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

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,

4 v.

NO. 33,723

5 **JAMES SIMPSON,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF TAOS COUNTY**

8 **Jeff Foster McElroy, District Judge**

9 Hector H. Balderas, Attorney General

10 Santa Fe, NM

11 Adam Greenwood, Assistant Attorney General

12 Albuquerque, NM

13 for Appellee

14 Jorge A. Alvarado, Chief Public Defender

15 Tania Shahani, Assistant Appellate Defender

16 Santa Fe, NM

17 for Appellant

18 **MEMORANDUM OPINION**

19 **VANZI, Judge.**

1 {1} A grand jury indicted Defendant James Simpson for operating a motor vehicle
2 with a blood or breath alcohol concentration (BAC) of eight one-hundredths (.08) or
3 more, and intentionally damaging a police car owned by the Town of Taos, New
4 Mexico. Defendant was consequently charged with one count of driving while
5 intoxicated (DWI), contrary to NMSA 1978, Section 66-8-102(C)(1) (2010), and one
6 count of criminal damage to property (over \$1000), contrary to NMSA 1978, Section
7 30-15-1 (1963). Defendant moved to vacate the latter charge on the ground that it
8 “ar[ose] from the same single course of conduct addressed in” the DWI charge,
9 violating his right to be free from double jeopardy. (Internal quotation marks omitted.)
10 The district court denied that motion, and Defendant ultimately accepted a conditional
11 plea, reserving his right to file this appeal. We affirm.

12 **BACKGROUND**

13 {2} There was no trial below, and the record is mostly devoid of any factual
14 background, but a few details were elicited at the plea hearing. Had the case gone to
15 trial, Officer Austin Barnes of the Taos Police Department would have testified that
16 Defendant crashed into his patrol car after “fail[ing] to yield,” causing over \$1000 in
17 damages. Officer Victor Flores of the New Mexico State Police would have testified
18 that Defendant then submitted to a blood alcohol test and was determined to be
19 driving while intoxicated. The parties agreed in separate hearings that the evidence

1 was sufficient for a reasonable jury to convict Defendant of both DWI and criminal
2 damage to property.

3 {3} Prior to pleading guilty, Defendant cited several of our felony murder
4 precedents and argued to the district court that DWI was being used by the State as a
5 “predicate” to the charge of criminal damage to property. According to Defendant, the
6 State could not prove an element of criminal damage to property (the intent element)
7 without also proving DWI; one crime was thus subsumed by the other; and Defendant
8 was therefore facing two convictions for a single course of conduct. He now raises
9 those same contentions on appeal. Our review is de novo. *State v. Bernal*, 2006-
10 NMSC-050, ¶ 6, 140 N.M. 644, 146 P.3d 289.

11 **DISCUSSION**

12 {4} The constitution protects against both successive prosecutions and multiple
13 punishments for the same offense. *Swafford v. State*, 1991-NMSC-043, ¶ 6, 112 N.M.
14 3, 810 P.2d 1223. There are two types of multiple punishment cases: unit-of-
15 prosecution cases, in which an individual is convicted of multiple violations of the
16 same criminal statute, and double-description cases, in which a single act results in
17 multiple convictions under different statutes. *Id.* ¶¶ 8-9. Defendant’s argument
18 involving the separate crimes of DWI and criminal damage to property raises double-
19 description concerns.

1 {5} Our courts apply a two-part inquiry to double-description claims. *State v.*
2 *Gutierrez*, 2011-NMSC-024, ¶ 51, 150 N.M. 232, 258 P.3d 1024. First, we analyze
3 the factual question “whether the conduct underlying the offenses is unitary, i.e.,
4 whether the same conduct violates both statutes,” and if so, we consider the legal
5 question “whether the [L]egislature intended to create separately punishable offenses.”
6 *Id.* (internal quotation marks and citation omitted). “If it reasonably can be said that
7 the conduct is unitary, then [we] must move to the second part of the inquiry.
8 Otherwise, if the conduct is separate and distinct, [the] inquiry is at an end.” *Swafford*,
9 1991-NMSC-043, ¶ 28.

10 **Unitary Conduct**

11 {6} Defendant argues that the conduct of DWI and criminal damage to property in
12 this case was both factually unitary and “unitary by definition.” The latter argument
13 relies on a narrow doctrine—sometimes referred to as “unitary conduct as a matter of
14 law”—that arose in the context of felony murder, where a jury necessarily resolves the
15 fact-based unitary conduct question when it decides that a killing occurred *during the*
16 *commission of the underlying felony*. See *State v. Frazier*, 2007-NMSC-032, ¶¶ 21-23,
17 142 N.M. 120, 164 P.3d 1; *State v. Sotelo*, 2013-NMCA-028, ¶ 19, 296 P.3d 1232.
18 However, despite making the argument as a matter of law, Defendant somewhat
19 paradoxically contends that the conduct is unitary by definition “under the facts of his

1 case” because the State could not prove the requisite intent for criminal damage to
2 property without proving DWI.

3 {7} We note at the outset that there is an inherent difficulty in resolving
4 Defendant’s arguments without the benefit of a trial below. In conducting our unitary
5 conduct analysis, we are tasked with considering such factual questions “as whether
6 the acts were close in time and space, their similarity, the sequence in which they
7 occurred, whether other events intervened, and the defendant’s goals for and mental
8 state during each act.” *State v. Melendrez*, 2014-NMCA-062, ¶ 8, 326 P.3d 1126
9 (internal quotation marks and citation omitted), *cert. denied*, 2014-NMCERT-006, 328
10 P.3d 1188. The ultimate question is whether “the jury reasonably could have inferred
11 independent factual bases for the charged offenses.” *State v. Franco*, 2005-NMSC-
12 013, ¶ 7, 137 N.M. 447, 112 P.3d 1104 (internal quotation marks and citation
13 omitted); *State v. Sanchez*, 1996-NMCA-089, ¶ 8, 122 N.M. 280, 923 P.2d 1165
14 (“[U]nitary conduct is fact specific; it requires meticulous review of the factual
15 scenario and can rarely be determined on just the face of the indictment.”); *Swafford*,
16 1991-NMSC-043, ¶ 27 (“The conduct question depends to a large degree on the
17 elements of the charged offenses and the facts presented at trial.”).

18 {8} Since Defendant pleaded guilty, we have no trial record to look to evaluate his
19 contention that “[t]he State’s legal theory in this case was that the criminal damage to
20 property arose out of [Defendant’s] decision to drive drunk.” (Emphasis omitted.)

1 That contention was contested when Defendant moved below to vacate on double
2 jeopardy grounds, and it is still contested on appeal. It is certainly not established on
3 the face of the indictment, which does not even mention Defendant’s intoxication with
4 respect to the criminal damage to property charge. And no details were provided at the
5 plea hearing regarding Defendant’s intent or the immediate circumstances surrounding
6 Defendant’s collision with the police car, other than that he “failed to yield.”

7 {9} Under these circumstances, we could summarily affirm because, after a guilty
8 plea, “[w]e place the burden on the defendant, the party raising the double jeopardy
9 challenge, to provide a sufficient record for the court to determine unitary conduct and
10 complete the remainder of the double jeopardy analysis.” *Sanchez*, 1996-NMCA-089,
11 ¶ 11; *see also State v. Wood*, 1994-NMCA-060, ¶ 19, 117 N.M. 682, 875 P.2d 1113
12 (holding that there must be a factual basis in the record to support a double jeopardy
13 claim); *cf. State v. Clark*, 1989-NMSC-010, ¶ 9, 108 N.M. 288, 772 P.2d 322 (stating
14 that the initial burden is on the defendant when challenging a plea agreement).

15 {10} Nonetheless, since we ultimately conclude that Defendant’s argument
16 unquestionably fails the legal prong of the double jeopardy analysis, i.e., the
17 Legislature intended to create separately punishable offenses, we will assume without
18 deciding that Defendant’s conduct was unitary.

19 **Legislative Intent**

1 {11} Having assumed unitary conduct, we must determine whether the Legislature
2 intended Sections 66-8-102(C)(1) and 30-15-1 to provide for separate punishment. *See*
3 *State v. Swick*, 2012-NMSC-018, ¶ 11, 279 P.3d 747. “Determinations of legislative
4 intent, like double jeopardy, present issues of law that are reviewed de novo, with the
5 ultimate goal of such review to be facilitating and promoting the [L]egislature’s
6 accomplishment of its purpose.” *State v. Montoya*, 2013-NMSC-020, ¶ 29, 306 P.3d
7 426 (alterations, internal quotation marks, and citation omitted). Since the statutes
8 themselves do not expressly provide for multiple punishments, we begin by applying
9 the rule of statutory construction from *Blockburger v. United States*, 284 U.S. 299
10 (1932), to determine whether each provision requires proof of a fact that the other
11 does not. *Swick*, 2012-NMSC-018, ¶¶ 11-12. If so, “it may be inferred that the
12 Legislature intended to authorize separate punishments under each statute.” *Id.* ¶ 13.
13 But “this is only an inference that leads to an examination of other indicia of
14 legislative intent.” *Id.*

15 {12} Needless to say, the elements of the two offenses have virtually no overlap. To
16 convict Defendant of DWI as charged, the State would have had to prove that
17 Defendant drove a vehicle in New Mexico with a BAC of .08 or higher. *See* § 66-8-
18 102(C)(1). To convict Defendant of criminal damage to property (over \$1000), the
19 State would have had to prove that Defendant intentionally damaged the property of
20 another without consent and that the amount of damage was more than \$1000. *See* §

1 30-15-1. DWI can be committed whether or not any property damage results; and
2 criminal damage to property can be committed when the perpetrator is completely
3 sober. As such, one offense does not subsume the other, and the *Blockburger* test
4 lends no support to Defendant’s argument.

5 {13} When two statutes survive *Blockburger*, we look to “the language, history, and
6 subject of the statutes, and we must identify the particular evil sought to be addressed
7 by each offense.” *Montoya*, 2013-NMSC-020, ¶ 32 (internal quotation marks and
8 citation omitted). “[T]he social evils proscribed by different statutes must be construed
9 narrowly[.]” *Swafford*, 1991-NMSC-043, ¶ 32.

10 {14} Since 1941, the Legislature has repeatedly addressed the evils of intoxicated
11 driving by augmenting DWI penalties, adding provisions for court-ordered drug and
12 alcohol screening, treatment, and rehabilitation, and decreasing the BAC at which a
13 driver is presumed intoxicated. *State v. Hernandez*, 2001-NMCA-057, ¶ 21, 130 N.M.
14 698, 30 P.3d 387. The entire statutory scheme makes no reference to property damage.
15 *See* § 66-8-102. Penalties are aggravated only for repeat offenses, an increased BAC,
16 bodily injury to a human being, or the refusal to submit to chemical testing. Section
17 66-8-102(D). Construed narrowly, “[t]he ultimate purpose of the DWI laws is to
18 protect the health, safety, and welfare of the public by stopping people from driving
19 under the influence of drugs and alcohol.” *State v. Valdez*, 2013-NMCA-016, ¶ 9, 293
20 P.3d 909 (internal quotation marks and citation omitted).

1 {15} In contrast, the offense of criminal damage to property expressly protects
2 against the intentional damage of property—real or personal. *See* § 30-15-1. The
3 offense is aggravated based on the monetary value of the property damage. *Id.* Thus,
4 the two offenses are unambiguously designed to address distinct social
5 ills—intoxicated driving on the one hand, and intentional damage to property on the
6 other—and they may be punished separately, even when committed during the course
7 of a single act.

8 **CONCLUSION**

9 {16} Defendant’s conviction for criminal damage to property (over \$1000) is
10 affirmed.

11 {17} **IT IS SO ORDERED.**

12 _____
13 **LINDA M. VANZI, Judge**

14 **WE CONCUR:**

15 _____
16 **JAMES J. WECHSLER, Judge**

1

2 **J. MILES HANISEE, Judge**