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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. A-1-CA-34242

5 **FRANKIE L. GARDUÑO,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY**

8 **T. Glenn Ellington, District Judge**

9 Hector H. Balderas, Attorney General

10 Santa Fe, NM

11 Jane A. Bernstein, Assistant Attorney General

12 Albuquerque, NM

13 for Appellee

14 Bennett J. Baur, Chief Public Defender

15 Kimberly Chavez Cook, Assistant Appellate Defender

16 Santa Fe, NM

17 for Appellant

18 **MEMORANDUM OPINION**

19 **FRENCH, Judge.**

1 {1} Defendant Frankie L. Garduño appeals from the district court’s judgment,
2 entered pursuant to a jury verdict, for the crimes of attempt to commit armed robbery
3 (firearm enhancement) (Count 1), contrary to NMSA 1978, Sections 30-28-1(B)
4 (1963), 30-16-2 (1973), 31-18-16(A) (1993); and aggravated battery with a deadly
5 weapon (Count 4), contrary to NMSA 1978, Section 30-3-5(C) (1969). Defendant
6 argues that: (1) these convictions violated his constitutional right to be free from
7 double jeopardy; (2) the enhancement of his sentence for attempted armed robbery by
8 one year, pursuant to Section 31-18-16(A), violated his constitutional right to be free
9 from double jeopardy; (3) the district court abused its discretion by denying a
10 severance for the charge of felon in possession of a firearm; (4) the district court erred
11 in excluding evidence of law enforcement bias; (5) there was insufficient evidence to
12 support his convictions; and (6) although the district court merged the charges of
13 assault with intent to commit a violent felony (Count 2 and Count 7), it must enter an
14 order vacating those convictions.

15 {2} On September 26, 2017, we issued a memorandum opinion affirming
16 Defendant’s convictions, but vacating the one-year firearm enhancement on
17 Defendant’s conviction for attempted armed robbery. *State v. Garduño*, No. A-1-CA-
18 34242, 2017 WL 4604324, ___-NMCA-___, ¶ 2, ___ P.3d ___ (Sept. 26, 2017). We
19 relied on *State v. Branch*, 2016-NMCA-071, 387 P.3d 250, *cert. granted*, ___-

1 NMCERT-____ (No. S-1-SC-35951, July 28, 2016), to hold that the firearm
2 enhancement of Defendant’s sentence violated double jeopardy. *Garduño*, ____-
3 NMCA-____, ¶ 15. The Supreme Court denied a writ of certiorari on November 28,
4 2017. Order at 1, *State v. Garduño*, No. S-1-SC-36717 (Nov. 28, 2017). On December
5 18, 2017—after quashing a writ of certiorari in *Branch* and remanding to this Court
6 for consideration of the Supreme Court’s opinion in *State v. Baroz*, 2017-NMSC-030,
7 404 P.3d 769, which decided issues related to whether firearm enhancements on
8 sentences for aggravated assault with a deadly weapon violated double jeopardy—the
9 Supreme court remanded this case to this Court for consideration of same. Order at
10 1, *State v. Garduño*, No. S-1-SC-36687 (Dec. 18, 2017). In *Baroz*, our Supreme Court
11 noted that “[t]he legislative policy behind the firearm sentence enhancement is that a
12 noncapital felony, committed with a firearm, should be subject to greater punishment
13 than a noncapital felony committed without a firearm because it is more
14 reprehensible.” 2017-NMSC-030, ¶ 27. Because the Legislature intended to authorize
15 an enhanced punishment when a firearm is used in the commission of aggravated
16 assault, the Court held that “[t]he sentence enhancement does not run afoul of double
17 jeopardy.” *Id.*

18 {3} On remand, we withdraw the memorandum opinion issued on September 26,
19 2017, and substitute this opinion in its stead.

1 **BACKGROUND**

2 {4} As noted in our original opinion, this is a memorandum opinion and the parties
3 are familiar with the facts. Thus, this background section is limited to the factual and
4 procedural events that are required to place our analysis in context. Additional facts
5 will be provided as necessary.

6 {5} Cody Tapie and Michelle Radosevich were getting gas at an Allsup’s
7 convenience store in Española, New Mexico. Tapie’s driver door faced the gas pump
8 and Radosevich’s door faced the curb. Tapie was outside the vehicle pumping gas,
9 when a black Ford F-150, driven by Joseph Vigil, pulled up directly behind Tapie’s
10 vehicle. Defendant emerged from the passenger side of the truck, approached
11 Radosevich, “lean[ed] in,” and began speaking to her.

12 {6} Defendant pointed his gun at Radosevich and demanded money. Radosevich
13 advised Defendant that she had no money, having concealed her purse by the driver’s
14 seat. After being told that Radosevich had no money, Defendant “turned his attention
15 to [Tapie].” From across the car, Tapie asked Defendant what he was doing, and
16 Defendant pointed his firearm at Tapie and demanded his money.

17 {7} In response to Defendant’s demand and having focused on him while he was
18 on the other side of the vehicle, Tapie passed his wallet to Defendant “over the car”
19 fearing Defendant would “seriously injure or kill [him].” Defendant seized the wallet

1 and ordered that Tapie get back in the car. Once Tapie was back in the car, Defendant
2 again pointed his gun inside the vehicle. Defendant turned his attention back to
3 Radosevich and demanded money from her.

4 {8} In an attempt to deflect attention from Radosevich, Tapie offered Defendant his
5 sunglasses, which Defendant seized. Defendant again demanded money from
6 Radosevich and then demanded her purse. Radosevich refused to comply. Frustrated
7 with the resistance he was receiving, Defendant opened the passenger door and began
8 striking Radosevich in the head and forehead with the barrel of his firearm as many
9 as five times. The physical attack on Radosevich continued until Defendant was
10 subdued by Tapie and other patrons at the station.

11 **DISCUSSION**

12 **I. Double Jeopardy**

13 {9} The appellate courts “generally review double jeopardy claims de novo.” *State*
14 *v. Rodriguez*, 2006-NMSC-018, ¶ 3, 139 N.M. 450, 134 P.3d 737; *see State v. Saiz*,
15 2008-NMSC-048, ¶ 22, 144 N.M. 663, 191 P.3d 521 (“Double jeopardy presents a
16 question of law, which [the appellate courts] review de novo.”), *abrogated on other*
17 *grounds by State v. Belanger*, 2009-NMSC-025, ¶ 36 n.1, 146 N.M. 357, 210 P.3d
18 783. “The constitutional prohibition against double jeopardy protects against both
19 successive prosecutions and multiple punishments for the same offense.” *State v.*

1 *Armijo*, 2005-NMCA-010, ¶ 15, 136 N.M. 723, 104 P.3d 1114 (internal quotation
2 marks and citation omitted); *see* U.S. Const. amend. V; *see also* N.M. Const. art. II,
3 § 15.

4 **A. Attempted Armed Robbery and Aggravated Battery With a Deadly**
5 **Weapon**

6 {10} Defendant argues that his convictions for attempted armed robbery and
7 aggravated battery with a deadly weapon violate double jeopardy because they impose
8 multiple punishments for the same conduct. In the present case, “we are faced with
9 multiple punishments, . . . [a] double description case.” *Armijo*, 2005-NMCA-010, ¶
10 15 (internal quotation marks and citation omitted). Because Defendant’s claim is a
11 double description type double jeopardy claim, which involves convictions of multiple
12 statutes based on the same criminal conduct, we apply the analysis set out in *Swafford*
13 *v. State*, 1991-NMSC-043, ¶ 25, 112 N.M. 3, 810 P.2d 1223. For double description
14 claims, we follow the two-part test set out in *Swafford. State v. Bernal*, 2006-NMSC-
15 050, ¶ 9, 140 N.M. 644, 146 P.3d 289. We first “examine whether the conduct was
16 unitary, meaning whether the same criminal conduct is the basis for both charges. If
17 the conduct is not unitary, then the inquiry is at an end and there is no double jeopardy
18 violation.” *Id.* (citation omitted).

19 {11} Defendant argues that his convictions for attempted armed robbery and
20 aggravated battery with a deadly weapon violate this prohibition because his conduct

1 was unitary based on the facts and that “[t]his was one series of acts of a similar
2 nature, committed with a single purpose, and which occurred in and around the car
3 over a matter of minutes without interrupting events.” Defendant asserts his acts were
4 unitary because “[t]he ongoing attempted robbery of [Radosevich] never stopped and
5 was ongoing, by virtue of the fact that it was not ‘successful.’ ” The State responds
6 that the conduct was not unitary under the facts and double jeopardy does not apply.
7 We agree that Defendant’s conduct was not unitary.

8 {12} Our analysis begins with an examination of the contours of unitary conduct. As
9 our Supreme Court observed, “[u]nitary conduct is often defined by what it is not.
10 Thus, conduct is not unitary if the defendant commits two discrete acts violative of the
11 same statutory offense, but separated by sufficient indicia of distinctness.” *State v.*
12 *Cooper*, 1997-NMSC-058, ¶ 59, 124 N.M. 277, 949 P.2d 660 (internal quotation
13 marks and citation omitted). In analyzing the contours of the “indicia of distinctness,”
14 our courts are to consider “the separation between the illegal acts by either time or
15 physical distance, the quality and nature of the individual acts, and the objectives and
16 results of each act.” *Id.* (internal quotation marks and citation omitted); *see State v.*
17 *Sotelo*, 2013-NMCA-028, ¶ 18, 296 P.3d 1232 (“Independent factual bases may be
18 established by determining whether the acts constituting the two offenses are
19 sufficiently separated by time or space, looking to the quality and nature of the acts,

1 the objects and results involved, and the defendant’s *mens rea* and goals during each
2 act.” (internal quotation marks and citation omitted)). Distinctness may also be
3 established by the “existence of an intervening event[,] . . . [the] defendant’s intent as
4 evidenced by his conduct and utterances[,] . . . [the] number of victims,” and “the
5 behavior of the defendant between [acts.]” *Herron v. State*, 1991-NMSC-012, ¶ 15,
6 111 N.M. 357, 805 P.2d 624.

7 {13} Regarding whether conduct is unitary, we look for “an identifiable point at
8 which one of the charged crimes had been completed and the other not yet
9 committed.” *State v. DeGraff*, 2006-NMSC-011, ¶ 27, 139 N.M. 211, 131 P.3d 61; *see*
10 *Bernal*, 2006-NMSC-050, ¶ 11 (holding that the defendant’s conduct is not unitary
11 where the defendant completes one of the charged crimes before committing the
12 other); *State v. Montoya*, 2016-NMCA-098, ¶ 21, 384 P.3d 1114 (same), *cert. denied*,
13 2016-NMCERT-____, ____ P.3d ____ (No. S-1-SC-36067, Sept. 29, 2016); *State v.*
14 *Melendrez*, 2014-NMCA-062, ¶ 10, 326 P.3d 1126 (same).

15 {14} In this case we conclude that the attempted armed robbery of Radosevich was
16 separated with a sufficient indicia of distinctness from Radosevich’s aggravated
17 battery by time, the nature of the individual criminal acts, and the objectives of the
18 criminal acts. Specifically, Defendant’s attempted armed robbery of Radosevich was
19 complete before Defendant turned his attention to the armed robbery of Tapie and

1 began to use force or threatened force against him. Defendant’s armed robbery of
2 Tapie was complete before Defendant subsequently committed aggravated battery on
3 Radosevich.

4 {15} Our conclusion that Defendant’s offenses were not unitary is also premised on
5 *Saiz*, which held that “[t]he proper analytical framework is whether the facts presented
6 at trial establish that the jury reasonably could have inferred independent factual bases
7 for the charged offenses.” 2008-NMSC-048, ¶ 30 (internal quotation marks and
8 citation omitted). Given the indicia of distinctness here and with *Saiz* in mind, we hold
9 that the criminal conduct was not unitary, and thus there was no double jeopardy
10 violation.

11 **B. Firearm Enhancement and Merger Issues**

12 {16} The district court sentenced Defendant to an additional year of incarceration,
13 pursuant to Section 31-18-16(A). Defendant appeals the enhancement of his sentence
14 for use of a firearm in the attempted armed robbery of Radosevich relying on this
15 Court’s decision in *Branch*, which has since been withdrawn upon order of remand
16 by the Supreme Court. We consider this issue on remand from the Supreme Court in
17 light of the Court’s disposition in *Baroz*. See Order at 1-2, *State v. Garduño*, No. S-1-
18 SC-36687 (Dec. 18, 2017). In *Baroz*, the defendant was sentenced to a term of
19 eighteen months, followed by one year of parole, for each of his convictions of

1 aggravated assault with a deadly weapon. 2017-NMSC-030, ¶ 20. The defendant’s
2 sentences on these counts were each enhanced by one year pursuant to the firearm
3 enhancement statute, Section 31-18-16(A). *Baroz*, 2017-NMSC-030, ¶ 20. Our
4 Supreme Court rejected the defendant’s contention that the firearm enhancement
5 violates double jeopardy because use of a firearm is an element of the underlying
6 crime, aggravated assault with a deadly weapon. *Id.* Concluding that the Legislature
7 intended to authorize an enhanced punishment when a firearm is used in the
8 commission of aggravated assault, our Supreme Court held that “[t]he sentence
9 enhancement does not run afoul of double jeopardy.” *Id.* ¶ 27.

10 {17} Given our Supreme Court’s holding in *Baroz*, we conclude that the firearm
11 enhancement in this case does not violate double jeopardy. We withdraw our previous
12 holding that the enhancement must be vacated and instead affirm the district court’s
13 ruling that Defendant’s sentence for attempted armed robbery be enhanced by one
14 year pursuant to the statutory firearm enhancement.

15 {18} In regard to Defendant’s convictions on the “merged” alternative counts,
16 Count 2 and Count 7, the same reasoning under double jeopardy applies. Although the
17 district court correctly merged Count 2 and Count 7 with Count 1 and Count 6,
18 respectively, and did not sentence Defendant on those counts, it inadvertently failed
19 to vacate the alternate convictions. Count 2 and Count 7 must be vacated. *See State*

1 v. *Santillanes*, 2001-NMSC-018, ¶ 28, 130 N.M. 464, 27 P.3d 456 (“[C]oncurrent
2 sentencing does not adequately remedy the imposition of impermissible multiple
3 punishments for a single offense; double jeopardy requires that the lesser offense
4 merge into the greater offense such that the conviction of the lesser offense, not
5 merely the sentence, is vacated.”); *see also State v. Mercer*, 2005-NMCA-023, ¶ 29,
6 137 N.M. 36, 106 P.3d 1283 (stating that “[i]f, upon retrial, the jury again convicts
7 [the d]efendant of alternatives on any count, one alternative conviction must be
8 vacated”).

9 **II. Failure to Sever Felon in Possession Charge Did Not Prejudice Defendant**

10 {19} “[T]he standard of review applicable to a severance issue is exceedingly
11 narrow.” *State v. Ramming*, 1987-NMCA-067, ¶ 24, 106 N.M. 42, 738 P.2d 914. “The
12 decision to grant a severance motion lies within the trial judge’s discretion and will
13 not be overturned on appeal unless the joinder of offenses results in *actual* prejudice
14 against the moving party.” *State v. Garcia*, 2011-NMSC-003, ¶ 16, 149 N.M. 185, 246
15 P.3d 1057. “[The d]efendant bears the burden of establishing that he was actually
16 prejudiced by a failure to sever.” *Id.*

17 {20} Defendant argues that he moved the district court to sever the felon in
18 possession charge thirteen days before trial. However, “the district court denied
19 severance as ‘untimely.’ ” Defendant contends that the district court erred in failing

1 to make “an affirmative finding of cross-admissibility” of the evidence pertaining to
2 each charge at separate trials and that admission of the evidence was highly prejudicial
3 to him.

4 {21} Our Supreme Court in *Garcia*, 2011-NMSC-003, ¶ 19, and *State v. Gallegos*,
5 2007-NMSC-007, ¶ 41, 141 N.M. 185, 152 P.3d 828, provided ample guidance
6 regarding the factors to be considered in deciding whether a defendant suffered actual
7 prejudice from failing to sever a felon in possession charge at trial.

8 {22} Defendant argues that his “being found guilty on all counts, . . . factual
9 similarities linking the offenses, . . . offenses that are inflammatory in nature, . . . [and]
10 proper jury instructions that adequately make clear to the jury that it must not consider
11 evidence inadmissible to a particular count,” all demonstrate actual prejudice.
12 *Gallegos*, 2007-NMSC-007, ¶ 41. We disagree.

13 {23} Our review of the record establishes that the State minimally focused on the fact
14 that Defendant was a convicted felon in its opening statement, during its case in chief,
15 or in closing. Moreover, the disclosure of Defendant’s status as a “convicted felon”
16 was appropriately handled by the district court when it read the stipulation of the
17 parties to the jury and by the State at the commencement of the State’s closing
18 argument when the prosecutor discussed the jury instruction relative to Count 5. The
19 stipulation and the second element of the jury instruction are identical: “Defendant,

1 in the preceding ten years, was convicted and sentenced to one or more years
2 imprisonment by a court of the United States or by a court of any state[.]”

3 {24} We conclude that the State did not prejudicially intertwine the offenses during
4 Defendant’s trial. *See Garcia*, 2011-NMSC-003, ¶ 20 (describing how the state
5 “generically mentioned the fact of the prior offenses” and in no way intertwined the
6 evidence of the past felony and the armed robbery charges). “Thus, in order for there
7 to be no prejudice at a trial of joined offenses when the simple and distinct evidence
8 as to each would not be cross-admissible at separate trials, court and counsel must
9 exercise a vigilant precision in speech and action far beyond that required in the
10 ordinary trial.” *Gallegos*, 2007-NMSC-007, ¶ 40 (internal quotation marks and
11 citation omitted).

12 {25} The limiting jury instruction given by the district court in regard to the charge
13 of felon in possession of a firearm, weighs against a showing of actual prejudice to
14 Defendant. The district court presented the following jury instruction tendered by
15 Defendant:

16 Evidence concerning [D]efendant’s status as a felon was admitted
17 for the limited purpose of consideration for Count 5.

18 You are instructed that you must not consider such evidence for
19 any purpose other than for your consideration of Count 5.

1 {26} Here, the district court took the proper step to mitigate the impact of the prior
2 felony evidence with its limiting instruction. We conclude, as our Supreme Court did
3 in *Garcia*, “the trial judge’s instruction to consider each offense separately adequately
4 addressed any concern that the jury might apply the evidence of prior felonies beyond
5 the felon in possession charge.” 2011-NMSC-003, ¶ 21.

6 **III. Sufficiency of the Evidence**

7 {27} Defendant appeals his conviction for conspiracy to commit armed robbery,
8 contending “[t]here was insufficient evidence of an agreement.” “The test for
9 sufficiency of the evidence is whether substantial evidence of either a direct or
10 circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt
11 with respect to every element essential to a conviction.” *State v. Montoya*,
12 2015-NMSC-010, ¶ 52, 345 P.3d 1056 (internal quotation marks and citation omitted).
13 The reviewing court “view[s] the evidence in the light most favorable to the guilty
14 verdict, indulging all reasonable inferences and resolving all conflicts in the evidence
15 in favor of the verdict.” *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711,
16 998 P.2d 176. We disregard all inferences and evidence that support a different result.
17 *See State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829.

18 {28} Defendant argues that the State’s only evidence of a conspiracy was the
19 presence of Vigil in the vehicle when Defendant arrived at the gas station and that

1 Vigil told Defendant to hurry, and the State therefore failed to show an agreement
2 made “by words or acts agreed together to commit armed robbery.” We hold that this
3 evidence was sufficient to prove the existence of an agreement. A conspiratorial
4 agreement may be proved by circumstantial evidence, and “the agreement can be
5 nothing more than a mutually implied understanding that can be proved by the
6 cooperative actions of the participants involved.” *State v. Roper*, 2001-NMCA-093,
7 ¶ 8, 131 N.M. 189, 34 P.3d 133. After Defendant confronted Tapie and Radosevich,
8 Vigil’s calling out to Defendant—“let’s go, let’s go”—could indicate that Defendant
9 was taking too long, according to a pre-planned arrangement. Vigil also covered his
10 face with his shirt during the incident, and Defendant told a detective it was Vigil’s
11 idea, stating, “[h]e’s the one that came up with the idea.” From these facts, the jury
12 could have reasonably inferred that Defendant and Vigil, by words or acts, agreed to
13 commit armed robbery.

14 {29} We also reject Defendant’s arguments that there was insufficient evidence in
15 support of his convictions for possession of a firearm by a felon, attempted armed
16 robbery, aggravated battery, and armed robbery. Defendant stipulated to his status as
17 a felon, and both Radosevich and Tapie testified that Defendant held a gun during the
18 encounter. Though there is no physical forensic evidence that Defendant possessed a
19 gun, the jury heard evidence establishing that Defendant threatened Radosevich and

1 Tapie at gunpoint, took Tapie’s wallet and sunglasses, tried to rob Radosevich of her
2 money, and struck Radosevich with a gun multiple times when she refused to comply
3 with his demands. The foregoing evidence was sufficient to support Defendant’s
4 convictions.

5 **IV. Exclusion of Evidence of Law Enforcement Bias**

6 {30} Defendant argues the district court erred by excluding evidence critical for
7 Defendant’s theory that the police were biased and therefore conducted a faulty
8 investigation. Defendant’s asserted defense theory was based on Radosevich and
9 Tapie “target[ing] and attack[ing]” him and that the police conducted a “flawed” or
10 “skewed” investigation because Radosevich’s father is a city councilor with influence
11 over the law enforcement officers handling the investigation. During cross-
12 examination, defense counsel attempted to ask Radosevich and one of the
13 investigating detectives about the position Radosevich’s father held as a city councilor
14 and his role on the scene immediately after the incident, but the district court sustained
15 the State’s objections based on relevance.

16 {31} “We review the admission of evidence under an abuse of discretion standard
17 and will not reverse in the absence of a clear abuse.” *State v. Sarracino*, 1998-NMSC-
18 022, ¶ 20, 125 N.M. 511, 964 P.2d 72. “An abuse of discretion occurs when the ruling

1 is clearly against the logic and effect of the facts and circumstances of the case.” *Rojo*,
2 1999-NMSC-001, ¶ 41 (internal quotation marks and citation omitted).

3 {32} We cannot conclude the district court abused its discretion by sustaining the
4 State’s objections. Defense counsel claimed that the presence of Radosevich’s father
5 on the scene was relevant because he was so “riled up” about what had happened to
6 his daughter that the police nearly arrested him. As noted in the State’s briefing, the
7 reaction of Radosevich’s father shows that he responded “as any normal parent
8 would” after discovering what had happened to his daughter, not that he improperly
9 exerted his authority as a politician or ordered law enforcement to investigate the
10 incident a particular way. Defense counsel was unable to offer any other explanation
11 or proof that Radosevich’s father attempted to direct the investigation through his
12 words or conduct. We, therefore, cannot “characterize [the ruling] as clearly untenable
13 or not justified by reason[,]” and we hold that the district court did not abuse its
14 discretion. *Id.* (internal quotation marks and citation omitted).

15 **CONCLUSION**

16 {33} We affirm all of Defendant’s convictions. The firearm enhancement to the
17 conviction of attempted aggravated robbery is also affirmed. We further direct the
18 district court to vacate Defendant’s convictions for Count 2 and Count 7.

19 {34} **IT IS SO ORDERED.**

1

2

STEPHEN G. FRENCH, Judge

3 **WE CONCUR:**

4

5 **LINDA M. VANZI, Chief Judge**

6

7 **MICHAEL E. VIGIL, Judge**