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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. 35,776

5 **STACY HARPER,**

6 **Defendant-Appellant.**

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

8 **Stan Whitaker, District Judge**

9 Hector H. Balderas, Attorney General

10 Santa Fe, NM

11 M. Victoria Wilson, Assistant Attorney General

12 for Appellee

13 Bennett J. Baur, Chief Public Defender

14 Kathleen T. Baldrige, Assistant Appellate Defender

15 Santa Fe, NM

16 for Appellant

17 **MEMORANDUM OPINION**

18 **HANISEE Judge.**

19 {1} Defendant Stacy Harper appeals from her conviction for aggravated assault

1 with a deadly weapon asserting that the district court erred in refusing to give the self-
2 defense instruction she requested. This Court issued a calendar notice proposing to
3 reverse Defendant's conviction. The State has filed a memorandum in opposition to
4 our notice of proposed disposition, which we have duly considered. Unpersuaded by
5 the State's arguments, we reverse.

6 {2} In this Court's notice of proposed disposition, we pointed out that a defendant
7 is entitled to jury instructions on her theory of the case if there is evidence to support
8 her instruction, and the failure to give an instruction under such circumstances is
9 reversible error. *See State v. Brown*, 1996-NMSC-073, ¶ 34, 122 N.M. 724, 931 P.2d
10 69. We further noted that, while a defendant is not entitled to a self-defense instruction
11 if the defendant is the aggressor, according to UJI 14-5191 NMRA this does not hold
12 true if (1) the victim "responded with force which would ordinarily create a substantial
13 risk of death or great bodily harm," or (2) the victim "became the aggressor." We
14 pointed out that Defendant's testimony provided evidence to support the alleged
15 victim responding with force, via the swerving towards her, and thus, proposed that
16 Defendant was entitled to a self-defense instruction. *See State v. Rudolfo*, 2008-
17 NMSC-036, ¶ 27, 144 N.M. 305, 187 P.3d 170 (providing that "there need only be
18 enough evidence to raise a reasonable doubt in the mind of a juror about whether the
19 defendant lawfully acted in self-defense"). Finally, we noted that to the extent there

1 was a question of the objective reasonableness of Defendant's actions raised by
2 Defendant waving a firearm in response to a car allegedly swerving towards her, such
3 questions were best left to the jury to consider. [CN 3-5]

4 {3} The State contends that the question of reasonableness is not best left to the jury
5 in this case, arguing that where "the defendant's response to the victim's actions is
6 disproportionate to the victim's actions, our courts have found insufficient evidence
7 to support each element of the self-defense instruction." [MIO 3-4] The State contends
8 that, while Defendant testified that the victim swerved towards her, there was "nothing
9 in the record to indicate that the red Jeep swerved out of its own lane, or made contact
10 with Defendant's vehicle[.]" [MIO 3] Thus, the State contends there was nothing to
11 indicate that the victim responded with deadly force that created a threat of great
12 bodily harm, and, therefore, Defendant responded to the use of non-deadly force (the
13 swerving) with deadly force (threatening the victim with a firearm). [Id.]

14 {4} We are not convinced. First, the case law the State relies on in support of its
15 argument addresses factual scenarios where the defendants' responses were clearly
16 disproportionate, and significantly more so than the conduct in this case. *See State v.*
17 *Lopez*, 2000-NMSC-003, ¶ 26, 128 N.M. 410, 993 P.2d 727 (holding that there was
18 insufficient evidence that the defendant had been put in fear where the victim drew a
19 pocket knife and the defendant stabbed the victim fifty-four times with a kitchen

1 knife and then crushed his skull with a rock); *State v. Lucero*, 1998-NMSC-044, ¶ 8,
2 126 N.M. 552, 972 P.2d 1143 (holding that the defendant was not entitled to a self-
3 defense instruction where a rival gang member made a gang sign and the defendant
4 followed him, drew his weapon, and fired his gun into the air); *State v. Emmons*,
5 2007-NMCA-082, ¶ 12, 141 N.M. 875, 161 P.3d 920 (holding that the defendant was
6 not acting in self-defense when he chased down men repossessing his truck and forced
7 them off the road at gunpoint).

8 {5} Second, our case law has recognized that a vehicle may be considered a deadly
9 weapon when used in such a manner that it could inflict death or great bodily harm.
10 *See State v. Mantelli*, 2002-NMCA-033, ¶¶ 40-48, 131 N.M. 692, 42 P.3d 272. Thus,
11 whether it was reasonable for Defendant to respond as she did would turn on the very
12 specific facts of the case, and as such, is a question for the jury. *See id.* ¶ 40
13 (recognizing that whether a suspect had used a vehicle as a deadly weapon justifying
14 the officer’s use of deadly force was a “factual and situational inquiry” that this Court
15 ultimately concluded was best left to the jury). While this Court may have questioned
16 the reasonableness of Defendant’s conduct in our notice of proposed disposition,
17 questioning the reasonableness of Defendant’s conduct is much different than
18 concluding that no reasonable jury could conclude that Defendant’s conduct was
19 reasonable under the circumstances of this case. *See Rudolfo*, 2008-NMSC-036, ¶ 27

1 (“If any reasonable minds could differ, the instruction should be given.”). This, we
2 cannot do based on the facts of the case.

3 {6} Accordingly, for the reasons discussed above and those articulated in this
4 Court’s notice of proposed disposition, we reverse.

5 {7} **IT IS SO ORDERED.**

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J. MILES HANISEE, Judge

8 **WE CONCUR:**

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M. MONICA ZAMORA, Judge

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HENRY M. BOHNHOFF, Judge