STATE V. DEANGELO M.

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
DEANGELO M.,
Child-Appellant.

No. A-1-CA-35466

COURT OF APPEALS OF NEW MEXICO

December 12, 2018

APPEAL FROM THE DISTRICT COURT OF ROOSEVELT COUNTY , Drew D. Tatum, District Judge

COUNSEL

Hector H. Balderas, Attorney General, Maha Khoury, Assistant Attorney General, Santa Fe, NM, for Appellee

Bennett J. Baur, Chief Public Defender, Kathleen T. Baldridge, Assistant Appellate Defender, Tania Shahani, Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

EMIL J. KIEHNE , Judge. WE CONCUR: JULIE J. VARGAS, Judge, DANIEL J. GALLEGOS, Judge

AUTHOR: EMIL J. KIEHNE

MEMORANDUM OPINION

KIEHNE, Judge.

{1} DeAngelo M. (Child) appeals from a jury verdict finding that he committed second-degree murder, contrary to NMSA 1978, Section 30-2-1(B) (1994) and NMSA

1978, Section 32A-2-3(A) (2009), aggravated burglary, contrary to NMSA 1978, Section 30-16-4(B) (1963) and Section 32A-2-3(A), larceny (over $250), contrary to NMSA 1978, Section 30-16-1(C) (2006) and Section 32A-2-3(A), and tampering with evidence, contrary to NMSA 1978, Section 30-22-5 (2003) and Section 32A-2-3(A). The district court committed Child to the custody of the Children, Youth and Families Department until he turned twenty-one (21) years old. Child claims (1) that the evidence was insufficient to support his convictions; (2) that the district court erred by failing to question the jury about a potentially prejudicial newspaper article that was published in a local newspaper during the trial; and (3) that the district court erred in failing to grant Child's motion to dismiss the charges based on the State's alleged failure to disclose exculpatory evidence. We reverse Child's larceny adjudication, and affirm his remaining adjudications.

Background

Procedural History

{2} This is the second time this case is before us on appeal. *See State v. DeAngelo M.*, 2015-NMCA-019, 344 P.3d 1019 (affirmed by *State v. DeAngelo M.*, 2015-NMSC-033, 360 P.3d 1151). Child was first tried in 2011 and found to have committed second-degree murder, aggravated burglary, two counts of tampering with evidence, and larceny. On appeal, we reversed Child's adjudication because the State did not overcome the rebuttable presumption, set forth in NMSA 1978, Section 32A-2-14(F) (2009), that statements he made to investigating officers were inadmissible against him because he was thirteen years old when he made the statements. *DeAngelo M.*, 2015-NMCA-019, ¶ 2. Our Supreme Court affirmed the decision, but rejected this Court's reasoning and promulgated a new test to determine whether the State has rebutted the presumption that it may not use a statement made by a thirteen-year-old against him at trial. *DeAngelo M.*, 2015-NMSC-033, ¶¶ 3, 16-19. Our Supreme Court remanded the case for a new trial. *Id.* ¶ 31. The State then pursued the same charges, except that it dropped one count of tampering with evidence.

Facts

{3} Angel Vale (Victim) lived with her boyfriend, Edward Lucero, in a house next door to Child's house. Child often played in the back yards of the homes on the street. He usually played alone.

{4} On the weekend of July 16-18, 2010, Victim and Mr. Lucero went out of town to visit family. When they returned, it was clear that someone had entered their home without their permission. Although nothing of value was taken, Victim and Mr. Lucero noticed a number of irregularities, including that their couch cushions were disheveled; the batteries in their television remote were missing; toilet paper had been spread around the house; a bottle of Smirnoff Ice had been consumed and placed in a trashcan that the couple had emptied before they left for the weekend; a can of Bud Light beer had been opened, sipped from, and placed back in the refrigerator; there was urine and

a shredded tampon in the toilet; the couple's bathroom medicine cabinet had been disarranged; tissues had been placed in Victim's underwear drawer; and a new pack of Trident gum that was on a table had been taken, with gum wrappers scattered around and inside the trashcan.

{5} The couple suspected that someone had entered the home through a side door that would not lock properly, and would open if pushed hard enough. They decided to move because their landlord would not fix the door, so they put down a deposit on an apartment that week, and started to clear their belongings from the house. Victim had also told a neighbor that she was afraid of Child because of the break-in.

{6} On July 22, 2010, Victim was loading things into the couple's SUV to start moving from their house to their new apartment. Victim's landlord saw her moving boxes around 2:30 p.m. that day.

{7} Around 3:00 p.m. that day, Randy Chavez, a repair person who was working on one of the houses on the street, heard what sounded like three or four fireworks. Less than a minute later, he saw Child come running around from the back of his house. Upon seeing Mr. Chavez, Child slowed to a walk, said "Hi" to Mr. Chavez, and then went to the front of his house.

{8} That evening, one of Victim's co-workers went looking for her after she did not report for work and found her body. Victim had been shot three times, and was found lying unresponsive on the south side of her house, which faced Child's house.

{9} During the investigation into Victim's death, police found a number of items belonging to Victim and Mr. Lucero in the dumpsters behind the houses on the street, including Mr. Lucero's .22 caliber rifle, an Mp3 player, video game discs, .22-caliber ammunition, a pornographic DVD, and other items. An expert determined that the rifle was the firearm used to shoot Victim.

{10} In Victim's back yard and in the shed located in the back yard, investigators found some spent .22 shell casings, a box of .22-caliber ammunition, some Trident gum wrappers, and some plastic cups. Other evidence connected Child to these items. The cups had Child's DNA and fingerprints on them, and the box of ammunition had Child's fingerprints on it. Child also could not be excluded as a source of a partial fingerprint that was taken from the rifle. Additionally, in the shed and in the backyard, there were a number of shoeprints with a distinct, hexagonal pattern. Investigators at the scene noticed that Child's shoes left the same distinct pattern. Investigators also noticed that Child had taken a keen interest in the crime scene—he watched the investigation intently—and they had to prevent him from accessing the dumpsters behind the houses.

Discussion

A. The district court did not err in declining to voir dire the jury after a local newspaper printed an article about the case

{11} Child argues that the district court erred when it refused to voir dire the jurors about whether they were aware of a newspaper article that had run in the *Portales News-Tribune* during the trial, which was entitled "Psychologist May Testify in [Child's][1] Trial." The issue arose when the State brought it to the district court's attention that a psychologist on Child's witness list, Dr. Maxann Shwartz, had performed an evaluation of Child that included personality or "profile" testing, and the State had not been made aware of this before trial began. After interviewing Dr. Shwartz following the first day of trial, the State learned that Child had admitted to Dr. Shwartz that he had killed Victim, but that Dr. Shwartz did not believe Child because he did not fit the profile of someone who would commit violence. The parties then discussed whether the confession should be admissible, and the district court reserved ruling on the issue until Dr. Shwartz was available to testify at a hearing. A news reporter, who was apparently present in the courtroom for this argument, wrote an article on it. Ultimately, after a later hearing, the district court excluded Dr. Shwartz from testifying as a discovery sanction because Child's counsel did not disclose discoverable information about her evaluation to the State before trial.

{12} Child did not include a copy of the article in the record, but alleges that the article stated the following:

> Deputy District Attorney Brian Stover told Judge Drew Tatum before testimonies began Tuesday morning that there were details about the testimony of Albuquerque Psychologist Maxann Shwartz—who Defense Attorney Chris Christensen plans to call to the stand later this week—which the state was not made aware of, such as an admission of guilt made by [Child] to Shwartz during an October 2010 interview.
>
> Stover clarified later that this afternoon's hearing will be to determine if Shwartz's testimony is admissible and, if so, what can and cannot be used from the testimony. Shwartz is due to testify in the late afternoon.

After the article was published, Child filed a motion to dismiss the case for prosecutorial misconduct, alleging that the prosecutor violated Rules of Professional Conduct 16-304 and 16-305 NMRA when he spoke about information in the case that he should have known would not be admissible while the news media were present. At a hearing on the motion, Child asked in the alternative that the district court question the jurors to determine whether any of them might have read the article. The district court ruled that no prosecutorial misconduct had occurred, and declined to voir dire the jury, noting that it had repeatedly instructed the jury to avoid any news coverage about the case, and that there was no evidence that it had disregarded this instruction. On appeal, Child abandons his prosecutorial misconduct claim, focusing instead on the district court's denial of his request to voir dire the jurors.

{13} Child argues that the article was prejudicial because it referred to an admission of guilt that Child made to Dr. Shwartz. Child also argues that the article had the potential to prejudice the jury against him because it mentioned that his counsel had not

provided information about Dr. Shwartz's evaluation to the State, making it look like Child had something to hide.

{14} We review claims of error regarding mid-trial requests to voir dire jurors for an abuse of discretion. *See State v. Greenwood*, 2012-NMCA-017, ¶ 57, 271 P.3d 753. In *State v. Holly*, 2009-NMSC-004, 145 N.M. 513, 201 P.3d 844, our Supreme Court explained how a district court is to proceed when a defendant in a criminal case claims that he or she has been prejudiced by mid-trial publicity. A district court must engage in a three-step process. "First, the trial court determines whether the publicity is inherently prejudicial." *Id.* ¶ 19. "If so, the court undertakes to canvass the jury as a whole to assess whether any of the jurors were actually exposed to the publicity." *Id.* "Finally, in the event of exposure, the court conducts an individual voir dire of the juror to ensure that the fairness of the trial has not been compromised." *Id.*

{15} In the first step of this analysis, district courts should consider the following factors in deciding whether mid-trial publicity is "inherently prejudicial": "(1) whether the publicity goes beyond the record or contains information that would be inadmissible at trial, (2) how closely related the material is to matters at issue in the case, (3) the timing of the publication during trial, and (4) whether the material speculates on the guilt or innocence of the accused." *Id.* ¶ 20. Additionally, "the trial court should consider the likelihood of juror exposure by looking at (1) the prominence of the publicity, including the frequency of coverage, the conspicuousness of the story in the newspaper, and the profile of the media source in the local community; and (2) the nature and likely effectiveness of the trial judge's previous instructions on the matter, including the frequency of instruction to avoid outside materials, and how much time has elapsed between the trial court's last instruction and the publication of the prejudicial material. It is significant whether the trial court merely told the jury to disregard such material or whether the jury was properly instructed to avoid looking at such material altogether." *Id.* "The accused is [not] required to present evidence of actual juror exposure in recognition of the near impossibility of doing so. However, the overall burden of persuasion remains with the defendant to show that the material is inherently prejudicial, which in turn gives rise to an *inference* of prejudice sufficient to compel a voir dire." *Id.* ¶ 23. "Any question as to the existence of prejudice should be resolved in favor of the accused." *Id.* ¶ 21. "Only when mid-trial publicity presents *a serious possibility of prejudice*, does voir dire become mandatory." *Id.* ¶ 22 (emphasis added). Where the accused fails to include a copy of the article in question in the record on appeal, "we indulge every presumption in favor of the correctness and regularity of the trial court's judgment." *Greenwood*, 2012-NMCA-017, ¶ 61 (omission, internal quotation marks, and citation omitted).

{16} Although Child's argument to the district court assumed that the article was prejudicial, Child never demonstrated to the district court how the newspaper article was inherently prejudicial using the factors set forth in *Holly*. Several factors weighed in favor of a finding of inherent prejudice: the article discussed evidence outside the record, it was published during the trial, and it referenced a possible admission of guilt by Child. But several factors also weighed against such a finding. Unlike the situation in *Holly*,

which involved a story on the front page of the local newspaper featuring a "banner headline" that the defendant had pleaded guilty to charges related to those at issue in the ongoing trial of that case, *Holly*, 2009-NMSC-004, ¶ 26, here the headline ("Psychologist May Testify in [Child's] Trial") was more innocuous. Child also failed to provide the district court with a copy of the article, thus preventing the district court from evaluating the location or prominence of the story in that day's edition of the newspaper. Child provided no information to the district court about the readership of the *Portales News-Tribune*, whether the newspaper had an online edition, and if so, whether the news story was published online. Under *Holly*, these are all factors relevant to the likelihood of juror exposure, and are necessary for the court to consider when determining whether the article was inherently prejudicial. *See id.* ¶ 20. It was Child's burden to establish inherent prejudice.

{17} Moreover, we note that the district court repeatedly instructed the jury to avoid any news coverage about the trial before every recess. *See id.* ¶ 20 ("It is significant whether the trial court merely told the jury to disregard such material or whether the jury was properly instructed to avoid looking at such material altogether."). The district court even gave two additional warnings about avoiding publicity about the case, warning jurors that the case had indeed received some publicity.

{18} Accordingly, under these circumstances we hold that the district court did not abuse its discretion in declining to voir dire the jury, because Child failed to establish as an initial matter that the article was inherently prejudicial. *See Greenwood*, 2012-NMCA-017, ¶¶ 58-61 (finding no abuse of discretion in the district court's denial of a motion to conduct a mid-trial voir dire where the defendant failed to provide a copy of an allegedly prejudicial article, where many facts in the article were presented to the jury, and the jury was constantly reminded to avoid media coverage).

B. The district court did not err by denying Child's motion to dismiss

{19} Child also argues that the district court should have dismissed his case because the State failed to disclose, before the first trial, evidence about the DNA found on the rifle used to kill Victim in violation of his constitutional right to disclosure of exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963). The New Mexico Department of Public Safety's Forensic Laboratory (State Crime Laboratory) completed a report in 2010 that eliminated Child as a contributor to the DNA on the rifle. Child received this report, and then requested that the laboratory test the DNA of another male suspect. The laboratory performed the test, but failed to notify Child in 2010 that the raw data from the testing, which was not included on any report, showed that most of the DNA was from a female. The State Crime Laboratory had also not informed the prosecution that the majority of the DNA was from a female contributor.

{20} Approximately two weeks before Child's second trial, Child's attorney received information from the laboratory the majority of the DNA found on the rifle as a result of the 2010 testing was female. There also may have been a male contributor present in

the DNA mixture, but the amount of DNA present was not sufficient to reach a firm conclusion about that.

{21} Child filed a motion to dismiss the charges for failure to disclose exculpatory information that could have affected the outcome of the first trial. Child argued that the district court should consider the State Crime Laboratory as an arm of the prosecution team, making it immaterial that the prosecutor was not actually aware of this evidence. After a hearing, the district court denied Child's motion, ruling that the evidence "may [have been] material to this case, but in comparison to the potential exculpatory evidence in [the report containing the DNA test results for the rifle], the degree to which the additional information provides a higher level of exculpatory value is minimal. The primary exculpatory evidence remains unchanged that [Child] was eliminated as a DNA contributor regardless of the additional information that most of the DNA appeared to come from a female contributor." Additionally, the district court ruled that Child had "ample opportunity to incorporate the newly discovered evidence into his defense of the case" at the second trial and that he had therefore not been prejudiced.

{22} On appeal, the State responds that the evidence was not material and that it did not suppress evidence because Child's counsel could have contacted the State Crime Laboratory at any time to receive the raw data from the report. The State cites *State v. Ortega*, 2014-NMSC-017, ¶ 49, 327 P.3d 1076, for the proposition that "[m]istrial is not appropriate where the raw data relied upon by the expert at trial was available to defense counsel and defense counsel failed to request it."

{23} We review the district court's ruling on Child's claim that the State failed to disclose evidence favorable to him, thereby committing a *Brady* violation, for an abuse of discretion. *See State v. Trujillo*, 2002-NMSC-005, ¶¶ 48-50, 131 N.M. 709, 42 P.3d 814. We employ the abuse of discretion standard for such claims because the trial court is in the best position to determine the significance of the alleged errors. *Id.* ¶ 49. "Our resolution of [the] issue rests on whether the prosecutor's improprieties had such a persuasive and prejudicial effect on the jury's verdict that [Child] was deprived of a fair trial." *Id.* (internal quotation marks and citation omitted).

{24} "Evidence is material under *Brady* only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *State v. Baca*, 1993-NMCA-051, ¶ 21, 115 N.M. 536, 854 P.2d 363 (internal quotation marks and citation omitted). Such evidence includes that known to the prosecution and others acting on behalf of the State. *See Case v. Hatch*, 2008-NMSC-024, ¶ 45, 144 N.M. 20, 183 P.3d 905. Reversal is required if the evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Youngblood v. West Virginia*, 547 U.S. 867, 870 (2006) (internal quotation marks and citation omitted).

{25} In order to show that a *Brady* violation has occurred, Child must demonstrate that "(1) the prosecution suppressed the evidence; (2) the evidence was favorable to the accused; and (3) the evidence was material to the defense." *Case*, 2008-NMSC-024,

¶ 44 (internal quotation marks and citations omitted). "When considering materiality, we place the suppressed evidence in the context of the entire record, rather than viewing it in isolation." *State v. Huerta-Castro*, 2017-NMCA-026, ¶ 33, 390 P.3d 185. Child must demonstrate that the State's failure to provide the information prejudiced him. *See Trujillo*, 2002-NMSC-005, ¶ 51.

{26} We hold that there was no prejudice to Child due to the State Crime Laboratory's failure to disclose, because, in hindsight, the State elicited the allegedly exculpatory information at the second trial, and the jury still found that Child committed the crimes charged. Child does not explain how the outcome of the first trial would have been different if the State had disclosed the information earlier. Moreover, we note that Child had the information several weeks before the second trial, affording him the opportunity to use the evidence in his defense at trial.

{27} Additionally, even assuming that the State suppressed this evidence, and that it was favorable to Child, we hold that the evidence was not material. *See Case*, 2008-NMSC-024, ¶ 44 (requiring all three elements to prove a *Brady* violation). Child was aware, before the first trial, that the DNA on the rifle was not his. The additional fact that the DNA came from a female did not add much to Child's defense, because the most relevant issue—whether DNA evidence could link Child to the murder weapon—had already been resolved in Child's favor.

{28} Having determined that the evidence was not material and that any failure to disclose it did not prejudice Child, we need not decide whether the State Crime Laboratory was an arm of the prosecutorial team such that the State should be held responsible for the its failure to disclose the data. We affirm the district court's denial of Child's motion to dismiss.

C. The evidence was insufficient to support Child's larceny adjudication

{29} Child challenges his adjudication for larceny, arguing that there was insufficient evidence that the total market value of the items listed in the jury instructions was greater than $250, and thus the State failed to prove all of the essential elements of the offense. *See* UJI 14-1601, use note 3 NMRA (indicating that proof of market value over $250 is an essential element of felony larceny). In its answer brief, the State concedes that it did not establish all of the elements of larceny over $250 at trial, and asks that we remand the case to the district court for entry of an adjudication of the lesser-included offense of petty misdemeanor larceny, which applies where the value of the property stolen is less than $250. The State argues that the jury clearly found that larceny had occurred and that the only issue is the value of the items taken. Child argues that because the State did not request a jury instruction on petty misdemeanor larceny, the proper remedy is to reverse the adjudication for larceny, and not to order the entry of an adjudication on the lesser-included offense.

{30} We agree with Child that reversal of his adjudication for larceny is required, and remand for entry of an adjudication on the lesser-included offense of petty misdemeanor

larceny would be improper. The "direct remand" rule, which allows a case to be remanded for entry of judgment on a lesser-included offense where the evidence is insufficient to support conviction for the greater offense, is improper in cases where a conviction on the greater offense is reversed for insufficient evidence and the jury was never instructed on the lesser-included offense. *See State v. Slade*, 2014-NMCA-088, ¶¶ 38-39, 331 P.3d 930. Where the State pursues a trial strategy that does not include charging the lesser-included offense, then remand for resentencing on the lesser-included offense is not allowed, because "[a]s our courts have stated many times, the parties should be liable for the risks of their respective trial strategies." *Id.* ¶ 41 (internal quotation marks and citation omitted). To allow direct remand in this case, where the State apparently made a tactical decision to forego jury instructions on the lesser-included offense of petty misdemeanor larceny, "would be to violate the very essence of fairness at the core of the Double Jeopardy Clause." *Id.* (internal quotation marks and citation omitted); *see also State v. Villa*, 2004-NMSC-031, ¶ 1, 136 N.M. 367, 98 P.3d 1017 ("[C]onviction of an offense not presented to the jury would deprive the defendant of notice and an opportunity to defend against that charge and would be inconsistent with New Mexico law regarding jury instructions and preservation of error."). Accordingly, we reverse Child's adjudication for larceny.

D. Sufficient evidence existed to support Child's other adjudications

{31} Child argues that the remainder of his adjudications are not supported by sufficient evidence. "The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Montoya*, 2015-NMSC-010, ¶ 52, 345 P.3d 1056 (internal quotation marks and citation omitted). The reviewing court "view[s] 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. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. We disregard all evidence and inferences that support a different result. *See State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829. "The jury instructions become the law of the case against which the sufficiency of the evidence is to be measured." *State v. Holt*, 2016-NMSC-011, ¶ 20, 368 P.3d 409 (alterations, internal quotation marks, and citation omitted).

{32} We note that Child failed to specify "with particularity the fact or facts that are not supported by substantial evidence" as required by Rule 12-318(A)(4) NMRA, instead addressing the three remaining adjudications as a whole, and did not provide us with any of the exhibits admitted at trial. Regardless, we address each of Child's adjudications in turn. *See State v. Lopez*, 2005-NMSC-036, ¶ 19, 138 N.M. 521, 123 P.3d 754 (reviewing the defendant's sufficiency claim despite his failure to comply with the Rules of Appellate Procedure), *overruled on other grounds by State v. Frawley*, 2007-NMSC-057, ¶ 22, 143 N.M. 7, 172 P.3d 144.

Second-degree murder

{33} Child argues that there is no evidence that directly linked him to Victim's murder, because nobody saw Child shoot Victim, nor did anyone see him with the stolen items. Child also notes that there was no evidence of how common the tread pattern on Child's shoes was; that some of the items taken from the dumpster did not have DNA or fingerprint evidence on them; that his DNA and fingerprints were not found on the murder weapon; and that there were fingerprints found on the rifle that had not been matched to anyone. However, this is not the proper inquiry for a sufficiency of the evidence claim. We pay no attention to evidence that supports acquittal, focusing instead on whether the evidence presented was sufficient to support the verdict. *See Rojo*, 1999-NMSC-001, ¶ 19.

{34} On the charge of second-degree murder, the jury was instructed as follows:

> For you to find that the child committed the delinquent act of Murder in the Second Degree, as charged in Count 1, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the act:
>
> 1. [C]hild killed Angel Vale;
>
> 2. [C]hild knew that his acts created a strong probability of death or great bodily harm to Angel Vale;
>
> 3. This happened in New Mexico on or about the 22nd day of July, 2010.

{35} Here, the evidence was sufficient to support the jury's decision that Child committed second-degree murder. First, Randy Chavez testified that he heard three or four loud noises that sounded like fireworks around 3:00 p.m., and then saw Child running around the corner. Victim was shot three times. Testimony was also presented that the trigger on the rifle had to be pulled separately each time it was fired. Victim's landlord testified that he saw her alive around 2:30 p.m., and there was evidence that a call had been placed from Victim's cell phone at approximately 2:22 p.m. Nobody testified to seeing Victim alive after this. After 3:00 p.m., Victim received a number of calls and text messages that were not opened or answered. The jury could have inferred from this evidence that Victim's death occurred around 3:00 p.m.—the time that Mr. Chavez heard the loud noises—and could have inferred that those loud noises were gunshots as opposed to fireworks, and that the shooter must have been Child, because he was the only person seen in the area at the time. Moreover, the jury could have inferred from the fact that Victim was shot three times, and that the trigger had to be pulled three separate times, that the shooting was not accidental, but rather that Child intended to shoot Victim. *See State v. Caldwell*, 2008-NMCA-049, ¶ 31, 143 N.M. 792, 182 P.3d 775 (observing that the jury is permitted to make reasonable inferences based on the evidence presented).

{36} Furthermore, there was evidence that Child had been in Victim's backyard handling .22-caliber ammunition. Child's fingerprints were on a box of ammunition that the police found in the shed. This was the same type of ammunition Victim was shot

with. Child also could not be excluded as the contributor to a partial fingerprint found on the rifle.

{37} We hold that this evidence is sufficient to support Child's adjudication for second-degree murder. *See* UJI 14-211 NMRA.

Aggravated burglary

{38} Child argues that his aggravated burglary adjudication is not supported by sufficient evidence because no witnesses saw him enter Victim's home, and nobody ever saw him with the stolen items. We disagree that the evidence was insufficient. The district court instructed the jury on the charge of aggravated burglary as follows:

> For you to find that the child committed the delinquent act of Aggravated Burglary as charged in Count 2, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the act:
>
> 1. [C]hild entered the dwelling house of Angel Vale and Edward Lucero without authorization;
>
> 2. [C]hild entered the dwelling house of Angel Vale and Edward Lucero with the intent to commit a theft once inside;
>
> 3. [C]hild became armed with a .22 rifle after entering
>
> 4. This happened in New Mexico on or about the 22nd day of July, 2010.

{39} Testimony was presented that a packet of Trident gum was taken from the house. Wrappers of Trident gum were found in the backyard around the sheds, in the same area that some plastic cups containing Child's DNA and fingerprints were located. Moreover, Child's fingerprints were on one of the stolen .22-caliber ammunition boxes the police found in the same area. Child's fingerprints were also found on the pornographic DVD that Mr. Lucero said was taken from his home without his permission. Finally, there was testimony that Victim was afraid of Child. Her fear of Child, because of the break-in, was the reason why Victim was packing up her house to move to a new apartment on the day she was shot. The jury could have inferred from this evidence that Child had been in the home before, decided to re-enter the home, had taken items from the home, and that the rifle was one of these items. *See Caldwell*, 2008-NMCA-049, ¶ 31. This satisfies all of the elements for aggravated burglary. *See* UJI 14-1632 NMRA. We affirm Child's adjudication for aggravated burglary.

Tampering with evidence

{40} Finally, we hold that sufficient evidence existed to support Child's adjudication for tampering with evidence. The district court instructed the jury on the charge of tampering with evidence as follows:

For you to find that the child committed the delinquent act of Tampering with Evidence as charged in Count 3, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the act:

1. [C]hild hid or placed a[] Rifle, MP3 Player, play station personal game discs, a computer flash drive, ammunition and a pornographic movie in a dumpster;

2. `[C]hild intended to prevent the apprehension, prosecution or adjudication of himself;

3. This happened in New Mexico on or between July 21, 2010 and July 22, 2010.

{41} Items taken from Victim and Mr. Lucero's house without permission were found in a dumpster in the alleyway behind their house, and some of those items had Child's fingerprints on them. Child was seen running away from behind the house, which is the area where the dumpsters were located. Investigators testified that Child seemed particularly interested in the investigation, and that they had to deny him access to the dumpsters where the evidence was ultimately found.

{42} From this evidence, the jury could have concluded that Child threw the stolen materials in the dumpster to hide them from the police. *See Caldwell*, 2008-NMCA-049, ¶ 31. They could have further inferred from his behavior that he was concerned about getting caught, and so he ran away from the scene of Victim's shooting and from the area where he disposed of the evidence. *See id.* Moreover, the jury could have determined that the reason Child attempted to gain access to the dumpsters was because he became concerned that the police would find the stolen items during their investigation. *See id.* The jury could have reasonably determined that Child was the person who stole the items and placed them in the dumpster. These actions satisfy the elements of tampering with evidence, because Child hid the items, which were evidence related to the crime of larceny, and the jury could infer from his actions that he hid the items with the intent to prevent his apprehension by police, or adjudication for that crime. *See* UJI 14-2241 NMRA. We affirm Child's adjudication for tampering with evidence.

Conclusion

{43} For the foregoing reasons, we reverse Child's adjudication for larceny and affirm the remainder of the judgment.

{44} IT IS SO ORDERED.

EMIL J. KIEHNE , Judge

WE CONCUR:

JULIE J. VARGAS, Judge

DANIEL J. GALLEGOS, Judge

---

1 Child's last name was in the headline, but we have omitted it to comply with Rule 12-305(H) NMRA.