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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-36616

5 **JOSEPH ORTEGA,**

6 Defendant-Appellant.

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

8 **Christina P. Argyres, District Judge**

9 Hector H. Balderas, Attorney General

10 Santa Fe, NM

11 for Appellee

12 Bennett J. Baur, Chief Public Defender

13 Will O'Connell, Assistant Appellate Defender

14 Santa Fe, NM

15 for Appellant

16 **MEMORANDUM OPINION**

17 **VANZI, Chief Judge.**

18 {1} Defendant Joseph Ortega appeals following his jury trial convictions for selling

19 or giving alcoholic beverages to a minor; two counts of possession of a controlled

1 substance; resisting, evading, or obstructing an officer; and possession of drug
2 paraphernalia, and he raises four issues on appeal. [RP 209, 227; DS 1, 7] This Court
3 issued a notice proposing to summarily affirm. Defendant has filed a memorandum
4 in opposition, which we have duly considered. Remaining unpersuaded, we affirm.

5 {2} Defendant continues to argue the district court erred in denying his requested
6 instruction providing a defense to possession of drug paraphernalia, [MIO 7] but his
7 memorandum in opposition does not address any other issues raised in his docketing
8 statement. When a case is decided on the summary calendar, an issue is deemed
9 abandoned when a party fails to respond to the proposed disposition of that issue. *See*
10 *State v. Johnson*, 1988-NMCA-029, ¶ 8, 107 N.M. 356, 758 P.2d 306. We therefore
11 limit our discussion to the denial of Defendant’s proposed instruction providing the
12 defense of his enrollment in a harm reduction program.

13 {3} A defendant is entitled to jury instructions on his theory of the case if there is
14 evidence to support the instruction. The failure to give such an instruction is reversible
15 error. *See State v. Brown*, 1996-NMSC-073, ¶ 34, 122 N.M. 724, 931 P.2d 69. “The
16 propriety of jury instructions given or denied is a mixed question of law and fact.
17 Mixed questions of law and fact are reviewed de novo.” *State v. Salazar*, 1997-
18 NMSC-044, ¶ 49, 123 N.M. 778, 945 P.2d 996. Defendant asserts the district court
19 improperly denied his proposed instruction regarding his participation in a harm
20 reduction program on the ground that Defendant’s testimony did not prove he was in

1 a program and the harm reduction defense does not apply to syringes containing a
2 controlled substance. [MIO 6-10] Defendant argues his testimony stating he was in
3 a harm reduction program was evidence supporting his defense instruction, and the
4 defense of participation in a harm reduction program is not limited to clean or unused
5 syringes. [MIO 7-10] As we previously noted, Defendant does not appear to have
6 disclosed or introduced a harm reduction card demonstrating his enrollment in a
7 program, and the existence and validity of the card were disputed. [CN 9] Thus, the
8 only evidence supporting Defendant’s proposed instruction was his own testimony
9 about his enrollment in a harm reduction program. [MIO 9-10]

10 {4} NMSA 1978, Section 24-2C-6 (1997) provides “[e]xchange or possession of
11 hypodermic syringes and needles in compliance with the procedures of the program
12 shall not constitute a violation of the Controlled Substances Act[.]” “[A] ‘participant’
13 or ‘client’ means an intravenous drug user who exchanges a used hypodermic
14 syringe. . . for a sterile hypodermic syringe and needle in compliance with the
15 procedures of the program[.]” NMSA 1978, § 24-2C-3(B) (1997). Clients in a harm
16 reduction program shall be issued an identification card (SHARPS card) bearing a
17 unique code, but participation in a harm reduction program will not prohibit a person’s
18 arrest or prosecution at times other than when he is engaged in a harm reduction
19 activity. 7.4.6.10(B)(3), (4), (9) NMAC. “Harm reduction activities,” as they relate to
20 a client’s participation, means “distribution of new syringes and the collection of used

1 syringes [and] disposal methods for used syringes and other potential biohazard
2 material[.]” 7.4.6.7(G) NMAC. Beyond Defendant’s testimony stating he was carrying
3 a SHARPS card, it does not appear there was any evidence actually demonstrating
4 Defendant’s enrollment or showing Defendant was engaged in “harm reduction
5 activities” at the time he was arrested. Therefore, we conclude the evidence did not
6 support Defendant’s proposed instruction. Thus, we hold the district court did not err
7 in denying Defendant’s proposed instruction.

8 {5} Accordingly, for these reasons and those explained in our notice of proposed
9 disposition, we affirm.

10 {6} **IT IS SO ORDERED.**

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LINDA M. VANZI, Chief Judge

13 **WE CONCUR:**

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JULIE J. VARGAS, Judge

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STEPHEN G. FRENCH, Judge