

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

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

3 Filing Date: June 30, 2015

4 **NO. 33,249**

5 **STATE OF NEW MEXICO,**

6        Plaintiff-Appellee,

7 v.

8 **PATRICIA GARCIA,**

9        Defendant-Appellant.

10 **APPEAL FROM THE DISTRICT COURT OF LUNA COUNTY**

11 **Daniel Viramontes, District Judge**

12 Hector H. Balderas, Attorney General

13 Paula E. Ganz, Assistant Attorney General

14 Santa Fe, NM

15 for Appellee

16 McGraw & Strickland, LLC

17 Margaret Strickland

18 Las Cruces, NM

19 for Appellant

1 **OPINION**

2 **GARCIA, Judge.**

3 {1} A jury found Defendant Patricia Garcia guilty of two second degree felonies,  
4 fraud, in violation of NMSA 1978, § 30-16-6(A), (F) (2006), and computer access  
5 with intent to defraud, in violation of NMSA 1978, § 30-45-3(E) (2006). On appeal,  
6 Defendant argues, among other things, that there was insufficient evidence presented  
7 to establish that the alleged victim, Page Kent, relied on her misrepresentations about  
8 her marital status. We agree that this was a critical issue regarding the fraud  
9 allegations filed by the State. The State did not ask Mr. Kent to testify about the  
10 reliance element of the fraud charge during Mr. Kent’s testimony at trial. Instead, it  
11 attempted to establish the element of reliance by inferences from the other evidence  
12 presented. We hold that the other evidence was insufficient to permit an inference  
13 establishing reliance beyond a reasonable doubt. As a result, we reverse both of  
14 Defendant’s convictions.

15 **BACKGROUND**

16 {2} The following facts relevant to the issue we address on appeal were adduced  
17 at trial. Defendant, a woman in her fifties, and Mr. Kent, a recently widowed man in  
18 his mid-eighties, first met at the post office around May 2010. At this first meeting,  
19 Defendant told Mr. Kent that she was not married and that she had been divorced

1 several times. She asked Mr. Kent for \$5,000 to “have her breast work raised[,]” and  
2 Mr. Kent wrote her a check for \$5,000.

3 {3} After this first meeting, Defendant and Mr. Kent “became friends.” Defendant  
4 took Mr. Kent to his medical appointments and helped him with his personal finances.  
5 “After a while,” Defendant asked Mr. Kent if she could use his bank account to help  
6 her pay for her “children’s education[,]” “everyday things, . . . cars[,]” and to “help  
7 [her children’s] way of life.” Defendant told Mr. Kent that she would “replace what  
8 she took.” Mr. Kent agreed, and Defendant began accessing and transferring money  
9 from Mr. Kent’s accounts to her own account in October 2010.

10 {4} On December 15, 2010, and January 4, 2011, Mr. Kent made Defendant a joint  
11 owner on his accounts. When the prosecutor asked Mr. Kent at trial “what caused”  
12 him to make Defendant a joint owner on his accounts, Mr. Kent replied that he did  
13 so because Defendant told him “it would be easier for her and her bookkeeping and  
14 also the contact with money and then she would replace it.” On cross-examination,  
15 Mr. Kent also stated that he put Defendant on his accounts because he “wanted to  
16 help her out” with “her family, . . . her children, and . . . other things.” A New Mexico  
17 Adult Protective Services Department caseworker who had interviewed Mr. Kent  
18 testified at trial that Mr. Kent told her that he allowed Defendant to use his accounts  
19 because “he felt sorry for [Defendant] and that he was helping her.”

1 {5} Mr. Kent allowed Defendant to use his accounts “as she needed[,]” and  
2 although he did not tell her she could use his money “carte blanche,” he did not  
3 expressly limit her spending. Mr. Kent allowed Defendant to access his accounts over  
4 the computer.

5 {6} On January 20, 2011—a few months after Defendant began using Mr. Kent’s  
6 accounts and about one month after Mr. Kent made Defendant a joint owner on his  
7 accounts—Defendant married a man named Jerry Marquez, whom she divorced about  
8 a year later on February 12, 2012. Defendant never told Mr. Kent that she had gotten  
9 married, that she was romantically involved with anyone prior to this marriage, or that  
10 Mr. Marquez was more than a “friend.” Indeed, when Defendant arranged to have Mr.  
11 Marquez work on Mr. Kent’s roof in May 2011, Defendant lied when she introduced  
12 Mr. Marquez to Mr. Kent as her “gay friend” because she was married to Mr.  
13 Marquez at that time. The prosecutor asked Mr. Kent at trial, “When you put  
14 [Defendant] on your accounts, did you know that you were putting a married woman  
15 on your bank accounts?” Mr. Kent replied, “It was impossible because I didn’t know  
16 it.”

17 {7} In May 2011, representatives from Mr. Kent’s bank and a caseworker from the  
18 New Mexico Adult Protective Services Department approached Mr. Kent about their  
19 concerns with Mr. Kent’s dwindling bank accounts. Mr. Kent then stopped Defendant

1 from accessing his accounts when he discovered that his “money was going down,  
2 down, down,” and he wanted to “curtail the action” on his accounts. However, after  
3 Mr. Kent and Defendant “talked about it” and Defendant agreed to “slow down on it,”  
4 Mr. Kent resumed allowing Defendant to access his accounts, but he did not make her  
5 a joint owner of his accounts again. Instead, in October 2011, Mr. Kent named  
6 Defendant the beneficiary of his accounts, which meant only that the money in Mr.  
7 Kent’s accounts would have gone to Defendant upon Mr. Kent’s death. Although  
8 Defendant’s use of Mr. Kent’s accounts “quieted down a little bit[,]” it eventually  
9 “went back to the same old way.” The money in Mr. Kent’s accounts “went down  
10 again” and Defendant “didn’t respect it[.]”

11 {8} Mr. Marquez testified that sometime in January 2012 he told Mr. Kent that he  
12 was married to Defendant and that Mr. Kent “was shocked.” However, when the  
13 prosecutor asked Mr. Kent how he learned that Defendant was married, Mr. Kent  
14 replied, “Well, it wasn’t [Mr. Marquez].” The last time that Defendant took money  
15 from Mr. Kent’s accounts was on February 14, 2012. On February 18, 2012, Mr. Kent  
16 removed Defendant as the beneficiary of his accounts.

17 {9} The prosecutor asked Mr. Kent at trial, “What caused you to finally take  
18 [Defendant] off your accounts permanently?” Mr. Kent replied, “The bank—they kept  
19 hounding me, ‘You have problems Mr. Kent,’ . . . and my money in the bank . . . was

1 down.” Mr. Kent also testified that after “the sheriff’s representatives came out and  
2 talked” to him is “when things started with [his] degeneration of [his] . . . contact with  
3 [Defendant].” He said that he “ended up taking her name off of everything” because  
4 he “finally woke up to see what was really happening to [his] money,” and that “after  
5 a while it got so bad . . . [he] had to stop it.” When defense counsel asked Mr. Kent  
6 why, other than the first time he met Defendant, he did not ask Defendant any details  
7 about her personal romantic life over the course of their friendship, Mr. Kent replied  
8 that such details were “pertinent, very pertinent now, but I didn’t even think of it  
9 ‘cause she said she was not [married].”

10 {10} On February 21, 2012, Mr. Kent filed a fraud complaint with his bank. At some  
11 point, Mr. Kent and a friend of his notified the police.

12 {11} At trial, the prosecutor repeatedly asked Mr. Kent to elaborate on the nature of  
13 his relationship with Defendant and how Mr. Kent viewed this relationship. Mr. Kent  
14 repeatedly replied that he and Defendant were friends, even though he admitted to  
15 having had a romantic interest in her that “meant more” than the interest that  
16 Defendant had in him:

17 [PROSECUTOR:] After you met [Defendant], what type of  
18 things would you do together?

1 [MR. KENT:] Oh my, let's see. We became friends and she  
2 . . . said, 'From now on I will take you to all  
3 the hospitals you have to go to or doctors,'  
4 and that was kinda the starter. And she did.  
5 And we just had a pleasant relationship.

6 . . . .

7 [PROSECUTOR:] What else did you and her do? What other  
8 kind of activities?

9 [MR. KENT:] Not much, really.

10 [PROSECUTOR:] What would you talk about? What kinds of  
11 things would you and her talk about?

12 [MR. KENT:] [Laughs]

13 [PROSECUTOR:] What did you have in common? I guess that's  
14 a way of putting it. What did you and her  
15 have in common that you liked to talk about?

16 [MR. KENT:] I guess, cars [laughs].

17 [PROSECUTOR:] What was the friendship based upon? . . .  
18 What type of conversation would she have  
19 with you, Mr. Kent? What sort of subjects  
20 would she bring up and talk about with you?

21 [MR. KENT:] I guess, after a year or so we kind of looked a  
22 little closer to ourselves and we just liked  
23 each other.

24 [PROSECUTOR:] How did you come to think of [Defendant]  
25 after a time? You said you were friends, but  
26 after a while how did you come to think of  
27 her? What did you think of her in your mind

1 as the relationship that you had with her after  
2 a while?

3 . . . .

4 [MR. KENT:] It was nice. Pleasant.

5 [PROSECUTOR:] Okay, but how would you describe her? What  
6 have you described her as in the past to  
7 people when you were . . . getting along with  
8 her quite well? How had you described her to  
9 other people? As your what?

10 [MR. KENT:] I guess, my friend. And my [pauses]—

11 [PROSECUTOR:] Your what?

12 [MR. KENT:] My friend, and uh, how will I say it—

13 [PROSECUTOR:] What are you trying to say?

14 [MR. KENT:] I'm trying to say that she meant more to me  
15 than what I thought.

16 [PROSECUTOR:] When you say meant more to you though, in  
17 what regard? Meant more to you in what  
18 way? 'Cause we have friends, you know, I  
19 mean, some people I might just consider a  
20 friend, like an acquaintance or someone that  
21 I might just see on the street and talk to. Is  
22 that all that it was with [Defendant] in your  
23 mind?

24 [MR. KENT:] No.

25 . . . .



1 [PROSECUTOR:] So, Mr. Kent, let me be just very blunt. Did  
2 you have a romantic interest in [Defendant] at  
3 some point?

4 [MR. KENT:] Yes.

5 [PROSECUTOR:] So then in some ways you told people that  
6 you regarded her as what to you?

7 [MR. KENT:] As my close friend, and I wouldn't say quite  
8 a lover 'cause I'm eighty-six, eighty-seven  
9 years old. But it was very nice and also . . . we  
10 were both content.

11 Although Mr. Kent did not testify that he thought of Defendant as his romantic  
12 partner, the caseworker testified that Defendant knew that Mr. Kent thought of  
13 Defendant as his "girlfriend."

14 {12} The prosecutor did not ask Mr. Kent any questions about whether he relied on  
15 his impression that Defendant was not dating or married to anyone during the time  
16 that he allowed Defendant access to his bank accounts. The prosecutor did not ask  
17 Mr. Kent if he gave Defendant access to his accounts because he thought of her as his  
18 romantic partner. Furthermore, on cross-examination, when defense counsel asked  
19 Mr. Kent whether he had been "tricked" into giving Defendant access to his account,  
20 Mr. Kent replied that he had not:

21 [DEFENSE COUNSEL:] You . . . granted [Defendant] access to  
22 that account, right?

23 [MR. KENT:] Yes.

1 [DEFENSE COUNSEL:] Nobody tricked you, nobody did  
2 anything to try and take advantage of  
3 you. . . . You did it freely and willingly,  
4 correct?

5 [MR. KENT:] Right.

6 {13} In his closing argument, the prosecutor asserted:

7 [I]t's hard for [Mr. Kent] to come out and say he thought that  
8 [Defendant] . . . was his girlfriend, but that's what he thought about her,  
9 that's how he thought of her, and she encouraged it. . . . by lying to Mr.  
10 Kent about who her husband was. . . . [and] she didn't think that way  
11 about him.<sup>1</sup>

12 **DISCUSSION**

13 {14} The narrow question we must answer in this appeal is whether there was  
14 sufficient evidence presented to establish beyond a reasonable doubt that Mr. Kent  
15 relied on Defendant's deception about her relationship and marriage status when he  
16 allowed Defendant to use his money and access his accounts. For reasons we explain  
17 below, we conclude that the evidence was insufficient.

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18 <sup>1</sup>The prosecutor also asserted in his closing argument that Defendant's asking Mr.  
19 Kent for \$5,000 for breast surgery upon their first meeting in May 2010, and then not  
20 having the surgery, was the first instance of fraud. However, the jury instructions and  
21 Defendant's resultant conviction covered conduct occurring only between the dates  
22 of October 10, 2010, and February 13, 2012. We assume this is why the State did not  
23 raise this issue in its answer brief. The State confirmed at oral argument that  
24 Defendant's May 2010 conduct should not be considered in upholding her fraud  
25 conviction.

1 **A. Elements of Criminal Fraud**

2 {15} The crime of “[f]raud consists of the intentional misappropriation or taking of  
3 anything of value that belongs to another by means of fraudulent conduct, practices  
4 or representations.” Section 30-16-6(A). A misrepresentation for purposes of criminal  
5 fraud may include a deceptive silence or omission. *See State v. Stettheimer*, 1980-  
6 NMCA-023, ¶¶ 9-14, 94 N.M. 149, 607 P.2d 1167. As contained within our uniform  
7 jury instructions and the jury instructions used in this trial, the state must also present  
8 evidence sufficient to prove that “[b]ecause of the . . . victim[’s] reliance on [the  
9 misrepresentation], the] defendant obtained [a thing of value].” UJI 14-1640 NMRA  
10 (emphasis added).

11 {16} A critical inquiry in this appeal is what constitutes reliance. Although the jury  
12 in this case was not instructed about how to determine whether Mr. Kent’s reliance  
13 on Defendant’s misrepresentation *caused* Mr. Kent to allow Defendant to access his  
14 accounts, we find it helpful to refer to UJI 14-134 NMRA in interpreting the legal  
15 requirements under which the element of reliance must be proved in a criminal trial  
16 for fraud. Although not used in this trial, UJI 14-134 is a criminal uniform jury  
17 instruction that “*should* be used in cases [other than homicide] in which causation is  
18 an issue.” UJI 14-134 n.1 (emphasis added). UJI 14-134 provides, in pertinent part:

19 In addition to the other elements of the crime . . . , the state must also  
20 prove . . . beyond a reasonable doubt that[] . . . [t]he act of the defendant

1 was a significant cause of the injury or harm. The defendant’s act was  
2 a significant cause of the injury or harm if it was an act which, in a  
3 natural and continuous chain of events, uninterrupted by an outside  
4 event, resulted in the injury or harm *and without which the injury or*  
5 *harm would not have occurred.* (Emphasis added.)

6 Thus, to sustain a fraud conviction, we conclude that the State must prove beyond a  
7 reasonable doubt that *without* the defendant’s misrepresentation, the defendant would  
8 not have obtained the thing of value. *Id.*; accord *State v. Young*, 1998 ME 107, ¶ 14,  
9 711 A.2d 134, 137 (referring to the Maine Criminal Code’s definition of causation  
10 in determining the nature of the causal relationship that must be proved in a theft by  
11 deception prosecution and framing the issue as whether the defendant “would not  
12 have obtained the money *but for* his deceptive act”); 3 Charles E. Torcia, *Wharton’s*  
13 *Criminal Law* § 427 (15th ed. 1995) (stating that, in proving a defendant obtained  
14 money or property by false pretenses, it is not “necessary . . . that the false  
15 representation be the paramount cause for the victim’s surrender of his property; it  
16 is sufficient merely that the false representation be a cause *without which* the victim  
17 would not have surrendered his property” (emphasis added)).

## 18 **B. Standard of Review and General Principles**

19 {17} In conducting a sufficiency-of-the-evidence analysis, we review the evidence  
20 in the light most favorable to the verdict “to determine whether substantial evidence  
21 of either a direct or circumstantial nature exists to support a verdict of guilty beyond

1 a reasonable doubt with respect to every element essential to [the] conviction.” *State*  
2 *v. Hornbeck*, 2008-NMCA-039, ¶ 33, 143 N.M. 562, 178 P.3d 847 (internal quotation  
3 marks and citation omitted). “We do not re-weigh the evidence or substitute our  
4 judgment for that of the fact-finder, so long as sufficient evidence supports the  
5 verdict.” *Id.* We remain mindful, however, that “evidence that is sufficient to allow  
6 a rational juror to make a finding adverse to a defendant under a lesser  
7 preponderance-of-the-evidence standard [of proof] will not necessarily suffice to  
8 allow a rational factfinder to reach the subjective state of certitude required by the  
9 beyond-a-reasonable-doubt standard.” *State v. Garcia*, 2004-NMCA-066, ¶ 9, 135  
10 N.M. 595, 92 P.3d 41, *rev’d in part on other grounds by State v. Garcia*, 2005-  
11 NMSC-017, 138 N.M. 1, 116 P.3d 72. “[E]vidence equally consistent with two  
12 inferences does not, without more, provide a basis for adopting either one—especially  
13 beyond a reasonable doubt.” *Garcia*, 2005-NMSC-017, ¶ 12 (internal quotation  
14 marks and citation omitted); *see also Baca v. Bueno Foods*, 1988-NMCA-112, ¶ 15,  
15 108 N.M. 98, 766 P.2d 1332 (“Evidence from which a proposition can be derived  
16 only by speculation among equally plausible alternatives is not substantial evidence  
17 of the proposition.”).

18 {18} “Although appellate courts are highly deferential to a jury’s decisions, it is the  
19 independent responsibility of the courts to ensure that the jury’s decisions are

1 supportable by evidence in the record, rather than mere guess or conjecture.” *State*  
2 *v. Slade*, 2014-NMCA-088, ¶ 14, 331 P.3d 930 (internal quotation marks and citation  
3 omitted). In *State v. Maes*, this Court found the Second Circuit’s discussion in  
4 *Goldhirsh Grp., Inc. v. Alpert*, 107 F.3d 105, 108 (2d Cir. 1997) helpful in discerning  
5 the fine line that sometimes exists between permissible inference and impermissible  
6 speculation:

7       The line between permissible inference and impermissible speculation  
8 is not always easy to discern. When we ‘infer,’ we derive a conclusion  
9 from proven facts because such considerations as experience, or history,  
10 or science have demonstrated that there is a likely correlation between  
11 those facts and the conclusion. If that correlation is sufficiently  
12 compelling, the inference is ‘reasonable.’ But if the correlation between  
13 the facts and the conclusion is slight, or if a different conclusion is more  
14 closely correlated with the facts than the chosen conclusion, the  
15 inference is less reasonable. At some point, the link between the facts  
16 and the conclusion becomes so tenuous that we call it ‘speculation.’  
17 When that point is reached is, frankly, a matter of judgment.

18 *State v. Maes*, 2007-NMCA-089, ¶ 18, 142 N.M. 276, 164 P.3d 975 (quoting  
19 *Goldhirsh Grp., Inc.*, 107 F.3d at 108).

20 **D. Analysis**

21 **1. Timing of Defendant’s Deception and Mr. Kent’s Decision to Allow Her**  
22 **Access to His Accounts**

23 {19} We begin our analysis by noting that at the time that Mr. Kent began allowing  
24 Defendant to access his accounts for her own purposes in October 2010 and at the  
25 time he made her a joint owner on his accounts on December 15, 2010, and January

1 4, 2011, Defendant was not married. The evidence shows that Defendant married Mr.  
2 Marquez on January 20, 2011. Although Mr. Marquez testified that prior to his  
3 marriage with Defendant, he and Defendant “cohabitat[ed] . . . off and on[,]” his  
4 testimony does not establish when their relationship began or whether it was  
5 exclusive or continuous prior to their marriage.<sup>2</sup> Thus, the evidence adduced at trial  
6 did not show that Defendant had deceived Mr. Kent in any way at the time that Mr.  
7 Kent decided to allow Defendant access to his accounts and to make her a joint owner  
8 of his accounts. Thus, the point that the State raised at trial and again raises in its  
9 answer brief—that Mr. Kent “did not know he was putting a married woman on his  
10 accounts”—is not persuasive because it is based on the assumption of a fact that was  
11 actually disproved by the evidence at trial.

12 {20} Defendant’s deceptive behavior becomes sufficiently apparent, however, when  
13 she married and moved in with Mr. Marquez in January 2011 and not only failed to  
14 tell Mr. Kent this significant detail about her personal life during the “couple times

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15 <sup>2</sup>Our review of the trial testimony belies the State’s assertion in its answer brief  
16 that “Defendant was living at . . . [Marquez]’s house” at the time that she met Mr.  
17 Kent. To the contrary, Mr. Marquez testified that prior to their marriage, he and  
18 Defendant “cohabitat[ed] . . . off and on.” After he and Defendant married in January  
19 2011, Mr. Marquez “moved into the mobile home with her[.]” Later, Mr. Marquez  
20 bought a home and he and Defendant moved there. Mr. Marquez stated that  
21 Defendant began “developing” her relationship with Mr. Kent while she was living  
22 at [his] home. He did not testify that he and Defendant were living together when  
23 Defendant and Mr. Kent met.

1 a week” they spent together, but blatantly lied to Mr. Kent when she introduced Mr.  
2 Marquez to him as her gay friend in May 2011. Regardless of whether Defendant’s  
3 deception established her intent to defraud Mr. Kent when she hid the fact that she  
4 was married to Mr. Marquez, the issue on appeal is not what Defendant intended, but  
5 rather what Mr. Kent himself relied upon when he allowed her to use his accounts.

## 6 **2. Insufficient Evidence of Reliance**

7 {21} During the State’s examination of Mr. Kent at trial, the prosecutor did not ask  
8 Mr. Kent whether he would have allowed Defendant to continue to access his  
9 accounts if he knew that Defendant was involved with and had eventually married  
10 Mr. Marquez. Instead, when the prosecutor asked Mr. Kent “what caused” him to  
11 allow Defendant to access his money and make Defendant a joint owner on his  
12 accounts, he replied, “[i]t would be easier for her and her bookkeeping and also the  
13 contact with money and then she would replace it.” On cross-examination, Mr. Kent  
14 also testified that he put Defendant on his accounts because he “wanted to help her  
15 out” with “her family, . . . her children, and . . . other things.” He told the caseworker  
16 that he allowed Defendant to access his accounts because “he felt sorry for  
17 [Defendant] and that he was helping her.” Mr. Kent testified that, beyond their first  
18 meeting, the status of Defendant’s romantic affairs was not “pertinent” to him until  
19 “now.” And when asked whether he felt he was “tricked” into allowing Defendant to



1 use his bank accounts, Mr. Kent replied that he did not. This testimony is not  
2 sufficient to prove that Mr. Kent would not have given Defendant access to his  
3 accounts *but for* his impression that she was romantically available to him. *See* UJI  
4 14-134; *Young*, 711 A.2d at 14; *Torcia*, *supra*, § 427.

5 {22} Although Mr. Kent was “shocked” when he discovered that Defendant had  
6 been married to Mr. Marquez, the evidence at trial was also insufficient to directly  
7 connect Mr. Kent’s discovery of this fact with his decision to finally cut Defendant  
8 off from his accounts. The prosecutor did not ask Mr. Kent whether learning of  
9 Defendant’s marriage prompted him to stop her from using his accounts. Instead, the  
10 evidence showed that Mr. Kent finally cut Defendant off from accessing his accounts  
11 for several other reasons: “[t]he bank . . . kept hounding [him],” his “money in the  
12 bank . . . was down[,]” he “finally woke up to see what was really happening to [his]  
13 money,” and that “after a while it got so bad . . . [he] had to stop it.” Mr. Kent  
14 testified that “[his] degeneration of [his] . . . contact with [Defendant,]” began when  
15 “the sheriff’s representatives came out and talked” to him—he did not testify that  
16 learning of Defendant’s marriage from Mr. Marquez caused him to take action or was  
17 the reason he ended his relationship with her. Furthermore, there was no evidence that  
18 Mr. Kent cut off Defendant’s access to his accounts prior to her last transaction on

1 February 14, 2012, which was at least two weeks after Mr. Marquez stated he told  
2 Mr. Kent about his marriage to Defendant in January 2012.

3 {23} Without testimony from Mr. Kent regarding what he relied upon and whether  
4 he would have continued to allow Defendant to access his accounts had he known her  
5 true marital status, the remainder of the evidence presented at trial would, at best, be  
6 equally consistent with two hypotheses on the factual element of reliance. *See Garcia*,  
7 2005-NMSC-017, ¶ 12; *Baca*, 1988-NMCA-112, ¶ 15. One that, irrespective of  
8 Defendant's marital status, Mr. Kent's own testimony appears to support the position  
9 that he would have allowed Defendant to access his money to assist with her  
10 children's financial needs because they were close friends, he felt sorry for her, and  
11 because she provided him with assistance and companionship. The second being that,  
12 irrespective of Defendant's assistance and companionship, Mr. Kent only allowed  
13 Defendant to access his accounts because of he thought of her as his romantic partner.

14 {24} Mr. Kent was the State's primary witness and testified at length in this case.  
15 Evidence of Mr. Kent's reliance on Defendant's misrepresentation of her marital  
16 status was not the type of evidence that was clandestine in nature, could only be  
17 proved by circumstantial evidence, and therefore required the jury to disregard Mr.  
18 Kent's testimony and extract contradictory inferences from other indirect testimony.  
19 *Cf. State v. Gallegos*, 2011-NMSC-027, ¶ 45, 149 N.M. 704, 254 P.3d 655

1 (recognizing that because conspiracies are clandestine in nature, establishing  
2 evidence of an agreement between the conspirators is seldom available, the jury may  
3 infer such an agreement from the parties' conduct and the surrounding circumstances,  
4 even though it raises the specter of a conviction by guess and speculation). The State  
5 offers no explanation for its failure to ask Mr. Kent about what he relied upon when  
6 he gave Defendant money and allowed her access to his accounts. Even if the jury  
7 could also infer that, had the victim known the truth about Defendant's marital status,  
8 he *possibly* would not have given Defendant money or access to his accounts, we  
9 conclude that, based upon the evidence presented, the jury could not reasonably make  
10 such a circumstantial inference *beyond a reasonable doubt*. See *Garcia*, 2004-  
11 NMCA-066, ¶¶ 9, 11; *Slade*, 2014-NMCA-088, ¶ 14; *cf. Commw. v. Imes*, 623 A.2d  
12 859, 863 (Pa. Super. Ct. 1993) (concluding that the government failed to prove the  
13 element of reliance on a false impression where "none of the [purported victims] were  
14 called to testify at the trial[,]” and “[c]onsequently, none of them could state whether  
15 they relied on [the] false impression”). The State failed to establish such a basis of  
16 reliance when Mr. Kent competently testified at trial. Asking the jury to determine the  
17 victim's reliance from these two plausible inferences presented by the State, without  
18 asking the victim about the matter during his trial testimony, was the type of

1 evidentiary guesswork and speculation that is insufficient for the State to meet its  
2 burden of proof. *See Slade*, 2014-NMCA-088, ¶ 14.

3 {25} Therefore, because the State carried the burden to prove beyond a reasonable  
4 doubt that “without” Defendant’s misrepresentation about her marital status, Mr. Kent  
5 would not have allowed her to access his accounts, the other indirect and  
6 contradictory circumstantial evidence was insufficient to infer the element of reliance  
7 necessary to sustain Defendant’s fraud conviction. UJI 14-134 (providing that, in  
8 criminal trials in which causation is an issue, the state must prove that “without” the  
9 defendant’s act, “the injury or harm would not have occurred”); *see Young*, 711 A.2d  
10 at 14; *Torcia*, *supra*, § 427; *see also Hornbeck*, 2008-NMCA-039, ¶ 33 (providing  
11 that substantial evidence must support every element essential to the conviction). On  
12 the record before us in this case, we hold that “the link between the facts and the  
13 conclusion” is “so tenuous that we call it ‘speculation.’ ” *Maes*, 2007-NMCA-089,  
14 ¶ 18 (internal quotation marks and citation omitted).

15 {26} We note that what makes Defendant’s conduct troubling is the age and  
16 vulnerability of Mr. Kent. He was in his mid-eighties, just lost his wife of thirty-six  
17 years, and needed someone to take him to his medical appointments and provide  
18 personal companionship. Although Defendant helped Mr. Kent in these ways, she  
19 also used his vulnerability to benefit herself in an amount that appeared somewhat

1 disproportionate. Rather than ask Mr. Kent to testify about whether he relied upon  
2 Defendant's marital status to allow her to access his accounts, the State asked the jury  
3 to infer such reliance based upon other indirect and contradictory circumstantial  
4 evidence. We cannot speculate as to why the State presented its case in this manner.  
5 This was either a tactical trial decision by the prosecutor or an inadvertent error.  
6 Unfortunately, the other indirect circumstantial evidence was insufficient to establish  
7 the element of reliance beyond a reasonable doubt.

8 **E. Computer Access with Intent to Defraud**

9 {27} We also conclude that there was insufficient evidence to support Defendant's  
10 conviction of computer access with intent to defraud. Our Supreme Court has  
11 concluded that "the Computer Crimes Act was intended by the [L]egislature to deter  
12 and punish crimes committed, at least in a manner of speaking, against computers, or  
13 through the abuse of computer sophistication." *State v. Rowell*, 1995-NMSC-079,  
14 ¶ 12, 121 N.M. 111, 908 P.2d 1379. The Court noted that the Senate bill upon which  
15 the Act was based stated that "[t]he [L]egislature recognizes a dramatic increase in  
16 computer-related crimes . . . through the introduction of fraudulent data into a  
17 computer system, the unauthorized use of computer facilities, the alteration or  
18 destruction of computerized information or files[,] and the stealing of financial  
19 information, data [or] other assets." *Id.* ¶ 12 n.2. It observed that the Act was not

1 intended to apply to the use of a computer as “a passive conduit through which the  
2 defendant’s criminal activity passed.” *Id.* ¶ 11.

3 {28} In this case, Defendant did not introduce “fraudulent data into a computer  
4 system,” use “computer facilities” without “[authorization,] . . . alter[] or [destroy] .  
5 . . . computerized information or files[,]” nor did she steal “financial information, data  
6 [or] other assets.” *Id.* ¶ 12 n.2. Instead, Defendant used the computer as “a passive  
7 conduit” to access accounts and transfer funds, just as any banking customer would.  
8 *Id.* ¶ 11.

9 {29} Furthermore, because we have concluded that the evidence was insufficient to  
10 prove that the underlying transfers made via the computer were criminal, and because  
11 Mr. Kent expressly approved Defendant’s use of a computer to perform these  
12 transfers, the elements of computer access with intent to defraud could not be proved  
13 beyond a reasonable doubt.

14 **CONCLUSION**

15 {30} Because we reverse Defendant’s convictions and remand the case to the district  
16 court with instructions to vacate Defendant’s convictions, we need not address the  
17 other issues that Defendant raises on appeal.

18 {31} **IT IS SO ORDERED.**

19  
20 \_\_\_\_\_  
**TIMOTHY L. GARCIA, Judge**

1 **I CONCUR:**

2

3 \_\_\_\_\_  
3 **M. MONICA ZAMORA, Judge**

4 **JONATHAN B. SUTIN, Judge (dissenting).**

1 **SUTIN, Judge (dissenting).**

2 {32} I acknowledge that one might question whether the peculiar and particular  
3 circumstances in this case should be covered under the criminal fraud statute. Why  
4 not leave it to civil fraud remedies? Why not, as Defendant strongly argued in her  
5 briefing and in oral argument, exclude deception in romantic relationships from  
6 criminal prosecution? Further, why not fall back on a view that the circumstances  
7 showed it only more likely than not that Mr. Kent relied on Defendant's conduct,  
8 deceitful hiding of material information, and fraudulent misrepresentations and  
9 omissions? I am unable to follow these why-not paths. Therefore, I respectfully  
10 dissent and would affirm.

11 {33} Looking at the totality of circumstances, particularly including Defendant's  
12 conduct, practices, and misrepresentations (including omissions), it seems apparent  
13 that the jury strongly believed that Defendant engaged in a deliberate, willful  
14 fraudulent scheme to have access to Mr. Kent's bank accounts. And the district court  
15 must have viewed the circumstances in a similar fashion, having imposed consecutive  
16 nine-year sentences for the two convictions for a total of eighteen years, ten of which  
17 were suspended, and having denied Defendant's motion for a restitution hearing and  
18 imposing restitution in the amount of \$53,800.



1 {34} Further, viewed in the light most favorable to the verdict, as we must, the  
2 evidence presented at trial should be considered sufficient to support Defendant’s  
3 convictions, including the element of reliance. *State v. Nichols*, 2014-NMCA-040,  
4 ¶ 15, 321 P.3d 937 (stating that in our review of sufficiency-of-the evidence claims,  
5 we view the evidence in the light most favorable to the guilty verdict). I would affirm.

6 {35} The jury was instructed, in relevant part, that to find Defendant guilty of fraud,  
7 the State was required to prove that (1) Defendant, “by any words or conduct,  
8 misrepresented a fact to [Mr.] Kent, intending to deceive or cheat” him; and (2)  
9 “[b]ecause of the misrepresentation and [Mr.] Kent’s reliance on it, [D]efendant  
10 obtained over \$20,000[.]” This instruction is the law of the case against which the  
11 sufficiency of the evidence supporting the jury’s verdict of guilty of fraud beyond a  
12 reasonable doubt is to be measured. *See State v. Smith*, 1986-NMCA-089, ¶ 7, 104  
13 N.M. 729, 726 P.2d 883 (“Jury instructions become the law of the case against which  
14 the sufficiency of evidence is to be measured.”).

15 {36} Mr. Kent inquired into Defendant’s marital status upon their first meeting in  
16 May 2010. Although at that time Defendant was apparently living with her boyfriend,  
17 Mr. Marquez, whom she married in January 2011, Defendant told Mr. Kent at the  
18 time only that she was not married, but that she had previously been married.

1 {37} Within several months following that meeting, Defendant persuaded Mr. Kent  
2 to allow her access to his bank accounts, and one month before she married Mr.  
3 Marquez, Defendant persuaded Mr. Kent to add her as a co-owner of his bank  
4 accounts and to use the accounts to help Defendant with her children's education and  
5 her "problems."

6 {38} Mr. Kent testified that he and Defendant started a friendship when Defendant  
7 offered to take and then began taking Mr. Kent to doctors and to hospitals. According  
8 to Mr. Kent, after a year or so, he and Defendant "liked each other." "After a while,"  
9 Mr. Kent regarded Defendant as a close friend, not "quite a lover," but someone in  
10 whom he had a romantic interest; and, as Mr. Kent described it, they "were both  
11 content."

12 {39} Beginning in October 2010, before Mr. Kent added Defendant as a co-owner  
13 of his bank accounts in December 2010, Defendant transferred money from one of  
14 Mr. Kent's accounts into her own accounts using the online-transfer banking feature  
15 available through Mr. Kent's bank. Defendant continued to transfer money from Mr.  
16 Kent's accounts into her own account through mid-February 2012. Mr. Kent had  
17 given Defendant permission to effect transfers and withdrawals from his accounts,  
18 and he did not specify a limit nor did he require a specific account of what the money  
19 was to be used for. Mr. Kent also gave Defendant permission to use his debit card,

1 and she did so. At times, Defendant paid Mr. Kent back at least some of the money  
2 that she had taken from his accounts. Mr. Kent did not know how much Defendant  
3 had paid back.

4 {40} Defendant never told Mr. Kent that she had married Mr. Marquez; in fact, she  
5 introduced Mr. Marquez, her then-husband, to Mr. Kent in May 2011 and told Mr.  
6 Kent that Mr. Marquez was her “gay friend.” In January 2012, Mr. Marquez went to  
7 Mr. Kent’s home to tell him that he and Defendant were married; according to Mr.  
8 Marquez, Mr. Kent “was shocked” by that information. In February 2012, Mr. Kent  
9 permanently removed Defendant from his accounts. Three days later, Mr. Kent filed  
10 an “affidavit of online fraud” with his bank.

11 {41} Given that the affidavit was admitted at trial as an exhibit, this Court sua sponte  
12 obtained a copy. The subject of the affidavit of online fraud was a series of  
13 enumerated transactions achieved by “unauthorized ATM activity[,] unauthorized  
14 branch withdrawal and deposit activity[, and] unauthorized teletransfer activity”  
15 totaling several thousand dollars that occurred between September 2011 and February  
16 2012. In handwritten responses to the questionnaire portion of the affidavit of online  
17 fraud, Mr. Kent provided the following relevant answers. In response to the question  
18 “[w]hen and how did you discover the fraud in your account?” Mr. Kent answered  
19 that “[a]round [the] 9th of February 2012, secondary acct holder’s ex-husband . . .

1 informed me of some suspicious activity.” In response to the question “[d]o you know  
2 who might have committed the fraud?” Mr. Kent responded, “Yes– Patricia G.  
3 Garcia. ‘Girlfriend’[.]” And, in response to the questionnaire’s request to “[e]xplain  
4 how the person that committed the fraud might have gained access to your account  
5 information[.]” Mr. Kent wrote, “manipulated, convinced me to trust her . . . [.]”

6 {42} These facts, among others in the record, must be viewed by us within the  
7 context of the evidence as a whole and considered within the totality of the  
8 circumstances while indulging all reasonable inferences in favor of the jury’s verdict  
9 of guilt beyond a reasonable doubt. *State v. Graham*, 2005-NMSC-004, ¶ 13, 137  
10 N.M. 197, 109 P.3d 285; *see Gallegos*, 2011-NMSC-027, ¶ 18 (rejecting a “divide-  
11 and-conquer” approach to considering the sufficiency of the evidence “whereby each  
12 piece of evidence is viewed in isolation, ignoring reasonable inferences from the  
13 totality of the circumstances that support guilt” (internal quotation marks omitted)).  
14 “When we infer, we derive a conclusion from proven facts because such  
15 considerations as experience, or history . . . have demonstrated that there is a likely  
16 correlation between those facts and the conclusion. If that correlation is sufficiently  
17 compelling, the inference is reasonable.” *Maes*, 2007-NMCA-089, ¶ 18 (internal  
18 quotation marks and citation omitted).

1 {43} By applying the appropriate standards of review to the jury’s decision, the jury  
2 could have reasonably inferred that, by asking Defendant at the outset of their  
3 relationship whether she was married, the mid-eighty-year-old victim, whose wife had  
4 recently died, intended to learn whether Defendant was available to engage in a  
5 romantic relationship. Defendant’s response that she was not married, while  
6 technically correct, could reasonably have been considered by the jury as  
7 disingenuous given that she was living with her boyfriend, Mr. Marquez, whom she  
8 married months later. The jury could also have reasonably inferred that Defendant  
9 intended to deceitfully present herself as romantically unattached. *See Stettheimer*,  
10 1980-NMCA-023, ¶ 13 (stating that silence that is calculated to deceive may form the  
11 basis for a criminal misrepresentation). In addition, based on Defendant’s almost  
12 immediate and continuing pursuit of Mr. Kent’s money, the jury could have  
13 reasonably inferred that Defendant’s conduct was purposeful in order to eventually  
14 gain access to Mr. Kent’s money, an inference that is supported by the fact that within  
15 months of their first meeting, Defendant had direct access to Mr. Kent’s bank  
16 accounts. *State v. Brenn*, 2005-NMCA-121, ¶ 24, 138 N.M. 451, 121 P.3d 1050  
17 (recognizing that “intent is usually inferred from the facts of the case” and established  
18 by circumstantial, not direct, evidence).

1 {44} Further, the jury could have reasonably inferred that Defendant understood that  
2 Mr. Kent's willingness to allow her access to his accounts was grounded in Mr.  
3 Kent's impression that Defendant was his "girlfriend," and in addition, that  
4 Defendant's conduct showed an intent to continue her ruse so as to continue using  
5 Mr. Kent's money, an inference that was supported by Defendant having never  
6 informed Mr. Kent of her pre-marriage relationship with and her marriage to Mr.  
7 Marquez and by her affirmative misrepresentation when introducing Mr. Marquez as  
8 her gay friend. Finally, based on the overall circumstances and on Mr. Kent's  
9 affidavit of online fraud stating that Defendant gained access to his bank accounts by  
10 having "manipulated" and "convinced [him] to trust her[.]" This, combined with the  
11 use of the term "girlfriend," in quotation marks and underlined, allowed the jury to  
12 reasonably infer that but for Defendant's deceitful conduct intended to lead Mr. Kent  
13 to believe that she was romantically unattached, unmarried, and was his girlfriend, he  
14 would not have permitted Defendant to access his bank accounts. This inference is  
15 further supported by the fact that, although Mr. Kent always knew that Defendant was  
16 accessing his bank accounts and using his money, he stated that he did not discover  
17 the fraud on his account until Mr. Marquez informed him in February 2012 of "some  
18 suspicious activity." From Mr. Marquez's testimony, the jury could infer that the  
19 "suspicious activity" to which Mr. Kent referred included that Mr. Marquez was not

1 Defendant's gay friend but was, instead, her husband. Viewed in the context of the  
2 evidence as a whole, the jury could reasonably have concluded that but for the  
3 knowledge that Defendant's "activity" was "suspicious" from which Mr. Kent could  
4 believe that Defendant's intent and activity was to defraud him, Mr. Kent would not  
5 have considered Defendant's use of his bank accounts to be fraud.

6 {45} To hold that the evidence in this case was insufficient to prove Mr. Kent's  
7 reliance on Defendant's fraudulent conduct, misrepresentations, and omissions  
8 sweeps aside reasonable inferences formed by the jury in reaching its verdict. *See*  
9 *Slade*, 2014-NMCA-088, ¶ 13 (noting that "the weight and effect of the evidence,  
10 including all reasonable inferences to be drawn from both the direct and  
11 circumstantial evidence is a matter reserved for determination by the [jury]" and  
12 recognizing that this Court should not substitute its judgment for that of the jury  
13 (internal quotation marks and citation omitted)). Although "[t]he line between  
14 permissible inference and impermissible speculation is not always easy to discern[.]"  
15 *see Maes*, 2007-NMCA-089, ¶ 18 (internal quotation marks and citation omitted), the  
16 jury's verdict in this case was supported by evidence and by permissible inferences  
17 drawn from that evidence, and it should be upheld. *See Slade*, 2014-NMCA-088, ¶ 14  
18 (recognizing that an inference is a logical deduction from proven facts).

1 {46} The notion that evidence of reliance was insufficient because Mr. Kent never  
2 explicitly testified that he relied upon Defendant’s conduct and statements relating  
3 to her marital status or her relationships with Mr. Marquez in allowing Defendant  
4 access to and partial ownership of his accounts is a theory that originated on appeal.  
5 Having heard the prosecution’s direct and re-direct examination of Mr. Kent, and  
6 having himself cross-examined Mr. Kent, Defendant’s trial counsel did not once raise  
7 or argue the fact that Mr. Kent had not explicitly testified that he relied on  
8 Defendant’s continuing purposeful failure to reveal her relationship with Mr.  
9 Marquez and marriage to him in allowing Defendant to access his bank accounts.

10 {47} This, notwithstanding the fact that after the prosecution presented its case,  
11 Defendant’s counsel moved for a directed verdict on grounds having nothing to do  
12 with a failure of evidence on reliance. *See State v. Barreras*, 2007-NMCA-067, ¶ 3,  
13 141 N.M. 653, 159 P.3d 1138 (“The question presented by a directed verdict motion  
14 is whether there was substantial evidence to support the charge.” (internal quotation  
15 marks and citation omitted)). It seems safe to assume that Defendant’s trial counsel  
16 inferred, as did the jury, that based under the totality of the circumstances, including  
17 in particular Defendant’s conduct and material misrepresentations and omissions, and  
18 the content of Mr. Kent’s affidavit of online fraud identifying Defendant’s marriage  
19 to Mr. Marquez as the basis for his claim, that the element of reliance was proved.



1 {48} A good part of Defendant’s argument on appeal dwelled on a view that the  
2 criminal fraud statute and any reasonableness standard cannot be applied to romantic,  
3 fleeting, and fickle relationships, in that persons in such relationships can be, and  
4 often are, deceitful and unreasonable. To bring these relationships under the criminal  
5 fraud statute, Defendant argues, opens a dangerous prosecution door of criminal  
6 liability not contemplated by or intended to be covered under the criminal fraud  
7 statute. The Majority Opinion does not address this policy argument. This argument  
8 might have legs in the Legislature, but it has none in this case.

9 {49} Because the mainstay of the Majority Opinion is that reliance was not proved  
10 because Mr. Kent did not explicitly say that he relied on Defendant’s  
11 misrepresentations, I have limited this dissent to that question. I have not dissected  
12 Defendant’s arguments relating to materiality, privacy, free speech, double jeopardy,  
13 and due process. Those issues need be addressed only if this case happens to return  
14 to this Court after certiorari review by our Supreme Court. In sum, the element of  
15 reliance required to prove fraud rested upon a combination of proven facts and  
16 permissible inferences, with each inference reasonably derived from evidence at trial.  
17 Accordingly, viewing the evidence and inferences in a light most favorable to the  
18 verdict, I would uphold the jury’s verdict and affirm Defendant’s convictions.

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**JONATHAN B. SUTIN, Judge**