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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

No. A-1-CA-35458

LEROY LINDSEY,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY

Jacqueline D. Flores, District Judge

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MEMORANDUM OPINION

FRENCH, Judge.

{1} Defendant Leroy Lindsey appeals from the district court's judgment, entered

pursuant to a jury verdict for three counts of reckless child abuse, one count of

1 aggravated battery, and one count of resisting an officer. Defendant argues that: (1)
2 there was insufficient evidence to support any of his convictions, (2) his
3 convictions for three counts of child abuse violated his constitutional right to be
4 free from double jeopardy, (3) the district court failed to vacate his convictions for
5 alternative Counts 1 and 4 after merging them for sentencing, and (4) instructional
6 error mandates reversal of his convictions for negligent child abuse, as it resulted
7 in fundamental error. We reject the bulk of Defendant's arguments and affirm his
8 convictions. However, we agree that the district court inadvertently failed to vacate
9 the alternative counts in Counts 1 and 4 and remand with instructions to do so.

10 **BACKGROUND**

11 {2} On February 21, 2014, at 3:00 a.m., Defendant Leroy Lindsey, his sister, and
12 his sister's boyfriend were staying in the trailer home of Samantha G. At some
13 point during the night, Defendant broke into the bedroom where Samantha and her
14 two daughters were sleeping. A.S. and S.S. were ten and eight years old,
15 respectively. Samantha was sleeping on the bed with S.S. and A.S. slept on
16 blankets on the floor. Defendant forcibly entered the bedroom and attacked
17 Samantha, beating her about the head and body with his fists and falling on her,
18 while the children watched. Both of the children attempted to stop Defendant's
19 attack on Samantha; A.S., by yelling and trying to call the police and S.S. by
20 yelling for Defendant to stop. Defendant's sister also came into the bedroom and

1 attempted to stop Defendant's attack on Samantha. After ending his attack in the
2 bedroom, Defendant went to the kitchen and got a knife.

3 {3} After Defendant left the bedroom, Samantha, A.S., and S.S. ran to their
4 bathroom in a different location in the trailer. Defendant returned with a knife and
5 cornered his victims in the bathroom. Defendant began his second attack by
6 stabbing Samantha in the arm with such force that the blade penetrated both her
7 arm and chest cavity, puncturing her lung. Defendant then turned his attention to
8 A.S.

9 {4} A.S., who was in her mother's arms, yelled at Defendant to get away from
10 her mother and threw her phone at Defendant's face. Defendant then stabbed A.S.
11 in the right side of her face with the knife, breaking the blade from the handle. The
12 force of the blow embedded the blade in A.S.'s head from her right ear, down
13 through her tongue, to just below the left side of her jawbone. While the attack was
14 taking place, S.S. was curled in a ball on top of the washing machine. She saw
15 blood coming from both her mother and sister, and saw blood on the floor of the
16 bathroom.

17 {5} After a jury trial, Defendant was found guilty on five counts: Count 1, child
18 abuse (recklessly caused-torture, cruel confinement or cruel punishment) (great
19 bodily harm), pursuant to NMSA 1978, Section 30-6-1(D), as against A.S.; Count
20 2, child abuse (recklessly caused) (no great bodily harm), pursuant to NMSA 1978,
21 Section 30-6-1-(D), as against A.S.; Count 3, child abuse (recklessly caused) (no

1 great bodily harm), pursuant to NMSA 1978, Section 30-6-1-(D), as against S.S.;

2 Count 4, aggravated battery (deadly weapon), pursuant to NMSA 1978, Section

3 30-3-5 (A) and (C), as against Samantha G.; and, Count 6, resisting, evading or

4 obstructing an officer, pursuant to NMSA 1978, Section 30-22-1. This appeal

5 followed.

6 **DISCUSSION**

7 **I. Sufficiency of the Evidence**

8 {6} “The sufficiency of the evidence is reviewed pursuant to a substantial

9 evidence standard.” *State v. Treadway*, 2006-NMSC-008, ¶ 7, 139 N.M. 167, 130

10 P.3d 746. When reviewing a challenge to the sufficiency of the evidence, we

11 determine “whether substantial evidence of either a direct or circumstantial nature

12 exists to support a verdict of guilt beyond a reasonable doubt with respect to every

13 element essential to a conviction.” *State v. Sutphin*, 1988-NMSC-031, ¶ 21, 107

14 N.M. 126, 753 P.2d 1314. “In reviewing the sufficiency of the evidence, we must

15 view the evidence in the light most favorable to the guilty verdict, indulging all

16 reasonable inferences and resolving all conflicts in the evidence in favor of the

17 verdict.” *State v. Holt*, 2016-NMSC-011, ¶ 20, 368 P.3d 409 (internal quotation

18 marks and citation omitted). “In that light, the Court determines whether *any*

19 rational trier of fact could have found the essential elements of the crime beyond a

20 reasonable doubt.” *Id.* (internal quotation marks and citation omitted). “The jury

21 instructions become the law of the case against which the sufficiency of the

1 evidence is to be measured.” *Id.* (alterations, internal quotation marks, and citation
2 omitted).

3 {7} Defendant asserts there was insufficient evidence to support all of his
4 convictions. However, Defendant only presents arguments regarding the
5 insufficiency of the evidence as to his Count 3 conviction: reckless endangerment
6 of S.S. Therefore, we will only consider Defendant’s argument as to Count 3. *See*
7 *State v. Fuentes*, 2010-NMCA-027, ¶ 29, 147 N.M. 761, 228 P.3d 1181 (noting
8 that we will “not review unclear or undeveloped arguments which require us to
9 guess at what [a party’s] arguments might be”). Defendant argues the elements
10 instruction for Count 3 required the jury to find that Defendant attacked Samantha
11 and A.S. in S.S.’s “presence” and that the attack caused S.S. to be placed in a
12 situation that “endangered [her] life or health.” We disagree.

13 {8} To convict Defendant of child abuse not resulting in death or great bodily
14 harm, the jury was instructed that it had to find beyond a reasonable doubt that: (1)
15 Defendant attacked Samantha and A.S. in S.S.’s presence; (2) the attack caused
16 S.S. to be placed in a situation that endangered her life or health; (3) Defendant
17 showed reckless disregard for the safety or health of S.S.; (4) Defendant caused a
18 substantial and unjustifiable risk of serious harm to the safety or health of S.S.; and
19 (5) such a risk is one that any law-abiding person would recognize and behave
20 differently than Defendant did out of concern for the safety and health of S.S.. *See*
21 UJI 14-612 NMRA. Relying on *State v. Trujillo*, 2002-NMCA-100, ¶¶ 19, 20, 132

1 N.M. 649, 53 P.3d 909, Defendant argues that there was no evidence that S.S. was
2 endangered specifically, as she was not in the zone or line of physical danger from
3 the knife attack. Defendant’s reliance on *Trujillo* is misplaced.

4 {9} In *Trujillo*, the child did not witness the commencement of the attack on the
5 child’s mother. After coming to the bedroom door and seeing her father hit her
6 mother, the child returned to her bedroom. *Id.* ¶ 4-5. The attack was directed at the
7 child’s mother, and the “[d]aughter was never placed in the line of physical
8 danger.” *Id.* ¶ 19 (noting that the attack was directed at the child’s mother and the
9 defendant made the child leave the room, placing the child outside the direct line of
10 danger).

11 {10} The State established that Defendant cornered his three victims in the
12 bathroom, brutally stabbed Samantha and A.S., all while S.S. watched the attack
13 from close proximity. And while curled in a ball on the washing machine in the
14 bathroom, S.S. observed blood coming from both victims of the knife attack and
15 falling on the bathroom floor. The proximity of these attacks to S.S. is sufficient
16 evidence upon which a jury could conclude that Defendant recklessly and
17 unjustifiably caused the life or health of S.S. to be endangered. *See State v.*
18 *Granillo*, 2016-NMCA-094, ¶ 12, 384 P.3d 1121(holding that “[a]buse by
19 endangerment is a special class of child abuse designed to punish conduct that
20 exposes a child to a significant *risk* of harm,” regardless of physical injury to child
21 (internal quotation marks and citation omitted)); *see also State v. Arrendondo*,

1 2012-NMSC-013, ¶ 25, 278 P.3d 517 (noting that recklessness causing a
2 foreseeable risk may be proven with evidence that “the defendant was or should
3 have been aware that the child was present within the zone of danger”).

4 **II. Double Jeopardy**

5 {11} The appellate courts “generally review double jeopardy claims de novo.”
6 *State v. Rodriguez*, 2006-NMSC-018, ¶ 3, 139 N.M. 450, 134 P.3d 737; *see also*
7 *State v. Saiz*, 2008-NMSC-048, ¶ 22, 144 N.M. 663, 191 P.3d 521 (“Double
8 jeopardy presents a question of law, which [the appellate courts] review de
9 novo.”), *abrogated on other grounds by State v. Belanger*, 2009-NMSC-025, ¶ 36
10 n.1, 146 N.M. 357, 210 P.3d 783. “The constitutional prohibition against double
11 jeopardy protects against both successive prosecutions and multiple punishments
12 for the same offense.” *State v. Armijo*, 2005-NMCA-010, ¶ 15, 136 N.M. 723, 104
13 P.3d 1114 (internal quotation marks and citation omitted); *see also* U.S. Const.
14 amends. V, XIV; N.M. Const. art. II, § 15.

15 **A. Defendant’s Convictions for Child Abuse in Count 1 and Count 2 Do** 16 **Not Violate Double Jeopardy**

17 {12} Defendant argues two theories regarding the application of double jeopardy
18 as to Counts 1 and 2. Defendant maintains that: (1) A.S.’s child abuse not resulting
19 in great bodily harm is a necessarily included offense of A.S.’s child abuse
20 resulting in great bodily harm, and (2) the stabbing of Samantha, while A.S. was in
21 her arms, cannot serve as reckless endangerment of A.S., as the precedent stabbing
22 and the subsequent reckless endangerment was a unitary act. Under both

1 arguments, Defendant contends that his conviction for child abuse not resulting in
2 great bodily harm is predicated upon the stabbing of Samantha and A.S. in the
3 bathroom, and therefore, unitary conduct. We reject Defendant's arguments
4 because Defendant's conviction under Count 2 is based upon Defendant's discrete
5 and distinct reckless endangerment of A.S. that occurred in the bedroom when he
6 first attacked Samantha, as A.S. yelled at him to stop and tried to call the police.

7 {13} Our analysis begins with an examination of the contours of unitary conduct.

8 As our Supreme Court observed, “[u]nitary conduct is often defined by what it is
9 not. Thus, conduct is not unitary if the defendant commits two discrete acts
10 violative of the same statutory offense, but separated by sufficient indicia of
11 distinctness.” *State v. Cooper*, 1997-NMSC-058, ¶ 59, 124 N.M. 277, 949 P.2d 660
12 (internal quotation marks and citation omitted). In analyzing the contours of the
13 “indicia of distinctness” our courts are to consider “the separation between the
14 illegal acts by either time or physical distance, the quality and nature of the
15 individual acts, and the objectives and results of each act.” *Id.* (internal quotation
16 marks and citation omitted). Distinctness may also be established by the “existence
17 of an intervening event[. . .][the] defendant’s intent as evidenced by his conduct
18 and utterances[. . .][the] number of victims,” and “the behavior of the defendant
19 between [acts.]” *Herron v. State*, 1991-NMSC-012, ¶ 15, 111 N.M. 357, 805 P.2d
20 624.

1 {14} To convict Defendant of Count 2, the jury was instructed it had to find
2 beyond a reasonable doubt that: (1) Defendant attacked Samantha in A.S.’s
3 presence; (2) the attack caused A.S. to be placed in a situation that endangered her
4 life or health; (3) Defendant showed reckless disregard for the safety or health of
5 A.S.; (4) Defendant caused a substantial and unjustifiable risk of serious harm to
6 the safety or health of A.S.; and (5) such a risk is one that any law-abiding person
7 would recognize and behave differently than Defendant did out of concern for the
8 safety and health of A.S.

9 {15} Conversely, to convict Defendant of Count 1, the jury was instructed it had
10 to find beyond a reasonable doubt that: (1) “[Defendant] stabbed [A.S.] in the head
11 with a knife;” and (2) “[Defendant] caused [A.S.] to be tortured, or cruelly
12 confined, or cruelly punished[.]”

13 {16} “First, we examine whether the conduct was unitary, meaning whether the
14 same criminal conduct is the basis for both charges. If the conduct is not unitary,
15 then the inquiry is at an end and there is no double jeopardy violation.” *State v.*
16 *Bernal*, 2006-NMSC-050, ¶ 9, 140 N.M. 644, 146 P.3d 289 (citation omitted).
17 Defendant argues that “the jury could have employed and likely did employ the
18 same facts—[Defendant] stabbing [A.S.] in the course of his attack on her
19 mother—to underwrite convictions for both Count[] 1 and Count 2.” We are
20 unpersuaded.

1 {17} In closing argument to the jury, the State argued that Defendant’s discreet
2 acts of recklessly endangering A.S. were perpetrated in the bedroom as opposed to
3 the bathroom. The evidence established that A.S. was awakened to find
4 “[D]efendant on top of her mother, punching her[,]” and, “[h]e leaves the bedroom
5 to go get a knife. All of that right there places [A.S.] in a situation that is
6 endangering her life or her health.” “[W]e look to the state’s trial theory to identify
7 the specific criminal cause of action for which the defendant was convicted[.]”
8 *State v. Sena*, 2018-NMCA-037, ¶ 43, 419 P.3d 1240, *cert. granted*, 2018-
9 NMCERT-___ (Nos. S-1-SC-36932 & S-1-SC-36933 (consolidated), May 25,
10 2018); *see also State v. Montoya*, 2011-NMCA-074, ¶ 43, 150 N.M. 415, 259 P.3d
11 820 (observing that the state can avoid double jeopardy violations by identifying
12 specific, non-unitary conduct in jury instructions). As noted above, our review of
13 the trial transcript reveals that the State specifically communicated its theory to the
14 jury that A.S. was recklessly endangered in the bedroom as opposed to the
15 bathroom. The attacks on Samantha in the bedroom and bathroom were separated
16 by time and location. As was the quality and nature of the distinct attacks. We
17 conclude that Defendant’s conduct in the bedroom was separate and distinct from
18 that of the bathroom, not unitary, and therefore his conviction in Count 2 does not
19 violate Defendant’s double jeopardy protections. *See State v. Sotelo*, 2013-NMCA-
20 028, ¶ 18, 296 P.3d 1232 (“Independent factual bases may be established by
21 determining whether the acts constituting the two offenses are sufficiently

1 separated by time or space, looking to the quality and nature of the acts, the objects
2 and results involved, and the defendant's mens rea and goals during each act."
3 (internal quotation marks and citation omitted)).

4 **B. Defendant's Convictions for Child Abuse in Count 2 and Count 3 Do**
5 **Not Violate Double Jeopardy**

6 {18} Next, Defendant argues his two child abuse convictions, one as against A.S.
7 and one as against S.S., offend his double jeopardy rights as they are predicated
8 upon a single course of conduct: Defendant's attack on Samantha in the bathroom.
9 As noted above, Defendant's conviction for the reckless endangerment of A.S., in
10 Count 2, was predicated upon Defendant's conduct that occurred in the bedroom.
11 To the contrary, Defendant's conviction for reckless endangerment of S.S. was
12 predicated upon Defendant's knife attack upon Samantha and A.S. in the
13 bathroom.

14 {19} In closing argument to the jury, the State argued that Defendant's discreet
15 acts of reckless endangerment against S.S. were perpetrated in the bathroom: "if
16 the knife had not broken off inside of her daughter's head . . . they don't know
17 what would have happened. [The attack] might have kept going. This is a situation
18 that [S.S.] is watching." And that Defendant "attacked [mother] or [A.S.] in
19 [S.S.'s] presence[,]" and, "[S.S. is] watching a man repeatedly hit her mother, hit
20 her sister, then stabbing both of them." We conclude that Defendant's conduct
21 toward S.S. in the bathroom was separate and distinct from that of Defendant's

1 | conduct toward A.S. in the bedroom, not unitary, and therefore his conviction in
2 | Count 3 does not violate Defendant’s double jeopardy protections. *See id.*

3 | **Defendant’s Convictions for Alternative Counts 1 and 4 Must Be Vacated**

4 | {20} In regard to Defendant’s convictions on the “merged” alternative counts in
5 | Count 1 and Count 4, the same reasoning under double jeopardy applies. The
6 | Defendant argues that the alternative counts were not vacated. The State did not
7 | respond to the argument. Our review of the judgment and sentence does not reveal
8 | that the alternative counts were vacated. Although the district court correctly
9 | merged the respective alternative counts in Count 1 and Count 4, and did not
10 | sentence Defendant on those counts, it inadvertently failed to vacate the alternate
11 | convictions. The alternative counts in Count 1 and Count 4 must be vacated. *See*
12 | *State v. Santillanes*, 2001-NMSC-018, ¶ 28, 130 N.M. 464, 27 P.3d 456
13 | (“[C]oncurrent sentencing does not adequately remedy the imposition of
14 | impermissible multiple punishments for a single offense; double jeopardy requires
15 | that the lesser offense merge into the greater offense such that the conviction of the
16 | lesser offense, not merely the sentence, is vacated.”); *see also State v. Garcia*,
17 | 2011-NMSC-003, ¶ 39, 149 N.M. 185, 246 P.3d 1057 (holding that conviction of
18 | two crimes for the same offense requires the trial court to vacate the merged crime
19 | to avoid double jeopardy).

1 **III. The District Court Did Not Commit Fundamental Error In Instructing**
2 **the Jury**

3 {21} Defendant challenges his convictions for child abuse by reckless
4 endangerment in Counts 2 and 3 based on the jury instructions given by the district
5 court. Defendant argues that although the submitted jury instruction conforms to
6 the newly adopted uniform jury instruction for child abuse by reckless
7 endangerment, UJI 14-612 NMRA (effective April 3, 2015), the instruction
8 incorrectly defined the mens rea that our Supreme Court announced in *State v.*
9 *Consaul*, 2014-NMSC-030, ¶¶ 37-40, 332 P.3d 850. The State argues that
10 Defendant’s claim of instructional error is one of partial definitional error, *see*
11 *State v. Allen*, 2000-NMSC-002, ¶ 76, 128 N.M. 482, 994 P.2d 728, and that this
12 Court should not overrule uniform jury instructions that have been considered by
13 our New Mexico Supreme Court in actual cases. We agree.

14 {22} We are persuaded that we can provide no remedy to Defendant, as we are
15 precluded from overruling instructions our Supreme Court has considered in actual
16 cases, and our Supreme Court has ruled on UJI 14-612 in a challenge made in an
17 actual case. *See State v. Wilson*, 1994-NMSC-009, ¶ 6, 116 N.M. 793, 867 P.2d
18 1175 (holding that this Court can review the validity of uniform jury instructions
19 and is precluded only from overruling instructions that our Supreme Court has
20 considered in actual cases). In *State v. Montoya*, 2015-NMSC-010, ¶ 32, 345 P.3d
21 1056, our Supreme Court addressed the newly adopted UJI for reckless child abuse
22 under *Consaul* and used language suggesting that the UJI “clearly define[s]

1 reckless . . . conduct” within the meaning and intention of *Consaul*. We therefore
2 reject Defendant’s argument that the district court committed instructional or
3 fundamental error when it failed to include in its instruction to the jury a subjective
4 test that Defendant “consciously disregarded a substantial risk” of harm. We also
5 decline an invitation to transfer or certify this case to our Supreme Court based on
6 this unpreserved issue, because the level of Defendant’s consciousness was not an
7 element actually taken away from the jury under the facts of this case.

8 **CONCLUSION**

9 {23} We affirm all of Defendant’s convictions. We further direct the district court
10 to vacate Defendant’s convictions for the alternative counts in Counts 1 and 4.

11 {24} **IT IS SO ORDERED.**

12 _____
13 **STEPHEN G. FRENCH, Judge**

14 **WE CONCUR:**

15 _____
16 **LINDA M. VANZI, Chief Judge**

17 _____
18 **JULIE J. VARGAS, Judge**