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

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellant,

4 v.

NO. 31,663

5 **MARK FIRSCHING,**

6 Defendant-Appellee.

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

8 **James Waylon Counts, District Judge**

9 Gary K. King, Attorney General

10 Pranava Upadrashta, Assistant Attorney General

11 Santa Fe, NM

12 for Appellant

13 Robert E. Tangora, L.L.C.

14 Robert E. Tangora

15 Santa Fe, NM

16 for Appellee

17 **MEMORANDUM OPINION**

18 **VANZI, Judge.**

1 {1} The State appeals the district court's order granting Defendant's motion for
2 judgment notwithstanding the verdict and dismissing the complaint, based on the
3 general/specific statute rule. The district court determined that the State was precluded
4 from seeking a conviction for the general offense of forgery, rather than the more
5 specific offense of seeking to obtain dangerous drugs by unlawful means. For the
6 reasons that follow, we affirm.

7 **BACKGROUND**

8 {2} The underlying criminal proceedings stem from an incident in which Defendant
9 apparently attempted to obtain a larger quantity of the prescription drug Xanax than
10 his doctor had prescribed.

11 {3} Defendant was initially charged with two offenses: (1) acquisition or attempt
12 to acquire a drug precursor by misrepresentation, in violation of NMSA 1978, Section
13 30-31B-12(A)(3) (2004); and (2) forgery (make or alter), in violation of NMSA 1978,
14 Section 30-16-10(A) (2006). Approximately one week before trial, the State filed an
15 amended criminal information, charging Defendant instead with: (1) attempt to obtain
16 any dangerous drugs or to procure or attempt to procure the administration of any
17 dangerous drugs other than a controlled substance by forgery or alteration of a
18 prescription or written order, in violation of NMSA 1978, Section 26-1-22(B) (1972);
19 and (2) falsely make or alter any signature to, or any part of any writing, purporting
20 to have any legal efficacy with intent to injure or defraud, contrary to Section 30-16-

1 10(A)(1), or in the alternative, give or deliver to another a prescription knowing it to
2 be a false writing or to contain a false signature or endorsement with intent to injure
3 deceive or cheat another, contrary to Section 30-16-10(A)(2).

4 {4} Prior to the start of trial, Defendant objected to the amended criminal
5 information as to the first count on grounds that it constituted an entirely new crime
6 that was in a different statutory section and because the eleventh-hour amendment
7 prejudiced him. The district court agreed and denied the State's request to amend as
8 to the first count. With respect to the second count, the district court allowed the
9 amendment. Thereafter, the State elected to proceed to trial solely on the second count
10 of forgery.

11 {5} At trial, the State presented evidence that Defendant had submitted a
12 prescription to a pharmacist for Xanax. Because the quantity of pills written on the
13 prescription appeared to be suspect, the pharmacist called the physician's office for
14 verification. The pharmacist testified that 84 pills had been prescribed, as opposed to
15 the 134 pills, which was written on the prescription. Defendant's subsequent interview
16 with a narcotics agent was played for the jury, during which Defendant stated that he
17 had tried to write the number 84, not 134, on the prescription where it had been
18 smudged after getting wet.

19 {6} After hearing the evidence and receiving instruction on the State's alternative
20 theories of forgery, the jury returned a general guilty verdict. Thereafter, Defendant

1 moved the district court to set aside the verdict based on the general/specific statute
2 rule. The district court granted the motion, and this appeal followed.

3 **STANDARD OF REVIEW**

4 {7} We review the district court’s application of the general/specific statute rule de
5 novo. *State v. Santillanes*, 2001-NMSC-018, ¶ 9, 130 N.M. 464, 27 P.3d 456.

6 **DISCUSSION**

7 **Waiver**

8 {8} As an initial matter, the State contends that Defendant’s objection to the State’s
9 attempt to amend the criminal information prior to trial effectively waived any
10 argument that he should have been charged under Section 26-1-22(B) (unlawful
11 means of obtaining dangerous drugs, by forgery or alteration), as opposed to Section
12 30-16-10(A) (forgery). For several reasons we disagree.

13 {9} First, as an abstract proposition, it is not clear to us that an objection based on
14 the general/specific statute rule is subject to waiver. *See Santillanes*, 2001-NMSC-
15 018, ¶¶ 11, 13 (noting “the close relationship between the general/specific statute rule
16 and the principle of double jeopardy,” and observing that ultimately, “if the
17 general/specific statute rule applies . . . the prosecutor is *compelled* to proceed under
18 the specific law and is *precluded* from charging the defendant under the general law”
19 (emphasis added)); *cf. State v. Jackson*, 1993-NMCA-092, ¶ 13, 116 N.M. 130, 860

1 P.2d 772 (reading the language of NMSA 1978, Section 30-1-10 (1963), to preclude
2 the waiver of double jeopardy claims).

3 {10} Second, we fail to see how Defendant’s objection to the eleventh-hour
4 amendment of the criminal information on the basis that it was a new charge pursuant
5 to Rule 5-204 NMRA could be said to have the effect of waiving the application of
6 the general/specific statute rule. We perceive no theoretical or logical relationship
7 between these matters, and the State provides us with none.

8 {11} Third and finally, we note that the State provides no authority supporting its
9 position that, by objecting to the amended criminal information, Defendant waived
10 any later argument that the State was required to charge under that section. *See*
11 *generally State v. Leon*, 2013-NMCA-011, ¶ 33, 292 P.3d 493 (“In the absence of
12 cited authority, we assume that none exists and decline to consider the argument
13 further.”), *cert. quashed*, 2013-NMCERT-010, 313 P.3d 251. In this regard, we
14 specifically note that, to the extent that the State charged the wrong offense and failed
15 to rectify the matter in a timely fashion, Defendant cannot be said to have invited the
16 State’s error.

17 {12} In light of the foregoing considerations, we reject the State’s waiver argument.

18 **General/Specific Statute Rule**

19 {13} The State argues that it was not required to charge under Section 26-1-22(B)
20 because the general/specific statute rule is inapplicable. We disagree. “The goal of the

1 general/specific statute rule in the context of criminal law is to determine whether the
2 Legislature intends to punish particular criminal conduct under a specific statute
3 instead of a general statute.” *Santillanes*, 2001-NMSC-018, ¶ 11. “[W]e determine
4 whether the general/specific statute rule applies to two criminal statutes by comparing
5 the elements of the crimes and, if necessary, resorting to other indicia of legislative
6 intent.” *Id.* “[I]f the general/specific statute rule applies under this analysis, then the
7 prosecutor is compelled to proceed under the specific law and is precluded from
8 charging the defendant under the general law.” *Id.*

9 {14} In order to determine “whether the Legislature intended to circumscribe
10 prosecutorial charging discretion,” we must first “assess whether each provision
11 requires proof of an additional fact that the other does not.” *Id.* ¶ 16 (internal quotation
12 marks and citation omitted). “If the elements of the two crimes are the same, the
13 general/specific statute rule applies, and the prosecution must charge the defendant
14 under the special law absent a clear expression of legislative intent to the contrary.”
15 *Id.* (internal quotation marks and citation omitted). “If the elements differ, however,
16 there is a presumption that the Legislature intended to create separately punishable
17 offenses and, concomitantly, intended to leave prosecutorial charging discretion intact;
18 further inquiry is then necessary to determine whether the presumption stands.” *Id.*

19 {15} In pertinent part, the elements of forgery as applied to the facts of this case and
20 as given to the jury are as follows: (1) Defendant changed a genuine prescription so

1 that its effect was different from the original; and (2) Defendant intended to injure,
2 deceive, or cheat Lowe's or another. *See generally State v. Foster*, 1999-NMSC-007,
3 ¶ 28, 126 N.M. 646, 974 P.2d 140 (stating that "we must presume that a conviction
4 under a general verdict requires reversal if the jury is instructed on an alternative basis
5 for the conviction that would result in double jeopardy, and the record does not
6 disclose whether the jury relied on [the unconstitutional] alternative"), *abrogated on*
7 *other grounds by State v. Frazier*, 2007-NMSC-032, ¶¶ 31-35, 142 N.M. 120, 164
8 P.3d 1. By contrast, the elements of the offense of unlawful means of obtaining
9 dangerous drugs, in pertinent part, are: (1) the defendant attempted to obtain
10 possession of a dangerous drug; and (2) the defendant did so by forgery or alteration
11 of a prescription or of any written order. *See* § 26-1-22(B); *see generally State v.*
12 *Swick*, 2012-NMSC-018, ¶ 12, 279 P.3d 747 (observing that, where a statute is written
13 in the alternative, it is necessary to consider the prosecution's legal theory in assessing
14 whether each statute requires proof of a fact that the other does not).

15 {16} We understand the State's argument to be that each offense contains an element
16 that the other does not, insofar as forgery incorporates the specific intent to injure,
17 deceive, or cheat, and unlawful means of obtaining dangerous drugs requires the
18 attempt to obtain dangerous drugs. However, we agree with Defendant that, under the
19 State's legal theory, all of the elements of forgery are incorporated into the crime of
20 unlawful means of obtaining dangerous drugs by virtue of the reference to forgery in

1 Section 26-1-22's second element. The alternative reference to alteration does not, in
2 our estimation, support a different result. *See generally State v. Schackow*, 2006-
3 NMCA-123, ¶ 21, 140 N.M. 506, 143 P.3d 745 (“[W]here it is unclear from the
4 verdict, we do not presume that the jury decided on grounds that do not violate the
5 Double Jeopardy Clause.”). Further, the State does not cite any authority supporting
6 its argument that we should read forgery and alteration as distinct, and we are aware
7 of no such authority.

8 {17} Insofar as the elements of the offense of forgery are subsumed within the
9 elements of the offense of unlawful means of obtaining dangerous drugs, our inquiry
10 is essentially at an end. *See Santillanes*, 2001-NMSC-018, ¶ 18 (observing that
11 “[m]ost criminal cases involving the general/specific statute rule will be resolved
12 through the elements-based inquiry”). While an identity of elements does not
13 ineluctably signify legislative intent to limit prosecutorial discretion, the State
14 advances no argument that this is an “exceptional case” warranting further analysis,
15 *see id.*, and we are aware of nothing that could be characterized as “a clear expression
16 of legislative intent to the contrary.” *Id.* ¶ 16 (internal quotation marks and citation
17 omitted). Accordingly, we conclude that it was incumbent upon the State to charge
18 Defendant with the more specific offense.

19 {18} As the New Mexico Supreme Court has previously observed, “it may be
20 difficult in some circumstances to determine which of two laws can be characterized

1 as specific and which can be characterized as general.” *State v. Cleve*, 1999-NMSC-
2 017, ¶ 28, 127 N.M. 240, 980 P.2d 23. In this case, however, we believe it is self-
3 evident that the offense of unlawful means of obtaining dangerous drugs is the
4 specific offense, particularly in light of the fact that it subsumes the elements of the
5 more general offense of forgery.

6 {19} In light of the foregoing considerations, we conclude that the State was required
7 to prosecute under the special statute, unlawful means of obtaining dangerous drugs.
8 Consequently, Defendant’s conviction under the general statute, forgery, was properly
9 vacated. *See, e.g., State v. Blevins*, 1936-NMSC-052, ¶¶ 11-13, 40 N.M. 367, 60 P.2d
10 208 (applying the general/specific statute rule, concluding that prosecutorial discretion
11 was limited due to an identity in elements and therefore reversing a conviction under
12 a more general statute).

13 **CONCLUSION**

14 {20} For the reasons stated, we affirm.

15 {21} **IT IS SO ORDERED.**

16
17

LINDA M. VANZI, Judge

18 **WE CONCUR:**

1

2 **JAMES J. WECHSLER, Judge**

3

4 **TIMOTHY L. GARCIA, Judge**