

1        **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 Opinion Number: \_\_\_\_\_

3 Filing Date: June 28, 2017

4 **NO. 34,260**

5 **STATE OF NEW MEXICO,**

6        Plaintiff-Appellee,

7 v.

8 **ALREE SWEAT,**

9        Defendant-Appellant.

10 **APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY**

11 **Douglas R. Driggers, District Judge**

12 Hector H. Balderas, Attorney General

13 Santa Fe, NM

14 Walter Hart, Assistant Attorney General

15 Albuquerque, NM

16 for Appellee

17 Bennett J. Baur, Chief Public Defender

18 Allison H. Jaramillo, Assistant Appellate Defender

19 Santa Fe, NM

20 for Appellant

1 **OPINION**

2 **WECHSLER, Judge.**

3 {1} Defendant Alree Sweat appeals his convictions of four counts of burglary of  
4 a vehicle, contrary to NMSA 1978, Section 30-16-3(B) (1971). Defendant’s primary  
5 arguments on appeal are that the district court erred by admitting (1) “grainy”  
6 surveillance video footage, and (2) lay witness testimony identifying Defendant as the  
7 person pictured on the surveillance video. Defendant also argues that sufficient  
8 evidence does not support his convictions and that he was deprived of his  
9 constitutional right to a speedy trial.

10 {2} For the reasons discussed herein, we first hold that the surveillance video  
11 footage was relevant and not unfairly prejudicial to Defendant, making it admissible  
12 at trial. We additionally hold that the admission of lay witness testimony identifying  
13 Defendant as the person pictured on the surveillance video was not error under the  
14 circumstances of this case and that Defendant’s sufficiency of the evidence and  
15 speedy trial arguments lack merit. We therefore affirm.

16 **BACKGROUND**

17 {3} On the morning of May 5, 2013, Las Cruces Police Department (LCPD) Officer  
18 Sean Terry was dispatched to investigate a reported auto burglary at the Super 8  
19 Motel. He was, however, rerouted by dispatch to the Mesilla Valley Hospital because

1 the complainant had left the motel to go to work. He observed that the window of  
2 Theresa Graham's white Buick LeSabre (the LeSabre) was pried open and broken.  
3 Graham reported that additional evidence was located at the Super 8 Motel. Officer  
4 Terry proceeded to the Super 8 Motel, where he discovered a blue Toyota Sienna (the  
5 Sienna) with similar damage. Officer Terry photographed the damage to both  
6 vehicles. He also viewed surveillance video footage with the manager of the motel  
7 and requested a copy of the surveillance video footage from the relevant time period  
8 (the surveillance video).

9 {4} On May 6, 2013, LCPD Detective Michael Rickards received an email message  
10 that contained still images captured from the surveillance video. Detective Rickards  
11 recognized Defendant as the person pictured. Detective Rickards then viewed the  
12 surveillance video and noted that the person pictured was driving a dark-colored  
13 pickup truck. With this information, Detective Rickards began an investigation to  
14 determine whether Defendant owned or drove such a vehicle. As Detective Rickards  
15 was driving to Defendant's last known address, he saw Defendant standing on the  
16 side of the road next to a disabled, dark-colored pickup truck. Detective Rickards  
17 obtained the registration information and determined that Defendant owned the  
18 vehicle.

1 {5} Given this information, Detective Rickards implemented a surveillance  
2 operation targeting Defendant. Officers stationed themselves at Defendant's house  
3 and observed that location until approximately 1:00 a.m.,<sup>1</sup> at which time Defendant  
4 left his house in a white Ford Mustang (the Mustang). Defendant drove through the  
5 city, ultimately parking at the Comfort Inn. New Mexico State Police Officer Daniel  
6 Lazos was assisting with the operation and positioned himself on the north side of the  
7 Comfort Inn. He saw Defendant in the northwest part of the parking lot banging on  
8 the door frame of a car. Officer Lazos then heard glass breaking, saw Defendant move  
9 to another vehicle, and heard more glass breaking. At this time, LCPD Officer Gary  
10 Pederson drove into the parking lot and parked his vehicle in close proximity to  
11 Defendant. Officer Pederson exited his vehicle and confronted Defendant, who  
12 dropped a backpack and fled on foot. Defendant ran directly toward Officer Lazos,  
13 but a rock wall separated the two. Defendant spoke to Officer Lazos as he ran by.  
14 While running away from Officer Lazos, Defendant passed directly in front of  
15 Detective Rickards' vehicle. Detective Rickards identified Defendant and yelled out  
16 for Defendant to stop running. The officers searched the area but did not find  
17 Defendant.

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18 <sup>1</sup>The next day, May 7, 2013.

1 {6} Crime Scene Photographer and Technician Anthony Martin photographed  
2 damage to two vehicles at the Comfort Inn: a silver Toyota Prius (the Prius) and a  
3 grey Ford F-250 (the F-250). The Mustang remained at the Comfort Inn.

4 {7} After being apprehended, Defendant participated in a custodial interview with  
5 Detective Rickards, during which they discussed the current location of property  
6 missing from the vehicles at the Super 8 Motel. Defendant denied having possession  
7 of the property and stated that “I don’t remember what I got [from the Super 8  
8 Motel]” and that “Bobby did something with it[.]”

9 {8} At trial, the State introduced the surveillance video through the testimony of  
10 Super 8 Motel manager Dipesh Gandhi. Gandhi testified that the surveillance video  
11 showed activity in the Super 8 Motel parking lot, including the “breaking of the  
12 vehicles” at issue in the case. Defendant objected to the admission of the surveillance  
13 video, claiming that, because it was “black-and-white” and “grainy,” the prejudicial  
14 effect outweighed the probative value. The district court overruled the objection.

15 {9} Numerous law enforcement officers testified about their specific involvement  
16 in the investigation or the surveillance operation targeting Defendant. During  
17 Detective Rickards’ testimony, the State played the surveillance video for the jury,  
18 including segments that showed (1) a dark-colored pickup truck pulling into and  
19 parking in the Super 8 Motel parking lot; (2) a person peering into the passenger side

1 window of a white vehicle with a flashlight; and (3) a person forcibly entering the  
2 LeSabre and the Sienna. As the jury viewed the second segment, the following  
3 exchange took place:

4 [The State:] I'm going to draw your attention to [the  
5 portion of the surveillance video] starting  
6 with 2:20 [a.m.]. . . . Can you tell from that  
7 angle, or did you know who this [person  
8 pictured] was?

9 [Detective Rickards:] Not at this particular moment, no.

10 [The State:] Okay. Is this part of the video that you  
11 watched?

12 [Detective Rickards:] Yes, it is.

13 [The State:] When did you start to realize who you  
14 thought it was?

15 [Detective Rickards:] As soon as he came from the passenger side  
16 window to this position, I knew immediately  
17 it was [Defendant].

18 Detective Rickards' testimony on this topic continued as follows:

19 [The State:] Do you know [Defendant]?

20 [Detective Rickards:] I do.

21 [The State:] Does he know you?

22 [Detective Rickards:] Yes, he does.

23 [The State:] Does he know you by name?

1 [Detective Rickards:] Yes, sir, he does.

2 [The State:] And you knew him before this incident by  
3 name?

4 [Detective Rickards:] Yes, I d[id].

5 [The State:] So the person you identified on the video, to  
6 you, how certain were you that that was  
7 [Defendant]?

8 [Detective Rickards:] I was certain.

9 [The State:] How certain?

10 [Detective Rickards:] 100 percent.

11 Defendant did not object to either line of questioning. Detective Rickards also  
12 testified that Defendant's physical appearance had changed substantially during the  
13 intervening year since the incident, stating specifically that Defendant "was much  
14 thinner back then."

15 {10} The owner of the Sienna, Michael Henderson, and the driver of the F-250,<sup>2</sup>  
16 Sheridan Hankins, testified that they did not authorize any person to enter the  
17 vehicles. The owner of the LeSabre, Graham, and the owner of the Prius, Jay Warren,  
18 did not testify.

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19 <sup>2</sup>The driver's employer owned the F-250.

1 {11} Defendant moved for a directed verdict on two of the burglary of a vehicle  
2 charges at the close of the State’s case, arguing that the State had failed to prove that  
3 entries into the LeSabre and the Prius were unauthorized. The district court denied  
4 this motion. Defendant was convicted on all four charges. This appeal resulted.

5 **ADMISSIBILITY OF THE SURVEILLANCE VIDEO**

6 {12} Defendant asserts two arguments related to the admissibility of the surveillance  
7 video: (1) that the quality of the surveillance video was so poor that it lacked  
8 probative value, and (2) that the combined effect of the quality of the surveillance  
9 video and Detective Rickards’ testimony opining that Defendant was the person  
10 pictured resulted in unfair prejudice to Defendant. These arguments raise evidentiary  
11 issues, which we review for abuse of discretion. *State v. Downey*, 2008-NMSC-061,  
12 ¶ 24, 145 N.M. 232, 195 P.3d 1244. A district court abuses its discretion if “the  
13 evidentiary ruling is clearly contrary to logic and the facts and circumstances of the  
14 case.” *Id.* (internal quotation marks and citation omitted).

15 **Probative Value of the Surveillance Video**

16 {13} “Evidence is relevant if . . . it has any tendency to make a fact more or less  
17 probable than it would be without the evidence[.]” Rule 11-401(A) NMRA. To be  
18 relevant, a piece of evidence need not be conclusive as to a defendant’s guilt,  
19 particularly when viewed in isolation from other evidence. *State v. Flores*, 2010-



1 NMSC-002, ¶ 29, 147 N.M. 542, 226 P.3d 641. Instead, it need only have probative  
2 value from which a fact at issue may be determined. *See Black’s Law Dictionary* 1397  
3 (10th ed. 2014) (defining “probative” as “[t]ending to prove or disprove”). The fact  
4 at issue in the present case is, of course, whether Defendant burglarized two vehicles  
5 in the parking lot of the Super 8 Motel during the early morning hours of May 5,  
6 2013.

7 {14} In *State v. Gonzales*, this Court discussed the evidentiary value of “grainy”  
8 surveillance video footage in addressing the defendant’s sufficiency of the evidence  
9 argument. 2008-NMCA-146, ¶ 9, 145 N.M. 110, 194 P.3d 725. We held that the  
10 evidence was not “worthless,” because a fact-finder could discern probative  
11 information, including “body type[], clothing, hair style[]” and other features. *Id.*

12 {15} The surveillance video in the present case showed that a dark-colored pickup  
13 truck pulled into the parking lot of the Super 8 Motel at approximately 2:16 a.m.  
14 Approximately five minutes after the dark-colored pickup truck parked, the same  
15 camera angle showed a person (1) peering into the passenger-side window of a white  
16 vehicle with a flashlight, (2) walking to the dark-colored pickup truck, and (3) driving  
17 away. It also showed the person’s face, body type, clothing, and gait. Another camera  
18 angle recorded during the same time period showed a person (1) peering into the  
19 LeSabre and the Sienna with a flashlight, (2) forcibly entering those vehicles, and (3)

1 removing items from the Sienna. The hat, shirt, and shorts worn by the person  
2 pictured in each camera angle appear identical.

3 {16} Defendant argues that admission of the surveillance video was error because  
4 its poor quality negated its “tendency to make the identification of the person in the  
5 video more or less probable.” Although identification may be the most obvious use  
6 of the surveillance video as evidence, Defendant’s argument does not address all the  
7 ways in which the surveillance video had probative value. In addition to showing the  
8 pictured person’s body type and gait—information from which a person familiar with  
9 the person pictured could make an identification—the surveillance video also showed  
10 the pictured person arriving and departing in a dark-colored pickup truck and  
11 removing items from the Sienna. Considering inferences to be drawn from other  
12 admitted evidence—including Defendant’s ownership of a dark-colored pickup truck  
13 and Defendant’s statements to Detective Rickards related to the whereabouts of items  
14 removed from the Sienna—the content of the surveillance video is probative to a  
15 determination as to whether Defendant was the person pictured. The district court’s  
16 admission of the surveillance video was not, therefore, “clearly contrary to logic and  
17 the facts and circumstances of the case.” *Downey*, 2008-NMSC-061, ¶ 24 (internal  
18 quotation marks and citation omitted).

## 1 **Substantial Risk of Unfair Prejudice**

2 {17} Rule 11-403 NMRA provides, in pertinent part, that “[t]he [district] court may  
3 exclude relevant evidence if its probative value is substantially outweighed by a  
4 danger of . . . unfair prejudice[.]” Evidence is unfairly prejudicial if it has “an undue  
5 tendency to suggest [a] decision on an improper basis, commonly, though not  
6 necessarily, an emotional one.” *State v. Stanley*, 2001-NMSC-037, ¶ 17, 131 N.M.  
7 368, 37 P.3d 85 (internal quotation marks and citation omitted). Emotional bases  
8 include those “best characterized as sensational or shocking, provoking anger,  
9 inflaming passions, or arousing overwhelmingly sympathetic reactions, or provoking  
10 hostility or revulsion or punitive impulses, or appealing entirely to emotion against  
11 reason.” *Id.* (internal quotation marks and citation omitted).

12 {18} Defendant argues that the probative value of the surveillance video is  
13 outweighed by a substantial risk of unfair prejudice because Detective Rickards’  
14 identification of Defendant as the person pictured “was the only evidence of identity  
15 for the charges related to the Super 8 Motel.” As discussed above, the evidence  
16 indicated that Defendant (1) owned a dark-colored pickup truck similar to the one  
17 pictured in the surveillance video, and (2) was previously in possession of items  
18 removed from the Sienna. The surveillance video is not, therefore, the only evidence  
19 related to Defendant’s involvement in the incident.

1 {19} Other than his assertion as to the nature of the evidence against him, Defendant  
2 has not articulated the manner in which the combined effect of the surveillance video  
3 and Detective Rickards’ testimony had “an undue tendency to suggest [a] decision on  
4 an improper basis[.]” *Id.* ¶ 17 (internal quotation marks and citation omitted); *see*  
5 *State v. Pitner*, 2016-NMCA-102, ¶ 13, 385 P.3d 665 (declining to review unclear or  
6 undeveloped arguments). “The purpose of Rule 11-403 is not to guard against any  
7 prejudice whatsoever, but only against the danger of *unfair* prejudice.” *State v. Otto*,  
8 2007-NMSC-012, ¶ 16, 141 N.M. 443, 157 P.3d 8 (alteration, internal quotation  
9 marks, and citation omitted). Because we discern no substantial risk of unfair  
10 prejudice, the district court’s admission of the surveillance video was not “clearly  
11 contrary to logic and the facts and circumstances of the case.” *Downey*, 2008-NMSC-  
12 061, ¶ 24 (internal quotation marks and citation omitted).

13 **LAY WITNESS IDENTIFICATION OF A DEFENDANT ON**  
14 **SURVEILLANCE VIDEO**

15 {20} Defendant next argues that the district court’s admission of testimony by  
16 Detective Rickards in which he identified Defendant as the person pictured in the  
17 surveillance video was reversible error. Defendant did not object to Detective  
18 Rickards’ testimony at trial. We therefore review for plain error. Plain error review  
19 applies to evidentiary issues not preserved at trial. Rule 11-103(E) NMRA. It only  
20 applies, however, if the allegedly erroneous testimony “affected the substantial rights

1 of the accused” and “constituted an injustice that created grave doubts concerning the  
2 validity of the verdict.” *State v. Contreras*, 1995-NMSC-056, ¶ 23, 120 N.M. 486,  
3 903 P.2d 228 (internal quotation marks and citation omitted).

4 {21} Photographic evidence, including surveillance videos, is admissible at trial  
5 under the “silent witness” theory. *State v. Imperial*, 2017-NMCA-040, ¶¶ 29, 31,  
6 \_\_\_ P.3d \_\_\_, *cert. denied* (No. 36,300, Mar. 9, 2017). The theoretical underpinning  
7 of the “silent witness” theory is that the photograph “speaks for itself[] and is  
8 substantive evidence of what it portrays[.]” *State v. Henderson*, 1983-NMCA-094,  
9 ¶ 8, 100 N.M. 260, 669 P.2d 736. Defendant claims that—because the surveillance  
10 video speaks for itself—Detective Rickards’ testimony “invaded the province of the  
11 jury” by opining that Defendant was the person pictured rather than simply allowing  
12 the jury to view the surveillance video and draw its own conclusion. Defendant  
13 further argues that Detective Rickards’ testimony was not helpful in that it provided  
14 no basis for concluding that Detective Rickards was more likely to correctly identify  
15 Defendant from the surveillance video than the jury. These arguments raise issues of  
16 first impression in New Mexico, although this Court has previously implied that a lay  
17 witness may give an opinion as to the identity of a person pictured on video. *See, e.g.,*  
18 *State v. Dombos*, 2008-NMCA-035, ¶¶ 1, 5-6, 143 N.M. 668, 180 P.3d 675 (affirming

1 the defendant’s conviction for criminal sexual penetration when the victim testified  
2 that the arm and sweater pictured on a video of the assault belonged to her husband).

3 {22} Rule 11-701 NMRA pertains to opinion testimony by lay witnesses and  
4 provides, in pertinent part, that “[i]f a witness is not testifying as an expert, testimony  
5 in the form of an opinion is limited to one that is . . . helpful . . . to determining a fact  
6 in issue[.]” *See* Rule 11-701(B). As recently stated by the Illinois Supreme Court in  
7 a factually similar case, “[l]ay opinion identification testimony is helpful to a  
8 determination of whether the individual depicted in a surveillance recording is the  
9 defendant where there is some basis for concluding that the witness is more likely to  
10 correctly identify the defendant from the photograph than is the jury.” *People v.*  
11 *Thompson*, 2016 IL 118667, ¶ 41, 49 N.E.3d 393 (internal quotation marks and  
12 citation omitted). The *Thompson* court identified five factors that it deemed “relevant  
13 to a determination of whether a lay witness is more likely than the jury to identify the  
14 defendant correctly.” *Id.* ¶ 43. These factors are (1) “the witness’s general level of  
15 familiarity with the defendant’s appearance”; (2) “the witness’s familiarity with the  
16 defendant’s appearance at the time the surveillance photograph was taken or whether  
17 the defendant was dressed in a manner similar to the individual depicted”; (3)  
18 “whether the defendant disguised his [or her] appearance at the time of the offense”;  
19 (4) “whether the defendant had altered his [or her] appearance prior to trial”; and (5)

1 “the degree of clarity of the surveillance recording and the quality and completeness  
2 of the subject’s depiction in the recording.” *Id.* ¶¶ 44, 46-48. The existence of even  
3 one of these factors “indicates [that] there is some basis for concluding that the  
4 witness is more likely to correctly identify the defendant from the photograph than  
5 is the jury.” *Id.* ¶ 49 (internal quotation marks and citation omitted). We agree with  
6 the *Thompson* court’s approach and adopt it for our analysis of this case.

7 {23} In *Thompson*, the defendant was charged with procurement of anhydrous  
8 ammonia—a component of methamphetamine—in violation of state law. *Id.* ¶ 4. The  
9 theft was captured on surveillance video, which was played for the jury and showed  
10 a white male with thinning hair carrying a bucket and hose while wearing a grey  
11 t-shirt and black, baggy pants. *Id.* ¶ 8. The Hamilton County Sheriff’s Department  
12 created still images from the surveillance video and circulated those images among  
13 other law enforcement agencies. *Id.* ¶ 9. Officer Brian Huff of the Mt. Vernon Police  
14 Department viewed the still image and identified the defendant. *Id.* ¶ 23. Officer Huff  
15 testified at trial that despite the blurriness of the image, “he recognized [the]  
16 defendant because he ‘had previous dealings with him.’ ” *Id.* Although the *Thompson*  
17 court applied “precautionary procedures” that rendered Officer Huff’s testimony

1 inadmissible,<sup>3</sup> it concluded that Officer Huff’s testimony was otherwise admissible  
2 because his previous interactions with the defendant rendered him “more likely to  
3 correctly identify [the] defendant than the jury.” *Id.* ¶¶ 59, 65.

4 {24} Defendant does not argue that he is entitled to the precautionary procedures  
5 applied in *Thompson*. Instead, he argues simply that Detective Rickards’  
6 identification was not helpful to the jury and, therefore, the jury must draw its own  
7 conclusion from the surveillance video itself. This argument fails to consider the five  
8 *Thompson* factors. First, Defendant himself describes the quality of the surveillance  
9 video as “grainy” and of “poor quality.” Second, with respect to his familiarity with  
10 Defendant, Detective Rickards testified that the two have had “countless  
11 interactions,” including an incident in which they were involved in a traffic accident.

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12 <sup>3</sup>In *Thompson*, the defendant argued, and the Illinois Supreme Court addressed,  
13 whether law enforcement officers should be prohibited from offering identification  
14 testimony based on prior interactions with criminal defendants because “a complete  
15 and uninhibited cross-examination regarding the witness’s familiarity is not possible  
16 since questions could reveal information about the defendant’s criminal past and  
17 unfairly cause the jury to focus on that.” *Id.* ¶ 55. The *Thompson* court concluded that  
18 a defendant’s ability to engage in “uninhibited cross-examination” is a question of  
19 trial tactics and, therefore, does not implicate a defendant’s right to confront  
20 witnesses. *Id.* ¶¶ 55-56. However, it applied a set of “precautionary procedures” that  
21 require the trial court to (1) allow the defendant to examine the officer outside the  
22 presence of the jury, (2) limit the officer’s testimony to how long he or she knew the  
23 defendant and how frequently they interacted, and (3) instruct the jury that it need not  
24 give any weight to the officer’s testimony and should not draw any inferences from  
25 the fact that the witness is a law enforcement officer. *Id.* ¶ 59.



1 Finally, with respect to alterations in Defendant’s appearance, Detective Rickards  
2 testified that Defendant “was much thinner” at the time of the incidents. These  
3 considerations render admissible Detective Rickards’ testimony opining that  
4 Defendant is the person pictured on the surveillance video. Because Detective  
5 Rickards’ testimony was admissible under the circumstances, it does not constitute  
6 plain error as argued by Defendant.

#### 7 **SUFFICIENCY OF THE EVIDENCE**

8 {25} Defendant additionally argues that sufficient evidence does not support his  
9 convictions for burglary of a vehicle. He asserts this argument in three parts: (1) as  
10 to the incident at the Super 8 Motel, (2) as to the incident at the Comfort Inn, and (3)  
11 as to the LeSabre and the Prius.

12 {26} Our review of whether sufficient evidence supports a conviction is a two-step  
13 process. *Gonzales*, 2008-NMCA-146, ¶ 5. “[W]e view the evidence in the light most  
14 favorable to the verdict, and then we must make a legal determination of whether the  
15 evidence viewed in this manner could justify a finding by any rational trier of fact that  
16 each element of the crime charged has been established beyond a reasonable doubt.”  
17 *Id.* (internal quotation marks and citation omitted). This Court “may neither reweigh  
18 the evidence nor substitute [our] judgment for that of the jury.” *State v. Sutphin*,  
19 1988-NMSC-031, ¶ 23, 107 N.M. 126, 753 P.2d 1314. Furthermore, “[c]ontrary

1 evidence supporting acquittal does not provide a basis for reversal because the jury  
2 is free to reject [the d]efendant’s version of the facts.” *State v. Rojo*, 1999-NMSC-  
3 001, ¶ 19, 126 N.M. 438, 971 P.2d 829.

#### 4 **The Super 8 Motel**

5 {27} Defendant claims that the evidence at trial was not sufficient to support his  
6 convictions because: (1) the dark-colored pickup truck in the video did not belong to  
7 him; (2) the person pictured on the surveillance video was not him; and (3) the LCPD  
8 did not recover any stolen property. The first and second claims raise purely factual  
9 questions, which are beyond the scope of our review. *See Sutphin*, 1988-NMSC-031,  
10 ¶ 23 (“A reviewing court may neither reweigh the evidence nor substitute its  
11 judgment for that of the jury.”). The third is a contrary evidence claim, which cannot  
12 form the basis of a reversal. *See Rojo*, 1999-NMSC-001, ¶ 19 (“Contrary evidence  
13 supporting acquittal does not provide a basis for reversal because the jury is free to  
14 reject [the d]efendant’s version of the facts.”).

15 {28} The surveillance video showed a dark-colored pickup truck enter the Super 8  
16 Motel parking lot at approximately 2:16 a.m. It then showed a person—identified by  
17 Detective Rickards as Defendant—forcibly entering the LeSabre and the Sienna and  
18 removing items from the Sienna. When asked by Detective Rickards about the items  
19 taken from the Sienna during a custodial interview, Defendant responded “I don’t

1 remember what I got” and that “Bobby did something with it.” Such evidence is  
2 sufficient to support Defendant’s convictions with respect to the Super 8 Motel  
3 charges.

#### 4 **The Comfort Inn**

5 {29} Defendant claims that the evidence at trial was not sufficient to support his  
6 convictions because: (1) he was at home in bed at the time of the incident and (2) he  
7 loaned the Mustang to a friend that evening. Both claims point to contrary evidence,  
8 which cannot form the basis of a reversal. *See id.* ¶ 19 (“Contrary evidence supporting  
9 acquittal does not provide a basis for reversal because the jury is free to reject [the  
10 d]efendant’s version of the facts.”).

11 {30} Officer Lazo testified that, after following Defendant to the Comfort Inn  
12 parking lot, he witnessed Defendant forcibly entering the F-250 and the Prius.  
13 Detective Rickards testified that Defendant abandoned the Mustang in the parking lot  
14 and fled the parking lot on foot, passing directly in front of Detective Rickards’  
15 vehicle. Such evidence is sufficient to support Defendant’s convictions with respect  
16 to the Comfort Inn charges.

1 **The LeSabre and the Prius**

2 {31} Defendant additionally claims that the jury instructions as given placed a  
3 burden on the State to present evidence that proved ownership of the LeSabre for  
4 Count 1 and the Prius for Count 3. We disagree.

5 UJI 14-1630 NMRA provides, in pertinent part:

6 For you to find the defendant guilty of burglary [as charged in  
7 Count \_\_\_\_\_], the state must prove to your satisfaction beyond a  
8 reasonable doubt each of the following elements of the crime:

9 1. The defendant entered a [vehicle] [watercraft] [aircraft]  
10 [dwelling] [or] [other structure] without authorization; [the least  
11 intrusion constitutes an entry.]

12 *Id.* (footnotes omitted). The district court modified UJI 14-1630 and instructed the  
13 jury as follows:

14 For you to find [D]efendant guilty of burglary as charged in Count  
15 1, the [S]tate must prove to your satisfaction beyond a reasonable doubt  
16 each of the following elements of the crime:

17 1. [D]efendant entered a vehicle (2000 Buick La Sabre (sic))  
18 owned by Theresa Graham without authorization; the least intrusion  
19 constitutes an entry[,]

20  
21 and

22 For you to find [D]efendant guilty of burglary as charged in Count  
23 3, the [S]tate must prove to your satisfaction beyond a reasonable doubt  
24 each of the following elements of the crime:

1           1.     [D]efendant entered a vehicle (2011 Toyota Prius) owned  
2     by Jay Warren without authorization; the least intrusion constitutes an  
3     entry[.]

4 {32}     Although the jury instructions as given technically included ownership of the  
5     vehicles by specific persons as elements of the crimes, we have previously rejected  
6     the argument that the erroneous addition of a statutory element to a jury instruction  
7     creates an additional essential element under the applicable statute. *See State v.*  
8     *Carpenter*, 2016-NMCA-058, ¶ 15, 374 P.3d 744 (holding that “the sufficiency of the  
9     evidence should be assessed against the elements of the charged crime. If the jury  
10    instruction requires the jury to find guilt on those elements . . . the defendant has been  
11    accorded the procedure that this Court has required to protect the presumption of  
12    innocence” (alterations, internal quotation marks, and citation omitted) (quoting  
13    *Musacchio v. United States*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 709, 713, 715 (2016)).

14 {33}     Although the erroneous addition in the present case was a factual rather than  
15    a statutory element, we find the analysis articulated in *Carpenter* persuasive. Section  
16    30-16-3(B) prohibits the unauthorized entry of “*any* vehicle.” (Emphasis added.)  
17    Defendant “was properly charged with the statutory elements” of burglary, and the  
18    jury instructions gave Defendant “a meaningful opportunity to defend . . . against  
19    those charges[.]” *Carpenter*, 2016-NMCA-058, ¶ 16. The district court’s erroneous

1 addition of the owners' names to the jury instructions given did not, therefore, create  
2 an additional element to be proved beyond a reasonable doubt.

### 3 **SPEEDY TRIAL**

4 {34} Finally, Defendant argues that the delay between his indictment and his trial  
5 violated his constitutional right to a speedy trial. Although Defendant made a demand  
6 immediately after his indictment, he never asserted a violation of his right to a speedy  
7 trial prior to trial. This Court discussed such a circumstance in *State v. Valdez*, from  
8 which we quote liberally:

9 [The d]efendant also contends that he was denied his sixth  
10 amendment right to a speedy trial. Determination of whether a defendant  
11 has been denied his constitutional right to a speedy trial requires  
12 weighing four factors: length of the delay, reason for the delay, assertion  
13 of the right, and prejudice to the defendant. The principal stumbling  
14 block for [the] defendant is his failure to raise his constitutional claim  
15 in the district court.

16 . . . .

17 Because [the] defendant did not raise the constitutional claim until  
18 this appeal, there were no district court proceedings to develop fully the  
19 facts relating to the *Barker [v. Wingo, 407 U.S. 514 (1972)]* factors, and  
20 the district court had no opportunity to weigh them. . . .

21 Although [the] defendants and their counsel are allowed  
22 considerable leeway in delaying their demand for a speedy  
23 trial before the trial court, the issue must be raised at some  
24 point. A complete failure to raise it in the trial court, as was  
25 the case here, precludes our consideration of the issue on  
26 appeal, for the simple reason that there is nothing to  
27 review. There is no decision of the district court weighing

1 the factors considered and no record from which we could  
2 independently evaluate the government's conduct.

3 1990-NMCA-018, ¶¶ 14-15, 109 N.M. 759, 790 P.2d 1040 (internal quotation marks  
4 and citations omitted). Our Supreme Court has similarly declined to consider speedy  
5 trial claims "absent a ruling by the district court." *State v. Collier*, 2013-NMSC-015,  
6 ¶ 41, 301 P.3d 370. "If a defendant does not raise a constitutional speedy trial issue  
7 before the district court, there is nothing for an appellate court to review." *Id.* Because  
8 Defendant did not invoke a ruling on the issue in the district court, we do not address  
9 his speedy trial argument.

10 **CONCLUSION**

11 {35} For the foregoing reasons, we affirm.

12 {36} **IT IS SO ORDERED.**

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**JAMES J. WECHSLER, Judge**

15 **WE CONCUR:**

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**MICHAEL E. VIGIL, Judge**

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**TIMOTHY L. GARCIA, Judge**