed and voted on during the upcoming meeting of the Bernalillo County Metropolitan Court Judicial Nominating Commission at 9 a.m. on Jan. 25 at the Metropolitan Courthouse, 401 Lomas NE, Albuquerque, NM. Eail Beverly Akin at akin@law.unm.edu for a copy of the proposed changes. Consistent with the governor's recent mask mandate, all attendees of the meeting of the Bernalillo County Metropolitan Court Judicial Nominating Commission will be required to wear a face mask at all times while at the meeting regardless of their vaccination status.

U.S. District Court, District of New Mexico

Public Notices Concerning Reappointments

The U.S. District Court is required by law to establish a panel of citizens to consider the reappointment of the magistrate judge to a new four-year term. The duties of a magistrate judge in this court include the following: (1) conducting most preliminary proceedings in criminal cases, (2) trial and disposition of misdemeanor cases, (3) conducting various pretrial matters and evidentiary proceedings on delegation from a district judge, and (4) trial and disposition of civil cases upon consent of the litigants. Comments from members of the bar and the public are invited as to whether the incumbent magistrate judge should be recommended by the panel for reappointment by the court. Comments may be submitted by email to MJMSP@nmcourt.fed.us. Questions or issues may be directed to Monique Apodaca, 575-528-1439. Comments must be received by Feb. 8.

Reappointment of Incumbent U.S. Magistrate Judge

The current term of office of full-time U.S. Magistrate Judge Carmen E. Garza is due to expire on Aug. 22.

Reappointment of Incumbent U.S. Magistrate Judge

The current term of office of Full-Time U.S. Magistrate Judge Kirtan Khalsa is due to expire on Sep. 7.

Professionalism Tip

With respect to my clients:

I will advise my client that civility and courtesy are not weaknesses.

Reappointment of Incumbent U.S. Magistrate Judge

The current term of office of Part-Time U.S. Magistrate Judge Barbara Smith Evans is due to expire on Sep. 10.

New Mexico Secretary of State

Important Information For Notary Publics and Notarial Officers

In 2021, the State of New Mexico enacted the Revised Uniform Law on Notarial Acts, aka RULONA (Sections 14-14-A1 to 14-14A-32 NMSA 1978) which is effective Jan. 1, 2022. This change in law impacts every current and future commissioned notary public. RULONA makes a distinction between a notary public and a notarial officer. A notarial officer is not commissioned to perform a notarial act, but is authorized to perform a notarial act by certain authority, including individuals who are authorized to practice law in New Mexico, a New Mexico Judge, or New Mexico county clerk or deputy county clerk. A notarial officer authorized to practice law in New Mexico is authorized to practice notarial acts with no expiration but shall maintain an active license to practice law. The commission expiration date is December 31, 2021, for a notarial officer authorized to practice law in this state who was commissioned under the previous Uniform Law on Notarial Acts. All notarial officers will be required to get new official stamps to meet new legal requirements, keep a mandatory journal of notarial acts, and pass a training examination before being recommissioned. The new law also provides for notarial officers to apply with the Secretary of State to become authorized to perform remote online notarizations. Notarial officers are required to have an official stamp that follows statutory requirements that is on file with the Secretary of State before the notarial officer performs a notarial act. RULONA also provides that a judge of a court of this state, a court clerk or deputy court clerk of this state while performing a notarial act within the scope of the clerk's duties, and an individual licensed to practices law in this state are "notarial officers" and may perform notarial acts without applying to become a commissioned notary public. The Secretary of State's Office has additional information about the changes and new requirements on their website that all current or prospective notaries should review. That information can be found by going to www.sos.state.nm.us/ or by calling the Secretary of State's Office Business Services Division at 505-827-3600.

State Bar News

License Renewal and MCLE Compliance–Due Feb. 1

State Bar of New Mexico licensing certifications and fees and Minimum Continuing Legal Education requirements are due Feb. 1, 2022. The Supreme Court of New Mexico recently revised the rules relating to attorney licensing and MCLE (see NMSC Order No. 21-8300-030). For more information, visit www.sbnm.org/compliance

To complete your licensing certifications and fees and verify your MCLE compliance, visit www.sbnm.org and click "My Dashboard" in the top right corner. If you have not logged into our website recently, you will need to choose "Forgot Password." For questions about licensing and MCLE compliance, email mcle@sbnm.org or call 505-797-6054. For technical assistance accessing your account, email techsupport@sbnm.org or call 505-797-6018.

Access to Justice Fund Grant Commission

Two Vacancies Exist

The New Mexico Supreme Court will make two appointments for three-year terms to the State Bar of New Mexico ATJ Fund Grant Commission. The ATJ Fund Grant Commission solicits and reviews grant applications and awards grants to civil legal services organizations consistent with the State Plan for the Provision of Civil Legal Services to Low Income New Mexicans. To be eligible for appointment, applicants must not be affiliated with a civil legal service organization which would be eligible for grant funding from the ATJ Fund. Anyone interested in serving on the Commission should send a letter of interest and brief résumé by Feb. 1, to Stormy Ralstin at sralstin@sbnm.org.

Board of Bar Commissioners

2021 Election Results

The following individuals have been elected by acclamation to the Board of Bar Commissioners for three-year terms: **Olga Serafimova**, First Judicial District; **Allison Block-Chavez** and **Tomas J. Garcia**, Second Judicial District; **Brett Phelps**, Fourth and Eighth Judicial Districts; and **Sean M. FitzPatrick**, Out-of-State District. No nomination petitions were received for two vacancies in the Seventh and Thirteenth Judicial Districts and one position in the Eleventh Judicial District, so the Board made the appointments at its Dec. 8, 2021, meeting. **Catherine Cameron** and **Simone M. Seiler**, Seventh and Thirteenth Judicial Districts; and **Joseph F. Sawyer,** Eleventh Judicial District, were elected to one-year terms, and an election for the positions will be held with the next regular election of the Board in November 2022.

New Mexico Judges and Lawyers Assistance Program

Defenders in Recovery

Defenders in Recovery meets every Wednesday night at 5:30 p.m. The first Wednesday of the month is an AA meeting and discussion. The second is a NA meeting and discussion. The third is a book study, including the AA Big Book, additional AA and NA literature including the Blue Book, Living Clean, 12x12 and more. The fourth Wednesday features a recovery speaker and monthly birthday celebration.

These meetings are open to all who seek recovery. We are a group of defenders supporting each other, sharing in each other's recovery. We are an anonymous group and not affiliated with any agency or business. Anonymity is the foundation of all of our traditions. Who we see in this meeting, what we say in this meeting, stays in this meeting. For the meeting link, send an email to defendersinrecovey@gmail.com or call Jen at 575-288-7958.

Employee Assistance Program

NMJLAP contracts with The Solutions Group, The State Bar's EAP service, to bring you the following: FOUR FREE counseling sessions per issue, per year. This EAP service is designed to support you and your direct family members by offering free, confidential counseling services. Check out the MyStress Tools which is an online suite of stress management and resilience-building resources. Visit www.sbnm.org/EAP or call 866-254-3555. All resources are available to members, their families, and their staff. Every call is completely confidential and free.

Free Well-Being Webinars

The State Bar of New Mexico contracts with The Solutions Group to provide a free employee assistance program to members, their staff, and their families. Contact the solutions group for resources, education and free counseling. Each month in 2022, The Solutions Group will unveil a new webinar on a different topic. In January, focus on getting into the right frame of mind for the new year. Starting Jan. 18, check out "Reframing Your Way Through 2022" which teaches practical steps to use positive reframing strategies and guide your way through 2022. February's topic is honoring grief and loss. Starting Feb. 17, watch "Navigating Through Grief and Loss," covering ways to say goodbye as well as navigating the five stages of grief in a healthy way. View all webinars at www.solutionsbiz.com or call 866-254-3555.

Monday Night Attorney Support Group

The Monday Night Attorney Support Group meets at 5:30 p.m. on Mondays by Zoom. This group will be meeting every Monday night via Zoom. The intention of this support group is the sharing of anything you are feeling, trying to manage or struggling with. It is intended as a way to connect with colleagues, to know you are not in this alone and feel a sense of belonging. We laugh, we cry, we BE together. Email Pam Moore at pmoore@sbnm.org or Briggs Cheney at BCheney@DSCLAW.com for the Zoom link.

NMJLAP Committee Meetings

The NMJLAP Committee will meet at 10 a.m. on April 2 and July 9. The NMJLAP Committee was originally developed to assist lawyers who experienced addiction and substance abuse problems that interfered with their personal lives or their ability to serve professionally in the legal field. The NMJLAP Committee has expanded their scope to include issues of depression, anxiety and other mental and emotional disorders for members of the legal community. This committee continues to be of service to the New Mexico Judges and Lawyers Assistance Program and is a network of more than 30 New Mexico judges, attorneys and law students.

UNM School of Law

Law Library Hours

Due to COVID-19, UNM School of Law is currently closed to the general public. The building remains open to students, faculty and staff, and limited in-person classes are in session. All other classes are being taught remotely. The law library is functioning under limited operations, and the facility is closed to the general public until further notice. Reference services are available remotely Monday through Friday, from 9 a.m.-6 p.m. via email at UNMLawLibref@gmail.com or voicemail at 505-277-0935. The Law Library's document delivery policy requires specific citation or document titles. Please visit our Library Guide outlining our Limited Operation Policies at: https://libguides.law.unm.edu/limitedops.

Women's Law Caucus

Nominations For The Annual Justice Mary Walters Award

The Women's Law Caucus organizes and hosts the annual Justice Mary Walters Award and Dinner. This award honors the pioneering spirit and legacy of Justice Mary Walters, the first female Justice of the New Mexico Supreme Court, by recognizing two women who represent Justice Walter's constant courage, strong ethics, leadership, and mentorship in the legal field. The Women's Law Caucus invites nominations. Submit the name of the nominee, a small blurb about why they should win the award, and a suggestion for who would introduce them if they win. Send nominations to johnstone@law.unm.edu by Feb. 28. The Justice Mary Walters Dinner and Award will be held on the evening of April 22.

Other Bars

Institute for Well-Being In Law

2022 Virtual Conference Open for Registration

Join hundreds of legal professionals for the Institute for Well-Being In Law 2022 Conference: Redesigning The Legal Profession for a Better Future, happening Jan. 19–21. The virtual annual conference will be an education and innovation event focused on redesigning the legal profession to support individual, organizational, and institutional thriving. Education tracks will include: individual well-being, workplace well-being, law school well-being and leading law firm well-being. Register and learn more at https://lawyerwellbeing.net/conference-2022-schedule/.

Other News

Gene Franchini N.M. High School Mock Trial Competition

Judge Registration is Open

Mock trial is an innovative, hands-on experience in the law for high school students of all ages and abilities. Every year, hundreds of New Mexico teenagers and their teacher advisors and attorney coaches spend the better part of the school year researching, studying, and preparing a hypothetical courtroom trial involving issues that are important and interesting to young people. To register to judge, visit https://registration.civicvalues.org/mock-trial/registration/judge-volunteer-registration. The competition is scheduled to be in person, but will be online if necessary. The qualifier tournament will be Feb. 18–19 in Albuquerque and Las Cruces and the state final competition will be March 11–12. For more information, contact Kristen at the Center for Civic Values at 505-764-9417 or Kristen@civicvalues.org.

August 11-13, 2022

Hyatt Regency Tamaya Resort and Spa

Conference will include breakout sessions with the Professional Development Program, Equity in Justice Program and Public Law Section! *That's just to name a few!*

Stay tuned for new details regularly in the *Bar Bulletin* and in your emails!

State Bar of New Mexico
Est. 1886

Do you have federal student loans?

- In March 2020, the federal government suspended all loan payments and set interest rates to 0% on federal student loans.
- This federal student loan forbearance ends on **January 31, 2022**.

What do I need to do now to get ready to resume payments on my student loans?

- Update your contact information on both your servicer's website and on your StudentAid.gov profile.
  - If your loan servicer is FedLoan Servicing, your loans will transfer to a different servicer in 2022 and it is especially important to ensure that your contact information is up to date.
- Check to see if the repayment plan you were enrolled in prior to federal student loan forbearance still meets your needs.
- If you are enrolled in an income-driven repayment (IDR) plan and you have had any change in financial or family situation since March of 2020, visit StudentAid.gov to request a recalculation of your payment.

What if I graduated law school in 2020 or 2021 and have not yet made a payment on my student loans?

- You should have been assigned a student loan servicer and automatically enrolled in a standard repayment plan. Log on to StudentAid.gov to change your repayment plan and learn what option will work best for you.

What if I am working towards Public Service Loan Forgiveness (PSLF)?

- PSLF is a federal program that forgives student loan debt for borrowers who work full-time for a government or non-profit and have made 120 qualifying payments on their student loans.
- **The Department of Education recently enacted new rules for the PSLF program.**
  - Student loan borrowers have until October 22, 2022 to apply for credit for past payments on loans that would not otherwise qualify for PSLF.
  - There are two requirements for eligibility for the limited waiver: 1) you must have worked full-time for a qualifying employer while you made the payments and 2) your loans must be consolidated into the Direct Loan program.
  - Learn more at https://studentaid.gov/announcements-events/pslf-limited-waiver.

Questions or Concerns About Your Federal Student Loans?

- The Department of Education has a Federal Student Aid Ombudsman Group available to provide technical assistance for concerns with student loans. Contact the Ombudsman at 1-877-557-2575.

Legal Education

January

13 **Deal or No Deal: Ethics on Trial**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org

13 **Exit Rights in Business Agreements**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

14 **Practical and Budget-Friendly Cybersecurity for Lawyers**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org

19 **Using Free Public Records and Publicly Available Information for Investigative Research**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org

20 **Ethics of Working with Witnesses**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

21 **Digital Signatures**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org

21 **Diversity, Equity & Inclusion in Law Practice**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

26 **Lawyer Ethics When Working with Paralegals**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

27 **Mandatory Succession Planning: It Has To Happen, But It Doesn't Have To Be That Difficult**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org

February

1 **Microsoft Office 365 in a Law Firm or Legal Department**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org

2 **Retain Your Clients: A Roadmap to Effective, Ethical Client Service**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org

9 **Staying Secure Electronically**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org

10 **Top 10 Music Copyright Cases of All Time**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org

Listings in the *Bar Bulletin* Legal Education Calendar are derived from course provider submissions and from New Mexico Minimum Continuing Legal Education. All MCLE approved continuing legal education courses can be listed free of charge. Send submissions to notices@sbnm.org. Include course title, credits, location/course type, course provider and registration instructions.

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

Joey D. Moya, Chief Clerk New Mexico Supreme Court
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

CLERK'S CERTIFICATE OF WITHDRAWAL

Effective December 10, 2021:
Donald Allan Adams
24913 SE 279th Street
Maple Valley, WA 98038

Effective December 10, 2021:
Dale M. Cone
4616 Waynesboro Pl., N.W.
Albuquerque, NM 87120

Effective December 10, 2021:
Stephen M. Crampton
P.O. Box 4506
Tupelo, MS 38803

Effective December 10, 2021:
Michael C. Crane
1190 Aspen Drive
Logan, UT 84341

Effective December 10, 2021:
Diane Daughton
2175 Deer Trail
Los Alamos, NM 87544

Effective December 10, 2021:
Brian Howard Lematta
6600 Lyndale Avenue S. #1301
Richfield, MN 55423

Effective December 10, 2021:
Maura T. McGowan
113 Broken Bough Lane
San Antonio, TX 78231

Effective December 10, 2021:
Laurie Joyce Hamilton
803 W. 48th Street, Unit 1005
Kansas City, MO 64112

Effective December 10, 2021:
Zenon F. Myszkowski
1424 Stagecoach Lane, S.E.
Albuquerque, NM 87123

Effective December 10, 2021:
David L. Negri
1290 W. Myrtle Street,
Suite 500
Boise, ID 83702

Effective December 10, 2021:
Andrea Waye Reynolds
322 E. Front Street, Suite 570
Boise, ID 83702

Effective December 10, 2021:
Dennis Shedd
114 Waltham Street, Suite 14
Lexington, MA 02421

Effective December 10, 2021:
Joshi A. Valentine
7909 Winthrope Street
Oakland, CA 94605

CLERK'S CERTIFICATE OF NAME CHANGE

As of October 19, 2021:
Theresa Cullen Cordova f/k/a Theresa Cullen-Garney
1058 Villa Linda Way
El Paso, TX 79932
915-214-5120
tcullengarney@elp.rr.com

As of October 15, 2021:
Madeleine Sligh Erwin f/k/a Madeleine Nicole Sligh
U.S. Department of Justice,
Executive Office for Immigration Review
26 Federal Plaza, Room 1237
New York, NY 10278
917-454-1040
madeleine.n.sligh@usdoj.gov

As of October 8, 2021:
Alisa C. Lauer f/k/a Alisa Cook Lauer
P.O. Box 24303
Santa Fe, NM 87502
505-490-3377
alisalauer.law@outlook.com

As of September 17, 2021:
Mariah Mumm f/k/a Mariah McKay
Office of the Eleventh Judicial District Court
103 S. Oliver Drive
Aztec, NM 87410
505-334-6151
aztdmmm@nmcourts.gov

As of October 1, 2021:
Stefanie Lee Nicholson-Black f/k/a Stefanie Lee
7 Avenida Vista Grande, Suite B7, PMB #506
Santa Fe, NM 87508
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stefanie@nicholsonblacklaw.com

As of October 27, 2021:
Jessica Goldman Pretiger f/k/a Jessica Goldman
Shared Assessments
729 Willow Glen Drive
El Paso, TX 79922
915-252-5652
jessicapretiger@gmail.com

As of September 20, 2021:
Kelsea Elaine Sona f/k/a Kelsea Elaine
City of Albuquerque Legal Department
P.O. Box 2248
One Civic Plaza, N.W. (87102)
Albuquerque, NM 87103
505-768-4500
ksona@cabq.gov

As of October 27, 2021:
Amanda Leigh Uberti f/k/a Amanda Uberti
4201 31st Street #1004
Arlington, VA 22206
571-309-2524
mandyuberti@hotmail.com

As of September 22, 2021:
Alexandria E. Vittitow f/k/a Alexandria E. Dell
Stiff, Keith & Garcia, LLC
500 Marquette Avenue, N.W., Suite 1400
Albuquerque, NM 87102
505-243-5755
505-243-5855 (fax)
adell@stifflaw.com

CLERK'S CERTIFICATE OF REINSTATEMENT TO ACTIVE STATUS

Effective November 17, 2021:
Howard C. Williams III
Law Firm of Howard Williams
1650 Hotel Circle N.,
Suite 210
San Diego, CA 92108
858-654-0407
williamshoward@hotmail.com

CLERK'S CERTIFICATE OF CHANGE TO INACTIVE STATUS

Effective August 19, 2021:
Frank Kenneth Bateman Jr.
801 Garcia Street
Santa Fe, NM 87505

Effective September 8, 2021:
Peter Sabian
926 24th Way S.W.
Olympia, WA 98502
Effective September 30, 2021:
Alan Hall
511 Solar Road, N.W.
Albuquerque, NM 87107

Effective October 1, 2021:
Alec Orenstein
707 Route 132
Norwich, VT 05055

Effective October 11, 2021:
Charles A. Wyman
P.O. Box 90952
Albuquerque, NM 87199

Effective October 12, 2021:
Hannah Bridget Bell
P.O. Box 40537
Albuquerque, NM 87196

Effective October 16, 2021:
David D. Mendes
6105 Arlington Blvd., Suite G
Falls Church, VA 22044

Effective October 31, 2021:
Gail MacQuesten
4 Frasco Court
Santa Fe, NM 87508
David L. Walther
123 E. Marcy Street, Suite 205
Santa Fe, NM 87501

Effective November 1, 2021:
David K. Cornwell
10698 Hampton Road
Fairfax Station, VA 22039
William C. Johnston
21 Lexington Drive
Hampstead, NH 03841

Effective November 2, 2021:
David A. Maestas
368 Calle Loma Norte
Santa Fe, NM 87501

Effective November 5, 2021:
Matthew Joseph Carlisle
4632 Elkhorn Court
Westfield, IN 46062
Leilani Darling
523 Highway 36
Quemado, NM 87829

Effective November 8, 2021:
Jeffrey Brian Diamond
P.O. Box 1866
Carlsbad, NM 88220

Before the Disciplinary Board of the Supreme Court of the State of New Mexico

Disciplinary No. 2021-03-4488

In the Matter of **BRIAN JEFFRIES, ESQ,** An attorney on inactive status to practice before the Courts of the State of New Mexico

Formal Reprimand

You are being issued this Formal Reprimand pursuant to a *Conditional Agreement Admitting the Allegations and Consent to Discipline* which was approved by a Disciplinary Board Hearing Committee and a Disciplinary Board Panel.

You first obtained your New Mexico law license in October of 2017. You became licensed in Virginia as well, obtaining that license in 2018. You practiced as a law clerk in Virginia and requested and obtained inactive status for your law license in New Mexico in February of 2019.

In July of 2020, you received an offer of employment from the Second Judicial District Attorney's Office in New Mexico while you still lived in Virginia. You advised the human resources director for that office that your New Mexico law license was inactive and that you would reinstate your law license to active status. The human resources director advised you to pick a start date and to apply for a limited law license in New Mexico. You and the human resources director agreed on a start date of August 24, 2020.

You completed the Character and Fitness portion of the reinstatement application and paid the $500 fee to the New Mexico Board of Bar Examiners. However, you did not completely fill out the application and were so notified by the Board of Bar Examiners of that on August 28, 2020.

In response to that notification, you sent an email to the Board of Bar Examiners advising them you were seeking both a reinstatement of your inactive license and applying for a limited license. However, you did not complete either application despite paying the fees for both.

On or about September 7, 2020, you commenced employment with the Second Judicial District Attorney's Office. While supervised by other personnel from that Office, you appeared in Court and represented the state in various matters, despite the fact you had not obtained either a limited law license and you had not been reinstated to the active practice of law in New Mexico.

On or about December 8, 2020, you were advised by your supervisor that you did not have an active New Mexico law license, and shortly thereafter were placed on administrative leave pending an investigation. You voluntarily resigned from your position on December 11, 2020.

Your conduct in this matter was found have violated Rule 16-101, by failing to provide competent representation; Rule 16-505(A), by practicing law in a jurisdiction in violation of the regulation of the legal profession of that jurisdiction; Rule 16-505(D)(1), by being a non-admitted lawyer and establishing a continuous presence in this jurisdiction for the practice of law; Rule 16-505(D)(2), by being a non-admitted lawyer and representing the lawyer is licensed to practice law in this state; and Rule 16-804(D), by engaging in conduct prejudicial to the administration of justice.

You have expressed remorse for these transgressions and have been cooperative throughout the disciplinary proceeding. It is hoped that you have learned from the experience and the misconduct will not reoccur.

You are hereby formally reprimanded for these acts of misconduct pursuant to Rule 17-206(A)(5) of the Rules Governing Discipline. The formal reprimand will be filed with the Supreme Court in accordance with 17-206(D), and will remain part of your permanent records with the Disciplinary Board, where it may be revealed upon any inquiry to the Board concerning any discipline ever imposed against you. In addition, in accordance with Rule 17-206(D), the entire text of this formal reprimand will be published in the State Bar of New Mexico Bar Bulletin.

Dated: October 15, 2021

The Disciplinary Board of the New Mexico Supreme Court

By
Hon. Cynthia Fry (Ret.)
Board Chair

From the New Mexico Supreme Court

NO. S-1-SC-38714 (Filing Date: December 13, 2021)

INQUIRY CONCERNING A JUDGE
JSC Inquiry No. 2020-038

IN THE MATTER OF
HON. GEORGE ANAYA, JR.
Santa Fe County Magistrate Court

PUBLIC CENSURE

Per Curiam.

This matter came this Court on a petition to accept the stipulated agreement and consent to discipline between the Judicial Standards Commission (the Commission) and Respondent, Honorable George Anaya, Jr., a Santa Fe County Magistrate Court Judge. In the stipulation agreement, Respondent acknowledged that the Commission had sufficient evidence to establish willful misconduct in office. We granted the Petition and accepted the terms of the *Stipulation Agreement and Consent to Discipline* (Stipulation). We now publish this Public Censure in the New Mexico *Bar Bulletin* in accordance with our Order, the Stipulation and JSC Rule 36(C)(5) NMRA 2020.

BACKGROUND

The facts leading to discipline in this case, as set out in the Stipulation, are as follows. On Friday, April 3, 2020, Judge Anaya received an ex parte phone call on his personal cell phone from Fernando Gallegos, the father of an alleged violent offender, Danielle Gallegos, who was charged with multiple violent felony offenses and arrested on Friday, April 3, 2020. On Saturday, April 4, 2020, Judge Anaya received and engaged in a second ex parte phone call on his personal cell phone, again from the father of Danielle Gallegos, the alleged violent offender. After receiving the second ex parte phone call, Judge Anaya signed an Order of Release, which resulted in Danielle Gallegos' release on Saturday, April 4, 2020.

Judge Anaya's weekend release of Danielle Gallegos disregarded a well-established Santa Fe County Magistrate Court protocol regarding the weekend release of alleged violent offenders. The Santa Fe County Magistrate Court enacted a protocol which instructs the judge on call over the weekend not to release alleged violent offenders until the next business day to allow the District Attorney's office an opportunity to review the charges and determine if a motion for pre-trial detention is appropriate in accordance with Rule 6-409 NMRA. Judge Anaya had never violated the Santa Fe County Magistrate Court protocol before receiving the two ex parte phone calls from Fernando Gallegos. After the Commission completed its investigation into this matter, which included an informal conference with the Respondent to discuss the allegations prior to the issuance of charges, Respondent stipulated that the evidence was sufficient to prove he had violated the following Rules of the Code of Judicial Conduct and committed willful misconduct in office:

- Rule 21-101 (requiring compliance with the law);
- Rule 21-102 (promoting confidence in the judiciary);
- Rules 21-204(B)-(C) (avoiding external influences on judicial conduct);
- Rule 21-205; (cooperation with others in administration of court business);
- Rule 21-206(A) (ensuring the right to be heard);
- Rules 21-209(A)–(B) (avoiding ex parte communications).

DISCUSSION

Article VI, Section 32 of the New Mexico Constitution provides that "any justice, judge or magistrate of any court may be disciplined or removed for willful misconduct in office." We have defined willful misconduct in office as "improper and wrong conduct of a judge acting in his official capacity done intentionally, knowingly, and, generally in bad faith. It is more than a mere error of judgment or an act of negligence." *In re Locatelli*, 2007-NMSC-029, ¶ 8, 141 N.M. 755. In imposing discipline, we must be satisfied that willful misconduct is proven by clear and convincing evidence. Id. ¶ 7. "There need not be clear and convincing evidence to support each and every [allegation or fact]. Rather, we must be satisfied by clear and convincing evidence that there is willful judicial misconduct which merits discipline." *In re Castellano*, 1995-NMSC-007, ¶ 37, 119 N.M. 140; *see also In the Matter of Robert Merle Schwartz*, 2011-NMSC-019, ¶ 13, 149 N.M. 721. In this case, Judge Anaya acknowledged and stipulated the Commission would have been able to establish by clear and convincing evidence that he had committed willful misconduct in office. While violations of the Code of Judicial Conduct do not control the imposition of discipline, they do provide evidence of misconduct. Id. ¶ 8.

Judge Anaya conceded that the Commission had sufficient clear and convincing evidence to establish that he violated Rules 21-101, 21-102, 21-204(B)-(C), 21-205, 21-206(A) and 21-209(A)-(B) NMRA. Rules 21-101 and 21-102 of the Code of Judicial Conduct codify the overarching principles that govern a Judge's conduct. Rule 21-101 requires a judge to "respect and comply with the law, including the Code of Judicial Conduct." Rule 21-102 states, "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety." The Committee Commentary on these rules explains that public confidence is eroded in the judiciary when a judge engages in improper conduct and conduct that has the appearance of impropriety. Rule 21-102 NMRA, cmt. (1). "The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated [the Code of Judicial Conduct] or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge." Id. at (5).

We agree that the stipulated factual findings support the conclusion that Respondent violated Rules 21-101 and 21-102 of the Code of Judicial Conduct. It is understandable that Respondent might receive an ex parte phone call from a litigant or the representative of a litigant from time to time. New Mexico is a sparsely populated state with many close-knit communities within its counties and judicial districts. New Mexico judges face additional challenges when working in these close-knit communities, including in avoiding individuals who attempt ex parte communications.

It is especially important for judges in these close-knit communities to maintain the independence and integrity of the judiciary to preserve the prestige of the office and the public's confidence in the judiciary *See In re Rael*, No. 33,633 (N.M. Sup. Ct. October 3, 2012) (non-precedential). If a judge receives an attempted ex parte communication, it is the judge's responsibility to not allow or engage in such communications. The judge should interrupt to advise the person that such communications are prohibited and redirect the person to pursue their matter through proper channels, such as through the filing of motions. The judge must also promptly notify all parties of the communication. By adhering to this requirement, the judge may effectively avoid any appearances of impropriety, as well as actual instances of impropriety.

In this matter, Respondent received the first ex parte phone call on his personal cell phone on Friday, April 3, 2020. Respondent should have interrupted the caller, should have told the caller it was improper to call the judge about this matter, and then should have redirected the caller to consult with an attorney and/or to have the defendant file a motion. Essentially, once it was apparent the call concerned Respondent's upcoming review of Danielle Gallegos' conditions of release, after being charged and arrested on serious felony charges, Respondent should have ended the call, and then promptly notified the District Attorney's Office and the defendant of the ex parte phone call and what was discussed.

The next day, Saturday, April 4, 2020, Respondent received and engaged in a second ex parte phone call on his personal cell phone from the defendant's father, Fernando Gallegos--the same individual that called him the night before. Upon recognizing the telephone number, Respondent should have ignored the second phone call. When Respondent answered the call, however, he should have advised Mr. Gallegos that he could not speak about the case without the prosecutor present, and then should have ended the phone call and notified the prosecutor of it. Respondent should not have taken any judicial action in Danielle Gallegos' pending matter without notifying the prosecutor of the two separate ex parte phone calls and affording the prosecutor the right to be heard.

After the second ex parte phone conversation with the defendant's father, Respondent entered an order setting conditions of release for Danielle Gallegos, pending her trial for violent offenses. Respondent's issuance of the release order following the ex parte communications from defendant's father violated an established Santa Fe County Magistrate Court protocol requiring the judge on call for weekend arrest determinations to not set conditions of release for alleged violent offenders until the next business day. The specific stated purpose of the protocol is to afford the District Attorney's Office an opportunity to review the charges and determine if a motion for pretrial detention is needed in the case.

Respondent had never before violated his court's release protocol. Respondent's action of releasing an alleged violent offender against a well-established Santa Fe County Magistrate Court protocol after receiving two separate ex parte phone calls on his personal cell phone from the alleged violent offender's father was improper for a number of reasons. The Respondent's actions deprived the prosecutor of his right to notice and to be heard. He violated his own court's established protocol concerning weekend arrests based upon these two ex parte calls. Respondent's actions also created the improper appearance that Respondent abandoned his role as a neutral and detached, independent, fair, and impartial fact finder. Respondent's conduct furthermore undermined the public's confidence in our state judiciary by compromising the fundamental integrity, impartiality and independence upon which our judicial system is based. *See generally In re Griego*, 2008-NMSC-020, ¶ 19, 143 N.M. 698.

The Rule of Law in our society depends critically upon the public's confidence in our courts, especially concerning the independence and integrity of the judges elected to serve in such high positions of responsibility and authority. Actual impropriety by a judge, or even the appearance of such, not only undermines the public's trust and confidence in that judge but also in the very institutions upon which society is based. To maintain that confidence and in consideration of the broad authority of judicial power, the "conduct prescribed for judges and justices is more stringent than conduct generally imposed on other public officials." *In the Matter of Robert Merle Schwartz*, 2011-NMSC-019, ¶ 18 (*Citing to In re Romero*, 1983-NMSC-054, ¶ 14, 100 N.M. 180, 668 P.2d 296 (1983)).

Rule 21-204(B) provides that "[a] judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment." Rule 21-204(C) provides that "a judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge." Committee commentary to Rule 21-204 emphasizes that its provisions are aimed not only at actual improper influences on judicial conduct but also at the creation of appearances of impropriety: "Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences." *See In re Naranjo*, 2013-NMSC-026, ¶ 11 (*Citing to* Arthur Garwin et al., *Annotated Model Code of Judicial Conduct*, 122 (2d ed. 2011)). Violating a well-established court protocol by releasing an alleged violent offender over the weekend after receiving two separate ex parte phone calls from the alleged violent offender's father violated Rules 21-204(B) and (C).

Rule 21-209(A) prohibits a judge from initiating, permitting, or engaging in ex parte communications. "Ex parte communications are prohibited generally because they undermine the adversary system, threaten the fairness of a proceeding, and create an appearance of bias and impartiality." *See In re Naranjo*, 2013-NMSC-026, ¶ 15; *see also* Rule 21-206 NMRA cmt. (1) ("[T]he right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed."). Engaging in ex parte communications and acting on those conversations robs the other parties to a case of their rights to be heard, and ultimately erodes the public confidence that the judge will afford them a fair hearing. Respondent prevented the District Attorney's Office from reviewing the matter and addressing issues relating to pretrial detention by releasing the alleged violent offender after communicating ex parte twice with the defendant's father, thereby depriving the state from being heard.

Rule 21-206(A) requires a judge to "accord to every person who has a legal interest in a proceeding . . . the right to be heard according to law." The Santa Fe County Magistrate Court protocol regarding the release of alleged violent offenders arrested over the weekend is not a law, but it was purportedly designed, in part, to ensure the very thing that Judge Anaya deprived: depriving the state's attorney of the opportunity to review the case before releasing an alleged violent offender into the community. Respondent has an affirmative duty under Rule 21-205 to comply with all court rules and procedures. *See In re Barnhart*, No. 29,379 (N.M. Sup. Ct. October 19, 2005) (where Respondent photographed interior of Court in violation of courthouse rules and policies) (non-precedential). Court protocols are set in each court and are specific to each

court to help ensure the proper administration of justice. Failing to abide by protocols, policies and/or rules set by a judge's court threatens to undermine the effective administration of justice in that court and could place the alleged victim(s), witness(es), or the community at risk of harm. Respondent's conduct violated the Code of Judicial Conduct and constitutes willful misconduct in office.

Rule 21-209(B) outlines the procedure a judge should follow when presented with an ex parte communication, stating "[i] f a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond." Respondent failed to make any of the parties—neither the defendant nor the District Attorney--aware of his multiple ex parte communications prior to taking the action those communications sought to achieve: the release of the alleged violent offender from jail pending trial. Respondent's violation of Rules 21-209(A) and (B) of the Code of Judicial Conduct is clear. He permitted and engaged in two separate ex parte phone calls with a criminal defendant's father, released the defendant following those ex parte calls, and then failed to make the other party (the prosecution) aware of the ex parte phone calls. The result of Respondent's misconduct was the deprivation of the right to notice and an opportunity to be heard on this important matter.

Under the terms of the stipulation offered by the Commission and Respondent, and considering our own case law, Respondent's conduct and violations of the Code of Judicial Conduct constituted willful misconduct in office. *Naranjo*, 2013-NMSC-026 (holding a judge who engaged in ex parte communications committed willful misconduct); *see also Rael*, No. 33,633, dec. (holding a judge engaging in ex parte proceedings and taking action in the case based off the ex parte proceeding committed willful misconduct). Respondent knowingly permitted, engaged, and acted upon two separate ex parte communications with the father of an alleged violent offender arrested over a weekend, and in so doing, violated the established protocol of his own court, and then failed to notify the other party in the case (the District Attorney) of the ex parte communications and their substance. In so doing, we agree that Respondent's actions constitute willful misconduct in office.

We therefore accept the stipulation agreement presented by the Commission and Respondent and issue this public censure to Respondent as an assurance to the public we serve and as a clear reminder to all judges under our supervisory authority that improper judicial behavior will not be tolerated. Furthermore, this censure affirms the steadfast commitments of our judiciary to all persons lawfully coming before our courts that they shall receive fair and impartial justice under the law.

For the foregoing reasons, Respondent Hon. George A. Anaya, Jr. is hereby censured for his willful misconduct as set forth fully above and our previous order accepting the stipulation and consent to discipline is accepted, adopted, and confirmed.

IT IS SO ORDERED.
MICHAEL E. VIGIL, Chief Justice
C. SHANNON BACON, Justice
DAVID K. THOMSON, Justice
JULIE J. VARGAS, Justice

From the New Mexico Court of Appeals

Opinion Number: 2020-NMCA-046
No. A-1-CA-37352 (filed July 31, 2020)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
KIMBERLY ANN LEDBETTER,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY
KEA W. RIGGS, District Judge

Released for Publication October 6, 2020.

HECTOR H. BALDERAS,
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JOHN KLOSS,
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for Appellee

BENNETT J. BAUR,
Chief Public Defender
JOHN BENNETT,
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Santa Fe, NM
for Appellant

Opinion

J. Miles Hanisee, Chief Judge.

{1} Defendant Kimberly Ledbetter appeals from her convictions for residential burglary, contrary to NMSA 1978, Section 30-16-3(A) (1971); larceny, contrary to NMSA 1978, Section 30-16-1(B) (2006); and criminal damage to property (over $1000), contrary to NMSA 1978, Section 30-15-1 (1963). On appeal, Defendant raises the following challenges: (1) the State presented insufficient evidence to support Defendant's convictions for residential burglary, larceny, and criminal damage to property; and (2) the district court fundamentally erred by providing the jury an incomplete instruction concerning accessory liability. We reverse.

BACKGROUND

{2} Thomas Wulf owned the residential property at issue (the property), consisting of a house, a detached garage, and a guest house. Thomas resided at the property until 2008, following which he hired Sonny Candelaria, a handyman, to conduct repairs and renovations. Sonny intermittently worked at the property about once or twice a week, occasionally allowing a week to pass between his visits, and Thomas would periodically visit to check on the work's progress. From June through October 2013, however, Sonny had neither been to nor worked at the property. In October 2013, when Sonny arrived to continue the remodeling work, he discovered that "everything was kind of demolished," with several fixtures and appliances stolen and significant structural damage from the removal of items such as ceiling fans, electrical wiring, and air conditioning units. Sonny immediately informed Thomas, who called the police to report the burglary.

{3} A police sergeant from the Chaves County Sheriff's Office (CCSO) arrived to investigate the burglary at the property. The sergeant observed as many as three different shoe tracks and collected approximately sixteen items of evidence. Twelve of those items were submitted for DNA testing, including cigarette butts, soda cans, water bottles, and human excrement. Both male and female DNA were detected on the items, and Defendant's DNA matched the DNA found on three cigarette butts and three soda cans. Of those, one cigarette butt and one soda can were collected in the master bedroom, one cigarette butt in the southwest bedroom, and two soda cans and one cigarette butt in the laundry room.

{4} At trial, the sergeant testified that at a post-incident interview, Defendant admitted that she was not in Roswell between April and October 2013. However, two officers contradicted Defendant's statement, testifying that they had contact with Defendant in Roswell on September 22 and October 1. The sergeant further testified that he did not see evidence that someone was living at the property, that he identified at least three different footprints, and that he found plastic casing and paper insulation on the floor from where someone spent time stripping the copper from the electrical wiring. On cross-examination, the sergeant indicated that he was unable to determine whether the burglary occurred over a period of time or all at one time, and that none of the stolen items had yet been recovered or linked to Defendant. The expert who conducted the DNA testing testified at trial and discussed in detail the results of the samples that matched Defendant. On cross-examination, the expert explained that the DNA evidence simply indicates that Defendant's DNA was on certain samples, but it cannot explain how or when the Defendant's DNA transferred onto the samples. Defendant did not present any witnesses or evidence, and the jury convicted Defendant of residential burglary, larceny, and criminal damage to property.

DISCUSSION

I. Insufficient Evidence Supported Defendant's Convictions for Residential Burglary, Larceny, and Criminal Damage to Property

{5} Defendant argues that there was insufficient evidence to establish her convictions for residential burglary, larceny, and criminal damage to property. We agree and address each conviction in turn.

{6} In reviewing the sufficiency of the evidence on appeal, we view the evidence "in the light most favorable to the [s]tate, resolving all conflicts and making all permissible inferences in favor of the jury's verdict." *State v. Dowling*, 2011-NMSC-016, ¶ 20, 150 N.M. 110, 257 P.3d 930. We must "determine whether any rational jury could have found the essential facts to establish each element of the crime beyond a reasonable doubt." *Id.* "Our appellate courts will not invade the jury's province as fact-finder by second-guessing the jury's decision concerning the credibility of witnesses, reweighing the evidence, or substituting its judgment for that of the jury." *State v. Gwynne*, 2018-NMCA-033, ¶ 49, 417 P.3d 1157 (internal quotation marks and citation omitted). "While we cannot substitute our own judgment for that of the jury in weighing the evidence, . . . [we] ensure that, indeed, a rational jury *could* have found beyond a reasonable doubt the essential facts required for a conviction." *State v.*

Vigil, 2010-NMSC-003, ¶ 4, 147 N.M. 537, 226 P.3d 636 (internal quotation marks and citation omitted). Specifically, "we have a duty to assure that the basis of a conviction is not mere speculation." *Id.* ¶ 19 (internal quotation marks and citation omitted); *see* UJI 14-6006 NMRA (providing that a jury's "verdict should not be based on speculation, guess or conjecture"). "Jury instructions become the law of the case against which the sufficiency of the evidence is to be measured." *State v. Smith*, 1986-NMCA-089, ¶ 7, 104 N.M. 729, 726 P.2d 883.

A. Residential Burglary

{7} As to the charge of residential burglary, the jury was instructed that the State must prove beyond a reasonable doubt that (1) "[D]efendant entered a dwelling without authorization"; (2) "[D]efendant entered the dwelling *with the intent* to commit a theft or [c]riminal [d]amage to [p]roperty (over $1000) when inside"; and (3) "This happened in New Mexico on or about or between April 1, 2013 and October 7, 2013." (Emphasis added.) A "dwelling house" was defined as "any structure, any part of which is customarily used as living quarters." Moreover, for each of the three charges, the State was required to prove beyond a reasonable doubt that Defendant acted intentionally, and the instructions elaborated that "[a] person acts intentionally when she purposely does an act which the law declares to be a crime [and w]hether [D]efendant acted intentionally may be inferred from all of the surrounding circumstances."

{8} Defendant does not dispute her unauthorized entry into the property, but she contends that "mere unauthorized entry does not lead to a reasonable inference of [her] intent to commit a felony or theft therein" as is required for burglary. At trial, the State presented evidence of Defendant's DNA found on cigarette butts and soda cans at the property, Defendant's statement that she was not in New Mexico during April to October 2013, and officers' testimonies regarding contact with Defendant in Roswell in late September and early October 2013. The State contends that Defendant's DNA found on items "near areas of the residence in which extensive damage had occurred over necessarily protracted periods of time" and the Defendant's statement that she was not in New Mexico—despite testimony by officers stating otherwise—supports an inference of Defendant's "consciousness of her own guilt for her involvement in what had occurred during her unauthorized entry" on the property. We are unpersuaded.

{9} Based on our review of the record, the evidence establishes only that Defendant entered the property without authorization. The State did not present sufficient evidence to establish, either directly or by circumstantial evidence, the specific intent required for a burglary charge—that Defendant entered the dwelling "*with the intent* to commit a theft or [c]riminal [d]amage to [p]roperty," such that a rational jury could have found beyond a reasonable doubt the essential facts required for a conviction. *See Dowling*, 2011-NMSC-016, ¶ 20; *State v. Flores*, 2010-NMSC-002, ¶ 19, 147 N.M. 542, 226 P.3d 641 (recognizing that "circumstantial evidence alone can amount to substantial evidence" and that intent is generally inferred from the circumstances). Defendant's statement, allegedly misleading the police about her whereabouts over the relevant period, does not clearly establish a "consciousness of her own guilt" as to the charged offenses. The statement could have suggested her "consciousness of guilt" as to the unauthorized entry, but in either case, mere speculation cannot form the basis of a conviction. *See Vigil*, 2010-NMSC-003, ¶ 19.

{10} Here, the speculation inherent in this conviction is evident when considering the sergeant's testimony that he was unable to determine whether the burglary occurred over a period of time or all at once and that none of the stolen items had yet been recovered or linked to Defendant. Further, the charging period of the offense spans over six months, and despite investigations, the officers were unable to establish a time frame that placed Defendant at the property when the offenses occurred.

{11} The State cites to *State v. Jennings* for the proposition that "[a]n unauthorized presence in a structure is evidence from which a jury could reasonably infer the necessary intent to commit a felony or theft therein." 1984-NMCA-051, ¶ 14, 102 N.M. 89, 691 P.2d 882. Defendant proposes that *Jennings* should be overruled or modified. We consider *Jennings* to be inapplicable because there were attendant circumstances in *Jennings* from which an inference of intent could be drawn, unlike the facts here. There, the defendants appealed convictions for possession of burglary tools and conspiracy to commit breaking and entering, and here Defendant appeals a conviction for residential burglary. *Id.* ¶ 1. The charges in both *Jennings* and our present case require specific intent—either demonstrating the intent to use the tools in committing a burglary or the intent to commit a felony or theft on the property, respectively. *Id.* ¶ 14; *see* UJI 14-1630 NMRA; UJI 14-1633 NMRA.

{12} In *Jennings*, we held that there was sufficient evidence to prove specific intent based on the facts and the evidence presented regarding the defendants' actions and surrounding circumstances, allowing the jury to reasonably infer that the defendants intended to break into the gas station and commit a theft. *Jennings*, 1984-NMCA-051, ¶ 14 ("The facts . . . regarding the defendants' actions and the surrounding circumstances, provide sufficient evidence from which a jury could infer that [the] defendants intended to break into the station and commit a theft therein. This is a reasonable inference."). There, officers testified at trial that they heard "metallic banging" coming from the back of the gas station (the scene of the crime), that "one defendant attempted to scale the [gas] station wall," that there were "fresh marks which appeared to be screwdriver marks . . . on the bathroom door, and [that] the padlock had been broken off the basement door[,]" and that the defendants were apprehended by officers with burglary tools on their persons. *Id.* ¶¶ 3-5, 12. In contrast to the evidence in *Jennings*, there is simply no comparable direct or circumstantial evidence here that leads to an inference of Defendant's intent to commit a theft or felony at the property. *Bowman v. Inc. Cty. of Los Alamos*, 1985-NMCA-040, ¶ 9, 102 N.M. 660, 699 P.2d 133 ("An inference is more than a supposition or conjecture. It is a logical deduction from facts which are proven, and guess work is not a substitute therefor." (internal quotation marks and citation omitted)).

{13} Moreover, in *Jennings*, several officers arrived at the gas station close in time to the suspected burglary and apprehended the defendants on the scene. 1984-NMCA-051, ¶¶ 3-4. Here, however, Defendant was not apprehended at the scene as the suspected burglary took place. Instead, Defendant was apprehended after the burglary was discovered to have taken place sometime between April and October 2013, and only after her DNA was determined to be on cigarettes and soda cans left behind at the scene during that same time period. Although some of those cigarettes and soda cans were found near where copper wiring was stripped and near significant structural damage, such evidence alone does little to narrow the broad window within which that DNA evidence was left or tangibly link it to the occurrence of the underlying crimes. As well, some of the DNA samples linked to Defendant also contained DNA contributions from unknown persons. Absent more, the DNA evidence from Defendant found on discarded cigarettes and soda cans on premises that had been unoccupied in excess of six months cannot support a reasonable inference that Defendant intended to commit a theft or to criminally damage the property upon entry. In fact, Defendant's unauthorized entry could have occurred weeks or months before or after any burglary took place. There is simply no evidence that Defendant was present then, much less with the requisite intent. Our conclusion is further supported by the sergeant's testimony that the stolen property was neither recovered nor linked to Defendant in any manner.

{14} What we have in this case is evidence of (1) Defendant's unauthorized presence on the property sometime within six months of the burglary; (2) stolen fixtures and appliances as well as structural damage at the property; (3) Defendant's statement that she was not in New Mexico during April to October 2013; and (4) officers' testimonies of contact with Defendant on September 22 and October 1. There is no evidence linking Defendant's presence to any theft or proving that Defendant was present during the burglary, or otherwise assisted or encouraged such burglary by others, except by speculation based on her DNA on cigarette butts and soda cans. Notably, there was no DNA evidence found on any burglary tools or plastic casing and paper insulation in the electrical wiring, nor fingerprints on the damaged areas of the property, nor eyewitness testimony placing Defendant at the scene during the incidents, nor even any evidence connecting Defendant to the stolen items. *See* UJI 14-2823 NMRA ("Mere presence of the defendant, and even mental approbation, if unaccompanied by outward manifestation or expression of such approval, is insufficient to establish that the defendant aided and abetted a crime."); *see also* NMSA 1978, § 30-1-13 (1972). As such, for the jury to have reached the conclusions necessary to yield a guilty verdict as to the residential burglary charge, it necessarily had to speculate that Defendant's presence on the property established by Defendant's DNA on cigarette butts and soda cans was sufficient to satisfy the specific intent required here. While evidence of intent can be based on circumstantial evidence, we will not uphold a conviction based on mere speculation. *See Dowling*, 2011-NMSC-016, ¶ 20; *Flores*, 2010-NMSC-002, ¶ 19. Here, none of the evidence presented, individually or collectively, gives rise to any reasonable conclusion that Defendant had the intent to commit a felony or theft at the property. Therefore, we reverse Defendant's conviction for residential burglary.

B. Larceny and Criminal Damage to Property

{15} A similar analysis follows regarding Defendant's convictions of larceny and criminal damage to property. The jury instructions for larceny required that the jury find beyond a reasonable doubt that (1) "[D]efendant took or carried away a battery, battery charger, two air conditioners, a stove, electrical wires, electrical parts, bathroom sink, toilet, plastic sawhorses, and a wheel barrow, belonging to another, which had a market value [of] over $2,500.00"; (2) "At the time she took this property, [D]efendant *intended* to permanently deprive the owner of it"; and (3) "This happened in New Mexico on or about or between April 1, 2013 and October 7, 2013." (Emphasis added.) To convict Defendant of criminal damage to property (over $1000), the State had to prove beyond a reasonable doubt that: (1) "[D]efendant *intentionally* damaged [the] property of another"; (2) "[D]efendant did not have the owner's permission to damage the property";(3) "The amount of the damage to the property was more than $1000.00"; and (4) "This happened in New Mexico on or about or between April 1, 2013 and October 7, 2013." (Emphasis added.)

{16} The State contends that the jury received sufficient evidence to support the convictions for larceny and criminal damage to property, pointing to testimony from Thomas and Sonny regarding the condition of the residence before the incident(s) and the missing items including copper electrical wiring, fixtures, and appliances. The State emphasizes that soda cans and cigarettes with Defendant's DNA found close to areas where "labor-intensive damage" had occurred support the inference that such damage would have taken several days to accomplish and contends that such circumstantial evidence supports the verdicts. We disagree.

{17} In our earlier residential burglary analysis, we held that the evidence presented at trial supported that Defendant entered the property without authorization, however, failed to prove the necessary specific intent. *See supra ¶ 14.* Both larceny and criminal damage to property also have comparable mens rea requirements. As to the larceny conviction, in particular, there was an insufficient basis from which the jury could infer that Defendant "took or carried away" the enumerated items, and much less that she did so with the specific intent "to permanently deprive the owner" based on the evidence at trial. *See State v. Paris*, 1966-NMSC-039, ¶ 5, 76 N.M. 291, 414 P.2d 512 (explaining that the corpus delicti of larceny is not established by showing loss by the owner, access by the defendant, and the defendant's unexplained disappearance and rather that, where circumstantial evidence was sufficient to establish the corpus delicti of larceny, some element of subsequent possession in the defendant of the stolen property was present); *see also State v. Brown*, 1992-NMCA-028, ¶ 17, 113 N.M. 631, 830 P.2d 183 (noting that where there are other circumstances linking the defendant with a theft, possession of stolen property can support a larceny conviction).

{18} Evidence that certain items and fixtures were missing from the property does not establish that Defendant took the property or assisted in the taking of property under an accomplice liability theory. The State effectively asked the jury to speculate that Defendant necessarily must have participated in taking and carrying away of the property or aided or encouraged another in taking the property because (1) the property had not been found; and (2) Defendant was the only unauthorized person identified to have been at the property at some unknown point in time during the lengthy charging period. *Cf. State v. Silva*, 2008-NMSC-051, ¶ 19, 144 N.M. 815, 192 P.3d 1192 (discussing that a conviction for tampering could not be sustained where the state effectively asked the jury to speculate that the defendant committed the overt act of hiding the murder weapon because it was never found). We will not uphold a conviction based on mere speculation; therefore, we conclude the evidence is insufficient for a larceny conviction.

{19} Similarly, there was an insufficient basis from which the jury could infer that Defendant damaged property. Again, her mere presence or unauthorized entry to the property alone does not satisfy either the actus reus or the mens rea required for criminal damage to property. *See State v. Vargas*, 2016-NMCA-038, ¶ 33, 368 P.3d 1232 ("Generally, mere presence during the commission of the charged offense, even presence accompanied by mental approbation, is insufficient to infer the criminal intent required by the statute."). For the jury to reach a guilty verdict here, it had to infer that, based on testimony that there was structural damage to the property, Defendant "intentionally damaged [the] property of another" or "helped, encouraged or caused" another to damage to property, merely because she was present without authorization at some time during the six-month period. This is a clear example of the sort of impermissible speculation our caselaw disallows.

{20} Given the complete lack of evidence directly linking Defendant to any criminal activity at the property, except by speculation based on her DNA on cigarette butts and soda cans discarded on the premises sometime within six months of the crimes for which she was convicted, we conclude that there was insufficient evidence to support Defendant's convictions for larceny and criminal damage to property beyond a reasonable doubt. Given our holding that there was insufficient evidence to uphold Defendant's convictions, we need not address Defendant's challenge to the accomplice liability instruction.

CONCLUSION

{21} For these reasons, we reverse and remand to the district court to vacate Defendant's convictions.

{22} IT IS SO ORDERED.
J. MILES HANISEE, Chief Judge

WE CONCUR:
KRISTINA BOGARDUS, Judge
JACQUELINE R. MEDINA, Judge

From the New Mexico Court of Appeals

Opinion Number: 2020-NMCA-047
No. A-1-CA-37352 (filed April 21, 2020)

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
JOSEPH A. GRUBB,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY
WILLIAM G. W. SHOOBRIDGE, District Judge

Certiorari Denied, July 17, 2020, No. S-1-SC-38321.
Released for Publication November 24, 2020.

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Opinion

Julie J. Vargas, Judge.

{1} The State appeals the district court's dismissal of one count of identity theft, contrary to NMSA 1978, Section 30-16-24.1(A) (2009), and seventeen counts of forgery, contrary to NMSA 1978, Section 30-16-10(A)(1) (2006), committed in Lea County, for the State's failure to join those charges under Rule 5-203(A) NMRA with Defendant's escape from jail charge, NMSA 1978, § 30-22-8 (1963), in Otero County. The State challenges whether the offenses Defendant allegedly committed in Lea County are, under Rule 5-203(A)(2), "based on the same conduct or on a series of acts either connected together or constituting parts of a single scheme or plan" as the offense Defendant was convicted of in Otero County; and, if so, whether the State is required to join offenses under Rule 5-203(A) when the offenses were committed in different counties located in different judicial districts—an issue of first impression for our courts. Concluding under the circumstances of this case that the charges in Lea County were erroneously dismissed in light of our statutory and constitutional venue requirements, we reverse.

BACKGROUND

{2} This appeal arises from offenses charged in separate counties located in different judicial districts. The forgery and identity theft charges, which were dismissed in the case at bar, were brought in Lea County (the Lea County offenses), located in the Fifth Judicial District, whereas the escape from jail charge was brought in Otero County (the Otero County offense), located in the Twelfth Judicial District. We set forth the relevant factual and procedural backgrounds of each case leading up to the present appeal.

Otero County Offense

{3} While on probation, Defendant was arrested and charged with unrelated crimes. The district court revoked his probation and granted him furlough until the imposition of his sentence on December 31, 2011, at which time he was required to turn himself into the custody of the Otero County Detention Center. Defendant failed to turn himself in on December 31, 2011, and was charged with one count of escape from jail.

Lea County Offenses

{4} In 2013 Defendant identified himself with his half-brother's name and personal information while being arrested, booked into jail, and appearing in court on unrelated offenses.[1] Based on these actions, the State charged Defendant with identity theft and forgery.

Proceedings in Otero County

{5} Prior to trial for the Otero County offense, the district court denied Defendant's motion in limine to exclude testimony about the Lea County offenses, ruling that the circumstances surrounding the Lea County offenses were "probative of the elements of the crime [with which D]efendant is currently charged." During trial, the State explained in its opening statement that the Lea County offenses were "evidenc[e of] a continuing intent not to come back, not to turn himself in, and to avoid [the district court's] order." Further, in its closing argument, the State argued Defendant's use of his half-brother's name was part of his ongoing effort to avoid a sentence and commitment in the conviction for the Otero County offense. Explaining Defendant's motive to use a different identity when being arrested in Lea County, the State argued Defendant was "living a lie" and wanted to go to jail under his half-brother's name because he "want[ed] to hide." Defendant was found guilty of escape from jail in the Otero County offense.[2]

Proceedings in Lea County

{6} Defendant filed a motion to dismiss the Lea County offenses with the Fifth Judicial District Court for failure to join those offenses with the Otero County offenses pursuant to Rule 5-203(A). In its response to the motion to dismiss, the State contended that (1) the "crimes in Lea County were presented at trial on the Otero County case pursuant to Rule 11-404(B) [NMRA]" as evidence of "[D]efendant's intent in not returning from the furlough"; (2) Rule 5-203 neither allows for nor requires joinder of offenses when those offenses are not of the same or similar character or based on the same conduct; and (3) "the rule does not contemplate joinder of offenses in one indictment or information in which venue lies in different jurisdictions." The district court granted Defendant's motion, dismissing the Lea County offenses for failure to join. This appeal followed.

DISCUSSION

[1]The facts underlying the arrests and charges were not made part of the record.

[2]We recently reversed Defendant's conviction for escape from jail and remanded for a new trial in *State v. Grubb*, 2020-NMCA-003, ¶ 1, 455 P.3d 877.

{7} The State raises the following issues on appeal: (1) whether compulsory joinder under Rule 5-203(A) was appropriate given the facts underlying the Otero County offense and the Lea County offenses; and (2) whether Rule 5-203(A) applies to offenses committed in multiple judicial districts. As our holding with respect to the inapplicability of Rule 5-203(A) to offenses committed in multiple counties located in different judicial districts is dispositive of the matter, we need not address whether joinder is appropriate under the circumstances.

{8} Rule 5-203(A) requires joinder of two or more offenses in one complaint, indictment, or information if the offenses "(1) are of the same or similar character, even if not part of a single scheme or plan; or (2) are based on the same conduct or on a series of acts either connected together or constituting parts of a single scheme or plan."[3] The State challenges our compulsory joinder rule's applicability when the offenses at issue were committed in two separate counties, located in different judicial districts. Whether Rule 5-203(A) required joinder in these circumstances is a question of law we review de novo. *See State v. Webb*, 2017-NMCA-077, ¶ 11, 404 P.3d 804 ("The question of whether offenses must be joined under Rule 5-203(A) is a question of law that we review de novo."); *State v. Aragon*, 2017-NMCA-005, ¶ 7, 387 P.3d 320 ("Whether a criminal statute applies to particular conduct is a question of law to be reviewed de novo.").

{9} The rule itself is silent as to the question the State raises, and neither our New Mexico Supreme Court nor this Court have provided guidance as to whether venue has any bearing upon the compulsory joinder rule's breadth. We therefore turn to guidance from other states with compulsory joinder requirements.

A. Venue as a Limitation on Compulsory Joinder

{10} Of states that require joinder of offenses, we identify distinctions based upon whether or not they have codified a venue limitation on compulsory joinder. Several states with compulsory joinder requirements have expressly included within the text of their joinder statutes or rules a limitation on joinder based upon venue. *See, e.g.*, Colo. R. Crim. P. 8(a)(1) (2002) ("If several offenses . . . were committed *within* [*the prosecuting attorney's*] *judicial district*, all such offenses upon which the prosecuting attorney elects to proceed must be prosecuted by separate counts in a single prosecution if they are based on the same act or series of acts arising from the same criminal episode." (emphasis added)); Me. Rev. Stat. Ann. Separate Trials 17-A, § 14 (1976) ("A defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, if such offenses . . . were within the jurisdiction of the same court and *within the same venue*[.]" (emphasis added)); N.J. Stat. Ann. § 3:15-1(b) (West 1987) (barring "separate trials for multiple criminal offenses based on the same conduct or arising from the same episode, if such offenses . . . are within the jurisdiction and *venue of a single court*" (emphasis added)); Or. Rev. Stat. Ann. § 131.515(2) (West 1997) (barring separate prosecutions "for two or more offenses based upon the same criminal episode, if the several offenses . . . establish *proper venue in a single court*" (emphasis added)).

{11} Conversely, there are also states that have declined to include venue limitations in their compulsory joinder statutes or rules. *See, e.g.*, 720 Ill. Comp. Stat. Ann. 5/3-3(b) (West 1961) ("If the several offenses are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution[.]"); N.Y. Crim. Proc. Law § 40.40(1) (McKinney 1970) ("Where two or more offenses are joinable in a single accusatory instrument against a person by reason of being based upon the same criminal transaction, . . . such person may not . . . be separately prosecuted for such offenses even though such separate prosecutions are not otherwise barred by any other section of this article."). Notwithstanding the lack of an express codification of a venue limitation, courts in these states have diverged with respect to whether compulsory joinder is limited by the venue of a defendant's criminal offenses. *Compare People v. Gray*, 783 N.E.2d 170, 179 (Ill. App. Ct. 2003) (concluding that although "venue is not jurisdictional[,]" compulsory joinder in one county is improper if that county is an improper venue because that county's prosecutor is not the "proper prosecuting officer" (internal quotation marks and citation omitted)), *People v. Lindsly*, 472 N.Y.S.2d 115, 118 (N.Y. App. Div. 1984) ("Offenses are joinable in a single accusatory instrument if they arise out of the same criminal transaction and the court has subject matter and *geographical jurisdiction* over both of them[.]" (emphasis added)), *and People v. Bigness*, 813 N.Y.S.2d 570, 571 (N.Y. App. Div. 2006) (recognizing that venue is also referred to by the term "geographical jurisdiction"), *with Commonwealth v. McPhail*, 692 A.2d 139, 141, 144-45 (Pa. 1997) (plurality opinion) (interpreting Pennsylvania's pre-2002 joinder statute—which barred a subsequent prosecution of "any offense based on the same conduct or arising from the same criminal episode, if such offense was . . . within the jurisdiction of a single court"—as not including a venue-based preclusion of joinder of offenses in one county when the offenses were committed during the same criminal episode across several counties (emphasis, internal quotation marks, and citation omitted)), *superseded by statute as stated in Commonwealth v. Fithian*, 961 A.2d 66, 76-77 (Pa. 2008).

{12} As we noted above, New Mexico's compulsory joinder rule does not expressly limit compulsory joinder's reach on the basis of venue. We therefore turn to an examination of our venue statute, which provides, "All trials of crime shall be had in the county in which they were committed." NMSA 1978, § 30-1-14 (1963). Our Supreme Court has held this provision to be "merely a reiteration of the constitutional right of venue" found in Article II, Section 14 of the New Mexico Constitution. *State v. Lopez*, 1973-NMSC-041, ¶ 11, 84 N.M. 805, 508 P.2d 1292; *see* N.M. Const. art. II, § 14 ("In all criminal prosecutions, the accused shall have the right to . . . a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."). Requiring joinder of offenses, committed exclusively within one county, with an offense committed and charged in another county located in a different judicial district would seem to contravene our venue requirements.[4]

{13} Among the approaches taken in

[3]On appeal and in the district court, Defendant limited his joinder argument to one of the applicability of Rule 5-203(A)(2).

[4]We recognize that our venue statute further provides that "[i]n the event elements of the crime were committed in different counties, the trial may be had in any county in which a material element of the crime was committed." Section 30-1-14; *see also State v. Roybal*, 2006-NMCA-043, ¶ 31, 139 N.M. 341, 132 P.3d 598 ("For purposes of a continuing crime, venue is proper in any county in which the continuing conduct has occurred."). Although Defendant contends the Otero County offense may have been based, in part, on conduct occurring within Lea County, the parties do not argue, nor does our review of the record reveal, that any element of the Lea County offenses was committed in Otero County such that we would be faced with the question of whether joinder is appropriate in those circumstances. We therefore leave resolution of that question for another day. *See Aragon*, 2017-NMCA-005, ¶ 9 n.4 (observing the need for case-by-case considerations of reasonable limitations on our compulsory joinder rule).

other jurisdictions set out above, we find those cases determining that venue functions as a reasonable limitation on compulsory joinder persuasive. *See* 4 Wayne R. LaFave et al., *Criminal Procedure* § 16.1(f) (4th ed. 2019) ("In general, states requiring same transaction joinder restrict that obligation to offenses that have venue in a single judicial district. . . . Where legislation requires joinder of offenses arising out of the same criminal episode, but makes no reference to venue limitations, courts have assumed that the venue limitations remain in place and modify the mandatory joinder obligation." (footnote omitted)). Significantly, this approach gives effect to our venue requirements, which are grounded in New Mexico's Constitution—as such, they may not yield to a court rule, such as Rule 5-203(A), to the extent there is a conflict between the rule and the constitutional directive. *See* 20 Am. Jur. 2d *Courts* § 50 (2020) ("A court rule will not be construed to circumvent or supersede a constitutional mandate."); 21 C.J.S. *Courts* § 166 (2020) ("Court rules and their official comments are not effective if they conflict with valid provisions of the constitution."). We now proceed with an application of our venue requirements to the circumstances in the present case.[5]

B. Venue Limitation as Applied to the Present Case

{14} Applying the applicable venue requirements to the case at bar, we conclude the proper venue for the Lea County offenses was in Lea County, in the absence of a change of venue or waiver. *See State v. House*, 1999-NMSC-014, ¶ 28, 127 N.M. 151, 978 P.2d 967 (recognizing the right of both the state and the defendant to seek a change of venue); *State v. Allen*, 2014-NMCA-111, ¶ 21, 336 P.3d 1007 (observing that challenges to venue may be waived). Here, neither party sought a change of, and Defendant did not waive, venue.[6] Rather, Defendant sought dismissal based on the State's failure to join the Lea County offenses with the Otero County offense. Under the procedural posture of the present case, we conclude venue was proper in Lea County and, therefore, the district court erred in dismissing the charges arising from the Lea County offenses for failure to join with the offense charged in Otero County.

CONCLUSION

{15} For the foregoing reasons, we reverse and remand to the district court for reinstatement of the charges arising from the Lea County offenses.

{16} IT IS SO ORDERED.
JULIE J. VARGAS, Judge

WE CONCUR:
JENNIFER L. ATTREP, Judge
KRISTINA BOGARDUS, Judge

[5]Although we recognize a potential conflict between our compulsory joinder rule and our statute identifying the duties of district attorneys, we need not address this issue under the present circumstances. *Compare* Rule 5-203(A) (requiring joinder of certain offenses "in one complaint, indictment or information"), *and State v. Gonzales*, 2013-NMSC-016, ¶ 25, 301 P.3d 380 (concluding that Rule 5-203(A) "demands that *the* [*s*]*tate* join certain charges" (emphasis added) (internal quotation marks and citation omitted)), *with* NMSA 1978, § 36-1-18(A)(1) (2001) (requiring district attorneys to "prosecute and defend for the state in all courts of record *of the counties of his district* all cases, criminal and civil, in which the state or any county in his district may be a party or may be interested" (emphasis added)). *But see* NMSA 1978, § 8-5-2(B) (1975) (vesting the attorney general with the authority to "prosecute and defend in any [court or tribunal other than the New Mexico Supreme Court and Court of Appeals] all actions and proceedings, civil or criminal, in which the state may be a party or interested when, in his judgment, the interest of the state requires such action or when requested to do so by the governor").

[6]Although Defendant states he "waived venue implicitly (if not explicitly) in the proceedings below[,]" he has failed to provide any reference to the record to support this assertion. *See State v. Dominguez*, 2014-NMCA-064, ¶ 26, 327 P.3d 1092 (explaining that "we will not search the record to find facts to support [the defendant's] argument").

From the New Mexico Court of Appeals

Opinion Number: 2020-NMCA-048
No. A-1-CA-38448 (filed August 12, 2020)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
CESAR B.,
Child-Appellant.

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
MARCI E. BEYER, District Judge

Released for Publication November 24, 2020.

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Opinion

Kristina Bogardus, Judge.

{1} We withdraw the opinion filed June 8, 2020, and substitute this opinion in its place.

{2} Child appeals from a conditional plea agreement, wherein he pled no contest to the delinquent act of unlawful carrying of a deadly weapon on school premises, contrary to NMSA 1978, Section 30-7-2.1 (1994) and NMSA 1978, Section 32A-2-3(A) (2009, amended 2019). Child entered into the agreement following the district court's partial denial of his motion to suppress certain statements he made to the assistant principal at his school. Child argues that the district court's partial denial of his motion to suppress was based on an erroneous interpretation of NMSA 1978, Section 32A-2-14(F) (2009), a provision of the Delinquency Act, NMSA 1978, §§ 32A-2-1 to -33 (1993, as amended through 2019). Child further argues that if this Court concludes that his statements are presumptively inadmissible under Section 32A-2-14(F), we should also conclude that the State has failed to rebut that presumption. We agree with Child that the district court's partial denial of his motion to suppress was based on an erroneous interpretation of Section 32A-2-14(F) and reverse on that basis. However, because the district court did not determine whether the State rebutted the presumptive inadmissibility of Child's statements under Section 32A-2-14(F), we leave that question for the district court to answer on remand.

BACKGROUND

{3} No evidence was presented at the hearing on Child's motion to suppress. The parties and the district court, however, relied on the following stipulated facts when arguing and deciding the motion.

{4} Child, a thirteen-year-old middle school student, showed a knife to a classmate on school grounds. Another student witnessed this and reported what she saw. Child was called into the assistant principal's office, and the assistant principal questioned him. Child admitted he had brought the knife to school. The assistant principal relayed what she learned to the school's resource officer. The officer also questioned Child and elicited incriminating statements about the knife.

{5} The State subsequently filed a petition alleging that Child committed the delinquent act of unlawfully carrying a deadly weapon on school premises. Child moved to suppress his statements to school officials and to the school resource officer. Following a hearing on Child's motion, the district court entered an order granting the suppression of Child's statement to the officer but otherwise denied the motion. Child then entered into a conditional plea and dispositional agreement, reserving his right to appeal the district court's partial denial of his motion to suppress. This appeal followed.

DISCUSSION

{6} Following our opinion dismissing Child's appeal on mootness grounds, Child filed a timely motion for rehearing. Having granted Child's motion and after full consideration of the briefing submitted by the parties, we are persuaded that we should review this case—even if it is moot—as it presents an issue of substantial interest and that is also capable of repetition yet evading review. *See Gunaji v. Macias*, 2001-NMSC-028, ¶ 10, 130 N.M. 734, 31 P.3d 1008 ("[Appellate courts] may review moot cases that present issues of substantial public interest or which are capable of repetition yet evade review."); *State v. Jones*, 1998-NMCA-076, ¶ 15, 125 N.M. 556, 964 P.2d 117 ("In determining whether the requisite degree of public interest exists to prevent dismissal on mootness grounds, we consider among other factors . . . the desirability of an authoritative determination for future guidance of public officers[] and the likelihood that the question will recur in the future."); *cf. State v. Sergio B.*, 2002-NMCA-070, ¶ 11, 132 N.M. 375, 48 P.3d 764 (noting that the short-term commitments involved in many children's court cases would allow issues to evade review unless appellate courts invoked the exception to the general rule that they should not decide moot cases). Accordingly, we withdraw our previous opinion and address the merits of Child's appeal.

{7} This case requires us to determine whether Child's statements, made when he was thirteen years old, to the assistant principal of his school are presumptively inadmissible under Section 32A-2-14(F).[1]

[1]On appeal, Child's suppression arguments concern only the statements Child made to the assistant principal. This appears to be a limitation on the relief requested by Child at the district court, where Child sought suppression of "any and all statements [he made] to all school officials[.]" However, based on the limited record before us, we are unable to tell if this is a meaningful limitation—that is, we do not know whether Child made any statements to any school officials other than the assistant principal. Nevertheless, because Child's appellate arguments concern only his statements to the assistant principal, we limit our analysis accordingly.

Because this determination requires us to interpret Section 32A-2-14(F), our review is de novo. *State v. Jade G.*, 2007-NMSC-010, ¶ 15, 141 N.M. 284, 154 P.3d 659. "When interpreting Section 32A-2-14(F), we seek to give effect to the Legislature's intent." *Jade G.*, 2007-NMSC-010, ¶ 15. "In discerning legislative intent, we look first to the language used and the plain meaning of that language." *State v. Trujillo*, 2009-NMSC-012, ¶ 11, 146 N.M. 14, 206 P.3d 125. "However, we look not only to the language used in the statute[] but also to the purpose to be achieved and the wrong to be remedied." *State v. DeAngelo M.*, 2015-NMSC-033, ¶ 7, 360 P.3d 1151 (internal quotation marks and citation omitted). "In doing so, we examine the plain language of the statute as well as the context in which it was promulgated, including the history of the statute and the object and purpose the Legislature sought to accomplish." *Id.* (internal quotation marks and citation omitted).

I. Child's Statements to the Assistant Principal Are Presumptively Inadmissible Under Section 32A-2-14(F)

{8} "The Children's Code . . . provides a child greater protections than those constitutionally afforded adults with regard to the admissibility of a child's statements or confessions." *State v. Adam J.*, 2003-NMCA-080, ¶ 3, 133 N.M. 815, 70 P.3d 805. In line with those greater protections, Section 32A-2-14(F) establishes "a rebuttable presumption that any confessions, statements or admissions made by a child thirteen or fourteen years old to a person in a position of authority are inadmissible." Whether Child's statements to the assistant principal are entitled to this presumption of inadmissibility turns on whether our Legislature intended assistant principals to be included as persons in a "position of authority."

{9} Our Legislature has not defined "position of authority" within the Delinquency Act or, more broadly, the Children's Code. Acknowledging as much, Child urges this Court to adopt the definition of "position of authority" contained in NMSA 1978, Section 30-9-10(E) (2005). There, our Legislature defined "position of authority" as "that position occupied by a parent, relative, household member, teacher, employer or other person who, by reason of that position, is able to exercise undue influence over a child." *Id.*; *see Adam J.*, 2003-NMCA-080, ¶ 16 (Alarid, J., specially concurring) (citing Section 30-9-10(E) when suggesting that "position of authority" as used in Section 32A-2-14(F) "is broad enough to include . . . parents, other adult relatives, employers, private security guards or teachers"). Child acknowledges that our Legislature specifically limited the definition in Section 30-9-10(E) to the uses of that phrase within Sections 30-9-10 through -16, which criminalize sexual offenses against children. Nevertheless, Child argues that the definition is applicable here because, like the statutes criminalizing sexual offenses against children, Section 32A-2-14(F)'s objective is to "protect[] children from the coercive effects of adults in positions of authority seeking to take advantage of the immaturity and inexperience of a child."

{10} Although Child urges us to adopt the broad definition of "position of authority" found in Section 30-9-10(E), we again note that this appeal involves only statements made to an assistant principal. We therefore need not, and do not, address whether parents, relatives, household members, and employers, among others, are persons in positions of authority under Section 32A-2-14(F). Addressing only the factual scenario presented here, we conclude that our Legislature intended assistant principals to be included as persons in a "position of authority." We explain.

{11} As the State points out, our relevant existing case law discussing Section 32A-2-14(F) involves statements made by thirteen- and fourteen-year-old children to law enforcement. *See, e.g.*, *DeAngelo M.*, 2015-NMSC-033, ¶ 1 (involving a thirteen-year-old's statements to three law enforcement officers during a custodial interrogation); *Adam J.*, 2003-NMCA-080, ¶ 2 (involving a thirteen-year-old's statement to a law enforcement officer). Based on this, the State argues that expanding Section 32A-2-14(F)'s protections beyond law enforcement would be absurd. However, the State cites no authority indicating that the factual limitations of the cases presented to New Mexico's appellate courts are suggestive of legislative intent. *See State v. Vigil-Giron*, 2014-NMCA-069, ¶ 60, 327 P.3d 1129 ("[A]ppellate courts will not consider an issue if no authority is cited in support of the issue and that, given no cited authority, we assume no such authority exists."). Further, contrary to the State's position, the plain language used by our Legislature in Section 32A-2-14(F) does not limit the presumptive inadmissibility to confessions, statements, or admissions made to law enforcement by thirteen- and fourteen-year-old children. Instead, it expressly applies to all "person[s] in a position of authority." Section 32A-2-14(F). If the Legislature intended the limitation the State advances, it certainly could have drafted the statute accordingly. *Cf. State v. Lopez*, 2011-NMCA-071, ¶ 12, 150 N.M. 34, 256 P.3d 977 ("If the Legislature had intended great bodily harm to be a necessary element of the underlying felony before criminal commitment can be imposed, the Legislature could have drafted the statute using such language."). And this Court previously has recognized—at least implicitly—that the meaning of "a person in a position of authority" is not limited to law enforcement officers, but includes them. *See Adam J.*, 2003-NMCA-080, ¶ 3 (discussing how the term "a person in a position of authority . . . would *include* a law enforcement officer" (emphasis added) (internal quotation marks and citation omitted).

{12} Just as the language of the statute does not limit persons in a position of authority to law enforcement, the recognized goal of the statute furthers our belief that our Legislature did not intend to so limit the presumptive inadmissibility under Section 32A-2-14(F). Our Supreme Court has recognized that Section 32A-2-14(F) has a "goal of encouraging free communication between children and adults." *Jade G.*, 2007-NMSC-010, ¶ 19. We must then ask whether it would further that goal of free communication to include assistant principals as persons "in a position of authority." *See Lopez v. Emp't Sec. Div.*, 1990-NMSC-102, ¶ 7, 111 N.M. 104, 802 P.2d 9 (stating "that statutes are to be interpreted in order to facilitate their operation and the achievement of their goals"). We believe that it would.

{13} New Mexico has "recognize[d] the value of preserving the informality of the student-teacher relationship." *State v. Antonio T.*, 2015-NMSC-019, ¶ 24, 352 P.3d 1172 (emphasis, internal quotation marks, and citation omitted). This is "[b]ecause maintaining security and order in schools requires a certain degree of flexibility in school disciplinary procedures[.]" *Id.* (omission, internal quotation marks, and citation omitted). In furtherance of school security and order, we do not question that an assistant principal should be able to compel answers from a thirteen- or fourteen-year-old child for the purposes of school discipline. *See id.* (stating that the principal "was entitled to act on her suspicion and compel answers from [the child] for the purposes of school discipline"). However, when the state then seeks to use those same answers in a criminal proceeding, our Legislature has provided additional safeguards for the thirteen- or fourteen-year-old child—the rebuttable presumption of inadmissibility under Section 32A-2-14(F). *See Antonio T.*, 2015-NMSC-019, ¶ 24 (acknowledging that certain school disciplinary violations can also lead to an adjudication of delinquency).

{14} For these reasons, we hold that assistant principals are included as "person[s] in a position of authority" under Section 32A-2-14(F). As such, the district court erred by not concluding that Child's

statements to the assistant principal were presumptively inadmissible under Section 32A-2-14(F).

II. The District Court Shall Determine Whether the State Can Overcome the Presumption of Inadmissibility on Remand

{15} Having concluded that the district court erred by not applying Section 32A-2-14(F)'s presumptive inadmissibility to Child's statements to the assistant principal, the next question is whether the State has overcome that presumption. Child argues that the State has failed to rebut the presumption and invites us to so hold. We decline this invitation.

{16} At the district court, the focus was not on whether the State could overcome the presumptive inadmissibility of Child's statements under Section 32A-2-14(F) but rather on the threshold question of whether that presumptive inadmissibility was even applicable in this case. When the district court concluded that it was not, the State necessarily did not need to put on rebuttal evidence as there was no presumption to rebut. Accordingly, because the State has not had the opportunity to put on rebuttal evidence and because the district court has yet to rule on whether the State can overcome the presumptive inadmissibility under Section 32A-2-14(F), we remand for further proceedings to determine whether the State can overcome the presumption.

{17} Recognizing the need to provide guidance to the district court as it makes that determination, we turn to our Supreme Court's opinion in *DeAngelo M.* In that case, our Supreme Court held that

> Section 32A-2-14(F) requires the [s]tate to prove by clear and convincing evidence that at the time a thirteen- or fourteen-year-old child makes a statement, confession, or admission to a person in a position of authority, the child (1) was warned of his constitutional and statutory rights, and (2) knowingly, intelligently, and voluntarily waived each right.

DeAngelo M., 2015-NMSC-033, ¶ 3. Regarding the second element, the state must establish by clear and convincing evidence that the child, at the time the statements were made, "had the maturity to understand his or her constitutional and statutory rights and the force of will to assert those rights." *Id.* ¶ 17. The district court on remand should apply these principles, as set out in *DeAngelo M.*, to determine whether the presumption has been rebutted.

{18} Finally, we note that nothing in this opinion should be read as limiting the school's use of Child's statements in a school disciplinary proceeding because that question is not before us. *See Antonio T.*, 2015-NMSC-019, ¶ 24 (stating that "maintaining security and order in schools requires a certain degree of flexibility in school disciplinary procedures" (omission, internal quotation marks, and citation omitted)); *In re Doe*, 1975-NMCA-108, ¶ 29, 88 N.M. 347, 540 P.2d 827 (stating that in-school disciplinary matters, unlike criminal proceedings, do not require *Miranda* warnings).

CONCLUSION

{19} For the foregoing reasons, we reverse and remand for further proceedings consistent with this opinion.

{20} IT IS SO ORDERED.
KRISTINA BOGARDUS, Judge

WE CONCUR:
JULIE J. VARGAS, Judge
JENNIFER L. ATTREP, Judge

From the New Mexico Court of Appeals

Opinion Number: 2020-NMCA-049
No. A-1-CA-37411 (filed August 18, 2020)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
ANTHONY BACA,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY
DREW D. TATUM, District Judge

Released for Publication November 24, 2020.

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Opinion
J. Miles Hanisee, Chief Judge.

{1} This formal opinion replaces the memorandum opinion filed in this matter on July 30, 2020.

{2} Anthony Baca (Defendant) appeals his convictions for (1) assault with intent to commit a violent felony upon a peace officer, contrary to NMSA 1978, Section 30-22-23 (1971); and (2) aggravated battery upon a peace officer with a deadly weapon, contrary to NMSA 1978, Section 30-22-25(C) (1971). On appeal, Defendant challenges the sufficiency of the evidence supporting his conviction for assault, and alternatively argues that his convictions for assault and aggravated battery constitute a double jeopardy violation and that we should therefore vacate his aggravated battery conviction. We affirm in part and reverse in part.

BACKGROUND

{3} On August 29, 2016, Defendant was stopped by Officer Christopher Caron of the Clovis Police Department for riding his bicycle on the wrong side of the road. Officer Caron asked Defendant for his identification, but Defendant had none. Officer Caron then asked Defendant his name and date of birth and relayed both to dispatch, from which Officer Caron learned there was an outstanding warrant for Defendant. But when Officer Caron told Defendant that he was going to be arrested on the warrant and tried to handcuff Defendant, Defendant decided to flee rather than be arrested.

{4} Defendant first attempted to utilize his bicycle to get away, but Officer Caron tackled him. Defendant then ran away, and was chased by Officer Caron into a poorly lit driveway. As Defendant tried again to thwart his capture, Officer Caron fired his taser at Defendant, but missed. Defendant then shot Officer Caron and subsequently "took off running" away from the scene. While Defendant's weapon cannot clearly be seen in Officer Caron's lapel camera footage, the footage depicts a bright flash and simultaneously records audio of a corresponding loud bang. From his perspective, Officer Caron "observed [the] bright flash, . . . heard [the] loud bang, and . . . then felt a very intense burning sensation [on] his left thigh[,]" where the bullet fired by Defendant struck Officer Caron. Although Officer Caron did not directly see Defendant shoot him, he knew immediately that he was shot and updated dispatch to this fact, simultaneously taking cover behind a barbeque grill until backup arrived on the scene.

{5} In the end, officers were unable to apprehend Defendant that night, but he turned himself in two days later. In the aftermath of all that happened, Defendant was charged with assault with intent to commit a violent felony upon a peace officer, aggravated battery upon a peace officer, and resisting, evading, or obstructing an officer. After a two-day trial, a jury found Defendant guilty of everything with which he was charged. Defendant appeals.

DISCUSSION

I. The Evidence Supporting Defendant's Conviction for Assault Was Insufficient

{6} Defendant argues there was insufficient evidence to support his conviction of assault with intent to commit a violent felony upon a peace officer. Specifically, Defendant contends that, under the State's theory of assault based on reasonable apprehension, there was no evidence presented that Defendant engaged in any conduct before or after the shooting that could have placed Officer Caron in reasonable fear of an immediate battery by Defendant. The State argues that Defendant's shooting of Officer Caron constituted not only the battery but what the State contends to be a subsequent assault as well, because the shot fired at Officer Caron caused him to reasonably fear that he would be shot again by Defendant, and that sufficient evidence supported both convictions. Specifically, the State asserts that "[u]nlawful conduct alone suffices as the actus reus for an assault charge" and that because Defendant's shooting of Officer Caron was indisputably unlawful conduct, such is, on its own, sufficient evidence to support Defendant's assault conviction.

{7} The test for sufficiency of the evidence is "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. Carson*, 2020-NMCA-015, ¶ 44, 460 P.3d 54 (internal quotation marks and citation omitted). "Substantial evidence is that which a reasonable mind accepts as adequate to support a conclusion." *State v. Huerta-Castro*, 2017-NMCA-026, ¶ 24, 390 P.3d 185. We evaluate the sufficiency of the evidence by "viewing the evidence in the light most favorable to the verdict, resolving all conflicts and indulging all permissible inferences in favor of upholding the conviction, and disregarding all evidence and inferences to the contrary." *State v. Trujillo*, 2012-NMCA-092, ¶ 5, 287 P.3d 344. "Our appellate courts will not invade the jury's province as fact-finder by second-guessing the jury's decision concerning the credibility of witnesses, reweighing the evidence, or substituting its judgment for that of the jury." *State v. Gwynne*, 2018-NMCA-033, ¶ 49, 417 P.3d 1157 (internal quotation marks and citation omitted). The ultimate question is "whether a rational jury could have found beyond a reasonable doubt the essential facts required for a conviction." *State v. Granillo*, 2016-NMCA-094, ¶ 10, 384 P.3d 1121 (internal quotation marks and cita-

tion omitted). "Jury instructions become the law of the case against which the sufficiency of the evidence is to be measured." *State v. Smith*, 1986-NMCA-089, ¶ 7, 104 N.M. 729, 726 P.2d 883.

{8} In this case, in order to convict Defendant of the assault charge, the jury was required to find beyond a reasonable doubt that:

> 1. [D]efendant shot Officer . . . Caron with a firearm;
> 2. At the time, Officer . . . Caron was a peace officer and was performing duties of a peace officer;
> 3. [D]efendant knew Officer . . . Caron was a peace officer;
> 4. [D]efendant's conduct caused Officer . . . Caron to believe [D]efendant was about to intrude on Officer . . . Caron's bodily integrity or personal safety by touching or applying force to Officer . . . Caron in a rude, insolent or angry manner;
> 5. A reasonable person in the same circumstances as Officer . . . Caron would have had the same belief;
> 6. [D]efendant intended to kill Officer . . . Caron[.]

At trial, Officer Caron testified that prior to the shooting, it was "very dark" and "very difficult" for him to see because he did not have a flashlight and there was no outdoor lighting nearby. Once shot, Officer Caron testified he could not see Defendant, did not know where Defendant was, and figured Defendant "was going to try and kill him." Officer Caron also testified that he did not specifically know where Defendant "took off running" after firing his gun.

{9} Defendant was charged with assault with intent to commit a violent felony against a peace officer which prohibits "assaulting a police officer . . . with intent to kill the peace officer." Section 30-22-23. More generally, "[a]ssault consists of either: [(1)] an attempt to commit a battery upon the person of another; [or (2)] any unlawful act, threat or menacing conduct which causes another person to reasonably believe that he [or she] is in danger of receiving an immediate battery." NMSA 1978, § 30-3-1 (1963). The testimony presented at trial fails to prove that Officer Caron *reasonably* feared an *immediate* battery after the shot. Defendant fled after shooting at Officer Caron, and Officer Caron testified that he thought that Defendant might come back and shoot him again. Were we to hold that such facts could allow a jury to infer that Officer Caron reasonably feared an immediate battery, any scenario wherein a battery with a deadly weapon occurs would necessarily transform into a subsequent assault, so long as the victim testifies that he was afraid the shooter would return and attack again. Without further evidence proving Defendant's menacing conduct or an explicit or implied threat of further violence, we cannot conclude that the jury was able to find beyond a reasonable doubt that the required elements of assault with intent to commit a violent felony against a peace officer were satisfied.

{10} The State additionally argues that because there was sufficient evidence to support the jury's conviction for battery—here, Defendant's shooting of Officer Caron—the "unlawful conduct" element of assault is satisfied, and such, on its own, is enough to satisfy the elements of the charged crime. The State reasons that because a conviction for assault can be supported by sufficient evidence of unlawful conduct *without* further evidence of threatening or menacing conduct, a conviction for assault with intent to commit a violent felony against a peace officer can likewise be supported merely by sufficient evidence of unlawful conduct.

{11} For this proposition, the State relies on *State v. Branch*, a case in which we held there to be sufficient evidence to uphold the defendant's conviction of aggravated assault with a deadly weapon based on the defendant's shooting of a victim, which caused a bystander to be assaulted in that she, too, feared that she would be shot by the defendant. 2018-NMCA-031, ¶¶ 1, 20-21, 417 P.3d 1141. There, we rejected the defendant's argument that because he had not made any threat or exhibited any menacing conduct toward the bystander there was insufficient evidence to support his conviction for aggravated assault. *Id.* ¶ 21. Instead, we held that because the defendant committed an unlawful act by shooting the victim, and because "[t]he commission of an unlawful act is an alternative method of committing [assault] that does not rely on threatening or menacing conduct[,]" there was sufficient evidence to uphold the defendant's conviction of aggravated assault with a deadly weapon. *Id.* (internal quotation marks omitted).

{12} We view *Branch* as distinct from the present case. *Branch* involved an alleged assault on a bystander who personally viewed the shooting. *Id.* ¶¶ 16, 21. Thus, the necessary inquiry in *Branch* was whether there was sufficient evidence to prove that a bystander was assaulted by witnessing the defendant shoot the victim. *Id.* ¶¶ 20-21. Here, by contrast, the State needed to present sufficient evidence to prove that Officer Caron, the victim who suffered a battery when shot, was assaulted after having been shot by Defendant. We reiterate that in *Branch*, the bystander—a separate person—was standing next to the victim when the victim was shot, had her hand on the victim's shoulder, saw the muzzle flash, "felt something hit her leg," and testified that she "thought [the defendant] was going to shoot all of us." *Id.* ¶¶ 9, 20. As well, after the defendant shot the victim, the defendant lingered at the scene. *Id.* ¶ 10. Conversely here, Officer Caron testified that while he did see a bright flash and felt a burning sensation in his leg, he did not know where Defendant was after being shot, stating that Defendant "took off running" after firing the gun at Officer Caron. We consider these factual distinctions to be significant because while the bystander in *Branch* witnessed the defendant both before and after the victim was shot—including the time in which the victim lingered at the scene of the shooting—here, Officer Caron's testimony itself makes clear his belief that Defendant ran from the scene afterward and that even before being shot by Defendant, Officer Caron was not able to clearly see Defendant or Defendant's weapon. Unlike in *Branch*, here the State did not introduce evidence sufficient to allow the jury to conclude that Officer Caron reasonably believed that Defendant would immediately batter him.

{13} It remains the case that our legal standard for determining whether there was sufficient evidence presented to uphold a jury's conviction of a particular defendant gives significant deference to the jury's determinations as fact-finder. *See Gwynne*, 2018-NMCA-033, ¶ 49. However, "[w]hile we cannot substitute our own judgment for that of the jury in weighing the evidence, our own responsibility as a court requires scrutiny of the evidence and supervision of the jury's fact-finding function to ensure that, indeed, a rational jury *could* have found beyond a reasonable doubt the essential facts required for a conviction." *State v. Vigil*, 2010-NMSC-003, ¶ 4, 147 N.M. 537, 226 P.3d 636 (internal quotation marks and citation omitted). In doing so, we have a duty to "assure that the basis of a conviction is not mere speculation." *Id.* ¶ 19 (internal quotation marks and citation omitted); *see* UJI 14-6006 NMRA (providing that a jury's "verdict should not be based on speculation, guess or conjecture"). Here, we conclude that the evidence presented merely allowed the jury to speculate—rather than infer—that Defendant separately acted in a manner that caused Officer Caron reasonable fear of an immediate battery after he was shot at by Defendant. Accordingly, we reverse Defendant's conviction for assault with intent to commit a violent felony upon a peace officer. Given our holding, we need not address Defendant's double jeopardy argument.

CONCLUSION

{14} For the reasons set forth above, we vacate Defendant's conviction for assault with intent to commit a violent felony upon a peace officer and affirm Defendant's conviction of aggravated battery upon a peace officer with a deadly weapon.

{15} IT IS SO ORDERED.

J. MILES HANISEE, Chief Judge

WE CONCUR:

MEGAN P. DUFFY, Judge

ZACHARY A. IVES, Judge

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The Fifth Judicial District Attorney's office has immediate positions open for new or experienced attorneys, in our Carlsbad and Hobbs offices. Salary will be based upon the New Mexico District Attorney's Salary Schedule with starting salary range of an Assistant Trial Attorney to a Senior Trial Attorney ($58,000 to $79,679). There is also an opening for a prosecutor with at least 2 years of Trial Experience for a HIDTA Attorney position in the Roswell office, with starting salary of ($ 70,000.00) Please send resume to Dianna Luce, District Attorney, 301 N. Dalmont Street, Hobbs, NM 88240-8335 or e-mail to 5thDA@da.state.nm.us.

Lawyer Position

Guebert Gentile & Piazza P.C. seeks an attorney with up to five years' experience and the desire to work in tort and insurance litigation. If interested, please send resume and recent writing sample to: Hiring Partner, Guebert Gentile & Piazza P.C., P.O. Box 93880, Albuquerque, NM 87199-3880; advice1@guebertlaw.com. All replies are kept confidential. No telephone calls please.

Assistant Trial Attorney 1st Judicial District Attorney

The First Judicial District Attorney's Office has an Assistant Trial Attorney position which is entry level in magistrate court. Salary is based on experience and the District Attorney Personnel and Compensation Plan. Please send resume and letter of interest to: "DA Employment," PO Box 2041, Santa Fe, NM 87504, or via e-mail to 1stDA@da.state.nm.us.

Public Regulation Commission Hearing Examiner (Attorney IV, PRC #53612) Job ID 120627, Santa Fe Salary $34.18-$54.68 Hourly $71,084-$113,734 Annually Pay Band LI

This position is continuous and will remain open until filled. Hearing Examiners provide independent recommended decisions, including findings of fact and conclusions of law, to the NMPRC Commissioners in adjudicated cases involving the regulation of public utilities, telecommunications carriers and motor carriers. They manage and organize complex, multi-discipline and multi-issue cases; preside over evidentiary hearings; and write recommended decisions, accomplished by reading and analyzing the evidence, and incorporating that evidence and analysis into a recommended decision similar to a court opinion. The ideal candidate will have experience practicing law in areas directly related to public utility regulation; experience as an administrative law judge or hearing officer; educational experience in areas directly related to public utility regulation, such as economics, accounting or engineering; and experience practicing law involving substantial research and writing. Minimum qualifications include a J.D. from an accredited school of law and five years of experience in the practice of law. Must be licensed as an attorney by the Supreme Court of New Mexico or qualified to apply for a limited practice license (Rules 15-301.1 and 15-301.2 NMRA). For more information on limited practice license please visit http://nmexam.org/limited-license/ . Substitutions may apply. To apply please visit www.spo.state.nm.us

City of Albuquerque – Contract Attorney

The City of Albuquerque, through the Albuquerque-Bernalillo County Air Quality Control Board ("Air Board"), is seeking a qualified attorney to contract with to provide legal representation and general legal services to the Air Board. This position is an independent contractor, and is not an employee of the City of Albuquerque. Applicant must be admitted to the practice of law by the New Mexico Supreme Court and be an active member of the Bar in good standing. A successful candidate will attend all Air Board meetings, have strong communication skills, knowledge of board governance and Robert's Rules of Order, The NM Open Meetings Act, and knowledge of environmental rules and regulations including the Clean Air Act. Prior experience with, or advising, board and commissions is preferred. Please submit a resume to the attention of "Air Board General Counsel Application"; c/o Angela Aragon; Executive Assistant; P.O. Box 2248, Albuquerque, NM 87103 or amaragon@cabq.gov.

Assistant City Attorneys (Various Departments)

The City of Albuquerque Legal Department is hiring for various Assistant City Attorney positions. The Legal Department's team of attorneys provides a broad range of legal services to the City, as well as represent the City in legal proceedings before state, federal and administrative bodies. The legal services provided may include, but will not be limited to, legal research, drafting legal opinions, reviewing and drafting policies, ordinances, and executive/administrative instructions, reviewing and negotiating contracts, litigating matters, and providing general advice and counsel on day-to-day operations. Attention to detail and strong writing and interpersonal skills are essential. Preferences include: Five (5)+ years' experience as licensed attorney; experience with government agencies, government compliance, real estate, contracts, and policy writing. Candidates must be an active member of the State Bar of New Mexico in good standing. Salary will be based upon experience. Current open positions include: Assistant City Attorney - APD Compliance; Assistant City Attorney – Employment/Labor. For more information or to apply please go to www.cabq.gov/jobs. Please include a resume and writing sample with your application.

Attorney Senior

The Eleventh Judicial District & Magistrate Courts has an immediate career opportunity for an Attorney Senior (Staff Attorney). This position, located at Aztec District Court, provides highly complex and diverse legal work and support for judges and staff in San Juan and McKinley Counties, with occasional travel to Gallup. Salary for this position will be based upon the New Mexico Judicial Branch Salary Schedule with a target starting pay rate of $76,556.48 annually $36.806 p/hr. For a full job description and to download the required forms or application, please visit the Judicial Branch Career page at https://www.nmcourts.gov/careers.aspx . Resumes, with the required Resume Supplemental Form or Application, and supporting documentation may be emailed to 11thjdchr@nmcourts.gov, faxed to 505-334-7762, or mailed to Human Resources, 103 S. Oliver Drive, Aztec NM 87410. Required documentation along with Resume must be received by 5:00 pm on Friday, January 21, 2022.

Legal Administrative Assistant

The Albuquerque Allstate Staff Counsel Office is seeking a legal administrative assistant to assist assigned attorneys in performing a variety of legal administrative duties. Please apply at https://career8.successfactors.com/sfcareer/jobreqcareer?jobId=629962&company=Allstate

Legal Assistant/Paralegal

Rodey's Santa Fe office is accepting resumes for a legal assistant/paralegal position in Santa Fe. Candidate must have excellent organizational skills; demonstrate initiative, resourcefulness, and flexibility, be detail-oriented and able to work in a fast-paced, multi-task legal environment with ability to assess priorities. Responsible for calendaring all deadlines. Must have a high school diploma, or equivalent, and a minimum of three (3) years' experience as a legal assistant or paralegal in litigation, be proficient with Microsoft Office products and electronic filing and have excellent typing skills. Paralegal skills a plus. Firm offers comprehensive benefits package and competitive salary. Please send resume to jobs@rodey.com with "Legal Assistant – Santa Fe" in the subject line, or mail to Human Resources Manager, PO Box 1888, Albuquerque, NM 87103.

Legal Resources for the Elderly Program (LREP) Intake Coordinator

The New Mexico State Bar Foundation Legal Resources for the Elderly Program (LREP) seeks a full-time Intake Coordinator to answer incoming calls, conduct and complete intakes, and establish case files in the LREP electronic case management system. This position also provides clerical assistance and support to other LREP staff as required. The successful applicant must have excellent communication, customer service, and organizational skills. Minimum high school diploma required. Generous benefits package. $15-$16 per hour, depending on experience and qualifications. To be considered, submit a cover letter and resume to HR@sbnm.org. Visit https://www.sbnm.org/About-Us/Career-Center/State-Bar-Jobs for full details and application instructions.

Legal Assistant

Dixon Scholl Carrillo PA is seeking a full time legal assistant with a minimum of 5 years experience in Litigation support. Must be self-motivated have strong writing, organizational, calendaring and multitasking skills. Knowledge of Office 365, and WordPerfect. We offer excellent benefits and great work environment. Competitive Salary. Submit your resume to Michaela O'Malley at momalley@dsc-law.com

Paralegal

Established Albuquerque Family Law Firm seeks experienced paralegal with current working knowledge of domestic matters, state & local rules, filing procedures, trial preparation, calendaring & discovery. Must possess strong word processing skills and experience with Word, Excel, and Outlook. Salary DOE. Bachelor's degree or Associate degree with minimum of two years' experience in NM Family Law. Please send both a cover letter and resume to Letty@cortezhoskovec.com

Paralegal
The City of Albuquerque Legal Department is seeking a Paralegal to assist an assigned attorney or attorneys in performing substantive administrative legal work from time of inception through resolution and perform a variety of paralegal duties, including, but not limited to, performing legal research, managing legal documents, assisting in the preparation of matters for hearing or trial, preparing discovery, drafting pleadings, setting up and maintaining a calendar with deadlines, and other matters as assigned. Excellent organization skills and the ability to multitask are necessary. Must be a team player with the willingness and ability to share responsibilities or work independently. Starting salary is $21.31 per hour during an initial, proscribed probationary period. Upon successful completion of the proscribed probationary period, the salary will increase to $22.36 per hour. Competitive benefits provided and available on first day of employment. Please apply at https://www.governmentjobs.com/careers/cabq.

Paralegal/Legal Assistant
The New Mexico Prison & Jail Project (NMPJP) is a new legal organization that advocates to protect the rights of incarcerated people in New Mexico by bringing civil rights lawsuits and other legal actions on their behalf. NMPJP has a position available for a part-time (20 hours per week) paralegal or legal assistant. Pay is $24 per hour, and the job has the potential to evolve into a full-time position. Work will be primarily remote with daily coordination of activities occurring with NMPJP's Director via Zoom, email, texts and calls, and with at least one in-person meeting per week at the NMPJP office in Albuquerque. The ideal candidate will have a passion for advocating for the rights of people who are incarcerated. We also seek candidates with a proficiency in online legal research and document review; excellent written, verbal and interpersonal communication skills; and experience with federal and New Mexico state court filings and procedures. Email a letter of interest and resume to the selection committee at info@nmpjp.org.

Legal Secretary
The City of Albuquerque Legal Department (Litigation Division) is seeking a Legal Secretary to assist assigned attorneys in performing a variety of legal secretarial/administrative duties, which include but are not limited to: preparing and reviewing legal documents; creating and maintaining case files; calendaring; provide information and assistance, within an area of assignment, to the general public, other departments and governmental agencies. Please apply at https://www.governmentjobs.com/careers/cabq.

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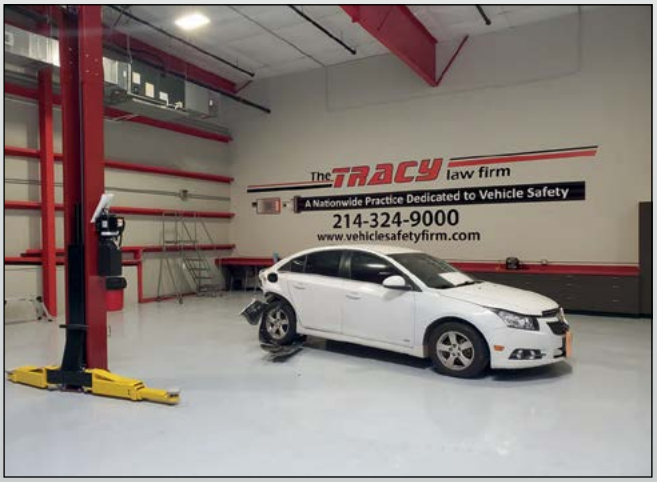
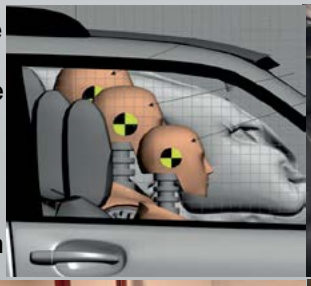
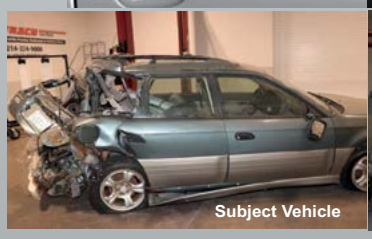
CRASHWORTHINESS:

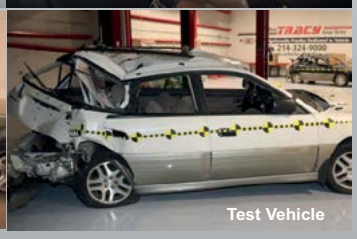
We Didn't Invent the Word;
We DEFINED it.



Every vehicle accident case you handle has the potential to be on one of the 235 racks or in one of our six inspection bays at the firm's Forensic Research Facility. We continually study vehicle safety through the use of engineering, biomechanics, physics and innovation.







If you have any questions about a potential case, please call us. There may be vehicle safety system defects that caused your clients catastrophic injury or death.

The TRACY law firm

A Nationwide Practice Dedicated to Vehicle Safety

4701 Bengal Street, Dallas, Texas 75235

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