

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

2 Opinion Number: _____

3 Filing Date: **October 7, 2015** _____

4 **NO. 32,663**

5 **STATE OF NEW MEXICO,**

6 Plaintiff-Appellee,

7 v.

8 **JOE ANDERSON,**

9 Defendant-Appellant,

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

11 **Jacqueline D. Flores, District Judge**

12 Hector H. Balderas, Attorney General

13 Nicole Beder, Assistant Attorney General

14 Santa Fe, NM

15 for Appellee

16 Jorge A. Alvarado, Chief Public Defender

17 Tania Shahani, Assistant Appellate Defender

18 Santa Fe, NM

19 for Appellant

1 **OPINION**

2 **KENNEDY, Judge.**

3 {1} Defendant appeals from his conviction for second degree murder asserting that
4 fundamental error was committed when the district court failed to give a necessary
5 instruction that it had agreed to give. Defendant asserts this was fundamental error.
6 Because the instruction was critical to the jury's determination on the issue of self-
7 defense and because the district court had a duty to fully instruct the jury on all
8 relevant aspects of the law, we agree with Defendant, reverse his conviction, and
9 remand for a new trial.

10 **I. BACKGROUND**

11 {2} The trial presented differing accounts to the jury of what happened between
12 Defendant and Vicente Sanchez the night of November 19, 2010. It appears, however,
13 that the following events occurred, subject to some variation.

14 **A. Altercation**

15 {3} Sanchez attended a house party on November 19, 2010, at which Defendant
16 was present. The two men took an immediate dislike to each other and got into an
17 argument. When Sanchez's girlfriend tried to intervene, Defendant moved her out of
18 the way, and Sanchez punched Defendant. Defendant fell backward into the next
19 room, and a brawl began between several individuals with apparent loyalties to either

1 Sanchez or Defendant. Sanchez's girlfriend armed herself with a handgun taken from
2 Sanchez's pocket and, upon brandishing the handgun, brought the brawl to a
3 momentary standstill. During the lull, Defendant removed himself and hid behind the
4 doorway of the room into which he fell where he, too, drew a handgun. Believing
5 Sanchez had obtained the gun from his girlfriend by this time, Defendant came out
6 from behind the doorway with his gun raised and fired six shots from a distance of
7 approximately two to three feet, four of which hit Sanchez. Sanchez died from the
8 wounds he sustained, and Defendant was charged with murdering Sanchez.

9 **B. Trial—Diagrams**

10 {4} Detective Anton Maltby created diagrams of the home where the altercation
11 occurred as part of his investigation of the incident. The diagrams gave a rough
12 depiction of the location of the house, yard, surrounding buildings, cars, and rooms,
13 as well as provided the layout of the furniture in the rooms. Defense counsel objected
14 to the State's proffer of these diagrams, both during trial and in a motion in limine,
15 claiming that they should be excluded under Rule 11-403 NMRA, asserting they were
16 cumulative because the jury could understand the layout of the buildings and rooms
17 by examining photographs, and misleading because they were not drawn to scale and
18 did not accurately portray the location of the furniture in the living room. The district

1 court overruled the objection because it believed the diagrams were instructive to the
2 jury and because witnesses had acknowledged that they were not drawn to scale.

3 **C. Trial—Jury Instructions**

4 {5} During trial, Defendant requested a self-defense instruction (UJI 14-5171
5 NMRA) and a stand-your-ground (or no-retreat) instruction (UJI 14-5190 NMRA).
6 The district court allowed the self-defense instruction. In response to the State’s
7 objection to the no-retreat instruction, the district court held that it was for the jury
8 to decide whether Defendant was standing his ground or re-involving himself in the
9 conflict and that the jury should be able to make an informed decision on that issue.
10 As such, the district court decided to submit the no-retreat instruction to the jury as
11 well.

12 {6} It is undisputed that, although the district court determined that both a general
13 self-defense instruction and a stand-your-ground instruction were warranted in the
14 case, it did not instruct the jury on New Mexico’s stand-your-ground law, either
15 orally or in the written instructions.¹ The omission of UJI 14-5190 appears to have
16 been the result of an oversight on the part of the district court and all counsel. During
17 the course of deliberations, the jury submitted a question to the district court asking
18 if there was a “stand-your-ground” law in New Mexico. The jury ultimately withdrew

19 ¹The written jury instructions appear in consecutive order in the record proper
20 with no gaps and do not include UJI 14-5190.

1 the question because it had “found what [it was] looking for.” Defense counsel
2 mistakenly believed that the no-retreat instruction had been included in the written
3 instructions given to the jury and offered the district court reassurances to that effect.
4 Counsel’s reassurance, coupled with the withdrawal of the jury’s question, ended the
5 court’s discussion with counsel regarding the stand-your-ground instruction. The jury
6 ultimately found Defendant guilty of second degree murder, and he appeals.

7 **II. DISCUSSION**

8 {7} Defendant makes several assertions of error, which we consolidate as an
9 assertion of fundamental error based on the missing jury instruction, an assertion of
10 error based on the admission of a diagram of the house where the altercation
11 occurred, and an assertion of error based on the district court’s denial of a
12 modification to UJI 14-250 NMRA.

13 **A. The Omission of the Jury Instruction Was Fundamental Error**

14 **1. Fundamental Error**

15 {8} Defendant did not object to the absence of UJI 14-5190 from the jury
16 instructions when they were given. We therefore review only for fundamental error.
17 *State v. Benally*, 2001-NMSC-033, ¶ 12, 131 N.M. 258, 34 P.3d 1134 (“The standard
18 of review we apply to jury instructions depends on whether the issue has been
19 preserved. If the error has been preserved we review the instructions for reversible

1 error. If not, we review for fundamental error.” (citation omitted)); *State v.*
2 *Cunningham*, 2000-NMSC-009, ¶ 8, 128 N.M. 711, 998 P.2d 176. An error is
3 fundamental when it “ ‘goes to the foundation or basis of a defendant’s rights.’ ”
4 *Cunningham*, 2000-NMSC-009, ¶ 13 (quoting *State v. Garcia*, 1942-NMSC-030, ¶
5 25, 46 N.M. 302, 128 P.2d 459). “We will not ‘uphold a conviction if an error
6 implicated a fundamental unfairness within the system that would undermine judicial
7 integrity if left unchecked.’ ” *State v. Rodarte*, 2011-NMCA-067, ¶ 10, 149 N.M. 819,
8 255 P.3d 397 (quoting *State v. Barber*, 2004-NMSC-019, ¶ 18, 135 N.M. 621, 92
9 P.3d 633).

10 ¶9) When reviewing jury instruction issues for fundamental error, we first apply
11 the standard for reversible error by determining if a reasonable juror would have been
12 “confused or misdirected” by the jury instructions that were given. *Barber*, 2004-
13 NMSC-019, ¶ 19. Juror confusion or misdirection may stem “from instructions which,
14 through omission or misstatement, fail to provide the juror with an accurate rendition
15 of the relevant law.” *Benally*, 2001-NMSC-033, ¶ 12. If we determine that a
16 reasonable juror would have been confused or misdirected by the instructions given,
17 our fundamental error analysis requires us to then “ ‘review the entire record, placing
18 the jury instructions in the context of the individual facts and circumstances of the
19 case, to determine whether the [d]efendant’s conviction was the result of a plain

1 miscarriage of justice.’ ” *State v. Sandoval*, 2011-NMSC-022, ¶ 20, 150 N.M. 224,
2 258 P.3d 1016 (quoting *Barber*, 2004-NMSC-019, ¶ 19). If such a miscarriage of
3 justice exists, we deem it fundamental error.

4 **2. The Jury Was Misdirected by the Instructions Issued**

5 {10} The State makes no challenge to the district court’s decision that the instruction
6 was warranted but states it was solely Defendant’s responsibility to ensure it was
7 given. We disagree with this limited view. Where there is any evidence to establish
8 a self-defense theory, it is the duty of the court to fully and clearly instruct the jury
9 on all relevant aspects of self-defense. *Benally*, 2001-NMSC-033, ¶ 41; *State v.*
10 *Heisler*, 1954-NMSC-032, ¶ 23, 58 N.M. 446, 272 P.2d 660 (stating that “where self-
11 defense is involved in a criminal case and there is any evidence, although slight, to
12 establish [self-defense], it is not only proper for the court, but its duty as well, to
13 instruct the jury fully and clearly on all phases of the law on the issue that are
14 warranted by the evidence”). The district court’s conclusion that there was evidence
15 to support the issuance of both the general self-defense instruction and the no-retreat
16 instruction triggered the district court’s duty to fully and clearly instruct the jury on
17 both self-defense and no-retreat. *See Heisler*, 1954-NMSC-032, ¶ 23.

18 {11} The jury was informed of the elements of self-defense: (1) Defendant was put
19 in fear by an apparent danger of immediate death or great bodily harm, (2) the killing

1 resulted from that fear, and (3) Defendant acted reasonably when he or she killed.
2 *State v. Rudolfo*, 2008-NMSC-036, ¶ 17, 144 N.M. 305, 187 P.3d 170; *see also* UJI
3 14-5171 (enumerating the elements of self-defense). The jury was not, however,
4 informed as required by UJI 14-5190 that a person “who is threatened with an attack
5 need not retreat. In the exercise of his right of self[-]defense, he may stand his ground
6 and defend himself.”

7 {12} Because of the omission, the jury’s understanding of all of the elements of the
8 law governing self-defense was deficient. We conclude not only that a reasonable
9 juror would have been misdirected by the jury instructions given, but also that the
10 jury in Defendant’s case was misdirected. As such, there was reversible error below;
11 we now turn to an analysis of whether there was fundamental error.

12 {13} The State maintains that UJI 14-5190 is a definition or amplification of an
13 essential self-defense element and that its omission from the given instructions
14 therefore does not rise to the level of fundamental error. *See State v. Coffin*, 1999-
15 NMSC-038, ¶ 17, 128 N.M. 192, 991 P.2d 477 (stating that “it is error to refuse a
16 requested instruction defining or amplifying an element only if ‘the element was not
17 adequately covered by the instructions given’ ” (citation omitted)). While failure to
18 instruct on a definition does not ordinarily rise to the level of fundamental error, some
19 definitional instructions provide “a determination critical to understanding the

1 elements instruction” and, as such, can be of central importance to a fair trial. *Barber*,
2 2004-NMSC-019, ¶¶ 20, 24-25 (discussing *State v. Mascareñas*, 2000-NMSC-017,
3 129 N.M. 230, 4 P.3d 1221). In order to determine whether UJI 14-5190 is a
4 definitional instruction that “provided a determination critical to understanding” the
5 self-defense instruction, we must consider all the facts and circumstances and decide
6 “whether the missing instruction caused such confusion that the jury could have
7 convicted [the d]efendant based upon a deficient understanding” of the law regarding
8 self-defense. *Barber*, 2004-NMSC-019, ¶ 25 (concluding amplification of an
9 instruction to provide a critical definition can prevent juror confusion). If such
10 confusion existed, even if UJI 14-5190 is viewed as a definitional instruction, its
11 omission may nevertheless constitute fundamental error.

12 {14} Where the evidentiary basis for the instruction has been laid, UJI 14-5190
13 informs jurors of what is reasonable under the third prong of UJI 14-5190, and it is
14 therefore critical to understanding the third element of a general self-defense
15 instruction. *See Barber*, 2004-NMSC-019, ¶ 25 (recognizing the necessity for jury
16 instruction when absence of clarification would render the jury’s understanding of the
17 law deficient). Because Defendant’s self-defense theory rests on the argument that,
18 under the circumstances, he had no duty to retreat from the confrontation with
19 Sanchez, and it is undisputed that that theory rests upon a correct statement of the

1 law, we agree that the instructions provided to the jury failed to fully and adequately
2 inform them of the law of self-defense relevant to the case. The jury was required to
3 make a critical determination of whether Defendant acted reasonably when he killed
4 Sanchez and could not make that determination without being informed as to whether
5 New Mexico law deems it reasonable to stand-your-ground when retreat is possible.
6 Omission of UJI 14-5190 alters what “reasonable” means in the context of self-
7 defense in this case.

8 **3. The No-Retreat Instruction Was Critical to the Jury’s Self-Defense**
9 **Determination**

10 {15} We recognize that courts generally disfavor finding fundamental error where
11 a definition is omitted from jury instructions. That reluctance is premised on the
12 concept that many definitions carry common meanings that are comparable to legal
13 meanings and, as such, their omission does not prejudice a defendant’s rights. *See*
14 *Barber*, 2004-NMSC-019, ¶ 22 (acknowledging that potential for jury confusion
15 exists where the legal definition of a term is “not necessarily rooted in common
16 discourse”); A.M. Swarthout, Annotation, *Duty in Instructing Jury in Criminal*
17 *Prosecution to Explain and Define Offense Charged*, 169 A.L.R. 315, III(g)
18 (acknowledging that while trial courts may have a “duty to define or explain technical
19 words[,]” they often have no duty to define “nontechnical, self-explaining words or
20 phrases which are of easy comprehension to the ordinary layman”). That is not the

1 case here. Rather, the term “reasonable” in the third prong of the self-defense
2 instruction carries a different meaning when read in conjunction with the no-retreat
3 instruction than it does alone. Read alone, a person exercising the “degree of
4 attention, knowledge, intelligence, and judgment that society requires of its members”
5 is acting reasonably. *Black’s Law Dictionary* (10th ed. 2014) (defining “reasonable
6 person”). When read together with the no-retreat instruction, however, a person who,
7 when threatened with an attack, does not retreat and stands his ground when
8 exercising his right of self-defense is acting reasonably. *See* UJI 14-5190; *cf. Brown*
9 *v. United States*, 256 U.S. 335, 344 (1921) (acknowledging that retreat, or failure to
10 retreat, is a fact to be considered in determining whether actions made in self-defense
11 were reasonable); *Rowe v. United States*, 164 U.S. 546, 558 (1896) (holding that a
12 defendant’s self-defense acts were reasonable where the law did not require him to
13 retreat when threatened with a deadly weapon). Thus, we conclude that once the
14 district court determined the propriety of giving it, the failure to provide the no-retreat
15 instruction that informed a determination critical to the case was akin to a missing
16 elements instruction. *Cf. Mascareñas*, 2000-NMSC-017, ¶ 20 (concluding that the
17 definition of “reckless disregard” was not a mere amplification of a term and instead
18 was more akin to an element instruction because it was aimed at preventing confusion
19 of the standard necessary to sustain a conviction).

1 {16} Given the difference between the reasonableness standard of a self-defense
2 instruction alone and a self-defense instruction read in conjunction with the no-retreat
3 instruction, there is simply no way to determine to which standard Defendant was
4 held. The jury's specific question on the subject and the absence of the instruction
5 specifically informing the jury of the law, reinforce our conclusion. We therefore
6 cannot determine that the jury delivered its verdict on a legally sound basis. The jury
7 answered its own question regarding no-retreat with other information than the
8 correct instruction. It was not fully and clearly informed as to the law governing the
9 case and likely made its decision based, at least in some part, on a deficient
10 understanding of the law governing self-defense.

11 {17} We conclude the jury's question regarding New Mexico's "stand-your-ground"
12 law and its subsequent withdrawal of that question, is evidence that the jury needed
13 the no-retreat instruction not only to be fully apprised of all relevant aspects of the
14 law governing self-defense but also in order to avoid being misdirected by the
15 instructions given. *See State v. Navarez*, 2010-NMCA-049, ¶ 25, 148 N.M. 820, 242
16 P.2d 387 (concluding that jury confusion was established by the jury's question to the
17 trial court judge). The jury ultimately withdrew the question because it had "found
18 what [it] was looking for[,]" namely, the "stand-your-ground" standard in New

1 Mexico. We have no way of knowing what the jury found to clear up its confusion,
2 but it was not UJI 14-5190.

3 **B. Waiver Does Not Prohibit Fundamental Error Analysis**

4 {18} The failure of defense counsel to realize that the complete UJI 14-5190 was not
5 given, does not bear upon our fundamental error analysis. The very nature of
6 fundamental error review is to protect rights that are essential to a defendant’s
7 defense and “which no court could or ought to permit him to waive.” *State v. Garcia*,
8 1942-NMSC-030, ¶ 25, 46 N.M. 302, 128 P.2d 459. Fundamental error provides a
9 means of relief that may not otherwise be available to defendants: “Where a man’s
10 fundamental rights have been violated, while he may be precluded by the terms of the
11 statute or the rules of appellate procedure from insisting . . . upon relief . . . , this court
12 has the power, in its discretion, to relieve him and to see that injustice is not done.”
13 *Id.* ¶ 23 (internal quotation marks and citation omitted). As such, the fundamental
14 error doctrine stands as “[a]n exception to the general rule barring review of questions
15 not properly preserved below.” *State v. Osborne*, 1991-NMSC-032, ¶ 38, 111 N.M.
16 654, 808 P.2d 624 (internal quotation marks and citation omitted). Our courts have
17 consistently acknowledged that waiver does not preclude courts from protecting a
18 defendant’s rights on appeal where fundamental error exists. *See, e.g., State v. Villa*,
19 2004-NMSC-031, ¶ 15, 136 N.M. 367, 98 P.3d 1017 (“*Except in cases of*

1 *fundamental error*, timely objections to improper instructions must be made or error,
2 if any, will be regarded as waived in every case.” (emphasis added) (alteration,
3 internal quotation marks, and citation omitted)); *State v. Boeglin*, 1987-NMSC-002,
4 ¶ 11, 105 N.M. 247, 731 P.2d 943 (concluding that, although the defendant’s failure
5 to object to incomplete instructions constituted a waiver of the objection, appellate
6 courts “nevertheless will grant relief if fundamental error has occurred in a particular
7 case”).

8 {19} In light of existing precedent, even if Defendant did waive his objection to the
9 omitted jury instruction, his waiver would not preclude our fundamental error
10 analysis. *Cf. State v. Foxen*, 2001-NMCA-061, ¶ 12, 130 N.M. 670, 29 P.3d 1071
11 (declining to characterize omission of instruction as invited error where deficiencies
12 in the jury instructions “were simply the result of oversight or neglect[,]” applying
13 fundamental error analysis). We therefore conclude that, in light of the importance
14 that self-defense and no-retreat had in Defendant’s case, allowing his conviction to
15 stand without adequate jury instructions would undermine judicial integrity and the
16 legitimacy of the jury’s verdict. *See Cunningham*, 2000-NMSC-009, ¶ 21 (inclining
17 toward reversal if error indicated a fundamental unfairness within the system that
18 would undermine judicial integrity). We conclude that Defendant’s conviction was
19 tainted by fundamental error and must be reversed. *See State v. Gee*, 2004-NMCA-

1 042, ¶ 8, 135 N.M. 408, 89 P.3d 80 (stating that appellate courts “reverse for
2 fundamental error when the foundation or basis of a defendant’s case . . . is
3 affected”).

4 {20} Although this Opinion could end here with reversal, other issues raised by
5 Defendant are likely to arise upon a retrial of the case. *See State v. Beal*, 1944-
6 NMSC-011, ¶ 28, 48 N.M. 84, 146 P.2d 175. We therefore proceed to consider
7 whether the district court erred in allowing the diagrams to be admitted and whether
8 it erred by refusing Defendant’s modifications to UJI 14-250.

9 **C. The District Court Did Not Abuse its Discretion in Admitting the**
10 **Diagrams**

11 {21} Appellate courts review a district court’s decision to admit or exclude evidence
12 for an abuse of discretion. *State v. Guerra*, 2012-NMSC-014, ¶ 36, 278 P.3d 1031.
13 District courts have broad discretion when applying Rule 11-403. *Guerra*, 2012-
14 NMSC-014, ¶ 36 (citing *State v. Chamberlain*, 1991-NMSC-094, ¶ 9, 112 N.M. 723,
15 819 P.2d 673).

16 {22} Defendant contends that under Rule 11-403, the district court abused its
17 discretion by admitting diagrams that an investigating detective made because they
18 had the potential to mislead the jury. Rule 11-403 allows the court to “exclude
19 relevant evidence if its probative value is substantially outweighed by a danger of one

1 or more of the following: unfair prejudice, confusing the issues, misleading the jury,
2 undue delay, wasting time, or needlessly presenting cumulative evidence.”

3 {23} We conclude that the district court did not abuse its discretion in determining
4 that the danger that the jury would be misled as to the size of the living room did not
5 outweigh the probative value of the diagrams. This was especially true because
6 several witnesses testified to the actual size of the space. In addition, photographs
7 entered into evidence showed the space and revealed the actual placement of the
8 furniture. The district court even attached a caption to each diagram to emphasize that
9 they were not drawn to scale. In light of the foregoing, we conclude that Defendant
10 has not demonstrated that the district court abused its discretion.

11 **D. The District Court Did Not Err in Refusing Defendant’s Modification**
12 **of the UJI**

13 {24} Although Defendant asserts the district court erred in refusing to allow his
14 modified version of UJI 14-250, which addresses jury procedure for the various
15 degrees of homicide, we conclude that it properly refused the requested instruction.
16 The district court was bound to give UJI 14-250 “without substantive modifications
17 or substitution.” UJI Crim. General Use Note NMRA (stating that “when a uniform
18 instruction is provided for the elements of a crime, a defense or a general explanatory
19 instruction on evidence or trial procedure, the uniform instruction must be used
20 without substantive modification or substitution”); *see, e.g., State v. Watchman,*

1 2005-NMCA-125, ¶ 15, 138 N.M. 488, 122 P.3d 855 (stating that “there are a host
2 of cases standing for the proposition that the uniform jury instructions and use notes
3 are to be followed without substantial modification” (internal quotation marks and
4 citation omitted)). Defendant requested the district court to submit an instruction to
5 the jury stating, “If you find the state has not proved beyond a reasonable doubt that
6 the defendant did not act in self-defense, you do not need to consider whether the
7 defendant acted with sufficient provocation, and you must find the defendant not
8 guilty.” Even without the general use note setting forth a requirement that UJIs not
9 be modified, the instructions given to the jury were sufficient to assuage any concern
10 that the jury was not adequately instructed on the necessary standards.

11 {25} Reviewing all of the jury instructions as a whole, it is unlikely a reasonable
12 juror would have been confused or misdirected. *State v. Laney*, 2003-NMCA-144,
13 ¶ 38, 134 N.M. 648, 81 P.3d 591. The language that the district court rejected and
14 Defendant complains should have been included, is virtually the same as the language
15 included at the end of UJI 14-5190, the self-defense instruction. *See* UJI 14-5171
16 (“The burden is on the state to prove beyond a reasonable doubt that the defendant
17 did not act in self[-]defense. If you have a reasonable doubt as to whether the
18 defendant acted in self-defense you must find the defendant not guilty.”). We

1 therefore conclude that the district court properly rejected Defendant's proffered
2 modifications to UJI 14-250.

3 **III. CONCLUSION**

4 {26} Defendant was deprived of a fair trial by the absence of a no-retreat instruction.
5 We therefore reverse his conviction and remand for a new trial. We conclude there
6 was no abuse of discretion in the district court's decision to allow the diagrams into
7 evidence, subject to a limiting instruction. We also conclude there was no error in the
8 district court's refusal to modify UJI 14-250.

9 {27} **IT IS SO ORDERED.**

10
11

RODERICK T. KENNEDY, Judge

12 **WE CONCUR:**

13
14

MICHAEL E. VIGIL, Chief Judge

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16

CYNTHIA A. FRY, Judge