

1 {1} Following a plea agreement, Defendant Kelvin Dickerson appeals from his
2 judgment and sentence, raising double jeopardy and sentencing issues. We issued a
3 notice of proposed summary disposition, proposing to affirm in part, and proposing
4 to reverse and remand in part. Defendant and the State filed responses to our notice
5 of proposed disposition, which we have duly considered. Consistent with our notice
6 of proposed disposition, we find no double jeopardy violation and affirm Defendant's
7 convictions, and we reverse the designations of the kidnapping convictions and child
8 abuse conviction as serious violent offenses and remand for additional fact finding.

9 {2} **Issue 1:** In our notice of proposed summary disposition, we considered
10 Defendant's argument that the district court erred in denying his motion to dismiss
11 based on the New Mexico Constitution's prohibition against double jeopardy. [CN 1-
12 2] We acknowledged Defendant's arguments that the federal and state government
13 may not prosecute and punish him for the same crimes, because to do so, is a violation
14 of double jeopardy. [CN 2] However, we stated that "[t]he law is well established in
15 both federal and state courts that where the same act is prohibited by the laws of the
16 separate jurisdictions, a prior acquittal or conviction by one sovereign does not
17 necessarily operate as a bar to a subsequent prosecution for the same act or transaction
18 by the other sovereign." *State v. Rogers*, 1977-NMSC-057, ¶ 8, 90 N.M. 604, 566

1 P.2d 1142. [CN 2] Therefore, we suggested that we were not persuaded by
2 Defendant's double jeopardy arguments. [CN 2]

3 {3} In response, the State agrees that the district court did not err in denying
4 Defendant's motion to dismiss based on double jeopardy principles. [S Response 1]
5 Defendant, on the other hand, maintains his double jeopardy arguments in his
6 memorandum in opposition. [D MIO 2-6] In response to our notice of proposed
7 disposition, Defendant contends that the "dual sovereignty" exception to double
8 jeopardy is no longer recognized in New Mexico. [D MIO 2] He claims that our
9 Supreme Court has abrogated its reasoning in *Rogers*, and therefore, that opinion is
10 no longer applicable. [D MIO 2-3] Moreover, Defendant urges this Court to follow
11 the original Court of Appeals decision in *State v. Rogers*, 1977-NMCA-019, 90 N.M.
12 673, 568 P.2d 199, which was reversed in part by the New Mexico Supreme Court in
13 *Rogers*, 1977-NMSC-057. [D MIO 3] He also relies on the evolving double jeopardy
14 jurisprudence to support this assertion. [D MIO 2-6] Defendant asks this Court to
15 assign this appeal to the general calendar, or in the alternative, to certify this appeal
16 to the New Mexico Supreme Court. [D MIO 5-6]

17 {4} We are not persuaded that *Rogers*, 1977-NMSC-057 has been abrogated, or
18 even negatively impacted, by recent double jeopardy jurisprudence. Additionally, we

1 decline Defendant's invitation to certify this appeal to the New Mexico Supreme
2 Court. Therefore, we affirm Defendant's convictions.

3 {5} **Issue 2:** In our notice of proposed disposition, we proposed to conclude that
4 the district court's failure to make findings regarding the nature of the offenses or the
5 resulting harm requires that we reverse and remand for additional fact finding,
6 pursuant to *State v. Morales*, 2002-NMCA-016, 131 N.M. 530, 39 P.3d 747,
7 *abrogated on other grounds by State v. Frawley*, 2007-NMSC-057, ¶ 36, 143 N.M.
8 7, 172 P.3d 144. [CN 2-5] In response, the State notes that it does not oppose this
9 Court's proposal for a limited remand. [S Response 1] Defendant's memorandum in
10 opposition does not address this issue. [*See generally* D MIO]

11 {6} For the reasons stated in this opinion and in our notice of proposed summary
12 disposition, we affirm Defendant's convictions, reverse the designations of the
13 kidnapping convictions and child abuse conviction as serious violent offenses, and
14 remand for additional fact finding.

15 {7} **IT IS SO ORDERED.**

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MICHAEL E. VIGIL, Chief Judge

1 **WE CONCUR:**

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3 **JONATHAN B. SUTIN, Judge**

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5 **LINDA M. VANZI, Judge**