

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

2 **Opinion Number:** _____

3 **Filing Date: June 20, 2016**

4 **NO. 34,042**

5 **STATE OF NEW MEXICO,**

6 Plaintiff-Appellee,

7 v.

8 **TRUETT THOMAS,**

9 Defendant-Appellant.

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

11 **Samuel L. Winder, District Judge**

12 Jorge A. Alvarado, Chief Public Defender

13 Karl Erich Martell, Assistant Appellate Defender

14 Santa Fe, NM

15 for Appellant

16 Hector H. Balderas, Attorney General

17 M. Victoria Wilson, Assistant Attorney General

18 Santa Fe, NM

19 for Appellee

1 **OPINION**

2 **DANIELS, Chief Justice.**

3 {1} The Sixth Amendment to the United States Constitution and Article II, Section
4 14 of the New Mexico Constitution guarantee a criminal defendant the right to
5 confront adverse witnesses. Defendant Truett Thomas appeals from his convictions
6 of first-degree deliberate murder and first-degree kidnapping on multiple grounds,
7 including an asserted violation of the Confrontation Clause through the admission of
8 two-way video testimony of a prosecution witness. We reverse Defendant’s
9 convictions on this basis but remand for a new trial on the murder charge only, having
10 concluded that there was insufficient evidence to support the kidnapping conviction.
11 Although we need not decide whether social media posts by the district court judge
12 about the case before him also would have required reversal, we caution judges to
13 avoid both impropriety and its appearance in their use of social media.

14 **I. BACKGROUND**

15 {2} On June 3, 2010, Guadalupe Ashford’s body was found partially hidden behind
16 a trash can at the edge of a small parking lot. Drag marks and blood spatter indicated
17 that Ashford had initially been assaulted in the lot and then dragged a short distance
18 to its edge where her body was found. The drag marks were contained within the span
19 of one parking space and extended less than ten feet. Ashford’s body had significant

1 head injuries, including lacerations, skull fractures, and a dislodged tooth. The
2 medical investigator determined that Ashford died from blunt force injuries to her
3 head, but he could not identify which of the several injuries was the cause and could
4 not calculate a specific time of death. Police testimony indicated that there were no
5 known witnesses to the assault and that no one reported seeing Defendant in the area.

6 {3} An Albuquerque Police Department (APD) forensic scientist analyst performed
7 DNA measurements of samples collected from Ashford’s body and from a six-inch
8 by six-inch bloodied brick described as “paver stone” and believed to be the murder
9 weapon, generating DNA profiles of Ashford and of the presumed perpetrator.
10 Unidentified DNA was also discovered on the paver stone, though in smaller amounts
11 than the DNA evidence matching either of the full profiles. The forensic analyst
12 entered the presumed perpetrator’s profile into the CODIS database, which resulted
13 in a match to Defendant. “Authorized by Congress and supervised by the Federal
14 Bureau of Investigation, the Combined DNA Index System (CODIS) connects DNA
15 laboratories at the local, state, and national level . . . [and] collects DNA profiles
16 provided by local laboratories taken from arrestees, convicted offenders, and forensic
17 evidence found at crime scenes.” *Maryland v. King*, __ U.S. __, ____, 133 S. Ct. 1958,
18 1968 (2013). Defendant was arrested and charged on the basis of this DNA evidence,

1 but he denied ever having met Ashford.

2 {4} Defendant was held in pretrial custody for twenty-two months before he moved
3 to dismiss the charges for violation of his right to a speedy trial. The district court
4 denied the motion and set the trial to begin approximately twenty-six months after
5 Defendant's arrest.

6 {5} By the time the case came to trial, the State's forensic analyst had moved out
7 of New Mexico. At a hearing two weeks before trial, the prosecutor expressed
8 concerns about securing the presence of that forensic analyst at trial and suggested
9 that she be allowed to testify over the live, two-way audio-video communications
10 application Skype as an alternative. *See State v. Schwartz*, 2014-NMCA-066, ¶ 5, 327
11 P.3d 1108 (describing Skype as "an Internet software application[] that . . . allow[s]
12 users to engage in real time video and audio communications between two or more
13 locations" (alterations and omission in original) (internal quotation marks and citation
14 omitted)). When the court asked about defense counsel's "thoughts with regard to
15 Skype," counsel, who had previously interviewed the witness through Skype,
16 responded,

17 I don't like it, but I think it will work. . . . It's just weird. She's
18 really just going to be there to establish the chain of custody, so she's
19 not—I mean, she's important, obviously, for the State, but she's not too
20 important. I don't really have a problem with Skyping it, as long as

1 there's no technical issues.

2 If there's technical difficulties, then they're not going to be able
3 to establish the chain of custody. Then it's game over.

4 At another pretrial hearing in the following week, the court asked if there were "any
5 other matters" that needed to be addressed before trial. In response, defense counsel
6 expressed hesitation at the use of Skype testimony, stating,

7 We are going to do the research on this. I don't think we have enough
8 research on the Skype issue[,] . . . and we have rethought our position on
9 that, and we're thinking it's going to cause a confrontation problem.

10 The prosecutor replied that the State had not sought an enforceable subpoena for the
11 witness in reliance on defense counsel's statement a week earlier that Skype would
12 "work." The district court judge took the position that Defendant had waived any
13 objection to the use of two-way video by defense counsel's initial informal
14 acquiescence.

15 {6} At trial seven days later, the State called the absent forensic analyst to testify
16 via Skype. During her testimony, a computer image of the forensic analyst faced the
17 jury, but she was able to see only an image of the attorney questioning her and could
18 not see Defendant, the jury, or the district court judge at any time. A second APD
19 forensic scientist analyst did testify in person for the State. She had reviewed and
20 interpreted the measurements performed by the forensic analyst who testified by

1 Skype but had not performed any of the DNA measurements herself.

2 {7} The jury found Defendant guilty of first-degree murder and first-degree
3 kidnapping. The district court imposed consecutive sentences of life imprisonment
4 for the murder and eighteen years for the kidnapping. Defendant moved for a new
5 trial based on additional DNA evidence developed after trial that, according to
6 Defendant's argument, suggested that one or more other individuals could have had
7 contact with Ashford or with the murder weapon.

8 {8} At the hearing on that motion, before a successor district court judge,
9 Defendant also raised the issue of social media posts made by the original district
10 court judge during the pendency of the trial. The posts, made on a Facebook page
11 used for the unsuccessful election campaign of the original district court judge,
12 discussed Defendant's case. During trial, the district court judge had posted, "I am on
13 the third day of presiding over my 'first' first-degree murder trial as a judge." After
14 trial, but before sentencing, the district court judge posted, "In the trial I presided
15 over, the jury returned guilty verdicts for first-degree murder and kidnapping just
16 after lunch. Justice was served. Thank you for your prayers." The district court denied
17 the motion for a new trial, and Defendant appealed his convictions directly to this
18 Court pursuant to the New Mexico Constitution. *See* art. VI, § 2 ("Appeals from a

1 judgment of the district court imposing a sentence of death or life imprisonment shall
2 be taken directly to the supreme court.”).

3 **II. DISCUSSION**

4 **A. Defendant’s Right to a Speedy Trial Was Not Violated**

5 {9} We first address Defendant’s argument that his twenty-six months of pretrial
6 custody violated his constitutional right to a speedy trial. *See* U.S. Const. amend. VI
7 (guaranteeing a speedy trial “[i]n all criminal prosecutions”); N.M. Const. art. II, §
8 14 (same). The Due Process Clause of the Fourteenth Amendment applies the Sixth
9 Amendment speedy trial right to state prosecutions. *Klopper v. North Carolina*, 386
10 U.S. 213, 222-23 (1967). Because Defendant makes no claim that his rights under the
11 New Mexico Constitution should be interpreted more broadly than those guaranteed
12 by the Fourteenth Amendment of the United States Constitution, “we base our
13 discussion of this issue on the constitutional requirements established under federal
14 law.” *State v. Coffin*, 1999-NMSC-038, ¶ 54 n.2, 128 N.M. 192, 991 P.2d 477.

15 {10} Pretrial delay may trigger a speedy trial inquiry but is not alone determinative
16 of a constitutional violation. *State v. Samora*, 2013-NMSC-038, ¶ 24, 307 P.3d 328.
17 Instead, in accordance with the federal constitutional guidelines established by the
18 United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972), we must

1 review the individual circumstances of the case, including the conduct of both
2 prosecution and defense, and the actual harm that a defendant may have suffered as
3 a result of pretrial delay. *State v. Garza*, 2009-NMSC-038, ¶ 13, 146 N.M. 499, 212
4 P.3d 387. Factors in this analysis are (1) the length of the delay, (2) the reasons for
5 the delay, (3) the defendant’s assertion of his right, and (4) the actual prejudice to the
6 defendant incurred from the delay. *Barker*, 407 U.S. at 530. “Each of these factors is
7 weighed either in favor of or against the State or the defendant, and then balanced to
8 determine if a defendant’s right to a speedy trial was violated.” *State v. Spearman*,
9 2012-NMSC-023, ¶ 17, 283 P.3d 272. While we give deference to the factual findings
10 of a trial court in performing this analysis, we review the application of the factors de
11 novo. *Id.* ¶ 19.

12 {11} The district court found that this was a complex case due to the required DNA
13 analysis and the average time required to process a homicide case in the jurisdiction,
14 and the parties do not dispute that finding. Because a “trial court [is] familiar with the
15 factual circumstances, the contested issues and available evidence, the local judicial
16 machinery, and reasonable expectations for the discharge of law enforcement and
17 prosecutorial responsibilities,” we defer to the district court’s finding on the question
18 of complexity when that “finding[] . . . [is] supported by substantial evidence.” *State*

1 v. *Manzanares*, 1996-NMSC-028, ¶ 9, 121 N.M. 798, 918 P.2d 714.

2 {12} The delay in this case was sufficient to trigger a speedy trial inquiry, *see Garza*,
3 2009-NMSC-038, ¶¶ 47-48 (stating that a delay of over eighteen months is sufficient
4 to trigger an inquiry in a complex case), but it was not sufficiently beyond the
5 guideline that may trigger further inquiry that it would weigh heavily against
6 continuation of the prosecution. *See id.* ¶¶ 23-24 (stating that “the greater the delay
7 the more heavily it will potentially weigh against the State,” and concluding that a
8 ten-month delay in a simple case “scarcely crosse[d] the bare minimum [of nine
9 months] needed to trigger judicial examination” and was not so extraordinary that it
10 would weigh heavily (internal quotation marks and citation omitted)); *State v.*
11 *Montoya*, 2011-NMCA-074, ¶ 17, 150 N.M. 415, 259 P.3d 820 (stating that a delay
12 of six months beyond the presumptive period weighed only slightly against the State).
13 Much of the delay here was administrative, due to a vacancy on the bench and due to
14 the unavailability to the defense of the forensic analyst for pretrial interviews.
15 Although this type of delay is characterized as negligent and weighs against the State,
16 it does not weigh heavily where, as here, there is no evidence of bad-faith intent to
17 cause delay. *Garza*, 2009-NMSC-038, ¶¶ 25-26.

18 {13} Defendant asserted his right to a speedy trial when his counsel filed an entry

1 of appearance one month after his arrest and then again twenty-one months later in
2 a motion to dismiss. We assess the timing and manner of Defendant’s assertions and
3 give weight to the frequency and force of his objections. *Id.* ¶ 32. Defendant here
4 initially asserted his speedy trial right in a pro forma manner but made no focused
5 assertion until almost two years had passed. This history weighs only slightly in his
6 favor. *See id.* ¶ 34 (weighing a speedy trial demand slightly in favor of a defendant
7 who asserted the right once, and not vigorously, before filing a motion to dismiss);
8 *State v. Urban*, 2004-NMSC-007, ¶ 16, 135 N.M. 279, 87 P.3d 1061 (stating that pro
9 forma pretrial motions filed upon counsel’s entry of appearance are generally
10 afforded relatively little weight in the analysis of a claimed violation of the right to
11 a speedy trial).

12 {14} Concerning the fourth *Barker* factor, “generally a defendant must show
13 particularized prejudice of the kind against which the speedy trial right is intended
14 to protect.” *Garza*, 2009-NMSC-038, ¶ 39. The first three *Barker* factors all weigh
15 slightly in Defendant’s favor, but “only where the length of delay and the reasons for
16 the delay weigh heavily in [a] defendant’s favor and [the] defendant has asserted his
17 right and not acquiesced to the delay [does] the defendant need not show
18 [particularized] prejudice in order to prevail on a speedy trial claim.” *Samora*, 2013-

1 NMSC-038, ¶ 27 (fourth alteration in original) (internal quotation marks and citation
2 omitted). In analyzing prejudice, we consider a defendant’s interests in (1) preventing
3 oppressive pretrial incarceration, (2) minimizing anxiety and concern, and (3) limiting
4 the possibility that the defense will be impaired. *Garza*, 2009-NMSC-038, ¶ 35. “The
5 burden of showing all types of prejudice lies with the individual claiming the
6 violation[,] and the mere ‘possibility of prejudice is not sufficient to support [the]
7 position that . . . speedy trial rights [are] violated.’” *Id.* (second and third alterations
8 and omission in original) (quoting *United States v. Loud Hawk*, 474 U.S. 302, 315
9 (1986)).

10 {15} Defendant argued in the district court that pretrial incarceration had caused him
11 to suffer from depression and to lose his ability to work and survive on the streets,
12 had diminished his social skills so that he might not be able to assist in his own
13 defense, and might cause witness memories to fade before trial. Because the effects
14 of pretrial incarceration are experienced by every jailed defendant awaiting trial, we
15 weigh this factor in the defendant’s favor only where the pretrial incarceration or the
16 anxiety suffered is “undue.” *Id.* ¶ 35; *see* Black’s Law Dictionary 1759 (10th ed.
17 2014) (“undue” is “[e]xcessive or unwarranted”).

18 {16} On appeal, Defendant makes no argument as to why his anxiety was beyond

1 that generally suffered by incarcerated defendants, nor does he point to any evidence
2 indicating that he was unable to assist in his own defense in any way, that any
3 witnesses were unable to remember any information needed for his defense, or that
4 he was impaired in his defense in any other demonstrable manner as a result of the
5 time that elapsed before he was brought to trial. “[W]ithout a particularized showing
6 of prejudice, we will not speculate as to the impact of pretrial incarceration on a
7 defendant or the degree of anxiety a defendant suffers.” *Garza*, 2009-NMSC-038, ¶
8 35. Because the other factors do not weigh heavily in his favor, and because
9 Defendant has failed to demonstrate any particularized prejudice, we conclude that
10 Defendant’s speedy trial claim does not call for reversal of his convictions.

11 **B. The Skype Testimony Violated the Confrontation Clause**

12 {17} The Confrontation Clause of the Sixth Amendment to the United States
13 Constitution, like its counterpart in the New Mexico Constitution, provides, “In all
14 criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the
15 witnesses against him.” *See* U.S. Const. amend. VI; N.M. Const. art. II, § 14. Under
16 this Court’s interstitial mode of constitutional analysis, we first consider whether the
17 United States Constitution provides Defendant relief before determining whether it
18 is necessary to address a counterpart protection under the New Mexico Constitution.

1 See *State v. Lopez*, 2013-NMSC-047, ¶ 8, 314 P.3d 236 (noting that where an asserted
2 right is protected by the United States Constitution, there is no need to reach the
3 counterpart State constitutional claim). “[Q]uestions of admissibility under the
4 Confrontation Clause are questions of law, which we review de novo.” *State v.*
5 *Montoya*, 2014-NMSC-032, ¶ 16, 333 P.3d 935 (internal quotation marks and citation
6 omitted).

7 **1. Defendant did not knowingly and voluntarily waive his right to object to**
8 **violation of his right to confrontation**

9 {18} As an initial matter, the State argues that Defendant waived his right to raise
10 the issue of violation of his confrontation rights. A fundamental right, even a
11 constitutional right, may be waived. *State v. Padilla*, 2002-NMSC-016, ¶ 12, 132
12 N.M. 247, 46 P.3d 1247. “Waiver is the intentional relinquishment or abandonment
13 of a known right or privilege.” *State v. Zamarripa*, 2009-NMSC-001, ¶ 38, 145 N.M.
14 402, 199 P.3d 846 (internal quotation marks and citation omitted). But “[t]here is a
15 presumption against the waiver of constitutional rights.” *Id.* To be valid, waivers
16 “must be voluntary[,] . . . knowing, [and] intelligent acts done with sufficient
17 awareness of the relevant circumstances and likely consequences.” *Padilla*, 2002-
18 NMSC-016, ¶ 18 (internal quotation marks and citation omitted). This Court reviews
19 de novo whether a waiver was knowing and voluntary, considering the facts and

1 circumstances of the case. *Id.*

2 {19} The district court judge apparently accepted that Defendant had waived his
3 right to object to violation of his confrontation rights when defense counsel initially
4 acquiesced to the admission of two-way video testimony, seemingly based on
5 counsel’s stated belief that the witness would only establish the chain of custody for
6 the DNA evidence. A week later and just one week before trial, defense counsel had
7 more thoroughly considered the issue and asserted that the video testimony would
8 violate Defendant’s right to confrontation. The district court judge refused a
9 continuance and advised defense counsel to “note [his] objections on confrontation
10 grounds.” Later, the district court judge stated that he believed the right to object had
11 been waived, but at no time did either the district court or defense counsel discuss any
12 permanent waiver of confrontation rights with Defendant directly.

13 {20} “The duty to protect fundamental rights ‘imposes the serious and weighty
14 responsibility upon the trial judge of determining whether there is an intelligent and
15 competent waiver by the accused.’” *Id.* ¶ 19 (quoting *Johnson v. Zerbst*, 304 U.S.
16 458, 465 (1938)). Although no particular form is required, it is the court’s obligation
17 to make sure that a waiver is valid and predicated upon a meaningful decision by the
18 defendant. *Padilla*, 2002-NMSC-016, ¶ 19. “[T]here must be a sufficient colloquy to

1 satisfy the trial court’s responsibilities; a knowing and voluntary waiver cannot be
2 inferred from a silent record.” *Id.* With no discussion in the record between the
3 district court and Defendant concerning his confrontation rights, there is no evidence
4 that Defendant understood those rights or that he voluntarily agreed to waive them,
5 and we must conclude that no intentional waiver occurred.

6 {21} The State also argues that defense counsel should be deemed to have
7 permanently waived his client’s confrontation rights because counsel’s “prior waiver
8 of [the out-of-state witness’s] physical presence at trial caused her unavailability.”
9 But the State points to nothing in the record indicating that the one-week period
10 between defense counsel’s initial acquiescence and his reconsideration and objection
11 had anything to do with the State’s failure to invoke the complex and time-consuming
12 procedures in the courts of two states required by the Uniform Act to Secure the
13 Attendance of Witnesses from Without a State in Criminal Proceedings, NMSA 1978,
14 §§ 31-8-1 to -6 (1937, as amended through 1953) (Uniform Act). The State
15 apparently never initiated any procedures under the Uniform Act, either before
16 defense counsel’s initial acquiescence to the Skype testimony or after counsel’s
17 reversal of that position one week later. The State has made no showing that it could
18 have secured the in-person attendance of the witness had counsel objected instantly

1 when the State first raised the unavailability problem just two weeks before trial, and
2 the State did not argue how the one-week period made a difference in its ability to do
3 so. We therefore find no factual support for the State’s waiver by estoppel theory.

4 **2. Defendant’s objection to the violation of his confrontation rights was**
5 **preserved because the district court was alerted to the error**

6 {22} Even in the absence of a formal waiver of rights, our law still requires that a
7 defendant preserve a question for appellate review by fairly invoking a ruling or
8 decision by a trial court. Rule 12-216(A) NMRA. “A party must assert its objection
9 and the basis thereof with ‘sufficient specificity to alert the mind of the trial court to
10 the claimed error.’” *Zamarripa*, 2009-NMSC-001, ¶ 33 (citation omitted). We
11 therefore address the State’s argument that defense counsel failed to preserve the
12 confrontation issue by not making a specific objection to the Skype testimony during
13 trial.

14 {23} The record reflects that the district court was alerted to the confrontation issue
15 in the hearing a week before the trial began when defense counsel specifically
16 advised the court on the record that he had been rethinking the Skype testimony issue
17 raised the previous week and stated, “[W]e’re thinking it’s going to cause a
18 confrontation problem.” The court clearly addressed the issue when it responded to
19 the confrontation claim by ruling that defense counsel had waived his client’s right

1 to object and telling counsel, “You can note your objections on confrontation
2 grounds.” The issue was therefore sufficiently brought to the attention of the court
3 and preserved for appellate review, whether or not counsel articulated a repeated
4 objection during the trial. *See Samora*, 2013-NMSC-038, ¶ 14 (“[W]e review an issue
5 for reversible error only when the defendant has properly raised the issue in the
6 district court. . . . ‘Unless the trial court’s attention is called in some manner to the
7 fact that it is committing error, and given an opportunity to correct it, cases will not
8 be reversed because of errors which could and would have been corrected in the trial
9 court, if they had been called to its attention.’” (citation omitted)); *State v. Mason*,
10 1968-NMCA-072, ¶ 12, 79 N.M. 663, 448 P.2d 175 (holding that a defendant need
11 not renew an objection at trial when the issue is fully preserved prior to trial).

12 **3. The presentation of Skype testimony violated Defendant’s confrontation**
13 **rights**

14 {24} The central purpose of the Confrontation Clause, to ensure the reliability of
15 evidence, is served by “[t]he combined effect of . . . physical presence, oath,
16 cross-examination, and observation of demeanor by the trier of fact.” *Maryland v.*
17 *Craig*, 497 U.S. 836, 846 (1990). In *Craig*, the United States Supreme Court
18 considered whether the Confrontation Clause allows a child victim of abuse to testify
19 at trial over one-way closed circuit television while physically located in a room

1 separate from the judge, the jury, and the defendant who nevertheless hear and see the
2 testimony. *Id.* at 840-41, 850 (holding that “the face-to-face confrontation
3 requirement is not absolute . . . , [but neither is it] easily . . . dispensed with. . . [A]
4 defendant’s right to confront accusatory witnesses may be satisfied absent a physical,
5 face-to-face confrontation at trial only where denial of such confrontation is
6 necessary to further an important public policy and only where the reliability of the
7 testimony is otherwise assured”). *Craig* emphasized that the video testimony was
8 given under oath, was subject to cross-examination, and allowed the fact-finder to
9 observe the demeanor of the witness. *Id.* at 851. In declining to hold that the child’s
10 testimony was given as an out-of-court statement, the Court noted that the
11 “assurances of reliability and adversariness [were] far greater than those required for
12 admission of hearsay testimony under the Confrontation Clause.” *Id.*

13 {25} Then, in *Crawford v. Washington*, 541 U.S. 36, 61-65 (2004), the United States
14 Supreme Court abandoned its previous reliability-focused approach and “adopted a
15 fundamentally new interpretation of the confrontation right, holding that [t]estimonial
16 statements of witnesses absent from trial [can be] admitted only where the declarant
17 is unavailable, and only where the defendant has had a prior opportunity to
18 cross-examine,” without regard to the reliability of particular substitutes for

1 confrontation. *Williams v. Illinois*, ___ U.S. ___, ___, 132 S. Ct. 2221, 2232 (2012)
2 (alterations in original) (internal quotation marks and citation omitted). *Crawford*
3 reaffirmed that “the Clause’s ultimate goal is to ensure reliability of evidence” but
4 relied on the history of the common-law right to confrontation to interpret the
5 Confrontation Clause as “a procedural rather than a substantive guarantee [that]
6 commands, not that evidence be reliable, but that reliability be assessed in a particular
7 manner: by testing in the crucible of cross-examination.” 541 U.S. at 61.

8 {26} *Crawford* may call into question the prior holding in *Craig* to the extent that
9 *Craig* relied on the reliability of the video testimony. But the face-to-face aspect of
10 confrontation was not at issue in *Crawford*, and *Crawford* did not overrule *Craig*. See
11 *United States v. Yates*, 438 F.3d 1307, 1314 n.4 (11th Cir. 2006) (stating that *Craig*
12 remains the proper test for the admissibility of live two-way video testimony under
13 the Confrontation Clause and declining to apply *Crawford*); *People v. Gonzales*, 281
14 P.3d 834, 863 (Cal. 2012) (rejecting the argument that *Craig* was no longer good law
15 after *Crawford*); *State v. Jackson*, 717 S.E.2d 35, 39-40 (N.C. Ct. App. 2011)
16 (acknowledging that part of *Craig*’s rationale seems inconsistent with *Crawford* but
17 explaining that they address distinct confrontation questions and agreeing with the
18 weight of authority that *Crawford* did not overrule *Craig*); *State v. Henriod*, 2006 UT

1 11, ¶ 16, 131 P.3d 232 (reasoning that *Crawford* did not implicitly overrule *Craig*
2 because *Crawford* did not mention video transmission of testimony given during trial,
3 which had previously been a subject of debate among the Justices and so was unlikely
4 to have been inadvertently overlooked). We conclude that *Craig* remains controlling
5 law when a witness does testify at trial but the defendant is nevertheless denied
6 physical face-to-face confrontation.

7 {27} Under *Craig*, the necessity of the substitute procedure to further an important
8 state interest is the critical inquiry. *See* 497 U.S. at 852. A trial court must hear
9 evidence and make a case-specific determination of necessity as it pertains to the
10 particular witness. *See id.* at 855. *Craig* dealt with one-way video transmission, and
11 we have not previously applied it to a live two-way video connection. *See State v.*
12 *Fairweather*, 1993-NMSC-065, ¶¶ 25-26, 34, 116 N.M. 456, 863 P.2d 1077 (holding,
13 pre-*Crawford*, that the admission of deposition testimony videotaped out of the
14 presence of the defendant, who sat at a remote monitor to see and hear the testimony
15 live, was consistent with *Craig* after the trial court made individualized findings of
16 necessity in furtherance of public policy). The United States Supreme Court has never
17 adopted a specific standard for two-way video testimony, but we doubt it would find
18 any virtual testimony an adequate substitute for face-to-face confrontation without

1 at least the showing of necessity that *Craig* requires. The United States Supreme
2 Court rejected a proposed amendment to Rule 26(b) of the Federal Rules of Criminal
3 Procedure that would have allowed unavailable witnesses to testify via two-way
4 video. *See Order of the Supreme Court*, 207 F.R.D. 89 (2002). In a filing related to
5 the rejection, Justice Antonin Scalia wrote,

6 I cannot comprehend how one-way transmission . . . becomes
7 transformed into full-fledged confrontation when reciprocal
8 transmission is added. As we made clear in *Craig*, [497 U.S.] at 846-47,
9 a purpose of the Confrontation Clause is ordinarily to compel accusers
10 to make their accusations *in the defendant's presence*—which is not
11 equivalent to making them in a room that contains a television set
12 beaming electrons that portray the defendant's image. Virtual
13 confrontation might be sufficient to protect virtual constitutional rights;
14 I doubt whether it is sufficient to protect real ones.

15 *Id.* at 94; *see also* Nancy Gertner, *Videoconferencing: Learning Through Screens*, 12
16 Wm. & Mary Bill Rts. J. 769, 786 (2004) (providing perspectives of an experienced
17 federal trial judge and cautioning that “in live testimony, face-to-face transmission
18 plainly increases the information available to the fact-finder”).

19 {28} Our Court of Appeals has consistently applied *Craig* when analyzing the
20 admissibility of live two-way video testimony under the Confrontation Clause. *See*
21 *Schwartz*, 2014-NMCA-066, ¶¶ 6, 14 (determining error under the Confrontation
22 Clause in the admission of two-way video testimony where findings of necessity in

1 the service of public policy were insufficient); *State v. Smith*, 2013-NMCA-081, ¶¶
2 8, 12, 308 P.3d 135 (same); *State v. Chung*, 2012-NMCA-049, ¶¶ 11-12, 290 P.3d
3 269 (same). The vast majority of courts from other jurisdictions, both federal and
4 state, are in accord. *See, e.g., United States v. Abu Ali*, 528 F.3d 210, 240-41 (4th Cir.
5 2008) (applying *Craig* to an analysis of the admissibility of two-way video testimony
6 under the Confrontation Clause); *Yates*, 438 F.3d at 1313-16 (applying *Craig* to test
7 the admissibility at trial of two-way video and listing cases from the Sixth, Eighth,
8 Ninth, and Tenth Circuits that have done the same); *State v. Rogerson*, 855 N.W.2d
9 495, 503-04 (Iowa 2014) (acknowledging that live two-way video testimony is
10 different than the one-way connection addressed in *Craig* but relying on cases from
11 numerous state and federal jurisdictions to conclude that *Craig* is still applicable);
12 *State v. Stock*, 2011 MT 131, ¶¶ 25, 30, 361 Mont. 1, 256 P.3d 899 (applying *Craig*
13 to determine the admissibility of two-way video testimony after holding that
14 *Crawford* did not overrule *Craig*). *But see United States v. Gigante*, 166 F.3d 75, 81
15 (2d Cir. 1999) (declining to adopt *Craig*'s requirement of necessity for two-way video
16 testimony but nevertheless requiring a finding of exceptional circumstances where the
17 use of two-way video testimony will further the interests of justice).

18 {29} We adopt the *Craig* standard here in our analysis of the admissibility of two-

1 way video testimony. A criminal defendant may not be denied a physical, face-to-face
2 confrontation with a witness who testifies at trial unless the court has made a factual
3 finding of necessity to further an important public policy and has ensured the
4 presence of other confrontation elements concerning the witness testimony including
5 administration of the oath, the opportunity for cross-examination, and the allowance
6 for observation of witness demeanor by the trier of fact.

7 {30} Nothing in the record of this case demonstrates that the use of two-way video
8 was necessary to further an important public policy as required by *Craig*. The district
9 court did not conduct an evidentiary hearing or enter any findings on the issue.
10 Because the required findings were not made, we hold that the admission of remote
11 testimony violated Defendant's right to confrontation. Inconvenience to the witness
12 is not sufficient reason to dispense with this constitutional right. *Schwartz*, 2014-
13 NMCA-066, ¶ 7.

14 {31} The State does not argue that the *Craig* standard was met but instead asserts
15 that there was no confrontation violation because the forensic analyst was unavailable
16 to present live testimony and Defendant was able to cross-examine her through the
17 audiovisual Skype connection. *See Crawford*, 541 U.S. at 53-54 (allowing testimonial
18 statements to be admitted under the Confrontation Clause when the witness is

1 unavailable and the defendant has had a prior opportunity to cross-examine).
2 Assuming for the sake of argument that *Crawford* can be applied to analyze the
3 admissibility of testimony given at trial over live video as if the statements were made
4 out of court, the requirements of unavailability and cross-examination must still be
5 met.

6 {32} An out-of-state witness is not generally considered unavailable for the purpose
7 of the admission of out-of-court statements unless the proponent of that witness's
8 testimony has complied with the Uniform Act. *See State v. Martinez*, 1984-NMCA-
9 106, ¶¶ 10-11, 102 N.M. 94, 691 P.2d 887 (holding, pre-*Crawford*, that although
10 “[o]ur prior cases have insisted on strict compliance with the Uniform Act before an
11 out-of-state witness may be declared unavailable,” a prosecutor’s untimely and
12 unsuccessful use of the Uniform Act was excusable when the witness had responded
13 to three prior subpoenas and the state reasonably expected him to respond to a fourth
14 in the same manner). After *Crawford*, the State must still comply with the Uniform
15 Act, and it failed to do so in this case despite knowing weeks in advance of trial that
16 the witness might not willingly attend. Accordingly, we conclude that the State has
17 failed to establish the legal unavailability of the witness, and we need not determine
18 whether cross-examination over Skype is sufficient to fulfill *Crawford*'s

1 requirements. Under current United States Supreme Court Confrontation Clause
2 jurisprudence, Defendant’s Sixth Amendment right to confrontation was violated by
3 the admission of the video testimony.

4 **4. The violation of Defendant’s confrontation rights was not harmless error**

5 {33} “Improperly admitted evidence is not grounds for a new trial unless the error
6 is determined to be harmful.” *State v. Tollardo*, 2012-NMSC-008, ¶ 25, 275 P.3d 110.

7 When an error is constitutional, it is harmless only if the challenger can prove there
8 is no reasonable possibility that the error affected the verdict. *Id.* ¶ 36. We must
9 reverse a conviction if the erroneously admitted evidence might have contributed to
10 it. *Id.* ¶ 40.

11 {34} The State argues that the admission of this two-way video testimony was
12 harmless error because another forensic analyst was present in court and properly
13 testified to her preparation of a report comparing the DNA profiles developed by the
14 absent forensic analyst. But the existence of other evidence to support the verdict
15 does not cure a constitutional error when there is a reasonable possibility that the
16 erroneously admitted evidence influenced the jury’s verdict. *See id.* ¶¶ 40, 43 (stating
17 that the existence of other evidence to support a conviction may be considered to
18 understand the role that erroneously admitted evidence played in the trial but may not

1 be the “focus of the harmless error analysis”). “The Court’s focus is not whether, in
2 a trial that occurred without the error, a guilty verdict would surely have been
3 rendered, but whether the guilty verdict actually rendered in *this* trial was surely
4 unattributable to the error.” *State v. Ortega*, 2014-NMSC-017, ¶ 20, 327 P.3d 1076
5 (internal quotation marks and citation omitted). The expert witness who testified via
6 Skype was the only APD forensic scientist analyst who had actually performed
7 measurements on the DNA samples in this case. Her involvement in the case was
8 significant, and she testified to the results of the measurements she performed. The
9 DNA profiles were offered as the sole evidence that implicated Defendant in this
10 crime. We conclude that there is no reasonable possibility the testimony of the absent
11 forensic analyst did not influence the verdict and accordingly that the error was not
12 harmless.

13 {35} Although an error may be prejudicial with respect to one conviction and
14 harmless with respect to another, *Tollardo*, 2012-NMSC-008, ¶ 44, we need not
15 separately assess the effect of the error on each conviction in this case because the
16 erroneously admitted DNA evidence was all that implicated Defendant in any crime.
17 We reverse both of Defendant’s convictions.

18 **C. Retrial Is Allowed Only If Sufficient Evidence Supported Defendant’s**
19 **Convictions**

1 {36} Although the violation of Defendant’s right to confrontation requires us to
2 reverse his convictions, we still must address the sufficiency of the evidence to
3 determine whether retrial would be barred on double jeopardy grounds. *State v.*
4 *Cabezuela*, 2011-NMSC-041, ¶ 47, 150 N.M. 654, 265 P.3d 705. On remand,
5 Defendant is entitled to an acquittal on a charge if the evidence presented at trial was
6 insufficient to support his conviction. *State v. Consaul*, 2014-NMSC-030, ¶ 41, 332
7 P.3d 850.

8 {37} In determining the sufficiency of the evidence, we review the evidence “in the
9 light most favorable to the State, resolving all conflicts and making all permissible
10 inferences in favor of the jury’s verdict.” *Id.* ¶ 42 (internal quotation marks and
11 citation omitted). Viewed in this manner, substantial evidence must exist that would
12 allow a rational trier of fact to find that each element of the crime has been
13 established beyond a reasonable doubt. *Id.*

14 **1. Sufficient evidence supports Defendant’s first-degree deliberate intent**
15 **murder conviction**

16 {38} To prove first-degree deliberate murder, the State was required to prove that
17 Defendant killed Ashford with the deliberate intention to take away her life. *See*
18 NMSA 1978, § 30-2-1(A)(1) (1994) (“Murder in the first degree is the killing of one

1 human being by another . . . by any kind of willful, deliberate and premeditated
2 killing.”); UJI 14-201 NMRA (“The word deliberate means arrived at or determined
3 upon as a result of careful thought and the weighing of the consideration for and
4 against the proposed course of action” and requires a “calculated judgment” to kill,
5 although it “may be arrived at in a short period of time.”). Defendant argues that the
6 jury verdict was inherently speculative because the DNA evidence did not adequately
7 prove that Defendant was the killer and because some hallmarks of deliberate intent,
8 such as motive or careful planning, were missing.

9 {39} There was sufficient evidence to allow a trier of fact to reasonably infer that it
10 was Defendant who killed Ashford. Physical evidence containing a full DNA profile
11 matching Defendant was found on Ashford’s body in semen on her thigh and under
12 the fingernails of her right hand, and also on the paver stone presumed to be the
13 murder weapon. The jury was informed that unidentified DNA was also present and
14 was alerted in closing arguments to consider the possibility that another person or
15 other people could have been involved.

16 {40} Additionally, the State presented substantial evidence at trial to raise a
17 reasonable inference of deliberate intent. This Court previously concluded there was
18 sufficient evidence for a rational jury to infer deliberate intent under factual

1 circumstances similar to those here based on evidence of a prolonged struggle and the
2 large number of the victim’s wounds. *See State v. Duran*, 2006-NMSC-035, ¶¶ 9, 11,
3 140 N.M. 94, 140 P.3d 515; *see also State v. Flores*, 2010-NMSC-002, ¶ 22, 147
4 N.M. 542, 226 P.3d 641 (concluding that there was sufficient evidence of deliberate
5 intent where the defendant stabbed the victim with a screwdriver “so many times that
6 it evidenced an effort at overkill”).

7 {41} Defendant concedes that a large number of wounds, such as those sustained by
8 Ashford, can indicate deliberation. The fact that the number of wounds could instead
9 indicate impulsivity, as Defendant argues, does not mean that the jury was required
10 to interpret them that way or, when combined with the evidence of dragging the
11 incapacitated Ashford followed by further assault, that deliberation and impulsivity
12 are equally possible so as to have required the jury to speculate. *See State v. Vigil*,
13 2010-NMSC-003, ¶ 20, 147 N.M. 537, 226 P.3d 636 (reversing a conviction because
14 the “chain of inferences” supporting the verdict amounted to no more than “guess or
15 conjecture” and stating that the jury may not speculate to reach the conclusions
16 necessary to the verdict). There was sufficient evidence for a rational trier of fact to
17 conclude that Defendant was the killer and that the killing was deliberate.

18 **2. There was insufficient evidence to support Defendant’s kidnapping**
19 **conviction**

1 {42} To support a kidnapping conviction under New Mexico law, the State must
2 prove an “unlawful taking, restraining, transporting or confining of a person, by force,
3 intimidation or deception, with intent . . . to inflict death, physical injury or a sexual
4 offense.” NMSA 1978, § 30-4-1(A)(4) (2003); *see also* UJI 14-403 NMRA. The State
5 based its case for kidnapping on evidence showing that Ashford was initially
6 assaulted in the small parking lot, then dragged to the edge of the lot behind a trash
7 can where she was struck again at least once and where she was later found. Blood
8 was found in two places within the parking lot, and there were drag marks showing
9 her body had been moved. The State also relied on this evidence to support the charge
10 of deliberate murder and informed the jury in closing arguments that it should
11 consider the evidence in establishing both charges.

12 {43} New Mexico’s kidnapping statute is broadly worded and often encompasses
13 conduct that occurs during the commission of another crime. *See State v. Trujillo*,
14 2012-NMCA-112, ¶¶ 23-29, 289 P.3d 238 (discussing the history of kidnapping
15 statutes and the types of conduct intended for punishment). We give effect to the
16 plain meaning of a statute only when that will “not render the statute’s application
17 absurd, unreasonable, or unjust.” *State v. Rowell*, 1995-NMSC-079, ¶ 8, 121 N.M.
18 111, 908 P.2d 1379 (internal quotation marks and citation omitted). “[V]irtually every

1 assault, sexual assault, robbery, and murder involves a slight degree of confinement
2 or movement.” *Trujillo*, 2012-NMCA-112, ¶ 23 (internal quotation marks and citation
3 omitted). To allow a kidnapping conviction to be based upon this incidental conduct
4 can give rise to serious injustice by increasing punishment so as to render it
5 disproportionate to culpability. *See id.* ¶ 24. The Legislature did not intend to punish
6 as kidnapping conduct that is “merely incidental to another crime.” *Id.* ¶ 39. Where
7 no evidence establishes a kidnapping separate from that of acts predictably involved
8 in another crime, the conviction cannot be sustained. *See id.* ¶¶ 39, 41.

9 {44} Any restraint here occurred during the commission of one continuous attack
10 that ended in murder. This is in contrast to our cases upholding convictions for both
11 kidnapping and murder, where separate evidence proved each crime. *See, e.g., State*
12 *v. Saiz*, 2008-NMSC-048, ¶ 33, 144 N.M. 663, 191 P.3d 521 (upholding convictions
13 for both murder and kidnapping where the initial motive to restrain the victim was to
14 commit a sexual assault, and the murder took place after the assault), *overruled on*
15 *other grounds by State v. Belanger*, 2009-NMSC-025, ¶ 36 & n.1, 146 N.M. 357, 210
16 P.3d 783; *State v. Jacobs*, 2000-NMSC-026, ¶¶ 24-25, 129 N.M. 448, 10 P.3d 127
17 (upholding convictions for both murder and kidnapping where the evidence showed
18 either a kidnapping by deception prior to the murder, based on the defendant’s false

1 pretenses causing the teenage victim to associate with him, or a kidnapping by
2 separate restraint for the purpose of sexual assault or during the victim's hundred-
3 yard walk to her death). The evidence here indicates that the events all took place
4 along one side of a small parking lot. The drag marks appear to extend less than ten
5 feet, within the span of one parking space. The State asserts that this act of moving
6 Ashford was distinct from her murder but fails to describe any separate restraint that
7 would result in a kidnapping prior to the murder. The movement across a short
8 distance within one small isolated parking lot did not constitute a separate crime from
9 the murder that was already in progress. We conclude that on remand, Defendant may
10 not be retried for kidnapping because insufficient evidence supported his kidnapping
11 conviction.

12 **D. Judges Must Adhere to the Code of Judicial Conduct and Avoid Any**
13 **Appearance of Impropriety When Using Electronic Social Media**

14 {45} Defendant argues that social media postings by the district court judge
15 demonstrate judicial bias. During the pendency of the trial, the district court judge
16 posted to his election campaign Facebook page discussions of his role in the case and
17 his opinion of its outcome. Although we need not decide this issue because we
18 reverse on confrontation grounds, we take this opportunity to discuss our concerns
19 over the use of social media by members of our judiciary.

1 {46} “An independent, fair, and impartial judiciary is indispensable to our system
2 of justice.” Rule 21-001(A) NMRA. Accordingly, judges must adhere to the Code of
3 Judicial Conduct, Rules 21-100 to -406 NMRA, at all times. A judge “should expect
4 to be the subject of public scrutiny that might be viewed as burdensome if applied to
5 other citizens.” Rule 21-102 n.2. Judges must avoid not only actual impropriety but
6 also its appearance, and judges must “act at all times in a manner that promotes public
7 confidence in the independence, integrity, and impartiality of the judiciary.” Rule 21-
8 102.

9 {47} These limitations apply with equal force to virtual actions and online comments
10 and must be kept in mind if and when a judge decides to participate in electronic
11 social media. *See* Rule 21-001(B) (“Judges and judicial candidates are also
12 encouraged to pay extra attention to issues surrounding emerging technology,
13 including those regarding social media, and are urged to exercise extreme caution in
14 its use so as not to violate the Code.”); New Mexico Supreme Court Advisory
15 Committee on the Code of Judicial Conduct, Advisory Opinion Concerning Social
16 Media, ¶ 4 (Feb. 15, 2016) (“[T]he Code . . . addresses conduct pertaining to social
17 media use in the context of its broader rules. . . . Simply put, a judge may not
18 communicate on a social media site in a manner that the judge could not otherwise

1 communicate.”).

2 {48} Social media use has led to numerous allegations of misconduct by participants
3 in our legal system. *See, e.g., United States v. Bowen*, 969 F. Supp. 2d 546, 625-27
4 (E.D. La. 2013) (granting the defendants’ motion for a new trial on the basis of
5 prosecutorial misconduct in posting online comments under anonymous pseudonyms
6 that portrayed the defendants in a negative light and created “an online ‘carnival
7 atmosphere’ . . . wherein justice was distorted and perverted in ways that are directly
8 and strictly prohibited”); *Chace v. Loisel*, 170 So. 3d 802, 804 (Fla. Dist. Ct. App.
9 2014) (quashing an order denying a motion to disqualify a trial judge because the
10 party’s failure to respond to the judge’s Facebook “friend” request created a
11 reasonable fear of offending the judge and not receiving a fair and impartial trial);
12 *State v. Smith*, 418 S.W.3d 38, 42, 48-49 (Tenn. 2013) (requiring an evidentiary
13 hearing to determine whether a new trial was necessary on the basis of juror
14 misconduct after a juror sent Facebook messages to one of the State’s witnesses
15 during trial).

16 {49} While we make no bright-line ban prohibiting judicial use of social media, we
17 caution that “friending,” online postings, and other activity can easily be
18 misconstrued and create an appearance of impropriety. Online comments are public

1 comments, and a connection via an online social network is a visible relationship,
2 regardless of the strength of the personal connection. *See Domville v. State*, 103 So.
3 3d 184, 185-86 (Fla. Dist. Ct. App. 2012) (quashing an order denying disqualification
4 of a trial judge based on a Facebook friendship with the prosecutor because the public
5 social networking relationship was sufficient to create in a reasonably prudent person
6 a well-founded fear of not receiving a fair and impartial trial); *but see Youkers v.*
7 *State*, 400 S.W.3d 200, 204-07, 213 (Tex. App. 2013) (affirming the denial of a
8 motion for a new trial based on a Facebook friend connection between the trial judge
9 and the victim's father because no evidence showed that the relationship would
10 influence the judge and lead to bias or impartiality in the case and because the judge
11 had placed all actual Facebook communications in the record and cautioned the father
12 not to communicate with him further regarding the case).

13 {50} We recognize the utility of an online presence in judicial election campaigns,
14 but we agree with the American Bar Association in recommending that these
15 campaign sites be established and maintained by campaign committees, not by the
16 judicial candidate personally. *See ABA Standing Comm. on Ethics & Prof'l*
17 *Responsibility*, Formal Op. 462 (2013) (discussing *Judge's Use of Electronic Social*
18 *Networking Media*). We clarify that a judge who is a candidate should post no

1 personal messages on the pages of these campaign sites other than a statement
2 regarding qualifications, should allow no posting of public comments, and should
3 engage in no dialogue, especially regarding any pending matters that could either be
4 interpreted as ex parte communications or give the appearance of impropriety.

5 {51} Judges should make use of privacy settings to protect their online presence but
6 should also consider any statement posted online to be a public statement and take
7 care to limit such actions accordingly. *See State v. Madden*, No. M2012-02473-CCA-
8 R3-CD, 2014 WL 931031, *8 (nonprecedential) (Tenn. Crim. App. March 11, 2014,
9 appeal denied September 18, 2014) (“[J]udges will perhaps best be served by ignoring
10 any false sense of security created by so-called ‘privacy settings’ and understanding
11 that, in today’s world, posting information to Facebook is the very definition of
12 making it public.”). A judge’s online “friendships,” just like a judge’s real-life
13 friendships, must be treated with a great deal of care. The use of electronic social
14 media also may present some unfamiliar concerns, such as the inability to retrieve or
15 truly delete any message once posted, the public perception that “friendships” exist
16 between people who are not actually acquainted, and the ease with which
17 communications may be reproduced and widely disseminated to those other than their
18 intended recipients. *See United States v. Fumo*, 655 F.3d 288, 305-06 (3d Cir. 2011)

1 (affirming the denial of a motion for a new trial because there was no evidence of
2 substantial prejudice to the defendant resulting from a juror’s Facebook and Twitter
3 comments during trial that were followed and rebroadcast by the media without the
4 juror’s knowledge). A judge must understand the requirements of the Code of Judicial
5 Conduct and how the Code may be implicated in the technological characteristics of
6 social media in order to participate responsibly in social networking. Members of the
7 judiciary must at all times remain conscious of their ethical obligations.

8 **III. CONCLUSION**

9 {52} Because Defendant’s confrontation rights were violated, his convictions must
10 be reversed. The evidence was sufficient to support a conviction of first-degree
11 murder but insufficient to support a conviction of first-degree kidnapping. We
12 therefore remand to the district court for entry of a judgment of acquittal on the
13 kidnapping charge and retrial on the charge of first-degree murder.

14 {53} **IT IS SO ORDERED.**

15
16

CHARLES W. DANIELS, Chief Justice

1 **WE CONCUR:**

2

3 **PETRA JIMENEZ MAES, Justice**

4

5 **EDWARD L. CHÁVEZ, Justice**

6

7 **BARBARA J. VIGIL, Justice**

8 **JUDITH K. NAKAMURA, Justice, not participating**