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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-36487

5 **DAVID A. DUNLAP, JR.,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY**

8 **Karen L. Townsend, District Judge**

9 Hector H. Balderas, Attorney General

10 Santa Fe, NM

11 for Appellee

12 Bennett J. Baur, Chief Public Defender

13 Kathleen T. Baldrige, Assistant Appellate Defender

14 Santa Fe, NM

15 for Appellant

16 **MEMORANDUM OPINION**

17 **VANZI, Chief Judge.**

1 {1} Defendant appeals his conviction for violating a restraining order. We issued
2 a calendar notice proposing to affirm. Defendant has responded with a memorandum
3 in opposition. We affirm.

4 {2} Defendant continues to argue that double jeopardy bars his convictions for both
5 stalking and violation of a restraining order prohibiting domestic violence. [DS 3-4]
6 Because Defendant was charged with violation of separate statutes, we are presented
7 with a “double description” issue. *See State v. Ford*, 2007-NMCA-052, ¶ 8, 141 N.M.
8 512, 157 P.3d 77 (classifying a double jeopardy challenge to separate convictions for
9 resisting, evading, or obstructing an officer and battery on a peace officer as a double
10 description issue). For double description cases, we apply the two-part test set forth
11 in *Swafford v. State*, 1991-NMSC-043, ¶¶ 9, 25, 112 N.M. 3, 810 P.2d 1223: (1)
12 whether the conduct is unitary, and (2) if so, whether the Legislature intended to
13 punish the offenses separately. *See State v. Silvas*, 2015-NMSC-006, ¶ 9, 343 P.3d
14 616. “Only if the first part of the test is answered in the affirmative, and the second
15 in the negative, will the double jeopardy clause prohibit multiple punishment in the
16 same trial.” *Id.* (internal quotation marks and citation omitted).

17 {3} When determining whether Defendant’s conduct was unitary, we consider
18 whether his actions were separated by sufficient indicia of distinctness. *See State v.*
19 *DeGraff*, 2006-NMSC-011, ¶ 27, 139 N.M. 211, 131 P.3d 61. “Conduct is unitary
20 when not sufficiently separated by time or place, and the object and result or quality

1 and nature of the acts cannot be distinguished.” *Silvas*, 2015-NMSC-006, ¶ 10. “[W]e
2 consider such factors as whether the acts were close in time and space, their similarity,
3 the sequence in which they occurred, whether other events intervened, and [the]
4 defendant’s goals for and mental state during each act.” *Ford*, 2007-NMCA-052, ¶ 12.

5 {4} In this case, the offense of stalking took place on September 8, 2015, whereas
6 the restraining order conviction (a lesser included offense of aggravated stalking) was
7 based on conduct that occurred on October 13, 2015. [RP 201, 228] Defendant had
8 entered an *Alford* plea to the stalking charge. [RP 228] Therefore, the pattern of
9 conduct that supported the stalking charge did not necessarily include the October 13
10 incident, which might have happened if the State chose to include it in a jury
11 instruction if the case went to trial. Instead, the State had alleged three incidents that
12 took place on September 7 and 8. [MIO 2] This would have been sufficient to support
13 the stalking charge, making the October 13 incident unnecessary to the State’s case.
14 As such, double jeopardy does not bar punishment for both offenses because the
15 conduct was not unitary. *See Swafford*, 1991-NMSC-043, ¶ 26 (stating that conduct
16 is not unitary if the crimes occurred on separate days, even if they involved the same
17 victim).

18 {5} For the reasons set forth above, we affirm.

1 } **IT IS SO ORDERED.**

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3

LINDA M. VANZI, Chief Judge

4 **WE CONCUR:**

5

6 **J. MILES HANISEE, Judge**

7

8 **EMIL J. KIEHNE, Judge**