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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. 31,567

5 **GEORGE TORRES,**

6 Defendant-Appellant,

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

8 **J. Richard Brown, District Judge**

9 Gary K. King, Attorney General

10 Pranava Upadrashta, Assistant Attorney General

11 Santa Fe, NM

12 for Appellee

13 Bennett J. Baur, Acting Chief Public Defender

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15 Santa Fe, NM

16 for Appellant

17 **MEMORANDUM OPINION**

18 **FRY, Judge.**

19 Defendant appeals his convictions for shooting from a motor vehicle and
20 tampering with evidence. He does not appeal his conviction for consumption of an

1 alcoholic beverage in a motor vehicle on a road. Because we conclude that the
2 instruction given to the jury on the charge of shooting from a motor vehicle rose to the
3 level of fundamental error, we reverse Defendant’s conviction on that charge.
4 Because we find Defendant’s remaining arguments to be without merit, we affirm his
5 remaining convictions and remand for further proceedings on the charge of shooting
6 from a motor vehicle.

7 **Fundamental Error in the Jury Instruction on Shooting From a Motor Vehicle**

8 “Shooting . . . from a motor vehicle consists of willfully discharging a firearm
9 . . . from a motor vehicle with reckless disregard for *the person of another*.” NMSA
10 1978, § 30-3-8(B) (1993) (emphasis added). The phrasing of the statute, which
11 provides that the defendant’s reckless disregard must be for “the person of another,”
12 indicates that it is the physical person of another—and not that person’s general rights
13 or property—that the statute seeks to protect. This is further reinforced by the fact
14 that the degree of the offense depends on whether the shooting has resulted in injury
15 or great bodily harm to another, and by the fact that the statute does not specifically
16 mention property or any other rights. *See id.* However, the uniform jury instruction,
17 rather than retaining this “person of another” phrasing, instead states that in order to
18 convict a defendant of shooting from a motor vehicle, the state must prove beyond a
19 reasonable doubt that “[t]he defendant willfully shot a firearm from a motor vehicle

1 with reckless disregard for *another person*.” UJI 14-342 NMRA (emphasis added)
2 (footnotes omitted). This language is slightly more ambiguous than the language in
3 the statute in that its phrasing lacks the emphasis on the person’s physical well-being
4 that is being disregarded.

5 However, while the phrase “reckless disregard for another person” in the
6 uniform jury instruction is less precise than the phrase “reckless disregard for the
7 person of another” in the statute, the uniform jury instruction compensates for this
8 slight imprecision by reinforcing the concept of harm to the physical person of another
9 in its definition of recklessness. The instruction’s use notes state that a definition of
10 “reckless disregard” must be provided and specifies the definition from UJI 14-1704
11 NMRA for negligent arson, noting that this definition should be modified by
12 substituting the term “with reckless disregard” for the word “recklessly.” UJI 14-342,
13 [u]se [n]ote 3. The negligent arson instruction states:

14 For you to find that the defendant acted recklessly in this case,
15 you must find that he knew that his conduct created a substantial
16 and foreseeable risk, that he disregarded that risk and that he was
17 wholly indifferent to the consequences of his conduct and to the
18 welfare and safety of others.

19 UJI 14-1704. Because the mandatory definition of reckless disregard makes clear that
20 the substantial and foreseeable risk is to the “welfare and safety” of others, it indicates

1 that the risk of harm that is encompassed by the statute is the risk to the physical
2 person of another.

3 Based on the uniform instructions, the jury instruction in this case should have
4 read as follows:

5 For you to find [D]efendant guilty of shooting from a motor
6 vehicle as charged in Count 1, the State must prove to your satisfaction
7 beyond a reasonable doubt each of the following elements of the crime:

8 1. [D]efendant willfully shot a firearm from a motor vehicle
9 with reckless disregard for another person.

10 2. This happened in New Mexico on or about the 18th day of
11 September, 2009.

12 For you to find that [D]efendant acted with reckless disregard in
13 this case, you must find that he knew that his conduct created a
14 substantial and foreseeable risk, that he disregarded that risk and that he
15 was wholly indifferent to the consequences of his conduct and to the
16 welfare and safety of others.

17 Rather than giving the definition of “reckless disregard” set forth in UJI 14-342 use
18 note 3 and UJI 14-1704, the district court gave the general recklessness instruction
19 contained in UJI 14-133 NMRA. That instruction states, “For you to find that the
20 defendant acted with reckless disregard in this case, you must find that the defendant
21 acted with willful disregard of the rights or safety of others and in a manner which
22 endangered any person or property.” UJI 14-133. And rather than including this

1 definition separately, it listed it as an element of the offense. The jury instruction that
2 was given at trial thus read as follows:

3 For you to find [D]efendant guilty of shooting from a motor
4 vehicle as charged in Count 1, the [S]tate must prove to your satisfaction
5 beyond a reasonable doubt each of the following elements of the crime:

6 1. [D]efendant wil[l]fully shot a firearm from a motor vehicle
7 with reckless disregard for another person;

8 2. For you to find that [D]efendant acted with reckless
9 disregard in this case, you must find that [D]efendant acted with willful
10 disregard of the rights or safety of others and in a manner which
11 endangered any person or property;

12 3. This happened in New Mexico on or about the 18th day of
13 September, 2009.

14 Defendant did not object to this instruction but now argues that it constitutes
15 fundamental error warranting reversal.

16 When reviewing a jury instruction for unpreserved, fundamental error, the
17 Court begins with the same inquiry as for preserved, reversible error: “whether a
18 reasonable juror would have been confused or misdirected by the jury instruction.”
19 *See State v. Barber*, 2004-NMSC-019, ¶ 19, 135 N.M. 621, 92 P.3d 633. However,
20 if the answer is yes, “[f]undamental-error analysis then requires a higher level of
21 scrutiny.” *Id.* “If we find error, our obligation is to review the entire record, placing
22 the jury instructions in the context of the individual facts and circumstances of the
23 case, to determine whether the [d]efendant’s conviction was the result of a plain

1 miscarriage of justice.” *Id.* (internal quotation marks and citation omitted).
2 Conviction of a nonexistent crime constitutes fundamental error per se. *See State v.*
3 *Arredondo*, 2012-NMSC-013, ¶ 20, 278 P.3d 517. In addition, a conviction for a
4 crime with which the defendant was not charged also constitutes fundamental error.
5 *See State v. Davis*, 2009-NMCA-067, ¶ 16, 146 N.M. 550, 212 P.3d 438.

6 The instruction given by the district court permitted the jury to convict
7 Defendant based on a determination that he willfully shot from a motor vehicle with
8 a reckless disregard for the property of another. Neither party has pointed this Court
9 to any crime under New Mexico law that contains these precise elements. *Cf. NMSA*
10 1978, § 30-7-4 (1993) (prohibiting the negligent use of a firearm and containing
11 certain provisions that prohibit conduct that endangers property, but containing no
12 provision that matches the jury instruction given here). Therefore, the instruction
13 permitted Defendant to be convicted of a nonexistent crime, creating fundamental
14 error in Defendant’s trial. And even if there is some other statute not cited by the
15 parties that prohibits such conduct, it was not charged in this case. Accordingly, the
16 error was fundamental and warrants reversal.

17 Defendant claims that even under the instruction presented, there was
18 insufficient evidence to support his conviction. We will address this argument
19 because it affects whether he may be retried on the charge on remand. *See State v.*

1 *Dowling*, 2011-NMSC-016, ¶ 18, 150 N.M. 110, 257 P.3d 930 (stating that double
2 jeopardy does not bar retrial if sufficient evidence was presented to support a
3 conviction at trial under the erroneous jury instruction). “In reviewing the sufficiency
4 of the evidence, we must view the evidence in the light most favorable to the guilty
5 verdict, indulging all reasonable inferences and resolving all conflicts in the evidence
6 in favor of the verdict.” *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711,
7 998 P.2d 176. “The relevant question is whether, after viewing the evidence in the
8 light most favorable to the prosecution, *any* rational trier of fact could have found the
9 essential elements of the crime beyond a reasonable doubt.” *Id.* (alterations, internal
10 quotation marks, and citation omitted).

11 The State was required to prove beyond a reasonable doubt that Defendant
12 willfully shot a firearm from a motor vehicle with reckless disregard for another
13 person. The jury instruction defined reckless disregard as the “willful disregard of the
14 rights or safety of others and in a manner which endangered any person or property.”
15 There was evidence presented at trial that officers heard gunshots and, when they went
16 to investigate, found a vehicle a block away with several occupants inside, including
17 Defendant. There were guns in the vehicle, and shell casings that matched one of the
18 guns were found outside on the ground. There was evidence that Defendant admitted
19 to the officers that he had fired the gun from inside the vehicle. There was evidence

1 that Defendant shot the gun in an area where one could not shoot safely in any
2 direction since the shooting occurred at a roundabout at an intersection of two streets
3 near downtown Artesia, and there was a hotel on one corner, the sheriff's office on
4 another corner, a restaurant on another corner, and a house, a doctor's office, and
5 some businesses on another corner. Although Defendant points out that one of the
6 other people in the car testified that Defendant fired from outside of the car and one
7 of the officers testified that the location of the shell casings could be consistent with
8 someone standing in place and firing the weapon straight up from the curb, the
9 evidence introduced at trial, when viewed in the light most favorable to the judgment,
10 supported his conviction. *See State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438,
11 971 P.2d 829 (“Contrary evidence supporting acquittal does not provide a basis for
12 reversal because the jury is free to reject [the d]efendant’s version of the facts.”). It
13 was for the fact finder to resolve any conflicts in the evidence, and this Court will not
14 reweigh the evidence on appeal. *See State v. Mora*, 1997-NMSC-060, ¶ 27, 124 N.M.
15 346, 950 P.2d 789 (“The reviewing court does not weigh the evidence or substitute
16 its judgment for that of the fact finder as long as there is sufficient evidence to support
17 the verdict.”), *abrogated on other grounds by State v. Frazier*, 2007-NMSC-032, ¶ 31,
18 142 N.M. 120, 164 P.3d 1, *as recognized in Kersey v. Hatch*, 2010-NMSC-020, ¶ 17,
19 148 N.M. 381, 237 P.3d 683.

1 **Sufficiency of the Evidence of Tampering With Evidence**

2 Defendant asserts that there was insufficient evidence to support his conviction
3 for tampering with evidence. The State was required to prove beyond a reasonable
4 doubt that Defendant hid a Glock .45 pistol with the intention to prevent himself from
5 being apprehended, prosecuted, or convicted.

6 Evidence was presented at trial that Defendant admitted that he was the one
7 who had shot the Glock and that when the police were stopping the vehicle, he hid the
8 Glock behind the radio in order to keep the police from finding it. This evidence was
9 sufficient to support Defendant's conviction for tampering with evidence.

10 **CONCLUSION**

11 For these reasons, we reverse Defendant's conviction for shooting from a motor
12 vehicle, affirm his remaining convictions, and remand for further proceedings on the
13 charge of shooting from a motor vehicle. Because we reverse Defendant's conviction
14 for shooting from a motor vehicle on the basis of the erroneous jury instruction, we
15 need not address his argument that his conviction for this crime should be reversed
16 based on what he claims was the erroneous admission into evidence of shell casings
17 the police found on the street.

1

IT IS SO ORDERED.

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CYNTHIA A. FRY, Judge

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WE CONCUR:

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JAMES J. WECHSLER, Judge

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J. MILES HANISEE, Judge