

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

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

3 Filing Date:   **APRIL 18, 2016**  

4 **NO. 33,823**

5 **STATE OF NEW MEXICO,**

6           Plaintiff-Appellee,

7 v.

8 **JESS CARPENTER,**

9           Defendant-Appellant.

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

11 **Jane Shuler Gray, District Judge**

12 Hector H. Balderas, Attorney General

13 Santa Fe, NM

14 Steven H. Johnston, Assistant Attorney General

15 Albuquerque, NM

16 for Appellee

17 Ray Twohig

18 Albuquerque, NM

19 for Appellant

1 **OPINION**

2 **ZAMORA, Judge.**

3 {1} Defendant, Jess Carpenter, appeals his conviction for involuntary  
4 manslaughter. Defendant argues that there is insufficient evidence to support the  
5 fourth element of the jury instruction given at trial—that he committed an unlawful  
6 act not amounting to a felony. Defendant also contends that the State’s failure to  
7 prove each element of involuntary manslaughter implicates his constitutional right  
8 to a jury trial. We conclude that the evidence, assessed against the elements of the  
9 charged crime, is sufficient to support Defendant’s involuntary manslaughter  
10 conviction and that Defendant was not denied his right to a jury trial. We affirm.

11 **I. FACTUAL AND PROCEDURAL BACKGROUND**

12 {2} On the evening of May 20, 2011, Defendant and his friend, Joe Darras, were  
13 out drinking at three Artesia establishments. After leaving the third establishment, at  
14 approximately 1:30 a.m. on May 21, 2011, the men went to Defendant’s house. At  
15 some point between 1:30 a.m. and 2:00 a.m., Defendant called 911 and reported that  
16 he shot his friend and that his gun had gone off accidentally. Eddy County Sheriff’s  
17 deputies arrived at Defendant’s residence shortly after 2:00 a.m. Defendant told one  
18 deputy that he and Darras had a problem with someone at the bar and they were going

1 to get their guns and take care of it, then the gun accidentally went off. Darras' body  
2 was found in Defendant's bedroom. He had been shot in the head.

3 {3} Defendant was taken into custody. His blood was drawn at approximately 5:46  
4 a.m. and his blood alcohol content was 0.116 grams per milliliter. Defendant was  
5 charged with second degree murder, contrary to NMSA 1978, § 30-2-1(B) (1994),  
6 and negligent use of a deadly weapon, contrary to NMSA 1978, § 30-7-4(A)(2)  
7 (1993). The case proceeded to a jury trial.

#### 8 **A. Defendant's Testimony at Trial**

9 {4} Defendant testified that Darras had an altercation with someone at the last  
10 establishment the two visited and that on the way back to Defendant's house, Darras  
11 was still upset about the incident and was going on and on about it. Both men were  
12 under the influence of alcohol. Defendant thought he could get Darras to drop the  
13 issue if Defendant got his guns and told Darras he would go back after the people  
14 from the bar. He expected Darras to tell him to forget about it. Defendant thought he  
15 could then lock the guns up.

16 {5} When Defendant and Darras arrived at Defendant's house, Defendant got out  
17 of Darras' truck, went into his bedroom, got a shotgun from his closet, and got a  
18 pistol from a dresser drawer. He placed the shotgun by his bed and the pistol in the  
19 back of his pants. As Darras came into the bedroom and asked Defendant what he was

1 doing, Defendant decided he would toss the pistol on the bed so that he did not have  
2 it on him as Darras approached. As Defendant pulled the gun out of his pants, he  
3 heard a loud boom and saw that Darras had been shot in the head. Defendant tried to  
4 stop the bleeding and realized that Darras was not alive. Defendant called 911 and  
5 waited for police to arrive.

6 {6} Defendant admitted that he was familiar with firearms, that he had hunted with  
7 his family, and he had taken a gun safety course as a child. As an adult, Defendant  
8 practiced shooting and hunted. Defendant testified that on the night that Darras was  
9 killed, the pistol should not have fired unless the hammer was cocked back, and that  
10 to his knowledge he never cocked the hammer back. Defendant did admit that at some  
11 point as he removed the pistol from his pants, it must have been pointed toward  
12 Darras, since Darras was shot in the head. Defendant also admitted that his drinking  
13 had impaired his judgment and that he should not have been handling his guns that  
14 night.

15 **B. Involuntary Manslaughter**

16 {7} Under the provisions of NMSA 1978, Section 30-2-3(B) (1994), “involuntary  
17 manslaughter” is “the unlawful killing of a human being without malice  
18 . . . committed in the commission of an unlawful act not amounting to felony, *or* in  
19 the commission of a lawful act[, ] which might produce death in an unlawful manner

1 or without due caution and circumspection.” (Emphasis added.) The jury was  
2 instructed that in order to convict Defendant of involuntary manslaughter, it had to  
3 find beyond a reasonable doubt that:

4 1. [D]efendant pointed a loaded pistol at . . . Darras while  
5 [Defendant] was under the influence of alcohol;

6 2. [D]efendant should have known of the danger involved by  
7 pointing a loaded pistol at . . . Darras while [D]efendant was under the  
8 influence of alcohol;

9 3. [D]efendant acted with a willful disregard for the safety of others;

10 4. [D]efendant committed an unlawful act not amounting to a felony;

11 5. [D]efendant’s act caused the death of . . . Darras; [and]

12 6. This happened in New Mexico on or about the 21 day of May,  
13 2011.

14 The involuntary manslaughter instruction given at trial tracks the uniform jury  
15 instruction on manslaughter but then added that fourth element not contained in UJI  
16 14-231 NMRA. It is not clear from the record how this additional element was added  
17 to the instruction. However, Defendant did not object to it at trial.

18 {8} A jury found Defendant guilty of negligent use of a deadly weapon and  
19 involuntary manslaughter, a lesser included offense of second degree murder. Prior  
20 to sentencing, the district court determined that Defendant’s conviction for negligent

1 use of a deadly weapon was subsumed within his conviction for involuntary  
2 manslaughter and dismissed that charge. This appeal followed.

## 3 **II. DISCUSSION**

4 {9} On appeal Defendant argues that there was insufficient evidence to support an  
5 added fourth element to the involuntary manslaughter instruction. Defendant also  
6 asserts that affirming his conviction with this added element would violate his right  
7 to a trial by jury. We address these arguments in turn.

### 8 **A. Sufficiency of the Evidence**

9 {10} “When reviewing a challenge to the sufficiency of the evidence, we must  
10 determine whether substantial evidence of either a direct or circumstantial nature  
11 exists to support a verdict of guilt beyond a reasonable doubt with respect to every  
12 element essential to a conviction.” *State v. Cordova*, 2016-NMCA-019, ¶ 16, 366  
13 P.3d 270 (internal quotation marks and citation omitted), *cert. granted*, 2015-  
14 NMCERT-008, \_\_\_ P.3d \_\_\_. “We must view the evidence in the light most favorable  
15 to the [s]tate, resolving all conflicts and indulging all permissible inferences in favor  
16 of the verdict.” *State v. Reed*, 2005-NMSC-031, ¶ 14, 138 N.M. 365, 120 P.3d 447.

17 {11} Defendant argues that there was insufficient evidence to support the added  
18 element that he committed an unlawful act not amounting to a felony. We disagree.  
19 Defendant’s argument rests on the faulty premise that the added element is an

1 essential element of involuntary manslaughter. Defendant does not dispute that the  
2 evidence was sufficient for the remaining elements.

3 {12} After briefing was completed in this case, the United States Supreme Court  
4 decided the question of “how a court should assess a challenge to the sufficiency of  
5 the evidence in a criminal case when a jury instruction adds an element to the charged  
6 crime and the Government fails to object.” *Musacchio v. United States*, \_\_ U.S. \_\_,  
7 \_\_, 136 S. Ct. 709, 713 (2016). In *Musacchio* the defendant was indicted under 18  
8 U.S.C. § 1030(a)(2)(C) (2008), which provides that a person commits a crime when  
9 he “intentionally accesses a computer without authorization *or* exceeds authorized  
10 access,” and in doing so “obtains . . . information from any protected computer.”  
11 *Musacchio*, \_\_ U.S. at \_\_, 136 S. Ct. at 713 (omission in original) (internal quotation  
12 marks and citation omitted). The Court noted that “[t]he statute thus provides two  
13 ways of committing the crime of improperly accessing a protected computer: (1)  
14 obtaining access without authorization; and (2) obtaining access with authorization  
15 but then using that access improperly.” *Id.*; *see* § 1030(e)(6) (defining “exceeds  
16 authorized access” (internal quotation marks omitted)). The defendant was charged  
17 with conspiring to make unauthorized access to a computer. *Musacchio*, \_\_ U.S. at  
18 \_\_, 136 S. Ct. at 713.

1 {13} The proposed jury instructions identified the conspiracy count as involving  
2 unauthorized access to protected computers, and did not require the jury to find that  
3 the defendant also conspired to exceed authorized access to protected computers. *Id.*  
4 However, the trial court diverged from the indictment and the proposed instructions  
5 and instructed the jury “that § 1030(a)(2)(C) makes it a crime for a person to  
6 intentionally access a computer without authorization *and* exceed authorized access.”  
7 *Musacchio*, 136 S. Ct. at 714 (internal quotation marks and citation omitted). The  
8 government did not object to the instruction. *Id.* A jury found the defendant guilty of  
9 conspiring to make unauthorized access to a computer. *Id.*

10 {14} The defendant challenged the sufficiency of the evidence to support his  
11 conspiracy conviction. *Id.* at 713. The Supreme Court rejected the defendant’s  
12 argument that “the sufficiency of the evidence should be assessed against the  
13 erroneous jury instruction that included the additional element.” *Id.* at 714. The Court  
14 recognized that in reviewing for the sufficiency of the evidence, the reviewing court  
15 “makes a limited inquiry tailored to ensure that a defendant receives the minimum  
16 that due process requires: a ‘meaningful opportunity to defend’ against the charge  
17 against him and a jury finding of guilt ‘beyond a reasonable doubt.’ ” *Id.* at 715  
18 (citation omitted). “The reviewing court considers only the legal question whether,  
19 after viewing the evidence in the light most favorable to the prosecution, *any* rational

1 trier of fact could have found the essential elements of the crime beyond a reasonable  
2 doubt.” *Id.* (internal quotation marks and citation omitted).

3 {15} The Court concluded that “the sufficiency of the evidence should be assessed  
4 against the elements of the charged crime.” *Id.* at 713. “[I]f the jury instruction  
5 requires the jury to find [guilt on] those elements . . . beyond a reasonable doubt, the  
6 defendant has been accorded the procedure that this Court has required to protect the  
7 presumption of innocence.” *Id.* at 715 (internal quotation marks and citations  
8 omitted). In that case, the addition of an element by using the word “and” in the  
9 instruction rather than eliminating the option, as permissible by the statute’s use of  
10 the word “or,” did not make the additional element an essential element under the  
11 statute. *Id.* at 714. Thus, “[t]he Government’s failure to introduce evidence of [the]  
12 additional element [did] not implicate the principles that sufficiency review protects.”  
13 *Id.* at 715. We believe *Musacchio* is dispositive here.

14 {16} In the present case, Defendant does not dispute that he was properly charged  
15 with the statutory elements for involuntary manslaughter as a lesser included offense  
16 to second degree murder; that he was given a meaningful opportunity to defend  
17 himself against those charges; or that the evidence was sufficient to convict him of  
18 the statutory elements of involuntary manslaughter. *See* § 30-2-3(B) (defining  
19 “involuntary manslaughter” as “the unlawful killing of a human being without malice

1 . . . committed in the commission of an unlawful act not amounting to felony, *or* in  
2 the commission of a lawful act[, ] which might produce death in an unlawful manner  
3 or without due caution and circumspection.” (emphasis added)). For the reasons  
4 explained in *Musacchio*, we reject Defendant’s assertion that the statutory element  
5 added to the involuntary manslaughter instruction is an essential element under the  
6 statute.

7 {17} As a final matter, Defendant does not dispute that the State presented sufficient  
8 evidence to support the jury’s verdict. We agree. The evidence presented at trial was  
9 that Defendant was familiar with firearms and that on May 21, 2011, while Defendant  
10 handled a loaded firearm under the influence of alcohol the firearm discharged in the  
11 direction of Darras, who was hit in the head by the discharged bullet and killed.  
12 Based on this evidence, a reasonable jury could have found the essential elements of  
13 involuntary manslaughter beyond a reasonable doubt.

14 **B. Right to a Jury Trial**

15 {18} Defendant argues that the State’s failure to present any evidence that he  
16 committed an unlawful act not amounting to a felony implicates his constitutional  
17 right to a jury trial. This argument, like Defendant’s sufficiency of the evidence  
18 challenge, relies on the added element in the given instruction—the commission of

1 an unlawful act, not amounting to a felony—as an essential element of involuntary  
2 manslaughter. Defendant’s constitutional argument is also without merit.

3 {19} The Fourteenth Amendment requires due process in criminal proceedings  
4 involving state statutes, and together with the Sixth Amendment right to a trial by  
5 jury, entitles “a criminal defendant to a jury determination that he is guilty of every  
6 element of the crime with which he is charged, beyond a reasonable doubt.” *Apprendi*  
7 *v. New Jersey*, 530 U.S. 466, 477 (2000) (alteration, internal quotation marks, and  
8 citation omitted).

9 {20} Thus, if a jury is instructed on the elements of the crime with which the  
10 defendant is charged, and the instruction requires the jury to find those elements  
11 beyond a reasonable doubt, “the defendant has been accorded the procedure that this  
12 Court has required to protect the presumption of innocence.” *Musacchio*, 136 S. Ct.  
13 at 715. Where an instruction includes all of the elements of the charged crime and an  
14 alternative element, the alternative element does not become an essential element  
15 simply because it is not identified as an alternative element in the given instruction.  
16 *See id.* We conclude that Defendant’s right to a jury trial under the federal  
17 constitution is not implicated under the circumstances of this case.

18 {21} To the extent Defendant broadly asserts that he may be entitled to greater  
19 protection under the New Mexico Constitution, he provides this Court with no

1 argument in support of this assertion, and for this reason we do not engage in a  
2 separate analysis to address his conviction under the New Mexico Constitution. *See*  
3 *State v. Gonzales*, 2011-NMCA-007, ¶ 19, 149 N.M. 226, 247 P.3d 1111 (stating that  
4 this Court has no duty to review an argument that is not adequately developed);  
5 *Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d  
6 1076 (same).

7 **III. CONCLUSION**

8 {22} For the foregoing reasons, we affirm Defendant’s conviction for involuntary  
9 manslaughter.

10 {23} **IT IS SO ORDERED.**

11 \_\_\_\_\_  
12 **M. MONICA ZAMORA, Judge**

13 **WE CONCUR:**

14 \_\_\_\_\_  
15 **JAMES J. WECHSLER, Judge**

16 \_\_\_\_\_  
17 **LINDA M. VANZI, Judge**