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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. 32,491**

5       **RUSSELL REED,**

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       Margaret McLean, Assistant Attorney General

11       Santa Fe, NM

12       for Appellee

13       Bennett J. Baur, Acting Chief Public Defender

14       Nina Lalevic, Assistant Appellate Defender

15       Santa Fe, NM

16       for Appellant

17                                       **MEMORANDUM OPINION**

18       **VANZI, Judge.**

1 {1} Defendant appeals from an amended judgment and sentence, by which he was  
2 convicted for two counts of aggravated battery (deadly weapon and great bodily  
3 harm). We issued a notice of proposed summary disposition, proposing to reverse and  
4 remand on grounds that the district court lacked jurisdiction to enter the amended  
5 judgment and sentence. The State has filed a responsive memorandum. After due  
6 consideration, we reverse and remand for further proceedings.

7 {2} As described at greater length in the notice of proposed summary disposition,  
8 the pendency of a prior appeal with this Court deprived the district court of  
9 jurisdiction to amend the judgment and sentence. *See State v. Aragon*, 109 N.M. 632,  
10 638-39, 788 P.2d 932, 938-39 (Ct. App. 1990) (noting that the district court lacks  
11 jurisdiction to amend a judgment and sentence during the pendency of an appeal and  
12 does not regain jurisdiction until mandate has issued); *State v. Aaron*, 103 N.M. 138,  
13 140, 703 P.2d 915, 917 (Ct. App. 1985) (observing that the trial court lacked  
14 jurisdiction to rule on a motion to correct sentence that was filed during the pendency  
15 of a prior appeal). In its response, the State indicates that it agrees with our analysis  
16 relative to this jurisdictional problem. [MIO 1-2] We therefore conclude that reversal  
17 is necessary.

18 {3} In our notice of proposed summary disposition, we also briefly addressed two  
19 issues that Defendant raised in his docketing statement because those issues seem  
20 likely to recur on remand. *See, e.g., State v. Martinez*, 2002-NMSC-008, ¶ 17, 132

1 N.M. 32, 43 P.3d 1042 (addressing a sentencing issue notwithstanding the fact that it  
2 was not strictly necessary to do so because the issue seemed likely to recur following  
3 remand); *State v. Soto*, 2001-NMCA-098, ¶ 11, 131 N.M. 299, 35 P.3d 304  
4 (proceeding to address a double jeopardy issue after vacating on other grounds  
5 because the issue seemed likely to arise again on remand). For reasons previously  
6 described, we expressed concern that substitution of a conviction for aggravated  
7 battery for the conviction for aggravated battery on a household member would  
8 violate applicable precedent. *See State v. Villa*, 2004-NMSC-031, ¶¶ 8, 12-18, 136  
9 N.M. 367, 98 P.3d 1017. We also observed that the entry of multiple convictions for  
10 aggravated battery (deadly weapon and serious bodily harm) would appear to violate  
11 double jeopardy. *See, e.g., State v. Cooper*, 1997-NMSC-058, ¶ 53, 124 N.M. 277,  
12 949 P.2d 660.

13 {4} In its memorandum in opposition the State indicates that it concurs with our  
14 analysis relative to the double jeopardy issue [MIO 7] but submits that *Villa* can and  
15 should be limited or distinguished. [MIO 3-6] Although we have serious reservations  
16 about the State's position, we believe it is appropriate to permit the parties to present  
17 their arguments on remand and to allow the district court to evaluate the matter and  
18 render its considered judgment.

1 {5} Accordingly, for the reasons stated above and in the notice of proposed  
2 summary disposition, we reverse and remand for further proceedings consistent herewith.

3 {6} **IT IS SO ORDERED.**

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**LINDA M. VANZI, Judge**

6 **WE CONCUR:**

7 \_\_\_\_\_  
8 **MICHAEL E. VIGIL, Judge**

9 \_\_\_\_\_  
10 **J. MILES HANISEE, Judge**