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Prairie Women by David Moss (see page 3)  
Weems Art Gallery, Albuquerque
Hats Off
to Our
Section Chairs

2009

Appellate Practice: Jocelyn C. Drennan
Bankruptcy Law: Manuel Lucero
Business Law: Susan M. McCormack
Children’s Law: Elizabeth A. Collard
Criminal Law: Matthew Coyte
Elder Law: Barbara Ann Michael
Employment and Labor Law: Danny W. Jarrett
Family Law: Maria Montoya Chavez
Health Law: CaraLyn Banks
Indian Law: Helen Bernadette Padilla
Intellectual Property Law: Gina Constant
Immigration Law: Rebecca Shreve
Natural Resources, Energy and Environmental Law: Christopher Schatzman
Prosecutors: Cheryl Hein Johnston
Public Law: Stephen C. Ross
Real Property, Probate and Trust: Patrick Joseph Dolan
Solo and Small Firm: Joseph A. Sapien
Taxation: Edward B. Hymson
Trial Practice: Lance D. Richards

2010

Appellate Practice: Scott M. Davidson
Bankruptcy Law: Michelle Ostrye
Business Law: James H. Bozarth
Children’s Law: Mia Chavez
Criminal Law: Alexander K. Russell
Elder Law: Laurie Ann Hedrich
Employment and Labor Law: Aaron Charles Viets
Family Law: N. Lynn Perls
Health Law: Caroline Blankenship
Indian Law: Christina S. West
Intellectual Property Law: Diane Albert
Immigration Law: Iris Calderon Godina
Natural Resources, Energy and Environmental Law: Jennifer Pruett
Prosecutors: Janice Schryer
Public Law: James C. Martin
Real Property, Probate and Trust: Linda Isaida Leyba
Solo and Small Firm: Donald Dean Becker
Taxation: Edward B. Hymson
Trial Practice: Denise A. Snyder
Cover: David Moss (www.davidmossart.com) is a traditional fine artist/illustrator. He earned his BFA in art studio at the UNM College of Fine Arts and his MFA in illustration at the Academy of Art University School of Illustration. He works in oil and digital media and his content includes landscapes, western themes, portraiture, and lifestyles. To see the cover art in its original color, visit www.nmbar.org and click on Attorneys/Members/Bar Bulletin.

Professionalism Tip

With respect to the public and to other persons involved in the legal system: I will keep current in my practice areas and, when necessary, will associate with or refer my client to other more knowledgeable or experienced counsel.

Meetings

January

4 Attorney Support Group, 5:30 p.m., First United Methodist Church
6 Real Property, Trust and Estate Section Board of Directors, 11:30 a.m., via teleconference
6 Bankruptcy Law Section Board of Directors, noon, U.S. Bankruptcy Court
6 Employment and Labor Law Board of Directors, noon, State Bar Center
6 Membership Services Committee, noon, via teleconference
11 Taxation Section Board of Directors, noon, via teleconference

State Bar Workshops

January

27 Consumer Debt/Bankruptcy Workshop 6 p.m., State Bar Center, Albuquerque

February

17 Lawyer Referral for the Elderly Workshop 9–10:30 a.m., Presentation 1:30–4:30 p.m., Clinics Meadowlark Senior Center, Rio Rancho
24 Consumer Debt/Bankruptcy Workshop 6 p.m., State Bar Center, Albuquerque

March

24 Consumer Debt/Bankruptcy Workshop 6 p.m., State Bar Center, Albuquerque

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The Bar Bulletin (ISSN 1062-6611) is published weekly by the State Bar of New Mexico, 5121 Masthead NE, Albuquerque, NM 87109-4367. Periodicals postage paid at Albuquerque, NM. Postmaster: Send address changes to Bar Bulletin, PO Box 92860, Albuquerque, NM 87199-2860.

(505) 797-6000 • (800) 876-6227 • Fax: (505) 828-3765
E-mail: address@nmbar.org • www.nmbar.org

December 28, 2009, Vol. 48, No. 52
Courts News
N.M. Supreme Court
Compilation Commission

The official 2010 New Mexico Rules Annotated three-volume set will be available in January from the Compilation Commission for $70. Now available is the New Mexico Official Forms, a two-disc set for $175 containing 1,345 court-approved and statutory forms. Applicable taxes and shipping rates apply to all products. For information or to reserve sets, call Brad Terry, (505) 363-3116.

First Judicial District Court
Mass Reassignment of Cases

Effective Jan. 4, 2010, a mass reassignment of 1st Judicial District Court cases will occur pursuant to NMSC Rule 23-109, the Chief Judge Rule. All of the civil cases previously assigned to the Hon. James A. Hall, Division II, will be reassigned to the Hon. Barbara J. Vigil, Division I. All of the juvenile and neglect and abuse cases previously assigned to the Hon. Barbara J. Vigil, Division I, will be reassigned to the Hon. Michael E. Vigil, Division IV. All of the Rio Arriba domestic relations cases previously assigned to the Hon. Barbara J. Vigil, Division I, the Hon. James A. Hall, Division II, the Hon. Michael E. Vigil, Division IV, and the Hon. Daniel A. Sanchez, Division VII, will be reassigned to the Hon. Sheri A. Raphaelson, Division V. Parties who have not previously exercised their right to challenge or excuse will have 10 days from Jan. 4, 2010, to challenge or excuse the newly assigned judge pursuant to Rule 1-088.1.

Second Judicial District Court
Change in Business Hours

The N. M. Supreme Court has authorized the 2nd Judicial District Court Clerk’s Office to change its business hours effective Jan. 4, 2010. The office will be open from 10 a.m. to 4 p.m., Monday through Friday.

Holiday Closures

The holiday schedule for all offices and divisions of the 2nd Judicial District Court is as follows:

- Dec. 31: Closed noon–5 p.m.
- Jan. 1, 2010: Closed

Judicial Records Retention and Disposition Schedules

Pursuant to the Judicial Records Retention and Disposition Schedules, exhibits (see specifics for each court below) filed with the courts for the years and courts shown below, including but not limited to cases that have been consolidated, are to be destroyed. Cases on appeal are excluded. Counsel for parties are advised that exhibits (see specifics for each court below) can be retrieved by the dates shown below. Attorneys who have cases with exhibits may verify exhibit information with the Special Services Division at the numbers shown below. Plaintiff(s) exhibits will be released to counsel of record for the plaintiff(s), and defendant(s) exhibits will be released to counsel of record for defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

<table>
<thead>
<tr>
<th>Court</th>
<th>Exhibits</th>
<th>For Years</th>
<th>May Be Retrieved Through</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st Judicial District Court (505) 827-4687</td>
<td>Exhibits in criminal, civil, domestic cases; Relations, children’s court cases</td>
<td>1981–1992</td>
<td>January 1, 2010</td>
</tr>
<tr>
<td>9th Judicial District Court (575) 742-7527</td>
<td>Evidence and exhibits including poster boards filed in the following case types: Civil</td>
<td>2005–2008</td>
<td>January 15, 2010</td>
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<td>Competency/Mental Health</td>
<td>1992–2008</td>
<td>January 15, 2010</td>
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<td>Adoption; Sequestered Incapacitated (SI)</td>
<td>1991–2008</td>
<td>January 15, 2010</td>
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<td>Tapes filed in criminal, civil, children’s court, domestic, competency/mental health, adoption and probate cases</td>
<td>1970–2008</td>
<td>January 15, 2010</td>
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<tr>
<td>10th Judicial District Court (575) 461-2764</td>
<td>Tapes filed in the following case types: Criminal</td>
<td>1993–2001</td>
<td>January 25, 2010</td>
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</tbody>
</table>
**Bernalillo County Metropolitan Court**  
**Change in Operating Hours**  
The Bernalillo County Metropolitan Court will change hours of operation, effective Jan. 4, 2010. The courthouse, including the Probation Waiting Room and the Customer Service Lobby, will now open at 7:30 a.m. instead of 7 a.m. The courthouse will close as usual at 5 pm.

**Bernalillo County Probate Court**  
**Holiday Closures**  
The holiday schedule for the Bernalillo County Probate Court is as follows:  
- Dec. 28–30: Open  
- Dec. 31–Jan. 3, 2010: Closed  
Anyone who needs to file a probate case during the time the court is closed should contact the 2nd Judicial District Court, (505) 841-7451 or (505) 841-7425, regarding its holiday hours.

**U.S. District Court, District of New Mexico**  
**Annual Federal Bar Dues**  
At the recommendation of the Bench and Bar Fund Committee, with the concurrence of the Article III judges for the District of New Mexico, and in accordance with D.N.M.LR-Civ. 83.2(c), collection of calendar year 2010 attorney bar dues has been ordered at the rate of $25. Dues should be submitted no later than Jan. 31, 2010, to the Clerk of Court, U.S. District Court, 333 Lomas Blvd. NW, Suite 270, Albuquerque, NM 87102; or e-mail bbcrctcmn@nmcourt.fed.us.

**Service on Court Panel**  
Chief Judge Martha Vázquez and the Article III district judges for the District of New Mexico solicit interest from Federal Bar members for service on the Magistrate Judge Merit Selection Panel. This panel is responsible for the selection, appointment, and reappointment of U.S. magistrate judges in the district. To be considered for appointment to the panel, interested Federal Bar members in good standing should reply no later than Jan. 4, 2010, to the Clerk of Court, U.S. District Court, 333 Lomas Blvd. NW, Suite 270, Albuquerque, NM 87102; or e-mail bbcrctcmn@nmcourt.fed.us.

**STATE BAR NEWS**  
**Attorney Support Group**  
- Afternoon groups meet regularly on the first Monday of the month:  
  - Jan. 4, 2010, 5:30 p.m.  
- Morning groups meet regularly on the third Monday of the month:  
  - Jan. 18, 7:30 a.m.  
Both groups meet at the First United Methodist Church at Fourth and Lead SW, Albuquerque. For more information, contact Bill Stratvert, (505) 242-6845.

**Board of Bar Commissioners Meeting Summary**  
The Board of Bar Commissioners met on Dec. 9 in Santa Fe. Action taken at the meeting follows:  
- Approved the Sept. 11 meeting minutes.  
- Accepted the October 2009 financials and executive summaries.  
- Reviewed the accounts receivable aging report as well as the directors’ travel reimbursements and credit card file.  
- Approved co-hosting the 2012 National High School Mock Trial Program in New Mexico with the Center for Civic Values and to raising $50,000 for the event.

**SBNM HOLIDAY DRIVE**  
**THRU DECEMBER 31**  
The State Bar is once again teaming up with Big Brothers Big Sisters of Central New Mexico to provide gently used clothing, books, tapes, toys, games, and kitchen items for those in need.  
Collection bins are located in the lobby of the State Bar Center. A donor tax form may be obtained at the front desk.

**MBER BENEFIT OF THE WEEK**  
**ABA Retirement Funds**  
The ABA Retirement Funds have been providing retirement plan solutions to the legal community for more than 40 years. Whether you operate a solo practice or a larger firm, the ABA Program can provide a 401(k) or profit sharing plan to meet your needs. Call (800) 826-8901 or e-mail abaretirement@us.ing.com for a free cost comparison, plan consultation and a prospectus.

- Held an executive session to discuss a personnel issue.  
- Received the Committee on Diversity in the Legal Profession Update Report on the Status of Minority Attorneys in New Mexico and accepted the report and recommendations.  
- Approved the bylaws pertaining to the Governmental Affairs Committee.  
- Approved amendments to the State Bar Bylaws.  
- Reappointed Henry A. Kelly to the Client Protection Fund Commission for a three-year term.  
- Approved the 2010 Board meeting schedule as follows: Feb. 26, April 30, July 15, Sept. 24, Nov. 5 and Dec. 8.  
- Approved a request for the executive committee to meet and discuss items for the Board of Bar Commissioner’s meeting agendas.  
- Elected Drew Cloutier as the new secretary-treasurer of the Board for 2010.  
- Received a report on the Unauthorized Practice of Law Task Force.  
- Received a report and update on the Disciplinary Board.  
- Reported that the State Bar was named one of the top 10 “Best Places to Work” by the New Mexico Business Weekly.  
- Distributed plaques to Craig A. Orraj and Kay L. Homan whose terms as commissioners are expiring this year, and to President Henry A. Alaniz for his service as president this year.

Note: The minutes in their entirety will be available on the State Bar’s website following approval by the Board at the Feb. 26, 2010 meeting.
Children’s Law Section Annual Meeting

The Children’s Law Section will hold its annual meeting Jan. 14, 2009, at the Hotel Albuquerque during the 2010 New Mexico Children’s Law Institute. The time of the meeting is forthcoming. Agenda items should be sent to Chair Mia Chavez, mia.chavez@state.nm.us. For information about the section, visit the State Bar website, www.nmbar.org, or contact Chair Aaron Viets, (505) 766-7588 or aviets@rodey.com.

Prosecutors Section Annual Awards

The State Bar Prosecutors Section is soliciting nominations for awards for the section will present to five prosecutors at the Association of District Attorneys Spring Conference, March 3–5, 2010, in Ruidoso.

Nominations should be submitted for receipt Feb. 1, 2010, to Janice Burt Schryer, Deputy District Attorney, c/o 9th Judicial District Attorney’s Office, 417 Gidding St., Room 200, Clovis, NM 88101-7560; fax to (575) 769-3198; or e-mail jschryer@da.state.nm.us. The nominees will be presented to a committee for selection. For a complete description of the award categories, see the Dec. 14 (Vol. 48, No. 50) Bar Bulletin.

Lawyers Professional Liability and Insurance Committee

STATE BAR OF NEW MEXICO

DISCLOSURE OF PROFESSIONAL LIABILITY INSURANCE: RULE 16-104

The Lawyers Professional Liability and Insurance Committee has assembled information to assist members regarding compliance with the amended Rule 16-104 NMRA of the Rules of Professional Conduct regarding disclosure of professional liability insurance.

Visit the committee’s website at http://www.nmbar.org/AboutSBNM/Committees/LPL/LPL.html for information on the new disclosure requirements, questions and answers, and lists of brokers and carriers. Also available is a helpful article, What Attorneys Need to Know About Professional Liability Insurance.

2010 State Bar Dues and Licensing Fees

- The 2010 Dues and Licensing forms have been mailed.
- Licensing fees and dues are payable Jan. 4, 2010, and are late after Feb. 1, 2010.
- Members who have not received the form by mid December should notify the State Bar at (505) 797-6035.
- Fees may also be paid online through secured eCommerce at www.nmbar.org. Click on “Pay Dues,” enter your bar ID number as your username and your last name as your password. If your last name is fewer than six characters, enter a zero(s) following your name to make six characters.
- State Bar, Disciplinary Board, and Client Protection Fund fees are mandatory and must be paid in order to maintain license status.
- Without exception, dues and licensing fees are payable regardless of whether you received your form.

Late fees may be assessed if payment is not postmarked by Feb. 1, 2010.

Other Bar

Albuquerque Bar Association Member Luncheon

The Albuquerque Bar Association’s Member Luncheon will be held at noon, Jan. 5, 2010, at the Embassy Suites Hotel, 1000 Woodward Pl. NE, Albuquerque. The luncheon speaker is Chief Judge Ted Baca of the 2nd Judicial District Court.

The CLE (1.0 general CLE credit) will immediately follow the luncheon from 1:15 to 2:15 p.m. Josh Link of Ambitions Consulting Group will present Enhancing Efficiency and Profitability Through Technology.

Lunch only: $25 members/$35 non-members with reservations; lunch and CLE: $55 members/$75 non-members with reservations; CLE only: $30 members/$40 non-members. Register for lunch by noon, Dec. 31. To register:

1. log onto www.abqbar.com;
2. e-mail abqbar@abqbar.com;
3. call (505) 842-1151 or (505) 243-2615;
4. fax (505) 842-0287; or
5. mail to PO Box 40, Albuquerque, NM 87103.

Other News

Workers’ Compensation Administration

Judicial Performance

Judge Helen Stirling’s term expires on April 12, 2010. The reappointment would be for a five-year term pursuant to NMSA 1978, Section 52-5-2 (2004). Anyone wishing to submit written comments concerning Judge Stirling’s performance may do so until 5 p.m. on Jan. 12, 2010. Comments may be addressed to WCA Director Glenn R. Smith, c/o Human Resources, PO Box 27198, Albuquerque, NM 87125-7198 or faxed to (505) 841-6813.

Pending Closures

For planning and scheduling purposes, the WCA is tentatively scheduled for closure during the following periods:


Direct questions to Van Cravens, (505) 841-6004 or Van.Cravens@state.nm.us.
**LEGAL EDUCATION**

**DECEMBER**

28 **An Attorney’s Guide to Good Lawyering for People With Disabilities**
VR, State Bar Center Center for Legal Education of NMSBF 1.0 P (505) 797-6020 www.nmbarcle.org

28 **Cybersleuth’s Guide to the Internet**
VR, State Bar Center Center for Legal Education of NMSBF 6.0 G (505) 797-6020 www.nmbarcle.org

28 **Should Corporate Counsel Be Corporate Conscience?**
Teleconference TRT, Inc. 2.0 E 1-800-672-6253 www.trtcle.com

28 **Tag Team Clydesdales in the Courtroom With Terrence MacCarthy and Dale Cobb**
VR, State Bar Center Center for Legal Education of NMSBF 6.5 G (505) 797-6020 www.nmbarcle.org

29 **Ethics Workout: Mental Aerobics for Solving Ethics Problems**
Teleconference TRT, Inc. 2.0 E 1-800-672-6253 www.trtcle.com

29 **How to Do Your First Personal Injury Case**
VR, State Bar Center Center for Legal Education of NMSBF 4.0 G, 1.0 P, 1.0 E (505) 797-6020 www.nmbarcle.org

29 **The Write Way With Stuart Teicher**
VR, State Bar Center Center for Legal Education of NMSBF 3.0 G (505) 797-6020 www.nmbarcle.org

29 **The Zealous Advocate With Stuart Teicher**
VR, State Bar Center Center for Legal Education of NMSBF 3.0 G (505) 797-6020 www.nmbarcle.org

30 **2009 Bridge the Gap**
VR, State Bar Center Center for Legal Education of NMSBF 6.0 G, 1.0 E, 1.0 P (505) 797-6020 www.nmbarcle.org

30 **Subordinate Lawyers: Sit, Stay, Roll Over No More**
Teleconference TRT, Inc. 1.0 E, 1.0 P 1-800-672-6253 www.trtcle.com

30 **Tag Team Trial Clydesdales With Terrence MacCarthy and Dale Cobb**
VR, State Bar Center Center for Legal Education of NMSBF 6.5 G (505) 797-6020 www.nmbarcle.org

31 **An Attorney’s Guide to Good Lawyering for People With Disabilities**
VR, State Bar Center Center for Legal Education of NMSBF 1.0 P (505) 797-6020 www.nmbarcle.org

31 **Ethics Risks Practicing Law**
VR, State Bar Center Center for Legal Education of NMSBF 1.0 E (505) 797-6020 www.nmbarcle.org

31 **I Was From Venus and My Lawyers Were From Mars**
VR, State Bar Center Center for Legal Education of NMSBF 2.0 E, 1.0 P (505) 797-6020 www.nmbarcle.org

31 **Lawyer Substance Abuse Addictions and Consequences**
Teleconference TRT, Inc. 1.0 E, 1.0 P 1-800-672-6253 www.trtcle.com

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**G** = General  
**E** = Ethics  
**P** = Professionalism  
**VR** = Video Replay  
*Programs have various sponsors; contact appropriate sponsor for more information.*
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<th>No.</th>
<th>Case Name</th>
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<th>Date Writ Issued</th>
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<td>32,092</td>
<td>State v. Trujillo</td>
<td>12/16/09</td>
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<td>32,117</td>
<td>Mambo v. Best</td>
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<td>32,115</td>
<td>State v. Zertuche</td>
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<td>32,116</td>
<td>Orduz v. Janecka</td>
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<td>32,113</td>
<td>State v. Lopez</td>
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<td>32,112</td>
<td>State v. Spillman</td>
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<td>32,111</td>
<td>Scorza v. Hanks</td>
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<td>32,104</td>
<td>Hiner v. Southern Farm</td>
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<td>32,106</td>
<td>Bishop v. Janecka</td>
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<td>State v. Sewell</td>
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<td>State v. Patrick</td>
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<td>State v. Smith</td>
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<td>State v. Flores</td>
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<td>32,071</td>
<td>State v. Wilson</td>
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<td>State v. Lopez-Esquibel</td>
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<td>31,989</td>
<td>Anderson Hills v. Auld</td>
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<td>State v. Johnson</td>
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<td>State v. Adrian N.</td>
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<td>Smith v. Ennrich, Inc.</td>
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<td>Farmington v. Dickerson</td>
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<td>State v. Valero</td>
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<td>State v. Rodriguez</td>
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<td>Kucera v. State</td>
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<td>Romero v. Progressive Northwestern Ins. Co.</td>
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<td>Cordova v. Cordova</td>
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<td>Jordan v. Allstate Insurance Co.</td>
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<td>State v. Titone</td>
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<td>Heltman v. Catanahe</td>
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<td>31,996</td>
<td>State v. Kavanaugh</td>
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**Petitions for Writ of Certiorari Filed and Pending:**

**Certiorari Granted but not yet Submitted to the Court:**
WRITS OF CERTIORARI

http://nmsupremecourt.nmcourts.gov.

CER T I O R A R I G R A N T E D A N D S U B M I T T E D T O T H E C O U R T:

Submission = date of oral argument or briefs-only submission

<table>
<thead>
<tr>
<th>No.</th>
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<tr>
<td>31,980</td>
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PETITION FOR WRIT OF CERTIORARI DENIED:

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Slip Opinions for Published Opinions may be read on the Court’s website: [http://coa.nmcourts.gov/documents/index.htm](http://coa.nmcourts.gov/documents/index.htm)
## Recent Rule-Making Activity

### As Updated by the Clerk of the New Mexico Supreme Court

Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court  
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

**Effective December 21, 2009**

- To view pending proposed rule changes visit the New Mexico Supreme Court’s Web site: http://nmsupremecourt.nmcourts.gov/
- To view recently approved rule changes, visit the New Mexico Compilation Commission’s Web site: http://www.nmcompcomm.us/

### Pending Proposed Rule Changes

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<td>5-123</td>
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<td>7-113</td>
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### Recently Approved Rule Changes

#### Since Release of 2009 NMRA

**Effective Date**

### Rules of Civil Procedure for the District Courts

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<tr>
<td>1-016</td>
<td>Pretrial conferences; scheduling; management.</td>
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<td>1-026</td>
<td>General provisions governing discovery.</td>
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<td>Interrogatories to parties.</td>
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<td>1-034</td>
<td>Production of documents and things and entry upon land for inspection and other purposes.</td>
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<td>1-037</td>
<td>Failure to make discovery; sanctions.</td>
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<td>1-038</td>
<td>Jury trial in civil actions.</td>
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<td>1-045.1</td>
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<td>1-071.1</td>
<td>Statutory stream system adjudication suits; service and joinder of water rights claimants; responses.</td>
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<td>9-102A</td>
<td>Certificate of excusal or recusal</td>
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<td>9-103B</td>
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that the PSA’s lack of statutory authority to detain or arrest him is an unreasonable seizure under the Fourth Amendment of the United States Constitution, entitled him to the remedy of suppression. While we agree that the PSA did not have the authority to detain or arrest an individual suspected of a crime, we disagree that a state actor’s unauthorized seizure of a person suspected of committing a crime is per se a violation of the Fourth Amendment. Because Defendant has not argued either that the unauthorized seizure violated the New Mexico Constitution or that the Legislature has made suppression the remedy for an unauthorized arrest, we do not address those issues. Finally, we disagree with Defendant’s final argument on appeal that his consent to a blood test was coerced. Therefore, we affirm Defendant’s conviction.

I. BACKGROUND

{2} On the afternoon of January 7, 2007, PSA Ali Blake (Blake) responded to a traffic accident in Roswell, New Mexico. Blake observed that a red vehicle had been rear-ended by a vehicle with white paint, and witnesses at the scene informed her that the driver of the white truck rear-ended the vehicle and left the scene. Blake obtained the license plate of the white truck from a witness and was told in which direction the truck was traveling as it left the scene. Blake located the truck parked in Defendant’s driveway with Defendant still inside, either unconscious or asleep.

{3} Blake knocked on the truck’s window, awakening Defendant and ordering him to get out of the truck. When Defendant got out of his truck, Blake detected an odor of alcohol coming from him and noticed several boxes of ammunition on the truck’s floorboard. Once he was out of the truck, she asked Defendant to get on his knees. Instead of complying, Defendant tried to walk toward his house but tripped and fell, injuring his nose. Citing concerns for both her safety and that of Defendant, Blake handcuffed Defendant and called police officers and medical assistance personnel to the scene.

{4} Roswell Police Officer Scott Stevenson responded to Blake’s request for assistance. Upon arriving at Defendant’s house, Officer Stevenson approached Defendant, who was sitting on the ground. He noticed that Defendant appeared disoriented or confused, had bloodshot, watery eyes, and slurred speech. Officer Stevenson reported that Defendant admitted he had been drinking vodka “all day” and driving his truck, but he could not remember the crash or why his nose was bleeding. Defendant was taken to the hospital, where Officer Stevenson formally placed him under arrest for DWI. Approximately four hours after the accident, Defendant consented to have his blood drawn to test his blood alcohol content (BAC). His BAC was 0.36 grams of alcohol per 100 milliliters of blood.

{5} Defendant filed three motions to suppress evidence in district court, two of which are the subject of this appeal. He moved the court to suppress all evidence obtained by the police after his detention or arrest because “[t]he arrest and detention of Defendant [were] without proper police authority” and were therefore illegal. He also moved to suppress all evidence relating to the blood alcohol draw because it was taken without Defendant’s voluntary
consent. The district court denied these two motions. Defendant entered a conditional plea of no contest to aggravated DWI, second offense, a misdemeanor, preserving his right to appeal the "issues surrounding his motions to suppress/unlawful arrest/blood alcohol draw without consent[.]" He then appealed to the Court of Appeals.


The majority held that Defendant failed to preserve the issue of Blake's authority to detain him because he had only argued to the district court that Blake was without the authority to arrest him. Id. at 6-7. The Court concluded that Blake's detention of Defendant did not amount to an arrest, and it therefore did not need to address whether Blake had the authority to arrest. Id. at 12. Regarding the issue of Defendant's consent to the blood draw, the Court held that Defendant was not forced to submit to the test, and therefore the blood draw evidence was not subject to suppression. Id. at 12-13.

[7] The dissent concluded that Defendant had preserved the issue of Blake's illegal detention of him. Id. at 17. In any case, the dissenting judge would have held that Defendant was arrested by the PSA, who was not a commissioned police officer. Id. at 22 (Vigil, J., dissenting). Judge Vigil explained that:

The majority's reasoning, with which I disagree, allows it to not address the consequences of an illegal detention or arrest by a PSA officer. I would address the merits of whether Defendant's detention and arrest were legal, and if they were not, the consequence. One consequence might be that Defendant's consent to the blood test was not sufficiently attenuated from PSA Blake's unconstitutional conduct. Without such an analysis, I do not agree with the majority's conclusion concerning Defendant's consent to the blood test. Id. at 22-23. This Court granted certiorari and now addresses the two suppression issues. State v. Slayton, 2008-NMCERT-008, 145 N.M. 255, 195 P.3d 1267.

II. DISCUSSION

A. DEFENDANT FAIRLY INVOKED A RULING ON THE ISSUE OF HIS DETENTION

[8] The State asserts that Defendant argued only to the district court that Blake was without authority to arrest him, a question separate and distinct from a determination of whether Blake was authorized to detain him. It contends that the district court's order embodied only two rulings: (1) that Blake did not arrest Defendant; and (2) that Defendant's detention was reasonable under the Fourth Amendment. According to the State, the absence of the district court's express ruling on Blake's authority to detain Defendant demonstrates Defendant's failure to adequately preserve that argument for consideration below.

[9] Defendant's argument in the district court was that Blake's actions, however characterized, were unreasonable within the context of the Fourth Amendment. He specifically argued that either "the arrest or detention of Defendant" was "illegal," and therefore all evidence obtained after his seizure should be suppressed. In addition to his broad argument that his detention was unreasonable, Defendant also specifically argued that "[t]he arrest and detention of Defendant [were] without proper police authority."

[10] While Defendant's argument could have been clearer, we believe that it was sufficient to invoke a ruling from the district court on the issue of Blake's authority to detain him. See Rule 12-216(A) NMRA ("To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked[].") Defendant focused the district court's attention on the fact that Blake was not a commissioned police officer, and therefore lacked authority to detain or arrest him, making his seizure unreasonable within the context of the Fourth Amendment. Indeed, the district court denied "Defendant's Motion to Suppress based upon an alleged unlawful arrest and detention by police officers[]."

Therefore, we conclude that Defendant did preserve the issue of whether Blake had the authority to detain him and, if not, whether exceeding that authority violated the Fourth Amendment's protections against unreasonable seizure.

B. BLAKE WAS WITHOUT STATUTORY AUTHORITY TO EITHER DETAIN OR ARREST DEFENDANT

[11] A ruling on a motion to suppress evidence presents a mixed question of law and fact." State v. Rivera, 2008-NMSC-056, ¶ 10, 144 N.M. 836, 192 P.3d 1213. This Court reviews factual findings under a substantial evidence standard, viewing the facts in the light most favorable to the prevailing party, and we review de novo whether the district court correctly applied the law to the facts. Id. In this case, the district court made formal findings of fact in its order denying Defendant's motions. Neither party asserts that these findings were made in error, and the pertinent factual findings are supported by the record. We therefore accept these findings as conclusive. Davis v. Devon Energy Corp., 2009-NMSC-048, ¶ 13, ___ N.M. ___, 218 P.3d 75 ("When there are no challenges to the district court's factual findings, we accept those findings as conclusive.").

[12] Defendant's argument that his seizure by Blake was unreasonable within the context of the Fourth Amendment rests entirely on the assertion that Blake lacked the statutory authority to detain or arrest anyone suspected of committing a crime. We believe that Defendant would concede that if a commissioned police officer had seized him, his detention and arrest would have been reasonable under the Fourth Amendment. Thus, Defendant's argument presents two separate issues: (1) whether Blake had the authority to seize Defendant, because if she did, her actions were presumably reasonable under the Fourth Amendment; and (2) if she did not have such authority, whether her lack of authority is an unreasonable seizure under the Fourth Amendment, which would entitle Defendant to application of the exclusionary rule. We address these arguments in turn.

[13] The State argues that there is nothing in the record to show that Blake's actions were unauthorized because Blake had the authority to seize Defendant for two reasons: (1) she may be considered to have had the authority to arrest by virtue of her status as a "peace officer" under this Court's decision in State v. Ogden, 118 N.M. 234, 245, 880 P.2d 845, 856 (1994); and (2) she was acting on the express authority of the Roswell Police Department. We disagree with both contentions.

[14] We are not persuaded by the State's first argument, which relies on Ogden as support for Blake's authority to arrest Defendant. In Ogden we determined that a City of Farmington Community Service Officer (CSO) was a "peace officer" within the context of the aggravating circumstances statute, NMSA 1978, Section 31-20A-5(A) (1981), 118 N.M. at 245, 880 P.2d at 856. We concluded that by enacting the aggravating circumstances statute, the Legislature intended "to protect a broader category of law enforcement officers than only police officers." Id. at 244, 880 P.2d
at 855. Because “CSOs are charged with the duty to maintain public peace or order” and “all of their responsibilities are of a peace-keeping nature[,]” we held that the Legislature intended to include CSOs in the definition of “peace officer” for the purpose of Section 31-20A-5(A). Ogden, 118 N.M. at 245-46, 880 P.2d at 856-57.

15 While we recognized in Ogden that CSOs and, by extension, PSAs may perform some police functions similar to those of commissioned officers, we did not endeavor to identify the scope of these non-commissioned officers’ duties. In fact, in holding that the aggravated circumstances statute protects a broader category of “peace officer” than simply commissioned police officers, we implicitly recognized that CSOs, PSAs, and other auxiliary officers or service aides are sometimes treated differently by virtue of their lack of commission. In any case, the analysis of whether a PSA possesses the authority to seize a person suspected of violating the Motor Vehicle Code or other laws relating to motor vehicles presents a distinct issue of statutory construction that is only tangentially related to the aggravated circumstances statute we addressed in Ogden. Therefore, although Blake was likely a “peace officer” within the context of the aggravating circumstances statute, as a non-commissioned employee of the Roswell Police Department, her authority to arrest individuals suspected of violating the Motor Vehicle Code has been limited by the Legislature.

16 We are also not persuaded by the State’s second argument that Blake was acting with the express authority of the Roswell Police Department. Any authority granted to Blake by the City of Roswell to arrest individuals suspected of violating the Motor Vehicle Code would be nullified by statutory authority to the contrary. See Stennis v. City of Santa Fe, 2008-NMSC-008, ¶ 21, 143 N.M. 320, 176 P.3d 309 (“[A] municipality may adopt ordinances or resolutions not inconsistent with state law. A municipal ordinance does not conflict with state law unless the ordinance permits an act the general law prohibits, or vice versa.”) (internal quotation marks and citations omitted)). The Legislature has expressly stated that “[n]o person shall be arrested for violating the Motor Vehicle Code [66-1-1 NMSA 1978] or other law relating to motor vehicles punishable as a misdemeanor except by a commissioned, salaried peace officer who, at the time of arrest, is wearing a uniform clearly indicating the peace officer’s official status.” NMSA 1978, § 66-8-124(A) (1961, prior to 2007 amendments). The Legislature intended that only commissioned officers may arrest a person who is suspected of violating the Motor Vehicle Code. Therefore, any municipal grant of authority to the contrary would “permit[] an act the general law prohibits” and would be impermissible. Stennis, 2008-NMSC-008, ¶ 21 (internal quotation marks and citations omitted).

17 Here, it is undisputed that Blake was not a commissioned police officer. It is also undisputed that Defendant was charged with second offense aggravated DWI, contrary to Section 66-8-102, a misdemeanor. See § 66-8-102(F) (stating that second offense aggravated DWI is punishable by up to 364 days in jail); NMSA 1978, § 30-1-6(B) (1963) (“A crime is a misdemeanor if it is so designated by law or if upon conviction thereof a sentence of imprisonment in excess of six months but less than one year is authorized.”). Therefore, according to Section 66-8-124(A), Blake was without statutory authority to arrest Defendant.

C. FOR PURPOSES OF SECTION 66-8-124(A), “ARREST” INCLUDES A TEMPORARY DETENTION

18 What constitutes an arrest under the provisions of Section 66-8-124(A) is pivotal to our determination in this case. In its opinion, the Court of Appeals devotes a significant amount of time distinguishing an arrest from a temporary detention and delineating when an arrest has occurred. Slayton, No. 27,892, slip op. at 9-12. The Court of Appeals directs its focus to State v. Werner, 117 N.M. 315, 871 P.2d 971 (1994), to determine at what point “‘an investigatory seizure is invasive enough to constitute an arrest.’” Slayton, No. 27,892, slip op. at 9 (quoting Werner, 117 N.M. at 317, 871 P.2d at 973). Though the definition of arrest can be narrowly construed to include only custodial arrests, for the purpose of determining which actions are governed by the Motor Vehicle Code, we have interpreted “arrest” broadly to include not only custodial arrests but also temporary detentions.

19 As used in Section 66-8-124(A), the term “arrest” does not refer solely to custodial arrest or incarceration; it also includes a “temporary detention.” See State v. Ochoa, 2008-NMSC-023, ¶ 15, 143 N.M. 749, 182 P.3d 130 (construing the misdemeanor arrest rule and Section 66-8-123, “[w]e hold that the Court of Appeals improperly applied New Mexico’s misdemeanor arrest rule to this case, because the ‘arrest’ at issue was an investigatory stop for a seatbelt violation”); State v. Bricker, 2006-NMCA-052, ¶ 9, 139 N.M. 513, 134 P.3d 800 (“While the statute [NMSA 1978, Section 66-8-123 (1978, as amended through 1989)] uses the words ‘arrest’ and ‘custody,’ we believe the Legislature intended those terms to refer to a temporary detention rather than a traditional custodial arrest in which a person is arrested and taken to the police station for booking.”); State v. Archuleta, 118 N.M. 160, 163, 879 P.2d 792, 795 (Ct. App. 1994) (construing Section 66-8-124(A), the Court developed two tests to determine if the officer is in “uniform”; the second test evaluated “whether the person stopped and cited either personally knows the officer or has information that should cause him to believe the person making the stop is an officer with official status”) (emphasis added); see also United States v. Gonzalez, 763 F.2d 1127, 1130 n.1 (10th Cir. 1985) (construing Section 66-8-123: “Despite the statute’s use of the words ‘arrest’ and ‘custody,’ when a New Mexico police officer stops a car merely to issue a traffic summons for a minor speeding infraction, we think that for Fourth Amendment purposes that stop is more in the nature of an investigative detention than a traditional arrest.”).

20 We have never interpreted the Legislature’s intent to restrict the term “arrest” in Section 66-8-124 only to custodial arrests, and we believe that under Chapter 66 of the New Mexico statutes, unless otherwise noted, “arrest” includes temporary detentions. See State v. Marquez, 2008-NMSC-055, ¶ 11, 145 N.M. 1, 193 P.3d 548 (“Nothing in the Fresh Pursuit Act indicates that the Legislature intended ‘authority to arrest’ to be limited to a custodial arrest. In fact, reference to other statutes indicates that the Legislature intended no such limit. Under NMSA 1978, Section 66-8-123(A) (1989), which provides for citations in lieu of custodial arrest for certain violations of the Motor Vehicle Code, ‘a person is arrested’ for the offense, ‘the arresting officer’ prepares the citation, ‘the arrested person’ signs the citation, and ‘the arrested person’ receives a copy of the citation before being released.”) (alterations omitted)); Archuleta, 118 N.M. at 162, 879 P.2d at 794 (construing Section 66-8-124(A), “[i]t seems clear enough that the intention of the legislature in requiring the officer to wear a uniform plainly indicating his official status was to enable the motorist to be certain that the
officer who stops him is, in fact, a police officer”). Therefore, legislative intent and previous New Mexico case law leads us to conclude that temporary detentions are covered under the term “arrest” as used in Chapter 66 as well as custodial arrests, and Blake’s actions in detaining Defendant constitute an arrest under Section 66-8-124(A). As a result, we need not address the de facto arrest analysis employed by the Court of Appeals in this case.

D. BLAKE’S SEIZURE OF DEFENDANT WAS STATE ACTION

{21} Having determined that Blake did not have statutory authority to either detain or arrest Defendant, we now address Defendant’s contention that Blake’s lack of authority resulted in an unreasonable seizure under the Fourth Amendment. The State argues that if Blake was acting without such statutory authority, she must have been acting as a private citizen, and she was therefore authorized to arrest Defendant for a breach of the peace. See State v. Arroyos, 2005-NMCA-086, ¶ 5, 137 N.M. 769, 115 P.3d 232 (“Any person . . . may arrest another upon good-faith, reasonable grounds . . . if a breach of the peace."

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{22} It is undisputed that Blake was acting in her capacity as an employee of the Roswell Police Department when she investigated the traffic accident. She was dispatched to the scene of the accident by the Roswell Police Department, and consistent with this directive, searched for and found Defendant sitting in his truck in his driveway. However, her authority to detain Defendant is less clear. Blake admitted that she did not have the authority to arrest Defendant, but the record does not clearly reveal whether she had the authority to detain him until a commissioned officer arrived to investigate the accident and make any necessary arrests. Nevertheless, Blake stated that the Roswell Police Department employed her to “do a lot of the same work that a certified officer would do,” including investigating traffic accidents and crime scenes. In fact, PSAs such as Blake wear uniforms and drive marked patrol cars.

{23} While on this record we cannot definitively determine that Blake was acting within the express authority granted to her by the Roswell Police Department, we nonetheless conclude that Blake’s actions were state actions because she was acting as an agent of the Roswell Police Department when she detained Defendant in his driveway. “Although the Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party or is their own initiative, the Amendment protects against such intrusions if the private party acted as an instrument or agent of the Government.” Skinner v. Ry. Labor Executives’ Ass’n, 489 U.S. 602, 614 (1989). As we recently stated in State v. Santiago, to determine whether a person is acting as an agent of the government, we consider “[1] whether the government knew of and acquiesced in the intrusive conduct, and (2) whether the party performing the search intended to assist law enforcement efforts or to further his [or her] own ends.” 2009-NMSC-045, ¶ 18, ___ N.M. ___, 217 P.3d 89 (internal quotation marks and citation omitted). We apply this same test to determine whether a seizure was state action. See United States v. Snowadzki, 723 F.2d 1427, 1429 (9th Cir. 1984) (applying the same factors “[t]o determine whether a private person acted as a government agent in an illegal search and seizure”).

{24} The sole reason Blake undertook to investigate and ultimately detain Defendant was due to her employment by the Roswell Police Department and her directive to investigate the accident. Although Blake exceeded the scope of her authority in detaining Defendant while waiting for commissioned officers to arrive, the government initiated her investigation and acquiesced in its results. Furthermore, acting in her capacity as an employee of the Roswell Police Department, Blake’s intentions were to assist the government in arresting Defendant for DWI. Thus, although Blake was without statutory authority to detain and arrest Defendant, she nonetheless was acting as an agent of the government when she seized him. Cf. People v. Rosario, 585 N.E.2d 766, 768-69 (N.Y. 1991) (non-commissioned auxiliary officers are “fellow officers” for the purpose of providing information for commissioned officers to make warrantless arrests that comport with the requirements of the Fourth Amendment). We now must determine whether her lack of statutory authority has Fourth Amendment implications.

{25} Before doing so, however, we are compelled to address a conflict in our case law that arises by virtue of our holding in this case that only commissioned peace officers may seize persons suspected of violating provisions of “the Motor Vehicle Code . . . or other law relating to motor vehicles punishable as a misdemeanor.” Section 66-8-124(A). In Arroyos, the Court of Appeals held that a deputy marshal acting outside of the territorial jurisdiction of his commission was authorized to detain a driver for suspected DWI, a misdemeanor breach of the peace. 2005-NMCA-086, ¶¶ 2-5, 9, 11. The Court reached its conclusion by construing NMSA 1978, Section 3-13-2 (1988), which limited the marshal’s territorial jurisdiction as “not divesting the officers of their common law right as citizens to make arrests or detentions.” Id. ¶ 8. Arroyos did not address any provisions of the Motor Vehicle Code that might affect a citizen’s authority to arrest another person for suspected violations of that statute, a matter we addressed earlier in this opinion.

{26} As we explained above, the common law right to citizen’s arrest for suspected violations of the Motor Vehicle Code and other misdemeanor motor vehicle laws has been abrogated by the Legislature. See NMSA 1978, § 66-1-4.14(J) (1990, as amended through 1999) (“‘police or peace officer’ means every officer authorized to direct or regulate traffic or to make arrests for violations of the Motor Vehicle Code”); § 66-8-124(A) (“No person shall be arrested for violating the Motor Vehicle Code . . . or other law relating to motor vehicles punishable as a misdemeanor except by a commissioned, salaried peace officer who, at the time of arrest, is wearing a uniform clearly indicating the peace officer’s official status.”). DWI is a violation of the Motor Vehicle Code. Section 66-8-102. Therefore, citizens’ arrests for DWI are not legal. To the extent that Arroyos suggests that a private citizen, including a commissioned peace officer acting outside the
of Defendant violated Section 66-8-123(A) and was therefore unlawful. However, this holding alone does not resolve the question of whether the evidence obtained from the search of Defendant’s wallet should have been suppressed.” Id. ¶ 14. To answer that question “requires an analysis of whether the unlawful custodial arrest violated the Fourth Amendment to the United States Constitution or Article II, Section 10 of our State Constitution.” Id.

[29] In Bricker, the State argued that “an arrest in violation of a statute does not elevate the issue to a constitutional level.” Id. ¶ 19 (citing People v. Lyon, 577 N.W.2d 124, 129 (Mich. Ct. App. 1998) for the proposition that the exclusionary rule is only compelled by the Fourth Amendment if the seizure was constitutionally invalid, based on a lack of probable cause, and not merely statutorily illegal). The Court agreed, stating that “[w]here we are to be guided solely by federal law interpreting the Fourth Amendment, the custodial arrest of Defendant would be reasonable. Under the Fourth Amendment, the constitutional reasonableness of a custodial arrest is measured by whether probable cause existed for the arrest.” Id. ¶ 21. The Bricker Court quoted Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) to set forth the principles of reasonableness under the Fourth Amendment:

[T]he United States Supreme Court [has] held fast with probable cause as the test of reasonableness, “without the need to balance the interests and circumstances involved in particular situations. . . . If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.” Bricker, 2006-NMCA-052, ¶ 21. Notwithstanding its Fourth Amendment analysis, the Court of Appeals ultimately concluded that the defendant’s custodial arrest violated Article II, Section 10 of the New Mexico Constitution and suppressed the evidence as unlawfully seized. Id. ¶ 30.

[30] A few years after Bricker was filed, the United States Supreme Court ratified the Court of Appeals’ decision. In a factual scenario essentially identical to the facts before the Court in Bricker, the United States Supreme Court relied in part on Atwater to hold that the defendant’s custodial arrest, in violation of a Virginia statute that required him to have been issued a citation and then released, did not offend the Fourth Amendment because it was supported by probable cause. Virginia v. Moore, ___ U.S. ___, 128 S. Ct. 1598, 1608 (2008). The United States Supreme Court stated that “[w]hether or not a search is reasonable within the meaning of the Fourth Amendment . . . has never depend[ed] on the law of the particular State in which the search occurs.” Id. at ___, 128 S. Ct. at 1604 (internal quotation marks and citation omitted, alterations in original). This same principle is true in the context of seizures. Id. at ___, 128 S. Ct. at 1604-05. The Court concluded that “warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution, and that while States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment’s protections.” Id. at ___, 128 S. Ct. at 1607. “When officers have probable cause to believe that a person has committed a crime in their presence, the Fourth Amendment permits them to make an arrest, and to search the suspect in order to safeguard evidence and ensure their own safety.” Id. at ___, 128 S. Ct. at 1608.

[31] The Supreme Court’s decision in Moore rested on the premise that “[i]n incorporating state-law arrest limitations into the Constitution would produce a constitutional regime” that would “vary from place to place and from time to time.” Id. at ___, 128 S. Ct. at 1606, 1607 (internal quotation marks and citation omitted). This is because what would be permissible under the Fourth Amendment in one state might not be permissible in another. “Fourth Amendment protections are not so variable and cannot be made to turn upon such trivialities[,]” such as “local law enforcement practices[,]” Id. at ___, 128 S. Ct. at 1605 (internal quotation marks and citation omitted). Rather, the Fourth Amendment places “great weight” on the “essential interest in readily administrable rules.” Id. at ___, 128 S. Ct. at 1606 (internal quotation marks and citation omitted). Simply put, “it is not the province of the Fourth Amendment to enforce state law.” Id. at ___, 128 S. Ct. at 1608.

[32] The glaring difference between the facts present in Bricker and Moore and those in Defendant’s case is that here, Defendant was not detained by a commissioned officer. The issue before us is whether the Fourth Amendment would treat a violation of a state law restricting who may seize a person differently from a state law concerning whether a person may

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be taken into custodial arrest by an otherwise authorized officer. Given the broad language of the United States Supreme Court’s recent decision in Moore, we do not believe that the Fourth Amendment would distinguish between state laws purporting to address a seizure’s lawfulness. The only inquiry of consequence to the Fourth Amendment is whether the state actor has reasonable suspicion to detain or probable cause to arrest the defendant for a crime committed in his or her presence.

Our conclusion that the Fourth Amendment is not concerned with a state actor’s violation of a statute governing who may seize a person suspected of committing a crime is supported by analogous cases from other jurisdictions reaching the same conclusion. See, e.g., People v. Hamilton, 666 P.2d 152, 156-57 (Colo. 1983) (en banc) (holding that an arrest supported by probable cause but made by officers acting in violation of a statute restricting their territorial jurisdiction did not violate the Fourth Amendment); Moore v. State, 798 S.W.2d 87, 89-90 (Ark. 1990) (finding that a citation issued by an officer who did not meet the statutory qualifications to serve as a police officer did not offend the Fourth Amendment), overruled on other grounds by Grillot v. State, 107 S.W.3d 136, 145 (Ark. 2003); State v. Drost, 697 N.E.2d 620, 622-23 (Ohio 1998) (holding that a DWI arrest made by liquor control investigators who did not have statutory authority to stop a driver for violating traffic laws was nonetheless constitutional under the Fourth Amendment because it was supported by probable cause). Therefore, we hold that an arrest made by a state actor in violation of a statute is not per se a violation of the Fourth Amendment. See Drost, 697 N.E.2d at 623 (“[A] violation of a constitutional right, the violation of a statute does not invoke the exclusionary rule.”). The pertinent question is whether the state actor who seized the defendant had “probable cause to believe that a person has committed a crime in their presence.” Moore, ___ U.S. at ___, 128 S. Ct. at 1608.

Defendant does not present any additional arguments that his seizure was unconstitutional under the Fourth Amendment. His sole argument on appeal to this Court is that his seizure was unconstitutional because Blake was without statutory authority to either detain or arrest him. Therefore, we do not address any other arguments relating to the lawfulness of his detention and subsequent arrest, such as whether his arrest was supported by probable cause. We hold that Blake’s lack of statutory authority to seize Defendant did not violate Defendant’s Fourth Amendment protections against unreasonable seizures.

F. DEFENDANT’S CONSENT TO THE BLOOD TEST WAS VALID

Defendant argues that the results of his blood test should be suppressed because the test was taken without his voluntary consent. He admits that he ultimately consented to the blood draw. However, he argues that his consent was not valid because it was the product of duress and coercion. We disagree.

The record shows that once Defendant was arrested at the hospital, he was asked “more than twice” if he would consent to a blood draw and that he refused these “numerous” requests. However, after Defendant had been evaluated and scheduled for release from the emergency room, the arresting officer gave him a “last chance” to consent to the blood draw. The officer explained to him that if he did not consent to the blood draw, he would be charged with aggravated DWI and, if he were to be convicted, the consequences of that conviction. Defendant then consented to have his blood drawn.

The Court of Appeals affirmed the district court’s denial of Defendant’s motion to suppress the results of his blood draw. Slayton, No. 27,892, slip op. at 12-13. The Court of Appeals concluded that “Defendant only had the right ‘not to be forcibly tested after manifesting refusal.’” Id. at 12 (quoting McKay v. Davis, 99 N.M. 29, 30, 653 P.2d 860, 861 (1982)). We agree.

Any person who operates a motor vehicle within this state shall be deemed to have given consent, subject to the provisions of the Implied Consent Act [66-8-105 NMSA 1978], to chemical tests of his breath or blood or both . . . for the purpose of determining the drug or alcohol content of his blood if arrested for any offense arising out of the acts alleged to have been committed while the person was driving a motor vehicle while under the influence of an intoxicating liquor or drug. NMSA 1978, § 66-8-107(A) (1978, as amended through 2003). The Implied Consent Act also provides that if a person refuses to submit to a breath or blood test, “none shall be administered except when a municipal judge, magistrate or district judge issues a search warrant authorizing chemical tests as provided in Section 66-8-107 NMSA 1978[.]” NMSA 1978, § 66-8-111(A) (1978, as amended through 2005). This right, however, is only a right “not to be forcibly tested after manifesting refusal.” McKay, 99 N.M. at 30, 653 P.2d at 861.

Defendant does not argue that he was forcibly tested. Rather, he argues that his consent was coerced by the arresting officer’s explanation that if he did not consent, he would be charged with aggravated DWI. As explained previously, Defendant’s implied consent to the blood draw was given when he got behind the wheel and took to the road. As a result, any coercion affecting his consent would be to his willingness to drive the vehicle, not to submit to the blood test. Therefore, because Defendant was neither forcibly tested nor coerced to drive his vehicle, he consented pursuant to the Implied Consent Act, regardless of the officer’s representations of the consequences of his failure to submit.

III. CONCLUSION

Although Blake did not have statutory authority to detain or arrest Defendant for suspected DWI, her lack of authority did not by itself amount to a violation of the Fourth Amendment’s protections against unreasonable seizure. Defendant’s consent to have his blood drawn was valid. Therefore, we affirm his conviction.

IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Chief Justice

WE CONCUR:

PATRICIO M. SERNA, Justice
PETRA JIMENEZ MAES, Justice
RICHARD C. BOSSON, Justice
CHARLES W. DANIELS, Justice
Following a jury trial, Reyes Marquez (Defendant) was convicted of driving while under the influence of intoxicating liquor (DWI) contrary to NMSA 1978, Section 66-8-102(A) (2005, prior to 2008 amendments). The Court of Appeals affirmed Defendant’s conviction, concluding in relevant part that (1) the evidence was sufficient to establish that Defendant had been driving while impaired by alcohol to the slightest degree, and (2) although scientific testimony correlating Defendant’s performance on three field sobriety tests with a ninety percent probability of a blood alcohol content (BAC) of .08 improperly had been admitted, the evidentiary error was harmless. State v. Marquez, 2008-NMCA-133, ¶¶ 15-25, 145 N.M. 31, 193 P.3d 578. We agree with the Court of Appeals that the evidence was sufficient to support Defendant’s conviction, but disagree that the evidentiary error was harmless. Accordingly, we reverse Defendant’s conviction and remand the present case for a new trial.

I. FACTS AND PROCEDURAL HISTORY

At approximately 12:50 a.m. on June 17, 2005, Defendant left a bar located on Montgomery Boulevard in Albuquerque, New Mexico. Benjamin Kirby, an officer with the Albuquerque Police Department, noticed that Defendant had “somewhat of a stagger to his step, and he . . . didn’t seem to have his balance about him.” Officer Kirby warned Defendant that “he shouldn’t be driving.” Although Defendant did not explicitly acknowledge Officer Kirby’s statement, he “looked at [Officer Kirby] as if he saw what [he] said, or understood what [he] said.”

Soon thereafter, Officer Kirby observed a white Ford truck pull into the parking lot at the same time that a red pickup truck was backing out of its parking space. Officer Kirby noticed that the white Ford truck accelerated at a very high rate of speed, as if to avoid a collision. After the danger of a collision had passed, the red pickup truck “stabb[ed] the brake real hard as if, oh, there was somebody there kind of thing.” The red pickup truck continued driving in reverse for approximately sixty feet and entered oncoming traffic on Montgomery Boulevard. Because Montgomery Boulevard is a “pretty dangerous street,” Officer Kirby radioed dispatch to report the suspicious vehicle.

Kelly Enyart, an officer with the DWI unit of the Albuquerque Police Department, was driving on Montgomery Boulevard when she received the call from dispatch. She made a U-turn and observed the red pickup truck pull into oncoming traffic while traveling in reverse. Officer Enyart pulled over the red pickup truck in a parking lot. She noticed that the driver, Defendant, had “bloodshot watery eyes,” smelled of alcoholic beverage, and had “fumbling fingers” while searching for his driver’s license, registration, and proof of insurance. She asked Defendant whether he had consumed any alcoholic beverages that evening, and Defendant admitted that he had drank two beers. Officer Enyart noticed that Defendant’s speech was slurred. At this point, Officer Kirby approached the vehicle and recognized Defendant as the individual whom he had warned earlier in the evening not to drive.

Officer Enyart asked Defendant to exit the vehicle and perform a series of field sobriety tests. Prior to administering the tests, she ensured that the area was flat, dry, well lit, and free of debris. Additionally, Officer Enyart asked Defendant whether he had any medical problems that might impede his ability to take tests that require walking or balancing. Defendant indicated that he did not.

Officer Enyart noticed that, when Defendant exited his vehicle, he was slow to respond and had to put his hand on the vehicle to maintain his balance. During the horizontal gaze nystagmus (HGN) test, Defendant failed to follow instructions and swayed noticeably backward and forward. During the walk and turn test, Officer Enyart had to repeat her instructions many times. Despite her thorough explanation of the test, Defendant failed to follow instructions and exhibited five out of eight clues. At this point, Defendant informed Officer Enyart that he had walking and balancing problems due to a recent military deployment in Iraq. Defendant was unable, however, to identify anything about his service in Iraq that would have caused walking and balancing problems. Lastly, Officer Enyart administered the one leg stand test, during which Defendant exhibited three out of four clues.

Thereafter, Officer Enyart arrested Defendant for DWI. Although Defendant initially agreed to submit to a breath alcohol test, he subsequently refused. Officer
Enyart advised Defendant of the adverse consequences of his refusal under the Implied Consent Act, but Defendant nonetheless refused to take the test. Accordingly, Defendant was charged by complaint in a metropolitan court with aggravated DWI contrary to Section 66-8-102(D)(3). Section 66-8-102(D)(3) (“Aggravated driving while under the influence of intoxicating liquor or drugs consists of a person who. . . refused to submit to chemical testing, as provided for in the Implied Consent Act, and in the judgment of the court, based upon evidence of intoxication presented to the court, was under the influence of intoxicating liquor or drugs.”).

At trial, Officer Enyart testified that studies conducted by the National Highway Traffic Safety Administration (NHTSA) have found correlations between the clues observed during the administration of field sobriety tests and subsequent chemical tests. The prosecutor asked Officer Enyart to explain these correlations, and Defendant objected based on the lack of an adequate foundation. The metropolitan court overruled Defendant’s objection and Officer Enyart testified that

[the] studies that have been done—there’s three specific studies that were done with these field sobriety tests. They’ve been done in Colorado, Florida, and San Diego. And, what they found is that these clues that we look for—on the walk and turn test, if somebody exhibits two or more of the eight clues, that there’s a sixty-eight percent chance that they are at or above a point zero eight on their chemical test, be that a breath or a blood test. On the one-leg-stand test, they have found that if a person exhibits two or more out of those four clues, there’s a sixty-five percent that their—on their chemical test, it will be at or above a point zero eight, either BAC or BRAC, depending if it’s a blood test or a breath test.

The prosecutor asked Officer Enyart, “What if you put all three of the tests together?” Defendant objected, and a bench conference ensued. The metropolitan court overruled Defendant’s objection, and the prosecutor repeated his question, “Under NHTSA, if you look at the clues with these three tests, what is the probability that the (inaudible) would be at or above the legal limit?” Officer Enyart explained that “[d]epending on which study you look at, it’s in the ninetieighth percentile.”

Defendant took the stand and offered his own testimony with respect to the events of the evening in question. Defendant admitted that he had consumed two beers within a two to three hour time period, but explained that he had not felt impaired to even the slightest degree. He informed the jury that he had not stumbled while exiting the bar and that he had neither seen nor heard Officer Kirby while walking to his truck. With respect to the near collision in the parking lot, Defendant testified that the white truck had pulled into the parking lot “like a bat out of hell” and that he had hit the brakes in order to avoid a collision. Defendant disputed Officer Enyart’s testimony that he had performed poorly on the field sobriety tests, testifying that he “didn’t have any problems falling or leaning over or anything.” Defendant explained that, during his encounter with Officer Enyart, she was “angry” and “aggressive.” Indeed, Defendant testified that he refused to take the breath alcohol test because he “was very upset with [Officer Enyart]. [He] felt like no matter what [he] did, she was going to charge [him] with something, by the way she treated [him].”

On the basis of the foregoing evidence, the jury found Defendant not guilty of the crime of aggravated DWI, but guilty of the lesser included offense of DWI. Defendant appealed his conviction to the district court, claiming that (1) the metropolitan court had violated Rule 7-506 NMRA by not providing Defendant with a trial within 182 days of the date of his arraignment, (2) the metropolitan court improperly had admitted Officer Enyart’s scientific testimony correlating Defendant’s performance on the field sobriety tests with a BAC at or above the legal limit of .08, and (3) the evidence was insufficient to support his conviction. The district court affirmed Defendant’s conviction.

Defendant appealed from the judgment of the district court to the Court of Appeals, which affirmed Defendant’s conviction in a divided opinion. Marquez, 2008-NMCA-133, ¶ 26. The Court determined that the metropolitan court’s failure to try Defendant within the 182 day time period set forth in Rule 7-506 was justified by exceptional circumstances. Id. ¶¶ 9-14. The Court further determined that “a reasonable mind could accept the . . . evidence [adduced at trial] as adequate to support a finding beyond a reasonable doubt that Defendant was impaired by alcohol to the slightest degree.” Id. ¶ 18 (internal quotation marks and citation omitted). Lastly, the Court held that, although the metropolitan court improperly had admitted Officer Enyart’s scientific testimony without an adequate foundation, the evidentiary error was harmless because (1) substantial evidence existed to support Defendant’s conviction without reference to Officer Enyart’s improperly admitted testimony; (2) the testimony as to Defendant’s driving, signs of intoxication, admittance of drinking, performance on the [field sobriety tests], and refusal to take a breath test constitute overwhelming evidence of his guilt when compared to the improperly admitted testimony”; and (3) there was no substantial evidence to discredit the State’s testimony regarding Defendant’s impairment. Id. ¶¶ 23-24. Additionally, the Court noted that Defendant’s BAC is not an essential element of the crime of DWI, and, therefore, the improperly admitted evidence “could not have contributed to Defendant’s conviction because it was not relevant to any fact the jury was asked to decide.” Id. ¶ 25.

Judge Kennedy agreed with the majority that Officer Enyart’s testimony improperly had been admitted, but disagreed that the error was harmless. Id. ¶¶ 28, 32 (Kennedy, J., concurring in part and dissenting in part). He noted that “[s]tatistical testimony that lacks foundation and that can clearly distract the jury from its function of weighing the proper evidence of guilt encourages a departure from the legitimate elements of proof.” Id. ¶ 32. In light of the high statistical probability cited in Officer Enyart’s testimony, and the explicit connection between a BAC at or above the legal limit and the crime of DWI, Judge Kennedy did not believe that the jury could “separate a proper basis for finding guilt from the improper one presented by the State.” Id. Because the improperly admitted evidence “invade[d] the jury’s ability to sufficiently decide the true facts,” Judge Kennedy concluded that the error was “harmful to a point that should require retrial.” Id. ¶ 33.

We granted Defendant’s petition for writ of certiorari pursuant to NMSA 1978, Section 34-5-14(B) (1972) and Rule 12-502 NMRA to determine whether (1) there was sufficient evidence to support Defendant’s DWI conviction, and (2) the improper admission of Officer Enyart’s scientific testimony was harmful error, necessitating a new trial. State v. Marquez, 2008-NMCT-009, 145 N.M. 258, 196 P.3d 489.

II. DISCUSSION

A. Sufficiency of the Evidence

“In reviewing the sufficiency of
the evidence, we must view the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict.” State v. Gallegos, 2009-NMSC-017, ¶ 30, 146 N.M. 88, 206 P.3d 993 (internal quotation marks and citation omitted). “[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” State v. Chavez, 2009-NMSC-035, ¶ 11, 146 N.M. 434, 211 P.3d 891 (internal quotation marks and citation omitted).

Section 66-8-102(A) provides that “[i]t is unlawful for a person who is under the influence of intoxicating liquor to drive a vehicle within this state.” A defendant is “under the influence of intoxicating liquor” if “as a result of drinking the liquor the defendant [is] less able to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to the person and the public.” UJI 14-4501 NMRA.

Defendant admitted that he had consumed two alcoholic beverages prior to driving his vehicle. Officer Enyart testified that Defendant’s eyes were bloodshot, his speech was slurred, and he smelled of alcohol. Additionally, the jury reasonably could have found that Defendant’s judgment, balance, and reaction time were impaired in light of the evidence that (1) Defendant staggered out of the bar, (2) Defendant was slow to react to the near collision with the white pickup truck, (3) Defendant drove approximately sixty feet into a dangerous street while traveling in reverse, (4) Defendant had “fumbling fingers,” (5) Defendant was slow to respond when exiting his vehicle and had to brace himself against the vehicle for balance, and (6) Defendant performed poorly on the field sobriety tests. Moreover, Defendant refused to submit to a breath alcohol test, from which the jury reasonably could have inferred consciousness of guilt. See State v. Soto, 2007-NMCA-077, ¶ 34, 142 N.M. 32, 162 P.3d 187 (“A jury may infer Defendant’s consciousness of guilt and fear of the test results from Defendant’s refusal to take a breath test.”). We conclude that the foregoing evidence is more than sufficient to support the jury’s factual finding that Defendant had been impaired by alcohol to the slightest degree.

Nonetheless, Defendant claims that the evidence was insufficient to support his DWI conviction because it was “equally consistent with not being impaired.” However, it is well established that “[c]ontrary evidence supporting acquittal does not provide a basis for reversal because the jury is free to reject Defendant’s version of the facts.” State v. Rojo, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829 (filed 1998); see also State v. Neal, 2008-NMCA-008, ¶ 19, 143 N.M. 341, 176 P.3d 330 (filed 2007) (“The test is not whether substantial evidence would support an acquittal, but whether substantial evidence supports the verdict actually rendered.”). Defendant further claims that Officers Kirby and Enyart were not credible witnesses in light of certain inconsistencies in their testimony. However, “under a substantial evidence review, [i]t is the exclusive province of the jury to resolve factual inconsistencies in testimony. We will not reweigh the evidence or substitute our judgment for that of the jury.” State v. Trujillo, 2002-NMSC-005, ¶ 28, 131 N.M. 709, 42 P.3d 814 (alteration in original) (internal quotation marks and citation omitted); see also State v. Hughey, 2007-NMSC-036, ¶ 16, 142 N.M. 83, 163 P.3d 470 (“It is the role of the factfinder to judge the credibility of witnesses and determine the weight of evidence.”). Accordingly, Defendant’s claims lack merit and are rejected.

B. Harmless Error

We next address Officer Enyart’s testimony, which correlated Defendant’s performance on the field sobriety tests with a ninety percent statistical probability of a BAC at or above the legal limit. It is well established that, “it is error to allow expert testimony involving scientific knowledge unless the party offering such testimony first establishes the evidentiary reliability of the scientific knowledge.” State v. Torres, 1999-NMSC-010, ¶ 24, 127 N.M. 20, 976 P.2d 20; see also Rule 11-702 NMRA (governing the admission of expert testimony). In Torres, we held that “HGN testing involves scientific knowledge” and, therefore, “only a scientific expert may testify as to [HGN] results.” 1999-NMSC-010, ¶ 46. We agree with the Court of Appeals that, in the present case, the State failed to “lay a sufficient foundation that a motorist’s HGN test results, in combination with the walk and turn and one leg stand test results, are scientifically valid means to determine the motorist’s BAC.” Marquez, 2008-NMCA-133, ¶ 20. Accordingly, Officer Enyart’s scientific testimony was improperly admitted in violation of Rule 11-702.

The State concedes that Officer Enyart’s testimony was improperly admitted, but argues that the evidentiary error was harmless because (1) there was substantial evidence to support Defendant’s DWI conviction, (2) the evidence of Defendant’s guilt was overwhelming in comparison to the impermissible testimony, and (3) Defendant’s version of events did not substantially discredit the State’s evidence. Defendant responds that the evidentiary error was not harmless because “[t]here is a substantial risk that,” rather than relying on the properly admitted evidence, “the jury improperly relied on the improper scientific testimony.”

Because the improper admission of Officer Enyart’s scientific testimony violated the New Mexico Rules of Evidence, non-constitutional error review is appropriate. State v. Barr, 2009-NMSC-024, ¶ 53, 146 N.M. 301, 210 P.3d 198 (“[W]here a defendant has established a violation of statutory law or court rules, non-constitutional error review is appropriate.”). “[N] on-constitutional error is reversible only if the reviewing court is able to say, in the context of the specific evidence presented at trial, that it is reasonably probable that the jury’s verdict would have been different but for the error.” Id. ¶ 54 (emphasis added) (clarifying the different standards of review for constitutional and non-constitutional error). However, “‘[t]he inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.’” Id. ¶ 57 (quoting Sullivan v. Louisiana, 508 U.S. 275, 279 (1993)). “Accordingly, in some circumstances where, in our judgment, the evidence of a defendant’s guilt is sufficient even in the absence of the trial court’s error, we may still be obliged to reverse the conviction if the jury’s verdict appears to have been tainted by error.” State v. Macias, 2009-NMSC-028, ¶ 38, 146 N.M. 378, 210 P.3d 804.

To determine whether the error in the present case was harmless, we must consider whether there is “(1) substantial evidence to support the conviction without reference to the improperly admitted evidence; (2) such a disproportionate volume of permissible evidence that, in comparison, the amount of improper evidence will appear insubstantial; and (3) no substantial conflicting evidence to discredit the State’s testimony.” Barr, 2009-NMSC-024, ¶ 56 (footnote omitted). “No one factor is
determinative; rather, they are considered in conjunction with one another. All three factors...provide...a reliable basis for determining whether an error is harmless."  

Id. ¶ 55.

[22] For the reasons explained in part II.A of this opinion, the evidence was more than sufficient to support Defendant's conviction without reference to Officer Enyart's improperly admitted scientific testimony. Defendant's admission that he had consumed alcohol before driving, his exhibition of signs of intoxication, his performance on the field sobriety tests, and his refusal to take a breath alcohol test, all provided a reasonable basis for the jury's factual finding that Defendant had been impaired by alcohol to the slightest degree.

[23] The second factor requires us to assess the impermissible evidence in light of the permissible evidence, the disputed factual issues, and the essential elements of the crime charged. Our focus is not limited to the quantity of impermissible evidence, but, rather, encompasses the quality of that evidence and its likely impact on the jury.  

See State v. Moore, 94 N.M. 503, 505, 612 P.2d 1314, 1316 (1980) ("[A] trial can be prejudiced by testimony last- ing but a fraction of a second... "). In the present case, Defendant did not submit to a breath alcohol test, and, therefore, the State's evidence of intoxication was limited to the personal observations of Officers Kirby and Enyart and the results of the field sobriety tests. The impermissible evidence correlated Defendant's performance on the field sobriety tests with a ninety percent statistical probability of a BAC at or above the legal limit. In a DWI trial, the improper admission of scientific evidence indicating that Defendant was legally intoxicated at the time of driving will "almost certainly... tip the balance in favor of the State."  

State v. Downey, 2008-NMSC-061, ¶ 39, 145 N.M. 232, 195 P.3d 1244 (internal quotation marks and citation omitted); see id. ¶¶ 16, 39 (holding that the improper admission of expert testimony indicating that the defendant had a BAC in the range of .075 to .111 at the time of driving was not harmless); Torres, 1999-NMSC-010, ¶ 53 (holding that the improper admission of expert testimony regarding an HGN test was not harmless because "the State presented the HGN results to the jury as the most accurate indicator of [the defendant's] intoxication");  

State v. Gardner, 1998-NMCA-160, ¶ 21, 126 N.M. 125, 967 P.2d 465 (holding that the improper admission of BAC evidence was not harmless); but see State v. Gutierrez, 1996-NMCA-001, ¶ 4, 121 N.M. 191, 909 P.2d 751 (holding that the improper admission of BAC evidence was harmless in light of the overwhelming evidence of guilt). We can perceive no reason to distinguish between the improper admission of a "definitive breath score," Marquez, 2008-NMCA-133, ¶ 24, and the improper admission of evidence revealing a high statistical probability of a breath or BAC at or above the legal limit, because both types of evidence are likely to impact the jury's verdict. See Gardner, 1998-NMCA-160, ¶ 21 ("[W]hen the only scientific evidence presented at [a DWI] trial was admitted in error, the court cannot say that the effect is harmless."). Accordingly, we conclude that the impermissible evidence was not insubstantial.

[24] The Court of Appeals held, however, that the testimony concerning Defendant's BAC "could not have contributed to Defendant's conviction because it was not relevant to any fact the jury was asked to decide."  

Marquez, 2008-NMCA-133, ¶ 25. We recognize that a defendant's BAC is not an essential element of the crime of DWI violation of Section 66-8-102(A). Compare Section 66-8-102(A) (requiring the State to prove that the defendant was "under the influence of intoxicating liquor") with Section 66-8-102(C)(1) (requiring the State to prove that the defendant had "an alcohol concentration of eight one hundredths"). Nonetheless, it is common knowledge that an individual with a BAC at or above the legal limit is highly likely to be impaired by alcohol, at least to the slightest degree. Given the explicit connection between BAC and physical or mental impairment, we agree with the dissenting opinion that there is a reasonable probability that Officer Enyart's testimony "distract[ed] the jury from its function of weighing the proper evidence of guilt [and] encourag[ed] a departure from the legitimate elements of proof."  

Marquez, 2008-NMCA-133, ¶ 32.

[25] Lastly, we consider the third factor, namely, whether there was substantial conflicting evidence to discredit the State's testimony. In the present case, Defendant testified that he had not been impaired by alcohol to the slightest degree, that he had not had any problems balancing and walking, and that he had not performed poorly on the field sobriety tests. Defendant's testimony directly contradicted the testimony of Officers Kirby and Enyart, both of whom testified that Defendant exhibited symptoms of alcohol impairment, including, but not limited to, bloodshot watery eyes, slurred speech, difficulty balancing and walking, and poor performance on the field sobriety tests. Thus, the jury was required to resolve a credibility contest between the State's witnesses and Defendant. Because the improperly admitted evidence undermined Defendant's credibility, we conclude that its admission was prejudicial to Defendant.  

See State v. Haynes, 2000-NMCA-060, ¶ 22, 129 N.M. 304, 6 P.3d 1026 (holding that evidentiary error was not harmless in relevant part because the evidence "came down to a swearing match between [the State's witness] and Defendant"). Stated simply, Defendant's testimony "might have had additional sway with the jury had the error not been made."  

Macias, 2009-NMSC-028, ¶ 43. Accordingly, the third factor, like the second factor, indicates that the evidentiary error was not harmless.

[26] Although the evidence in the present case was sufficient to support Defendant's conviction without reference to Officer Enyart's scientific testimony, we nonetheless are compelled to conclude that there is a reasonable probability that this testimony impacted the jury's verdict. Accordingly, the evidentiary error was not harmless and a new trial is required.

III. CONCLUSION

[27] We conclude that the evidence was sufficient to support Defendant's DWI conviction, but that the improper admission of Officer Enyart's scientific testimony was not harmless. Accordingly, we reverse Defendant's conviction and remand for a new trial.

[28] IT IS SO ORDERED.  

PETRA JIMENEZ MAES, Justice

WE CONCUR:  
EDWARD L. CHÁVEZ, Chief Justice  
PATRICIO M. SERNA, Justice  
CHARLES W. DANIELS, Justice  
RICHARD C. BOSSON, Justice (dissenting)

BOSSON, Justice (dissenting).

[29] I respectfully dissent. But first a word about lack of prosecutorial judgment. This is what is known in the trade as a "slam dunk" prosecution. The evidence of Defendant's drunken behavior was overwhelming, capped off by driving his vehicle sixty feet, in reverse, into oncoming traffic on Montgomery Boulevard. Only a miracle prevented serious injury or death.
The prosecution had only to lay its case before the jury and conviction would surely have followed. Instead, an overzealous prosecutor pressed the officer for pseudo-scientific conclusions about the accuracy of field sobriety tests that, quite simply, do not hold up. The metro court judge should never have allowed this testimony into evidence. Now, after all this time, money, and effort expended, the state must do it all over again.

Based solely on this one evidentiary error, the majority has decided to reverse, and I feel compelled to disagree. For all the reasons so ably expressed in Judge Pickard’s Court of Appeals majority opinion, I cannot agree that “it is reasonably probable that the jury’s verdict would have been different but for that [one] error.” State v. Barr, 2009-NMSC-024, ¶ 54, 146 N.M. 301, 210 P.3d 198. Juries are fully capable of assessing the mountain of evidence proving Defendant’s culpability beyond any reasonable doubt. Juries are not so easily distracted by isolated error as the majority opinion suggests.

This jury could put Officer Enyart’s erroneous testimony in context and in proper perspective; it likely had very little to do with Defendant’s all-but-inevitable conviction. The rules of review for non-constitutional error (“probable that the jury’s verdict would have been different but for the error”) impose on appellate courts a high level of tolerance for mere evidentiary error before we reverse. I do not find the substantial likelihood of prejudice that we need to reverse. Accordingly, I would affirm Defendant’s well-deserved conviction and the opinion of the Court of Appeals.

RICHARD C. BOSSON, Justice
Reverse the convictions. Defendant, found fundamental error, and or even no trial and a judgment of acquittal, fundamental error and demands a new trial, on that one statement, Defendant claims withheld from the jury by the court. Based on that one statement, Defendant claims fundamental error and demands a new trial. The parties hotly contended any suggestion that Defendant consent due to alcohol and perhaps drug-related intoxication. The parties hotly contested any suggestion that Defendant might have given the victim a so-called date-rape drug. During closing arguments, the prosecutor made a statement which, according to Defendant, implied that the prosecutor made a statement which, might have given the victim a so-called date-rape drug. During closing arguments, the prosecutor made a statement which, according to Defendant, implied that the prosecutor made a statement which, might have given the victim a so-called date-rape drug. The prosecutor made a statement which, might have given the victim a so-called date-rape drug.

BACKGROUND

Defendant was charged with three counts of third-degree criminal sexual penetration, which requires proof of “the use of force or coercion.” NMSA 1978, § 30-9-11(E) (2005). Force or coercion can be proven by evidence that the accused knew or had reason to know that the victim was “unconscious, asleep or otherwise physically helpless or suffers from a mental condition that renders the victim incapable of understanding the nature or consequences of the act.” NMSA 1978, § 30-9-10(A)(4) (2005). The State’s theory at trial was that the victim, J.M., was intoxicated by alcohol or a date-rape drug, or both, to such an extent that she was incapable of consenting to sexual activity. Defendant denied giving her a drug of any kind, and maintained that their sexual activity was at all times knowing and consensual. Defendant and J.M. first met when she hired him as her personal trainer. A relationship developed between them, and over the course of the next two years they would occasionally go out socially for dinner or drinks. At times they engaged in various forms of flirtation and sexual contact, even sleeping together, but avoided penile sexual intercourse.

J.M. later believed she had been given a date-rape drug that night. J.M. testified that she did not remember anything between the events at the hotel bar and being in Defendant’s shower, vomiting, and then laying on Defendant’s bed begging him for a bucket. The next morning she woke up naked in Defendant’s bed. She had no recollection of, and Defendant denied, any sexual activity. Detecting some blood spotting, J.M. was examined two days later by a sexual assault nurse who observed bruising, redness and a laceration at the entrance of her vagina, symptoms described at trial as consistent with non-consensual, forced sexual penetration.

Defendant’s recollection differed. He testified that when they arrived at his house, J.M. vomited, took a shower, and then joined him in consensual sexual activity not including penile penetration. The issue at trial, therefore, distilled down to J.M.’s consent, and particularly her ability to consent given her condition that night. The State attacked Defendant’s credibility with evidence that he had provided inconsistent statements to the police regarding the events of that night, first denying any sexual activity and then admitting to sexual activity, short of penile penetration, with J.M.’s consent.

A toxicology report revealed only ibuprofen in J.M.’s blood. The State’s expert testified, however, that date-rape drugs disappear quickly from the blood, suggesting that the negative toxicology report was not conclusive. Throughout the trial, the State continually referred to J.M.’s condition that night as drunk or drugged.

Defendant moved in limine to exclude any evidence from trial that J.M. had been
drugged. Accommodating Defendant in part, the trial court did not allow J.M. to testify that she believed Defendant had drugged her. However, the court did allow J.M. to describe her own perceptions that night (that she “felt drugged”), and the court allowed expert testimony regarding the effects of date-rape drugs generally. The State’s expert, a pediatrician with a degree in pharmacy, testified generally about the nature of date-rape drugs. They are put into the victim’s drink, and because they have no taste the victim does not perceive the drug. They cause the victim to lose consciousness, and then the drug passes quickly out of the victim’s system making detection difficult. The victim regains consciousness with no memory of events that occurred while under the influence of the drug.

During voir dire, the prosecutor informed the jury about the State’s theory of the case: that J.M. was so incapacitated through drugs or alcohol that she could not consent. Although there would be ample evidence of J.M.’s alcoholic consumption, the prosecutor conceded that there would be no direct evidence of drugging, such as a scientific test. In response, defense counsel’s opening remarks stated flatly that there would be “no evidence of any drugging by anybody in the course of this trial.”

After all the evidence was in and the parties rested, counsel began their closing arguments to the jury. During the State’s initial closing, the prosecutor again conceded the absence of any direct evidence of drugging, but reminded the jury of the circumstantial evidence of drugging. Responding, defense counsel attacked the drugging theory by calling it “false,” claiming there was “no proof” of drugs, and arguing that all of J.M.’s symptoms were caused by alcohol alone. Counsel told the jury not to consider any evidence of drugging. Thereafter, in the State’s rebuttal closing, the prosecutor made the following statement, which is the subject of this Opinion: “[Defense counsel] says, No evidence of date rape drug. That is wrong. The Judge wouldn’t allow things—wouldn’t allow you to hear things that you are not allowed to consider as evidence. That wouldn’t come in.” Defendant did not object to the statement or move for a mistrial.

The jury convicted Defendant of two counts of third-degree criminal sexual penetration for performing digital penetration and cunnilingus on J.M. when she was incapable of consent. The jury acquitted Defendant of the third count for penile penetration. The court sentenced Defendant to six years imprisonment with three years suspended.

After the verdict, Defendant filed a motion for a new trial, asserting inter alia a lack of evidence to support the drugging theory. Significantly, Defendant did not assert any error with respect to the prosecutor’s closing statement. The motion was denied.

On appeal, the Court of Appeals reversed the jury verdict, concluding that the prosecutor’s statement was intended to suggest to the jury—inappropriately—that inculpatory evidence of drugging did exist but had been withheld by the court. Sosa, 2008-NMCA-134. The majority found the statement to be “extreme prosecutorial misconduct,” amounting to fundamental error, and granted Defendant a new trial. Id. ¶ 17. Chief Judge Sutin dissented, observing that the majority had misread the prosecutor’s remarks, and that, in any event, those remarks did not undermine the fairness of the verdict and amount to fundamental error. Id. ¶¶ 32-39 (Sutin, J., dissenting in part). We granted certiorari to resolve the tension between these opposing views in light of our prior opinions discussing when remarks made during closing argument constitute error.

DISCUSSION
The Prosecutor’s Comment Did Not Constitute Error

We find no error, fundamental or otherwise, in the prosecutor’s remark. The entire comment, in full text, was as follows:

[Defense counsel] says, No evidence of date rape drug. That is wrong. The Judge wouldn’t allow things—wouldn’t allow you to hear things that you are not allowed to consider as evidence. That wouldn’t come in.”

When Dr. Williams came in and said that all of her statements were consistent with being drugged, you’re allowed to consider that.

In the first paragraph of the Court of Appeals opinion, however, the majority recast the comment as: “[T]he prosecutor, without objection, told the jury that there was ‘no evidence of date rape drugs’ because the judge would not ‘allow you to hear it.’” Sosa, 2008-NMCA-134, ¶ 1. With the statement thus rephrased, the Court of Appeals went on to call it “false” and “misleading.” Id. ¶ 15.

If one thing is clear to us at the outset, it is that the statement—as paraphrased by the Court of Appeals—is more objectionable than what the prosecutor actually said. If the prosecutor had really told the jury that inculpatory evidence of drugging had been withheld by the court, then we would be faced with a most serious matter indeed. In the absence of a curative instruction, we would be compelled to consider a new trial and perhaps more. But that is not the only interpretation, nor necessarily the reasonable one, of what the prosecutor actually said.

Grammatically, the confusion comes down to which verb tense the reader chooses to apply to the comment as it appears in the transcript. The Court of Appeals, and Defendant on appeal, interpret the prosecutor’s remark as utilizing the past tense, thus reading “the judge wouldn’t allow you to hear things” as “the judge didn’t allow you to hear things.” To Defendant, the only logical inference is that there were things about drugs to be heard, and the judge prevented the jury from hearing them.

Our reading, however, is that the prosecutor was referring to the evidence the judge did admit, not to matters the judge did not admit. The prosecutor used the negative contraction “wouldn’t” in the sense that a judge would not allow “things” into evidence if the court did not intend the jury to consider them as evidence. See Mary E. Whitten, et al., Hodges’ Harbrace College Handbook 564 (11th ed. 1990) (“would” as a modal auxiliary verb shows determination, promise, or intention). In other words, by allowing testimony of drugging—such as J.M.’s perception that she felt drugged—the judge intended the jury to consider that testimony as evidence and give it appropriate weight.

1Defendant argues there should be no retrial because the prosecutor’s remark was so outrageous that it falls within the rare circumstance we have recognized as prosecutorial misconduct, barring a new trial on the basis of double jeopardy. Because we do not find reason for a new trial, we need not consider the double jeopardy issue. See State v. Breit, 1996-NMSC-067, ¶ 14, 122 N.M. 655, 930 P.2d 792.
We understand, of course, that closing argument is inherently conversational, and on this appeal we review the cold, written record without the benefit of any audio record of what was said. Like the Court of Appeals, we cannot listen to the words—along with inflection—as spoken by counsel at trial. The point we make is that Defendant’s interpretation of the transcript does not stand alone. It is not the only reasonable way to comprehend what the prosecutor said, and it certainly is not a grammatically favored interpretation. Perhaps an audio recording would have clarified the matter. But in the absence of such additional evidence, it seems superficial to assume that Defendant must be right and the State must be wrong, based on what little we have on appeal.

Our primary concern is what the jury understood the comment to mean, and grammar aside, several aspects of the trial support our interpretation of the prosecutor’s remarks. First, defense counsel did not object to the prosecutor’s statement. If the prosecutor’s inflection were such that the past tense was so apparent (meaning, the judge didn’t allow you to consider evidence of drugging but it does exist), then we would have expected some reaction from defense counsel—a seasoned criminal defense attorney—who vigorously fought throughout the trial to silence the prosecution on the subject of drugs. Why now, moments before the end of the trial, would counsel sit mute and allow the jury to be contaminated by a suggestion that such evidence existed but had been withheld by the court?

Second, even such a comment were to escape defense counsel’s attention, we would expect the trial judge to intervene with a warning to counsel or a curative instruction if, in fact, the comment were as prejudicial as Defendant now suggests. Yet in this case the court did not react to the statement.

Finally, and most tellingly, defense counsel—even after time for reflection—made no mention of this supposedly prejudicial remark in his motion for a new trial. That motion alleged several improprieties with respect to the State’s drugging theory, but nothing about statements made in closing argument. We find it highly improbable that prosecutorial misconduct of the worst sort, as the Court of Appeals found, would evade all but the jury until well into the appellate process. It is far more likely that the comment was not understood by the jury or by anyone else to mean what Defendant now suggests.

We think the prosecutor was simply responding to defense counsel’s closing argument—an appropriate use of rebuttal—and counsel’s claim that there was “no proof” of a date-rape drug. The prosecutor prefaced her comment with an explicit reference to defense counsel’s statement in closing (“[Defense counsel] says, No evidence of date rape drug. That is wrong.”). The prosecutor followed that comment with an explanation that testimony admitted at trial is, in fact, evidence of drugging that a jury may consider. In contrast, Defendant’s interpretation only makes sense when the statements are removed from the context of the prosecutor’s broader argument.

Error in Closing Statements—Our Precedent

Closing argument is unique. Coming at the end of trial, and often after jury instructions, it is the last thing the jury hears before retiring to deliberate, and therefore has considerable potential to influence how the jury weighs the evidence. At the same time, closing argument, and rebuttal argument in particular, is necessarily responsive and extemporaneous, not always capable of the precision that goes into prepared remarks.

At the trial level, courts strike a balance between these competing considerations by affording counsel reasonable latitude in their closing statements, and by instructing the members of the jury that they are to base their deliberations only on the evidence along with instructions from the court, and not on argument from counsel. See State v. Taylor, 104 N.M. 88, 94, 717 P.2d 64, 70 (Ct. App. 1986); State v. Henderson, 100 N.M. 519, 521-22, 673 P.2d 144, 146-47 (Ct. App. 1983). Additionally, a trial court can correct any impropriety by striking statements and offering curative instructions. And should all the preceding safeguards fail, the trial court retains the power to declare a mistrial. Because trial judges are in the best position to assess the impact of any questionable comment, we afford them broad discretion in managing closing argument. See State v. Chamberlain, 112 N.M. 723, 729, 819 P.2d 673, 679 (1991) (district courts are given wide discretion in controlling closing statements, and a reviewing court will not find reversible error absent an abuse of discretion). Only in the most exceptional circumstances should we, with the limited perspective of a written record, determine that all the safeguards at the trial level have failed. Only in such circumstances should we reverse the verdict of a jury and the judgment of a trial court.

Where error is preserved at trial, an appellate court will review under an abuse of discretion standard. State v. Duffy, 1998-NMSC-014, ¶ 46, 126 N.M. 132, 967 P.2d 807. Where counsel fails to object, the appellate court is limited to a fundamental error review. Id. In both instances, however, the reviewing court must determine whether the relative weight of the error meets the threshold required to reverse a conviction. We have reviewed over 30 years of appellate decisions regarding challenges to closing arguments under both standards of review, and we discern three factors that appear to carry great influence in our deliberations: (1) whether the statement invokes some distinct constitutional protection; (2) whether the statement is isolated and brief, or repeated and pervasive; and (3) whether the statement is invited by the defense. In applying these factors, the statements must be evaluated objectively in the context of the prosecutor’s broader argument and the trial as a whole.

With respect to the first factor, our courts have been most likely to find reversible error when the prosecution’s comment invokes a distinct constitutional protection. In State v. Ramirez, 98 N.M. 268, 269, 648 P.2d 307, 308 (1982), the prosecutor stated in closing, “Nowhere during this period of time does this [d]efendant come forward and most of all, nowhere does he come forward and produce the gun that can acquit him or maybe show he didn’t fire the fatal shot.” We held that reference to a defendant’s post-Miranda silence violated the constitution, and constituted reversible error despite defense counsel’s failure to object. Id.; see also State v. Allen, 2000-NMSC-002, ¶ 27, 128 N.M. 482, 994 P.2d 728 (filed 1999); State v. Clark, 108 N.M. 288, 303, 772 P.2d 322, 337 (1989), disapproved of on other grounds by State v. Henderson, 109 N.M. 655, 659, 789 P.2d 603, 607 (1990).

Similarly, in Garcia v. State, 103 N.M. 713, 714, 712 P.2d 1375, 1376 (1986), the prosecutor made repeated references to the defendant’s failure to consent to a warrantless search. Comparing the Fourth Amendment right to refuse entry to a police officer with the Fifth Amendment right to silence, we held that the prosecutor’s comment placed an “unfair and impermissible
burden” on the defendant’s exercise of his Fourth Amendment rights, which had “an obvious and extreme prejudicial impact [requiring] reversal.” 115 N.M. 514, 517, 853 P.2d 626, 673 P.2d at 147, a sexual assault case, we found reversible error where the prosecutor indulged in a “true story” about a man who was accused of rape, and went on to commit several more rapes before being caught. Defense counsel repeatedly objected and the court admonished the jury to disregard the story, but the court did not declare a mistrial. Id. at 521, 673 P.2d at 146. Our Court of Appeals reversed because it was an exceedingly close case with little evidence, and the prosecutor’s “story” was “lengthy, not based on evidence, and served no purpose other than to arouse prejudice against the defendant.” Id. at 522, 673 P.2d at 147.

We declined to reverse the conviction, concluding that the comments were invited by the defendant’s opening remarks. Id. ¶ 37. No such evidence was presented at trial. Id. In closing, the prosecutor said that the defendant was charged with murder after she and three other defendants drove the victim outside of town and shot him several times. Defense counsel stated in opening that the defendant remained seated in the vehicle while the others committed the murder. Id. ¶ 51. No evidence was presented at trial. Id. In closing, the prosecutor stated that the defendant was not seated in the vehicle while the murder occurred, and commented on the lack of any testimony suggesting otherwise. Id. The defendant objected that the prosecutor had impermissibly referred to her silence. Id. We declined to reverse the conviction, concluding that the comments were invited by the defendant’s opening remarks. Id. ¶¶ 39-40; see also State v. Henry, 101 N.M. 266, 681 P.2d 51, 52 (1984) (closing statements regarding the defendant’s right to silence were permissible because invited by defendant’s opening statements); State v. Rojo, 1999-NMSC-001, ¶¶ 54 n.3, 56, 126 N.M. 438, 971 P.2d 829 (filed 1998) (prosecutor’s comment, “[h]e did not look you in the eyes and say, ‘I did not kill [the victim],’” were responsive to defense closing argument, and permissible comment on the character of a witness (the defendant)).

While we find no error in the prosecutor’s comment, we must be convinced that the prosecutor’s conduct created “a ‘reasonable probability that the error was a significant factor in the jury’s deliberations in relation to the rest of the evidence before them.’” State v. DetGraff, 2006-NMSC-011, ¶ 21, 139 N.M. 211, 131 P.3d 61 (quoting Clark, 108 N.M. at 303, 772 P.2d at 337). As with any fundamental error inquiry, we will upset a jury verdict only (1) when guilt is so doubtful as to shock the conscience, or (2) when there has been an error in the process implicating the fundamental integrity of the judicial process. State v. Barber, 2004-NMSC-019, ¶¶ 16, 135 N.M. 621, 92 P.3d 633.

In discussing the fundamental error standard of review, the Court of Appeals stated, “we resolve any doubt as to [the statement’s] effect . . . in favor of our belief that it likely swayed the jury. . . . We cannot say that the prosecutor’s improper statement did not contribute to Defendant’s conviction.” Sosa, 2008-NMCA-134, ¶ 17. The appellate court’s presumption of fundamental error is incorrect. To presume prejudice wherever there is error would turn our fundamental error jurisprudence on its head, shifting the burden on appeal.
to the State to prove that no fundamental error occurred.

{37} Under the proper standard, we begin with the presumption that the verdict was justified, and then ask whether the error was fundamental. See Allen, 2000-NMSC-002, ¶ 95; Rojo, 1999-NMSC-001, ¶ 55. In the case before us, even if we were to assume that the prosecutor’s comment was error, the principles we outlined above warrant a different conclusion from what the Court of Appeals decided.

{38} To begin the analysis, the prosecutor’s comment did not invade any distinct constitutional protection of the sort we condemned in Ramirez, 98 N.M. at 269, 648 P.2d at 308, and Garcia, 103 N.M. at 714, 712 P.2d at 1376. Absent a constitutional violation, we look at the length and repetition of the comment to determine whether it was so pervasive as to clearly distort the body of evidence before the jury. See Brown, 1997-NMSC-029, ¶ 23. At its worst, the comment was brief and singular. It was not repeated, nor was it a return to an impermissible theme from before. The comment was a far cry from the long, detailed story we saw in Henderson. Our view might be different had defense counsel objected at trial, but he did not.

{39} Turning to the third factor in our analysis, the prosecutor’s statement was clearly in response to defense counsel’s remarks. The prosecutor began with “[Defense counsel] says, No evidence of date rape drug. That is wrong.” Defense counsel had argued in closing that the State’s drugging theory was “a very false issue,” and that there was “simply no proof of it.” In fact, as the parties concede, several items of circumstantial evidence arguably supported a drugging theory. Under the circumstances, the prosecutor was almost compelled to respond. Having opened the door, Defendant cannot now split semantic hairs over the prosecutor’s choice of words. See State v. Chacon, 100 N.M. 704, 706-07, 675 P.2d 1003, 1005-06 (Ct. App. 1983) (no fundamental error where prosecutor’s error was limited to one improper word, and the defendant had opened the door to the comment); see also State v. Ruffino, 94 N.M. 500, 503, 612 P.2d 1311, 1314 (1980) (“That the prosecutor can refer to the defendant’s failure to testify if the door is opened by the defense, is well supported by case law.”).

{40} What also sets this case apart is the overwhelming evidence of J.M.’s state of extreme intoxication that night, whether through alcohol or drugs, and the State’s repeated argument at trial that intoxication by alcohol alone was sufficient to impair J.M.’s ability to consent. Defendant did not dispute much of the evidence going to alcohol intoxication; his theory was that J.M. was capable of consenting and did consent to the sexual contact. Defendant admitted to certain sexual acts, and the jury only convicted him of the charges that were based on the acts he conceded. The State also produced circumstantial evidence to suggest its drugging theory, and physical evidence to support the idea that J.M. did not willfully participate in sexual activity that night. Not to be underestimated, the evidence also showed Defendant making inconsistent statements to both J.M. and the police about what occurred that night.

{41} Our discussion highlights the importance of adhering to the fundamental error standard of review. It is undoubtedly possible that the jury heard the statement as Defendant suggests, but we cannot say as a matter of law that the probability is so great that a miscarriage of justice will result without our intervention. We conclude that there was no error at all, but more importantly, our obligation is to assume there was no error until Defendant satisfies his burden of persuasion by showing otherwise. In light of the overwhelming evidence of guilt, the context of the statement, and Defendant’s failure to alert the judge to any error during trial, we decline to take the extraordinary action of upsetting the jury’s verdict.

CONCLUSION

{42} We reverse the opinion of the Court of Appeals and affirm the judgment of the district court below.

{43} IT IS SO ORDERED.

RICHARD C. BOSSON,
Justice

WE CONCUR:
EDWARD L. CHÁVEZ, Chief Justice
PATRICIO M. SERNA, Justice
PETRA JIMÉNEZ MAES, Justice
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New Mexico Legal Aid (NMLA) has an opening for a Staff Attorney in its Roswell Office. One (1) or more years of legal experience required. NMLA represents low-income individuals and families in a wide variety of poverty law areas including family law, housing, public benefits, and consumer issues. Expectation is that attorney will be active in local bar and community activities. The candidate will handle general poverty law cases, utilizing a computerized case management system, participate in community education and outreach to those in need of housing and other benefits, and participate in recruitment of pro bono attorneys. Requirements: Candidates must possess excellent writing and oral communication skills, ability to manage multiple tasks, skills sufficient to implement an array of advocacy strategies, ability to manage a caseload, and the ability to build collaborative relationships within the community. Proficiency in Spanish is a plus. Reliable transportation is mandatory. New Mexico bar license is preferred. NMLA offers an excellent benefits package, including generous leave, health insurance and opportunities for training. Competitive salary based on experience, DOE. NMLA is an EEO Employer. Send Resume, two references and writing sample to: Gloria Molinar, NMLA, PO Box 25486, Albuquerque, NM 87125-5486 and or email to: gloriam@nmlegalaid.org; Deadline:1/5/2010

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Seeking attorney to handle residential foreclosure and related cases. No billable hours requirement. Prior foreclosure, real estate title, &/or litigation experience required. Fax cover letter, resume, salary requirements & references to Susan C. Little, 254-4722 or mail to PO Box 3509, Alb 87190.

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Associate attorney with three years experience wanted for fast paced, well established, litigation defense firm. Please send your resume and references to Human Resources, Civerolo, Gralow, Hill and Curtis, P.A., P.O. Drawer 887, Albuquerque, N.M. 87103.
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**Santa Fe Downtown Law Firm Has Office Space Available**
VanAmburg, Rogers, Yapa, Abeita & Gomez, LLP, 347 E. Palace Ave. Rent includes receptionist; use of conference room; library, high speed internet available; free parking for staff and clients, copy machine available, security and janitorial services. The law firm is a pleasant, relaxed, non-smoking atmosphere. Client Referrals possible. Please call 988-8979

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