STATE V. ANDERSON

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STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
CHAD ANDERSON,
Defendant-Appellant.

NO. A-1-CA-35511

COURT OF APPEALS OF NEW MEXICO

December 18, 2018

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY, Jane Shuler Gray, District Judge

COUNSEL

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JUDGES

HENRY M. BOHNHOFF, Judge. WE CONCUR: EMIL J. KIEHNE, Judge, DANIEL J. GALLEGOS, Judge

AUTHOR: HENRY M. BOHNHOFF

MEMORANDUM OPINION

BOHNHOFF, Judge.

{1} Defendant Chad Anderson appeals his conviction of larceny over $500, a fourth degree felony pursuant to NMSA 1978, Section 30-16-1(D) (2006). For the following

reasons, we affirm. This is a memorandum opinion, and because the parties are familiar with the facts and procedural posture of the case, we set forth only such facts and law as are necessary to decide the issues raised.

BACKGROUND

{2} On May 11, 2015, Linda Cantano went to a Wal-Mart in Artesia, New Mexico, to do her grocery shopping. Once Ms. Cantano had finished shopping she walked to the parking lot and placed all of the items she had purchased in her vehicle and drove home. She then realized she had forgotten her white purse in the shopping cart. Her purse contained $1,200 in cash as well as her passport. Ms. Cantano returned to the Wal-Mart to report to loss prevention personnel that she had left her purse behind in the shopping cart and then she also reported the incident to police. Loss prevention personnel retrieved surveillance video tape that showed Defendant and a woman park their vehicle in the same spot that Ms. Cantano had parked in earlier. The video showed Defendant going into the Wal-Mart pharmacy department, exiting Wal-Mart, walking back to his vehicle, and picking up the white purse from the shopping cart before driving away. Officers were able to obtain Defendant's name from the pharmacy department. Defendant was subsequently charged with larceny over $500 but no more than $2,500. Following a jury trial, Defendant was convicted and sentenced to one year and six months' incarceration with one year and five months suspended.

DISCUSSION

{3} Defendant raises four arguments on appeal: (1) the jury should have been instructed that larceny must involve a trespassory taking and that abandoned property cannot be the subject of larceny; (2) the State failed to present sufficient evidence to support Defendant's conviction; (3) the district court erred in allowing a witness to narrate the surveillance video; and (4) the prosecutor misled the jury regarding the burden of proof, improperly commented on Defendant's silence, and misstated the law of larceny.

I. Jury Instructions

{4} "The standard of review we apply to jury instructions depends on whether the issue has been preserved. If the error has been preserved we review the instructions for reversible error. If not, we review for fundamental error. Under both standards we seek to determine whether a reasonable juror would have been confused or misdirected by the jury instruction." *State v. Benally*, 2001-NMSC-033, ¶ 12, 131 N.M. 258, 34 P.3d 1134 (internal quotation marks and citations omitted). "The exacting standard of review for reversal for fundamental error requires the question of guilt be so doubtful that it would shock the conscience of the court to permit the verdict to stand." *State v. Cabezuela*, 2015-NMSC-016, ¶ 37, 350 P.3d 1145 (alterations, internal quotation marks, and citation omitted). Defendant concedes that he failed to preserve his jury instruction argument for appeal. As such, we will review Defendant's jury instruction challenge for fundamental error. *See Benally*, 2001-NMSC-033, ¶ 12.

{5} The pertinent portion of New Mexico's larceny statute states: "Larceny consists of the stealing of anything of value that belongs to another. . . . Whoever commits larceny when the value of the property stolen is over five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) is guilty of a fourth degree felony." Section 30-16-1 (A), (D).

{6} The instruction given to the jury, which tracks the uniform jury instruction (UJI) for the essential elements of larceny, states:

> For you to find [D]efendant guilty of larceny, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. [D]efendant took and carried away a purse containing cash money, belonging to another, which had a market value over $500;
>
> 2. At the time he took this property, [D]efendant intended to permanently deprive the owner of it;
>
> 3. This happened in New Mexico on or about the 11th day of May, 2015.

See UJI 14-1601 NMRA. The committee commentary to UJI 14-1601 states:

> This instruction does not use the words "without consent" or the like to indicate that larceny involves a trespassory taking. *See generally* Perkins, *Criminal Law* 245-46 (2d ed. 1969). The committee believed that the element of trespassory taking was covered by this instruction together with the instruction on general criminal intent, UJI 14-141 [NMRA].

The jury was also given an instruction on intent that tracks the language of UJI 14-141:

> In addition to the other elements of Larceny (Over $500), the state must prove to your satisfaction beyond a reasonable doubt that [D]efendant acted intentionally when he committed the crime. A person acts intentionally when he purposely does an act which the law declares to be a crime. Whether [D]efendant acted intentionally may be inferred from all of the surrounding circumstances, such as the manner in which he acts, the means used and his conduct and any statements made by him.

See UJI 14-141.

{7} Defendant argues that a trespassory taking or an "abandonment" element is part of the statutory offense of larceny and should be the subject of an instruction if at issue. We disagree. We believe the UJIs for larceny and for general intent properly state the law applicable to larceny. *See Lopez v. State*, 1980-NMSC-050, ¶ 7, 94 N.M. 341, 610

P.2d 745 (holding that the uniform jury instructions for larceny and criminal intent correctly state the law applicable to larceny).

{8} Defendant further argues that once the facts of the case indicate that the property was abandoned then a trespassory taking becomes an essential element of larceny for the State to disprove and the uniform jury instruction fails to properly convey this element. If abandonment was an issue, the jury instruction would have to make clear that the State had to prove that the taking was trespassory and without the owner's consent. However, Defendant has no basis for asserting that the jury had to be instructed that the taking was trespassory, because he never claimed he had Ms. Cantano's permission to take her purse. Similarly, defense counsel never argued abandonment during trial. Instead, defense counsel's theory of the case was essentially that someone other than Defendant took the purse.[1]

{9} Further, even assuming abandonment had been an issue, the jury was sufficiently instructed, because the absence of any belief that the purse was abandoned was implicit in the requirement in the jury instructions that Defendant intended to permanently deprive Ms. Cantano—the "owner"—of her purse. As stated in the committee commentary on the UJI for larceny, "[t]he committee believed that the element of trespassory taking was covered by this instruction together with the instruction on general criminal intent[.]" UJI 14-1601.

{10} Therefore, we find no error with the jury instructions used in this case. A fortiori, we find no fundamental error.

II. Sufficiency of the Evidence

{11} Defendant argues that the State must prove that Defendant intended not just to take the property in question but to deprive the owner of her possession. Defendant contends that the State presented no evidence of such specific intent because the purse was abandoned.

{12} "We review the evidence introduced at trial to determine whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Gipson*, 2009-NMCA-053, ¶ 4, 146 N.M. 202, 207 P.3d 1179 (internal quotation marks and citation omitted)." We do not reweigh the evidence or substitute our judgment for that of the fact[-]finder as long as there is sufficient evidence to support the verdict." *Id.* 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. So long as "a rational jury could have found beyond a reasonable doubt the essential facts required for a conviction," we will not disturb a jury's conclusions. *State v. Garcia*, 2011-NMSC-003, ¶ 5, 149 N.M. 185, 246 P.3d 1057 (emphasis, internal quotation marks, and citation omitted). "Jury instructions become

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

{13} Defendant raises the theory of abandonment as a basis for his sufficiency of the evidence argument for the first time on appeal. *See Wolfley v. Real Estate Comm'n*, 1983-NMSC-064, ¶ 5, 100 N.M. 187, 668 P.2d 303 (stating that the appellate courts will not consider theories that are raised for the first time on appeal). While as a general matter substantial evidence claims can be raised for the first time on appeal, *State v. Stein*, 1999-NMCA-065, ¶ 9, 127 N.M. 362, 981 P.2d 295, the jury was not presented with evidence or the legal theory of abandonment below. Under these circumstances, we will not consider a substantial evidence argument premised on a new legal theory and substitute our judgment for that of the fact-finder on appeal. *State v. De Jesus-Santibanez*, 1995-NMCA-017, ¶ 10, 119 N.M. 578, 893 P.2d 474 (refusing to consider contentions raised for the first time on appeal when the failure to raise those contentions in the district court has deprived the prevailing party of an opportunity to develop facts that might bear on the contentions); *see State v. Franks*, 1994-NMCA-097, ¶ 5, 119 N.M. 174, 889 P.2d 209 (holding that the appellate courts will not support a ruling on new arguments which require factual determinations).

{14} In any event, there was substantial evidence on the basis of which the jury could find not only that Ms. Cantano did not intend to abandon her purse but also that Defendant did not believe that the purse was abandoned. *See State v. Muqqddin*, 2010-NMCA-069, ¶ 14, 148 N.M. 845, 242 P.3d 412, *reversed on other grounds sub nom State v. Office of Pub. Def. ex rel. Muqqddin*, 2012-NMSC-029, ¶ 14, 285 P.3d 622 (noting that abandoned property cannot be the subject of larceny, because it no longer belongs to another person and therefore the owner cannot be deprived of its possession). The State presented its case through the testimony of Ms. Cantano and the surveillance video tapes from the Wal-Mart parking lot and the pharmacy department. Ms. Cantano testified that she had $1,200 in her purse and that she forgot her purse in the Wal-Mart shopping cart after she unloaded her groceries into her vehicle. No testimony or other evidence was presented that Ms. Cantano had abandoned her purse. Rather, she testified that she returned to the store immediately after realizing that she had forgotten her purse. The surveillance video that the jury watched showed Ms. Cantano leaving her white purse in her shopping cart and driving away. The jury then saw on the video Defendant parking near the purse, walking into the Wal-Mart pharmacy department, and then walking out to his car and taking Ms. Cantano's purse out of the shopping cart and putting the purse into his vehicle. This evidence was sufficient to meet the elements required by the jury instructions: Defendant (1) took and carried away a purse containing cash money, belonging to another, which had a market value over $500; and (2) intended to permanently deprive Ms. Cantano of her purse. *See State v. Roybal*, 1960-NMSC-012, ¶ 6, 66 N.M. 416, 349 P.2d 332 (explaining that in larceny cases, intent "may be inferred by the jury from the facts and circumstances established at the trial"). We will not invade the jury's province as fact-finder by second-guessing the jury's decision concerning the credibility of witnesses, reweighing the evidence, or substituting our judgment for that of the jury.

See Cabezuela, 2015-NMSC-016, ¶ 23. Thus, there was sufficient evidence to support Defendant's conviction.

III. Witness Narration of Surveillance Video

{15} Defendant does not object to the admission of the surveillance video itself, and instead objects to the narration of the surveillance video provided by Wal-Mart's asset protection manager, Mr. Dishman, while it was played for the jury. The surveillance video came into evidence on the basis of the "silent witness" foundation theory. Part of the theory is that once the foundation is laid, the video will speak for itself. *See State v. Sweat*, 2017-NMCA-069, ¶ 21, 404 P.3d 20, *cert. denied*, (2017-NMCERT-___ (No. S-1-SC-36574, Aug. 16, 2017). Defendant contends that Mr. Dishman's narration of the video therefore invaded the province of the jury. Defendant further argues that Mr. Dishman had no personal or first-hand knowledge about what was depicted in the video and his testimony therefore constituted improper lay witness opinion testimony in violation of Rule 11-701(B) NMRA.

{16} "In order to preserve an issue for appeal, a defendant must make a timely objection that *specifically apprises* the trial court of the nature of the claimed error and invokes an intelligent ruling thereon." *State v. Montoya*, 2015-NMSC-010, ¶ 45, 345 P.3d 1056 (emphasis added) (internal quotation marks and citation omitted). If an evidentiary issue is preserved by objection, we review the district court's decision to admit or exclude evidence for abuse of discretion. *See State v. Loza*, 2016-NMCA-088, ¶ 10, 382 P.3d 963. If an appellant fails to object to the admission of evidence below, on appeal we will review only for plain error: that is, an error that "affect[s] a substantial right[.]" Rule 11-103(E) NMRA; *State v. Bregar*, 2017-NMCA-028, ¶ 28, 390 P.3d 212 (same). To find plain error, the Court "must be convinced that admission of the testimony constituted an injustice that created grave doubts concerning the validity of the verdict." *Id.* (internal quotation marks and citation omitted).

{17} Here, defense counsel stated before Mr. Dishman took the stand that she would object if Mr. Dishman tried to describe anything that he saw on the surveillance video, because that would violate the best evidence rule. The district court agreed with the State that the best evidence rule was not applicable in this context. Defense counsel did not object to Mr. Dishman's narration of the videotape on the basis of his lack of personal knowledge or that his narrative amounted to improper lay witness testimony or invaded the province of the jury. Therefore, Defendant failed to preserve the claimed error and we will review only for plain error. *See id.*

{18} Defendant relies on *Sweat* for the proposition that Mr. Dishman's testimony was not helpful to the jury. In *Sweat*, the issue was whether a detective was properly allowed to give his opinion of the identity of the person shown in a surveillance video, which had been admitted into evidence and was available for the jury to view. 2017-NMCA-069, ¶¶ 8, 21. The defendant argued that "the surveillance video speaks for itself" and that allowing the detective to offer his opinion "invaded the province of the jury" by not "allowing the jury to view the surveillance video and draw its own conclusion." *Id.* ¶ 21

(internal quotation marks omitted). This Court concluded otherwise and adopted five factors that it deemed "relevant to a determination of whether a lay witness is more likely than the jury to identify the defendant correctly[,]" stating that the existence of even one of these factors "indicates that there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury." *Id.* ¶ 22 (alteration, internal quotation marks, and citation omitted). The factors are as follows: "(1) the witness's general level of familiarity with the defendant's appearance; (2) the witness's familiarity with the defendant's appearance at the time the surveillance photograph was taken or whether the defendant was dressed in a manner similar to the individual depicted; (3) whether the defendant disguised his or her appearance at the time of the offense; (4) whether the defendant had altered his or her appearance prior to trial; and (5) the degree of clarity of the surveillance recording and the quality and completeness of the subject's depiction in the recording." *Id.* (alterations, internal quotation marks, and citation omitted).

{19} Relevant to this Court's analysis in *Sweat* was, among others, the fifth factor: "the degree of clarity of the surveillance recording and the quality and completeness of the subject's depiction in the recording." *Id.* ¶¶ 22, 24 (internal quotation marks and citation omitted). In *Sweat*, we considered that the defendant "himself describe[d] the quality of the surveillance video as grainy and of poor quality" in concluding that the detective's testimony regarding the identity of the person in the surveillance video was admissible because it was helpful to the jury. *Id.* ¶ 24 (internal quotation marks omitted). Likewise, here, defense counsel described the videos in question as unclear and not obvious.

{20} Mr. Dishman explained that when he reviewed the surveillance tapes he saw Ms. Cantano load her groceries into her vehicle and then drive off, leaving her purse behind. He then explained that he saw a man and woman pull into the parking lot right by the purse, look at the purse Ms. Cantano had left behind, and enter the Wal-Mart. He explained that when the couple came back out of the store the man grabbed the purse and put it into his vehicle. He further explained that when he reviewed the video again he saw that the man had gone to the pharmacy department, and he was able to obtain the man's name, Chad Anderson, by using the pharmacy department's records. After showing Mr. Dishman the surveillance video from the pharmacy department and the surveillance video from the parking lot to refresh his memory, Mr. Dishman identified Chad Anderson as the Defendant sitting in the courtroom.

{21} The prosecutor then showed the video to the jury. While the video was playing the prosecutor asked Mr. Dishman a series of questions. The prosecutor asked if he had seen anyone else go near the area of the purse, Mr. Dishman responded, "no you're watching exactly what I watched that day, and I did not see anybody else even go near." The prosecutor then asked if he could tell if Defendant had anything in his hands to which Mr. Dishman responded, "I can clearly see the white purse lifted out of the cart and put into the vehicle." Defense counsel did not object to any of Mr. Dishman's testimony.

{22} Consistent with *Sweat*, we hold that Mr. Dishman's testimony was admissible under Rule 11-701(B) and did not invade the province of the jury, because it was "helpful . . . to determining a fact in issue[,]" i.e., identification of Defendant in the video taking the purse from the shopping cart. *Sweat*, 2017-NMCA-069, ¶ 22 (internal quotation marks and citation omitted). The district court did not commit plain error when it admitted Mr. Dishman's narrative testimony.

IV. Prosecutorial Misconduct

{23} Defendant argues that the State engaged in prosecutorial misconduct in three respects during the prosecutor's closing argument rebuttal: (1) the prosecutor suggested that Defendant had to testify, which improperly shifted the burden of proof; (2) the prosecutor's statement also amounted to an indirect comment on Defendant's silence; and (3) in arguing that "if [Defendant] took the purse then he is guilty," the prosecutor misstated the law on abandoned property and the intent requirement for larceny.

{24} "When an issue of prosecutorial misconduct has been preserved by a specific and timely objection at trial, we review the claim of error by determining whether the trial court's ruling on the claim was an abuse of discretion." *State v. Wildgrube*, 2003-NMCA-108, ¶ 20, 134 N.M. 262, 75 P.3d 862. When an issue of prosecutorial misconduct has not been properly preserved by a timely objection at trial, we may review the claim on appeal for fundamental error. *See State v. Trujillo*, 2002-NMSC-005, ¶ 52, 131 N.M. 709, 42 P.3d 814. "Prosecutorial misconduct rises to the level of fundamental error when it is so egregious and had such a persuasive and prejudicial effect on the jury's verdict that the defendant was deprived of a fair trial." *State v. Allen*, 2000-NMSC-002, ¶ 95, 128 N.M. 482, 994 P.2d 728 (internal quotation marks and citation omitted).

{25} Defendant preserved the claimed error that the State improperly shifted the burden of proof when he objected to the prosecutor's rebuttal during closing argument. Defendant, however, failed to preserve the claimed error that the prosecutor improperly commented on Defendant's silence and misstated the law on abandoned property and the intent requirement of larceny. We will review Defendant's preserved argument for abuse of discretion and his other arguments for fundamental error. *See Wildgrube*, 2003-NMCA-108, ¶ 20; *Trujillo*, 2002-NMSC-005, ¶ 52.

{26} Even when an issue of prosecutorial misconduct is properly preserved, we must determine whether the prosecutor's actions had such a persuasive and prejudicial effect on the jury's verdict that Defendant was deprived of a fair trial. *State v. Duffy*, 1998-NMSC-014, ¶ 46, 126 N.M. 132, 967 P.2d 807, *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, ¶ 37 n.6, 275 P.3d 110. During closing argument, "remarks by the prosecutor must be based upon the evidence or be in response to the defendant's argument." *State v. Smith*, 2001-NMSC-004, ¶ 38, 130 N.M. 117, 19 P.3d 254. "It is misconduct for a prosecutor to make prejudicial statements not supported by evidence." *Duffy*, 1998-NMSC-014, ¶ 56. However, "[s]tatements having their basis in the evidence, together with reasonable inferences to be drawn therefrom, are

permissible and do not warrant reversal." *State v. Herrera*, 1972-NMCA-068, ¶ 8, 84 N.M. 46, 499 P.2d 364 (internal quotation marks and citation omitted).

{27} Prosecutorial misconduct that is not properly preserved rises to the level of fundamental error when it is so egregious and had such a persuasive and prejudicial effect on the jury's verdict that the defendant was deprived of a fair trial; an isolated, minor impropriety ordinarily is not sufficient to warrant reversal, because a fair trial is not necessarily a perfect one. *Trujillo*, 2002-NMSC-005, ¶ 52.

{28} Our Supreme Court has identified three factors to consider when reviewing statements made during closing argument for error under both an abuse of discretion and a fundamental error standard: "(1) whether the statement invades some distinct constitutional protection; (2) whether the statement [was] isolated and brief, or repeated and pervasive; and (3) whether the statement [was] invited by the defense." *State v. Sosa*, 2009-NMSC-056, ¶ 26, 147 N.M. 351, 223 P.3d 348. In addition, to determine whether a prosecutor's statements are comments on the defendant's decision not to testify, an appellate court must determine whether the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's exercise of his or her right to remain silent. *State v. DeGraff*, 2006-NMSC-011, ¶ 8, 139 N.M. 211, 131 P.3d 61.

{29} We reject Defendant's first argument that the prosecutor improperly shifted the burden of proof. The prosecutor reasonably responded to defense counsel's closing argument that the surveillance video did not show Defendant taking the white purse by arguing that it did in fact show Defendant taking the white purse. The prosecutor stated that it was up to the jury to decide if he took the purse and that if he did take it then he is guilty and "this is a common sense case." He then stated, "what does your common sense tell you about the sequence of events? What evidence have you heard to the contrary? What evidence have you heard that he didn't do it? Defense counsel then objected stating that the prosecutor was very close to putting the burden on Defendant. The prosecutor stated that "he was just balancing" to which the judge responded that the jury does not need to balance anything and that he can tell them they can weigh the evidence, the prosecutor responded "that's what I'm doing." The judge then told him to "be careful you don't go there." The prosecutor then stated to the jurors that they must weigh the evidence and that it was up to them to decide whether or not Defendant took the purse.

{30} We do not regard the prosecutor's statement—"What evidence have you heard to the contrary? What evidence have you heard that he didn't do it?"—as shifting the burden of proof so much as asking the jury to weigh the evidence and suggesting that Defendant had presented no evidence, including testimony of the woman who was with him in the parking lot, that he did not take the purse. Moreover, even assuming the prosecutor's statement indirectly suggested a shifting of the burden of proof it was not so persuasive, pervasive, and prejudicial as to effect the jury's verdict and deprive Defendant of a fair trial. Rather, the prosecutor's statement was isolated and brief. *See Torres*, 2012-NMSC-016, ¶ 10. We believe there is no reasonable probability that the

error if any, was a significant factor in the jury's deliberation and denied him a fair trial. We hold that the district court did not abuse its discretion.

{31} Defendant next argues that when the prosecutor made the same statement—"What evidence have you heard to the contrary? What evidence have you heard that he didn't do it?"—he was improperly commenting on Defendant's silence. We disagree. Defendant cites to *State v. Aguayo*, 1992-NMCA-044, 114 N.M. 124, 835 P.2d 840, and argues that the prosecutor's statement here more clearly commented on Defendant's failure to testify than in *Aguayo*. In *Aguayo*, during closing argument, the prosecutor reasoned there was only one possibility as to who could have harmed a young baby, stating, "and no one else in this courtroom has presented any evidence that anybody . . ." *Id.* ¶ 36. Defense counsel objected and argued that this was an improper comment on Defendant's failure to testify. *Id.* This Court held that to evaluate allegedly improper prosecutorial comments, we determine whether the language used was manifestly intended to be a comment on the accused's failure to testify, or was of such a character that the jury would naturally and necessarily take it to be such a comment. *Id.* ¶ 37. We concluded that the remark in this case was intended to direct the jury's attention to Defendant's failure to testify and "came dangerously close to improper comment requiring reversal." *Id.*

{32} *Aguayo* is distinguishable. Here, the prosecutor was not commenting on Defendant's silence, defense counsel did not object on that basis, and the district court did not view it that way and instead was concerned about burden shifting. In *Aguayo*, the prosecutor affirmatively stated that there was no evidence that pointed to anyone else in the courtroom, whereas here, the prosecutor merely posed questions asking the jury to consider and make a determination whether or not there was evidence that anyone other than Defendant had taken the purse. The statements made by the prosecutor in the present case were not so egregious as to rise to the level of fundamental error.

{33} Lastly, Defendant argues that the prosecutor's statement "if Defendant took the purse he is guilty" was a misstatement of the law that was not corrected by the jury instructions given, because the jury instructions omitted the statutory element that the taking must be trespassory. The prosecutor was responding to defense counsel's argument that the surveillance video did not show that the white item was in fact a purse, and that Defendant did not take the white item from the cart. *Cf. State v. Smith*, 2001-NMSC-004, ¶ 40, 130 N.M. 117, 19 P.3d 254 (declining to reverse a conviction because the prosecutor's comments were invited by the defendant's opening remarks). It is not apparent that the prosecutor intended for the jury to disregard any elements of larceny. In any event, this statement did not invade some distinct constitutional protection and it was isolated and brief. *Torres*, 2012-NMSC-016, ¶ 10. We hold that the comment failed to rise to a level of fundamental error. At most, the comment was a harmless statement in light of the overwhelming evidence against Defendant. *See Tollardo*, 2012-NMSC-008, ¶ 36.

CONCLUSION

{34} We affirm Defendant's conviction.

{35} IT IS SO ORDERED.

HENRY M. BOHNHOFF, Judge

WE CONCUR:

EMIL J. KIEHNE, Judge

DANIEL J. GALLEGOS, Judge

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[1] Defense counsel argued that the video was not clear, that there were large trees in the video that disrupted the view of the purse, and that several other people were seen in the video in the vicinity of the purse that could have taken it; therefore, the State's evidence failed to prove beyond a reasonable doubt that it was Defendant who took the purse.