

APPENDIX A

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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Filing Date: March 8, 2018

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

NO. S-1-SC-35981

MANUEL GARDNER,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY

Jacqueline D. Flores, District Judge

Bennett J. Baur, Chief Public Defender

Allison H. Jaramillo, Assistant Appellate Defender

Santa Fe, NM

for Appellant

Hector H. Balderas, Attorney General

Maris Veidemanis, Assistant Attorney General

Santa Fe, NM

for Appellee

1 **DECISION**

2 **MAES, Justice.**

3 {1} Defendant Manuel Gardner was found guilty of first-degree murder and armed
4 robbery for fatally shooting Richard Glass and robbing the National Jewelry Buyers
5 store on Coors Boulevard in Albuquerque. The district court sentenced Defendant
6 to life in prison, and Defendant filed a motion for new trial on the basis that the State
7 had used perjured testimony to convict him. The district judge denied the motion.

8 {2} In this direct appeal, Defendant raises the following issues: (1) whether the
9 district court erred in failing to instruct the jury on how to evaluate circumstantial
10 evidence, (2) whether his conviction is based on sufficient evidence, (3) whether the
11 State violated *Brady v. Maryland*, 373 U.S. 83 (1963), in failing to disclose jail
12 records showing Defendant was not incarcerated in the same facility as Robin
13 Thomas, and (4) whether the district court erred in failing to grant Defendant's
14 motion for a new trial. We affirm the denial of Defendant's motion for new trial and
15 affirm Defendant's convictions. Because Defendant raises no questions of law that
16 New Mexico precedent does not already sufficiently address, we issue this non-
17 precedential decision pursuant to Rule 12-405(B)(1) NMRA.

18 **I. FACTS AND PROCEDURAL HISTORY**

19 {3} On July 19, 2013, Mr. Glass was working alone at the National Jewelry Buyers

1 (NJB) store on Coors Boulevard in Albuquerque. NJB buys jewelry from the public
2 and pays cash, which was kept in a locked desk drawer. At 5:05 p.m., a man wearing
3 baggy jean shorts, black tennis shoes with white trim, a black hooded sweatshirt
4 (hoodie) with the hood pulled over his head, and a red bandanna covering his face
5 entered the store, shot Mr. Glass three times with a 9 millimeter handgun, and took
6 a money pouch from the desk drawer. The man then ran from the store and drove
7 away in a white, four-door, police-type sedan parked on Coors Boulevard. Mr. Glass
8 was dead as a result of the gunshot wounds by the time the police arrived.

9 {4} No one directly witnessed the shooting of Mr. Glass; however, surveillance
10 cameras inside the store captured the incident. Surveillance video from nearby
11 businesses also captured the man walking around the area before the crime, but his
12 face cannot be seen as it was covered by the hood of his sweatshirt.

13 {5} Ruphay Penaloza was working nearby at Integrity Automotive (Integrity), a car
14 dealership. Penaloza testified he heard three gunshots and then saw a man wearing
15 a black hoodie and red bandanna running from the building towards Coors Boulevard.
16 Penaloza walked across the side street between the businesses, looked inside the
17 building, and saw a body. He then called 911.

18 {6} Luis Fernandez was also at Integrity that day. Fernandez testified that when

1 he arrived around 2 p.m., he was unable to turn into the side street between NJB and
2 Integrity because a white Crown Victoria with Texas license plates was stopped on
3 Coors Boulevard in front of the NJB store. He testified that a portable gas can was
4 on the car and that a man wearing a white tank top and a black or dark beanie was
5 inside the car. Fernandez did not see any dents or markings on the car but recalled
6 a window was down although it had been a rainy day. He described the man as
7 "light-complected" and having "a broken nose or straight nose." Fernandez testified
8 he heard gunshots and then saw the white car leave. However, on cross-examination
9 he said he only heard the tires screech and did not actually see the car leave the scene.
10 Another witness, Karina Luna, said that when she arrived at Integrity that day, she
11 also saw a white car stopped in the turn lane on Coors Boulevard. She did not see a
12 license plate on the car but recalled seeing the hazard lights on and a portable gas can
13 on the car. A man with a black hoodie was sitting in or standing near the white car.
14 Luna said Penaloza came in and told her someone had been shot across the street and
15 they, along with another coworker, went across the street to see what had happened.
16 They went inside the NJB store and saw a man on the floor, bleeding and
17 unresponsive.

18 {7} With few leads to go on, police sent local news media a portion of the

1 surveillance video showing the assailant and a description of the car. After the
2 information was broadcast, police received many tips, and one led them to an
3 individual named Garret King. King had been to another NJB store in Albuquerque
4 on several occasions and drove a white Crown Victoria. After police interviewed
5 King, they believed he did not have any connection to the murder.

6 {8} Virgie Russ contacted the police after she saw the video of the assailant on
7 television. She lives at the end of a residential cul-de-sac in northwest Albuquerque
8 and had recently noticed a white Crown Victoria parked on her street. On several
9 occasions she watched the man park the car, get out, and jump the wall dividing the
10 homes and the adjacent apartment complex. Russ believed this man moved like the
11 man she saw on the video. Russ said the man wore glasses, but she never got a clear
12 look at his face. She said the man almost always wore a black hooded sweatshirt,
13 baggy jean shorts, and black tennis shoes with white trim. She called him "bird legs"
14 because she thought his legs looked small.

15 {9} In response to Russ contacting the police, Albuquerque Police Officer Shawn
16 Lockey went to Kingsway Drive on July 24, 2013, and found the white Crown
17 Victoria. Officer Lockey saw a "reddish pinkish" bandanna inside the car. The
18 driver's side window was missing, and a blanket covered the window. The car did

1 not have a license plate. Officer Lockey called Detective Kevin Sanchez to the scene.

2 {10} Detective Sanchez, along with another detective, arrived and saw the bandanna
3 inside the car. He also saw a pay stub with Defendant's name on it. Sanchez
4 photographed the car and the bandanna. Investigation of Defendant's name led
5 Sanchez to the apartment complex adjacent to Russ's home. Detective Sanchez began
6 surveillance of the complex and saw the white Crown Victoria on two occasions. On
7 the second occasion, Sanchez saw an individual, later identified as Defendant, exit
8 the apartment with two children and get into the white car.

9 {11} Defendant's ex-girlfriend Ashley Sanchez lived in the apartment with their two
10 children. Sanchez said Defendant lived in the apartment recently, but his drug use
11 and unemployment caused problems with their relationship and they had broken up.
12 Defendant still had belongings at the apartment and would watch the children
13 sometimes when Sanchez was at work. Sanchez identified the white Crown Victoria
14 as Defendant's and said he parked it on Kingsway Court because it would have been
15 towed if parked at the apartment complex without a license plate. Police obtained a
16 warrant to search the apartment and found a pair of jean shorts and black tennis shoes
17 with white trim, which Sanchez identified as belonging to Defendant.

18 {12} APD Detective Holly Anderson interviewed Defendant on August 10, 2013,

1 and a video of the interview was introduced into evidence. In the interview
2 Defendant denied committing the crime. He said he had sold jewelry to Mr. Glass at
3 the NJB store on three or four prior occasions but had not done so in the last four or
4 five months. At trial, Detective Anderson pointed out particular similarities in the
5 jeans and shoes worn by the shooter and those found by police that belonged to
6 Defendant. Anderson also noted that the man in the video appears to adjust
7 something on his face and that Defendant wears glasses.

8 {13} Romie Salem was the owner of the NJB store at the time of the incident. Salem
9 testified that when someone comes to the store to sell jewelry, they take down the
10 seller's information from their identification, such as a driver's license or passport.
11 This information was kept in their records. Through Salem, the State introduced
12 invoices that showed Defendant had sold jewelry at the NJB on Coors on nine
13 different occasions from January through June 2013. Salem testified the money paid
14 to sellers was kept in a locked drawer of the desk where Mr. Glass sat.

15 {14} Shannon Villegas testified that he was arrested for armed robbery in June of
16 2014 and was in the Metropolitan Detention Center (MDC) at the same time as
17 Defendant. Villegas testified that Defendant would speak with Villegas's cell mate,
18 who was also charged with murder. Villegas said Defendant would talk about

1 Defendant's case "many times." He remembered Defendant specifically saying on
2 more than one occasion that he went in and "shot the dude in the chest." Villegas
3 also said Defendant said he got \$1,800 and spent it on heroin. Villegas said he never
4 heard Defendant deny killing anybody. On cross-examination, Villegas said he has
5 a "real bad memory" and defense counsel was able to point out several
6 inconsistencies in his testimony from what he had initially told the police.

7 {15} Lastly, Thomas testified that he was incarcerated in the Polk County Detention
8 Center (PCDC) in Texas along with Defendant around the time of October 2013.
9 Thomas was transferred to PCDC due to overcrowding at MDC. He said that while
10 he was in PCDC, he overheard Defendant say that he robbed the NJB store and
11 "blasted the guy." Thomas said that he himself had sold jewelry at the NJB store on
12 many occasions and had tried to sell some jewelry there the day after the murder.
13 Thomas admitted to having twenty-three felony convictions including identity theft,
14 fraud, forgery, and drug trafficking. When Thomas said that he was released from
15 PCDC in October, defense counsel asked him if he was aware that Defendant was not
16 transferred to PCDC until November, after Thomas said he was released. Thomas
17 said, "Maybe I got my days wrong, or whatever, but, I mean, I know—that's why I
18 know him; it was from Texas." Both Villegas and Thomas said they did not receive

1 anything for testifying at trial.

2 {16} No weapon was ever found during the investigation.

3 {17} At the close of trial, Defendant requested that two instructions on
4 circumstantial evidence be given to the jury: UJI 14-5001 and UJI 14-5002 NMRA.
5 The first, UJI 14-5001, explains direct and circumstantial evidence and that the law
6 makes no distinction between the two but only requires that the jury be satisfied of
7 the defendant's guilt beyond a reasonable doubt from all the evidence. The second,
8 UJI 14-5002, instructs the jury that they cannot find the defendant guilty of a crime
9 based on circumstantial evidence alone, "unless the chain of circumstances excludes
10 every other reasonable explanation except the defendant's guilt beyond a reasonable
11 doubt." The use notes for both instructions state that "[n]o instruction on this subject
12 shall be given." The district judge denied the two instructions on that basis and gave
13 the jury UJI 14-5060, the required instruction on the beyond-a-reasonable-doubt
14 standard of proof. The jury found Defendant guilty of first-degree murder (willful
15 and deliberate) contrary to NMSA 1978, Section 30-2-1(A)(1) (1994) and armed
16 robbery (robbery while armed with a deadly weapon) contrary to NMSA 1978,
17 Section 30-16-2 (1973). The district court sentenced Defendant to life imprisonment
18 for the first-degree murder conviction and ten years for the armed robbery conviction.

1 Defendant filed a motion for new trial claiming he was not in PCDC at the same time
2 as Thomas and, therefore, Thomas committed perjury when he testified that he
3 overheard Defendant admit to the crime while in PCDC. Defendant attached an
4 exhibit to the motion which appears to be an MDC record showing that Defendant
5 was in PCDC from November 8, 2013, through December 12, 2013. Defendant
6 requested a new trial in light of the perjured testimony put on by the State. After a
7 hearing, the district judge denied the motion.

8 {18} Defendant appeals directly to this Court under Rule 12-102(A)(1) NMRA
9 (providing a right to direct appeal when a sentence of life imprisonment has been
10 imposed).

11 **II. DISCUSSION**

12 **A. Defendant's Request for Jury Instructions on Circumstantial Evidence**

13 {19} Defendant argues that the evidence presented against him was almost entirely
14 circumstantial and that the jury should have been instructed with UJI 14-5001 and
15 UJI 14-5002. Defendant recognizes the use notes for the two instructions state to not
16 use the instructions but argues they are still necessary to properly guide the jurors on
17 how to evaluate circumstantial evidence and that without this guidance, the jury is
18 susceptible to misinterpreting the evidence and misapplying the beyond-a-reasonable-

1 doubt standard. Defendant contends that had the jury been given the two requested
2 instructions, it is likely they would have acquitted him.

3 {20} Whether a jury instruction was properly denied is a mixed question of law and
4 fact that we review de novo. *See State v. Gaines*, 2001-NMSC-036, ¶ 4, 131 N.M.
5 347, 36 P.3d 438. At trial, the two instructions were proffered and briefly discussed
6 before the district judge denied them, and this was sufficient to preserve the issue for
7 appellate review. *See Rule 5-608(D) NMRA; State v. Jernigan*, 2006-NMSC-003,
8 ¶ 10, 139 N.M. 1, 127 P.3d 537.

9 {21} In a criminal case, the district court must instruct the jury upon all questions
10 of law essential for a conviction of any crime with which the defendant is charged.
11 *See State v. Osborne*, 1991-NMSC-032, ¶ 10, 111 N.M. 654, 808 P.2d 624. In
12 addition, “a defendant is entitled to have his or her theory of the case submitted to the
13 jury under proper instructions where the evidence supports it.” *State v. Lucero*, 1998-
14 NMSC-044, ¶ 5, 126 N.M. 552, 972 P.2d 1143. Failure to give a requested
15 instruction to which the defendant is entitled constitutes reversible error. *See State*
16 *v. Ellis*, 2008-NMSC-032, ¶ 12, 144 N.M. 253, 186 P.3d 245. Jury instructions are
17 sufficient if they fairly and correctly state the applicable law. *See State v. Rushing*,
18 1973-NMSC-092, ¶ 20, 85 N.M. 540, 514 P.2d 297.

1 {22} New Mexico used to instruct jurors that “where the state relies solely upon
2 circumstantial evidence to prove its case, such evidence must be inconsistent with any
3 reasonable hypothesis of the defendant’s innocence.” *State v. Rice*, 1954-NMSC-037,
4 ¶ 15, 58 N.M. 205, 269 P.2d 751; *see also State v. Easterwood*, 1961-NMSC-084, ¶ 5,
5 68 N.M. 464, 362 P.2d 997; *State v. Peden*, 1973-NMCA-095, ¶ 7, 85 N.M. 363, 512
6 P.2d 691. In *State v. Bell*, this Court announced its abandonment of the traditional
7 distinction between direct and circumstantial evidence. 1977-NMSC-013, ¶ 9, 90
8 N.M. 134, 560 P.2d 925. Since *Bell*, we have reaffirmed on several occasions that the
9 law in New Mexico does not recognize a difference between the two types of
10 evidence and that the fact-finder need only apply the reasonable doubt standard of
11 review to the evidence, no matter the type. *See, e.g., State v. Reymundo Carlos*
12 *Garcia*, 2005-NMSC-017, ¶ 20, 138 N.M. 1, 116 P.3d 72; *State v. Graham*, 2005-
13 NMSC-004, ¶ 9-10, 137 N.M. 197, 109 P.3d 285; *State v. Brown*, 1984-NMSC-014,
14 ¶ 7, 100 N.M. 726, 676 P.2d 253.

15 {23} It is settled law in New Mexico that instructions on circumstantial evidence are
16 not to be given. *See State v. Smith*, 1979-NMSC-020, ¶ 35, 92 N.M. 533, 591 P.2d
17 664; *State v. Williams*, 1978-NMCA-065, ¶ 5, 91 N.M. 795, 581 P.2d 1290. We find
18 no basis to depart from settled law in this case and reiterate that the mandatory

1 instruction to the jury on the reasonable doubt standard found in UJI 14-5060
2 accurately and sufficiently instructs the jurors on the essential law. Additional
3 instructions defining the types of evidence or the reasonable hypothesis test are
4 confusing and do not help the jury. Accordingly, we find the district court properly
5 denied the two requested instructions.

6 **B. There Was Sufficient Evidence for the Jury to Convict Defendant of First-**
7 **Degree Murder and Armed Robbery**

8 {24} Defendant next argues that the evidence presented by the State was insufficient
9 to support his conviction. He contends that most of the evidence was based on mere
10 coincidence and that the jury had to speculate and form conjectures in order to draw
11 the necessary inferences needed to conclude that he was the perpetrator. In reviewing
12 the sufficiency of the evidence, we determine “whether substantial evidence of either
13 a direct or circumstantial nature exists to support a verdict of guilt beyond a
14 reasonable doubt with respect to every element essential to a conviction.” *State v.*
15 *Jose Pedro Garcia*, 2011-NMSC-003, ¶ 5, 149 N.M. 185, 246 P.3d 1057 (internal
16 quotation marks and citation omitted). The evidence is viewed “in the light most
17 favorable to the guilty verdict, indulging all reasonable inferences and resolving all
18 conflicts in the evidence in favor of the verdict.” *State v. Cunningham*, 2000-NMSC-
19 009, ¶ 26, 128 N.M. 711, 998 P.2d 176. We do not weigh the evidence or substitute

1 our judgment for that of the fact-finder but must determine whether there was
2 sufficient evidence to support the verdict. *See State v. Chavez*, 2009-NMSC-035,
3 ¶ 11, 146 N.M. 434, 211 P.3d 891. As long as a rational jury could have found
4 beyond a reasonable doubt the essential facts required for a conviction, we will not
5 upset a jury's conclusions. *See State v. Duran*, 2006-NMSC-035, ¶ 5, 140 N.M. 94,
6 140 P.3d 515.

7 {25} Defendant was charged with first-degree murder contrary to Section 30-2-
8 1(A)(1). To meet its burden of proof that Defendant committed first-degree murder,
9 the State had to prove that (1) Defendant killed Mr. Glass, (2) the killing was with the
10 deliberate intention to take away his life, and (3) this occurred in New Mexico on or
11 about the 19th day of July, 2013. *See* UJI 14-201. To convict Defendant of armed
12 robbery contrary to Section 30-16-2, the State was required to prove that (1)
13 Defendant committed a robbery and (2) did so while armed with a deadly weapon.
14 *See* § 30-16-2; UJI 14-1621 NMRA.

15 {26} When the evidence is viewed as a whole, we find that a rational jury could have
16 found beyond a reasonable doubt that Defendant was the man in the video and that
17 Defendant shot Mr. Glass in the chest with the deliberate intention to take away his
18 life. The State presented evidence that Defendant owned and frequently wore

1 identical shorts and shoes to that of the person in the video. Detective Anderson
2 testified that in the video footage, the man seemed to be adjusting his glasses and that
3 Defendant wore glasses. The State also presented evidence that Defendant owned
4 and drove a white Ford Crown Victoria that is identical to the car witnesses said they
5 saw that day and that appears in the video. Defendant told police he had sold jewelry
6 to Mr. Glass at the NJB store on three or four occasions in the past year. The State
7 presented receipts showing Defendant went to the NJB store nine times, the last
8 occasion being less than a month before the crime occurred. A witness living next
9 to the apartment complex where Defendant's two children and ex-girlfriend lived and
10 where Defendant used to live said that she had seen a man parking a white Crown
11 Victoria in her neighborhood weeks before the crime and that the man moved like the
12 person she saw in the surveillance camera footage shown on the news. The police
13 found Defendant's car parked near the witness's house and saw a reddish bandanna
14 inside the car. The surveillance video footage of the crime and the man walking
15 around the area before the crime was introduced into evidence. The jurors could have
16 viewed the video footage and reasonably concluded it was Defendant. The jury could
17 reasonably infer that the shooter was familiar with the NJB store and knew exactly
18 where to find the money. It can also be reasonably inferred that the shooter intended

1 to kill Mr. Glass when, upon entering the store, and without any provocation, he
2 immediately pulled out his handgun and shot Mr. Glass three times in the chest. *See*
3 *Duran*, 2006-NMSC-035, ¶ 8 (“Deliberate intent may be inferred from the particular
4 circumstances of the killing . . .”).

5 {27} Finally, Villegas testified he heard Defendant admit to the crime and provided
6 details such as the victim was a “jewelry store clerk” and was shot in the chest.
7 Though neither Villegas and especially Thomas were very credible witnesses, “the
8 fact finder resolves conflicts and determines weight and credibility.” *State v.*
9 *Sanchez*, 2000-NMSC-021, ¶ 32, 129 N.M. 284, 6 P.3d 486.

10 {28} The evidence, when viewed in accordance with the standard of review, is
11 sufficient to support the jury’s finding that Mr. Glass was shot with the deliberate
12 intent to kill and that Defendant was the shooter. Also, there was sufficient evidence
13 to prove, while armed with a deadly weapon, that Defendant robbed the NJB store on
14 Coors Boulevard in Albuquerque.

15 **C. Defendant’s Rights Under *Brady* Were Not Violated**

16 {29} In *Brady*, the United States Supreme Court held that a defendant’s due process
17 rights are violated when the prosecution suppresses favorable evidence. *See* 373 U.S.
18 at 87. On appeal, Defendant argues that the State failed to disclose the MDC records

1 which showed that he was not housed in PCDC at the same time as Thomas and that
2 this violated the *Brady* rule requiring disclosure of exculpatory evidence. *Id.*
3 Defendant claims that the State knew or should have known that Thomas was not in
4 PCDC at the same time as Defendant because the State is presumed to know a
5 defendant's whereabouts when he is in custody. *See State v. Tartaglia*, 1990-NMCA-
6 045, ¶ 4, 109 N.M. 801, 791 P.2d 76. Because the State used Thomas's perjured
7 testimony to convict Defendant, he claims he did not receive a fair trial.

8 {30} An alleged *Brady* violation constitutes a charge of prosecutorial misconduct.
9 *See State v. Turrietta*, 2013-NMSC-036, ¶ 35, 308 P.3d 964. "When an issue of
10 prosecutorial misconduct is preserved by a timely objection at trial, we review the
11 trial court's ruling on a claim under the deferential standard of abuse of discretion,
12 because the trial court is in the best position to evaluate the significance of any
13 alleged prosecutorial errors." *State v. Allen*, 2000-NMSC-002, ¶ 95, 128 N.M. 482,
14 994 P.2d 728 (internal quotation marks and citation omitted). When the district court
15 did not have the opportunity to rule on a claim of prosecutorial misconduct because
16 the defendant did not object in a timely manner, we review the claim on appeal for
17 fundamental error. *Id.*

18 {31} This issue of the jail records and Thomas's testimony was brought to the

1 district court's attention for the first time in Defendant's motion for a new trial. In
2 the motion, Defendant did not claim the prosecutor failed to disclose the jail records
3 or knew that Thomas was not in PCDC at the same time as Defendant. At trial,
4 Defendant did not move to exclude Thomas from testifying or object when Thomas
5 testified. A motion for new trial is not sufficient to preserve an issue that was not
6 otherwise raised during trial proceedings. *See State v. Pacheco*, 2007-NMSC-009,
7 ¶¶ 7-8, 141 N.M. 340, 155 P.3d 745 (determining that because the defendant raised
8 his claim of error for the first time in a motion for a new trial, the claim was not
9 properly preserved for appellate review); *see also* Rule 12-321 NMRA ("To preserve
10 an issue for review, it must appear that a ruling or decision by the trial court was
11 fairly invoked."). Because Defendant did not raise the issue of prosecutorial
12 misconduct in a timely manner, we review the claim on appeal for fundamental error.
13 *Allen*, 2000-NMSC-002, ¶ 95.

14 {32} "Prosecutorial misconduct rises to the level of fundamental error when it is so
15 egregious and had such a persuasive and prejudicial effect on the jury's verdict that
16 the defendant was deprived of a fair trial." *Id.* (internal quotation marks and citations
17 omitted). Put another way, "[a]n error is fundamental if there is a reasonable
18 probability that the error was a significant factor in the jury's deliberations in relation

1 to the rest of the evidence before them.” *State v. DeGraff*, 2006-NMSC-011, ¶ 21,
2 139 N.M. 211, 139 P.3d 61. Even assuming Thomas committed perjury, we are not
3 convinced his testimony had such a persuasive and prejudicial effect on the jury’s
4 verdict that Defendant was deprived of a fair trial. First, defense counsel effectively
5 tarnished Thomas’s credibility as a witness. This was reflected in the order denying
6 the motion for new trial in which the district judge stated that “it was clear that the
7 jury did not find [Thomas’s] testimony persuasive and did not consider it in making
8 their decision.” Second, when Thomas’s testimony is considered within the context
9 of all the evidence presented, we are not persuaded that Thomas’s testimony and the
10 few times it was referred to by the prosecutor in closing argument were so prejudicial
11 that it would “shock the conscience” to allow the verdict to stand. *See Cunningham*,
12 2000-NMSC-009, ¶ 21 (“Parties alleging fundamental error must demonstrate the
13 existence of circumstances that ‘shock the conscience’ or implicate a fundamental
14 unfairness within the system that would undermine judicial integrity if left
15 unchecked.” (citation omitted)). Thomas’s testimony was essentially cumulative of
16 Villegas’s testimony, and there was sufficient evidence for the jury to find Defendant
17 guilty even if Thomas had not testified.

18 {33} A defendant must prove three elements under *Brady*: (1) the evidence must

1 have been suppressed by the prosecution, (2) the evidence must have been favorable
2 to the defendant, and (3) the evidence must have been material to the defense. *See*
3 *State v. Trujillo*, 2002-NMSC-005, ¶ 50, 131 N.M. 709, 42 P.3d 814. Even assuming
4 without deciding that Defendant satisfied *Brady*’s first two elements, Defendant fails
5 to convince this Court of the materiality of the MDC record. In order for evidence
6 to be material under *Brady*, there must be “a reasonable probability that, had the
7 evidence been disclosed to the defense, the result of the proceeding would have been
8 different.” *Trujillo*, 2002-NMSC-005, ¶ 50.

9 {34} Defendant argues on appeal that the MDC record was material “as it would
10 have challenged . . . Thomas’ claim of a confession.” The MDC record certainly
11 raises the question of Thomas’s truthfulness but is not definitive proof that Thomas
12 was not in PCDC at the same time as Defendant. Yet even without the record, the
13 defense tried to impeach Thomas and specifically asked him, “Would it surprise you
14 to know that Mr. Gardner didn’t go to Texas until November?” Thomas replied,
15 “Maybe I got my days wrong, or whatever, but, I mean, I know—that’s why I know
16 him; it was from Texas.” Defendant does not explain why Thomas’s testimony was
17 vital to the State’s case or why there is a reasonable probability that a different
18 outcome would have resulted had the MDC records been provided to Defendant. If

1 the defense had the record at trial, it could have produced the record to impeach
2 Thomas; but the jurors likely did not find Thomas credible anyway, given the lack of
3 any real substance to his testimony and his criminal record. Accordingly, we do not
4 find any violation of *Brady* by the State and affirm the district court's findings
5 regarding Thomas's testimony and the MDC record.

6 **D. The District Court's Denial of Defendant's Motion for a New Trial Was**
7 **Not an Abuse of Discretion**

8 {35} Finally, Defendant argues the district judge erred in denying the motion for a
9 new trial. We review the denial of a motion for new trial for abuse of discretion.
10 *State v. Moreland*, 2008-NMSC-031, ¶ 9, 144 N.M. 192, 185 P.3d 363. "An abuse
11 of discretion occurs when the ruling is clearly against the logic and effect of the facts
12 and circumstances of the case." *Id.* "The trial court has broad discretion in granting
13 or denying a motion for new trial, and such an order will not be reversed absent clear
14 and manifest abuse of that discretion." *State v. Guerra*, 2012-NMSC-027, ¶ 18, 284
15 P.3d 1076.

16 {36} In denying Defendant's motion, the district court noted that "Thomas's alleged
17 perjured testimony did not affect the outcome of the trial" and that "there was
18 sufficient evidence to sustain a conviction absent . . . Thomas's testimony." Based
19 upon our review of the evidence in this case and the discussion above, we agree and

1 find no abuse of discretion by the district court. Accordingly, we affirm the denial
2 of the motion for a new trial.

3 **III. CONCLUSION**

4 {37} For the foregoing reasons, we affirm Defendant's convictions for first-degree
5 murder and armed robbery.

6
7

PETRA JIMENEZ MAES, Justice

8 **WE CONCUR:**

9
10

JUDITH K. NAKAMURA, Chief Justice

11
12

EDWARD L. CHÁVEZ, Justice

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CHARLES W. DANIELS, Justice

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BARBARA J. VIGIL, Justice

APPENDIX B

Frances M. Gallegos
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SECOND JUDICIAL DISTRICT COURT
BERNALILLO COUNTY, NM
JAMES A. NOEL
4/13/2016 2:57 PM

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

No. CR 2013-04043
DA# 2013-4690-1

STATE OF NEW MEXICO
Plaintiff,

vs.

MANUEL GARDNER,
Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

THIS MATTER having come before the Court on April 7, 2016, and after reviewing the written motions as well as arguments, the Court finds:

1. The Defendant was convicted of First Degree Murder on August 7, 2013, and sentenced September 24, 2015
2. On or about November 12, 2015 Defendant filed his *Motion for a New Trial*, alleging perjured testimony from Department of Corrections inmate Robin Thomas. Thomas testified that he overheard Defendant admit to the murder while they were both in custody in Texas in October 2013. Defense counsel inquired of Thomas whether he knew that Defendant did not go to Texas until November 2013. The testimony was not developed further.
3. A motion for new trial, not alleging newly discovered evidence, must be submitted within ten days of the verdict. The Court is not convinced it has jurisdiction to rule on the motion.
4. However, if the Court indeed has jurisdiction, the Court finds that Thomas's alleged perjured testimony did not affect the outcome of the trial. The Court did not find this testimony

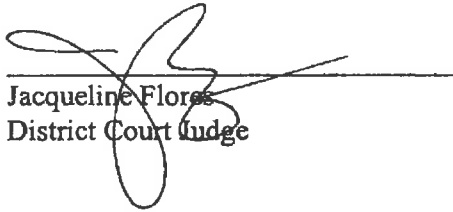
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particularly persuasive. Upon speaking with the jury after trial, it was clear that the jury did not find this testimony persuasive and did not consider it in making their decision.

5. The Court notes that there was a host of other inculpatory evidence in this case, apart from Mr. Thomas's testimony. In particular, there was surveillance video of the killing in which the masked killer closely resembled Mr. Gardner. Clothing that closely resembled the clothing worn by the killer was found at Mr. Gardner's girlfriend's apartment. There was video of the vehicle in which the killer fled, and that vehicle closely resembled the vehicle that Mr. Gardner drove. A bandana closely resembling the one worn by the killer was observed in Mr. Gardner's car. A civilian witness had observed Mr. Gardner exiting his vehicle and moving along the street; that witness testified that he looked like the same person in the surveillance video of the killing. There was record that the Defendant had done business at the scene of the murder on prior occasions, with the victim.

6. Based on the totality of the evidence, the Court finds that there was sufficient evidence to sustain a conviction absent Mr. Thomas's testimony. The Court finds that the outcome of the trial would probably not have changed had Mr. Thomas's alleged perjury been further developed in testimony, or had Mr. Thomas not testified.

IT IS HEREBY ORDERED that the defendant's *Motion for a New Trial* is denied.



Jacqueline Flores
District Court Judge

Submitted by:



Letitia Carroll Simms
Assistant District Attorney

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Approved:

Approved as to form via email 4/7/16

Armando Torres

Attorney for Defendant

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