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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-37126**

5 **STEVE GEORGE MARTINEZ,**

6           Defendant-Appellant.

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

8 **Christina Pete Argyres, District Judge**

9 Hector H. Balderas, Attorney General

10 Emily C. Tyson-Jorgenson, Assistant Attorney General

11 Santa Fe, NM

12 for Appellee

13 Bennett J. Baur, Chief Public Defender

14 Kimberly M. Chavez Cook, Assistant Appellate Defender

15 Santa Fe, NM

16 for Appellant

17   **MEMORANDUM OPINION**

18 **VANZI, Chief Judge.**

1 {1} Defendant Steve George Martinez appeals from the district court's judgment  
2 and sentence, entered pursuant to a jury trial, convicting him for aggravated DWI  
3 (eighth or subsequent offense), two counts of resisting, evading or obstructing an  
4 officer, and reckless driving. Unpersuaded that the docketing statement demonstrated  
5 error, we issued a notice of proposed summary disposition, proposing to affirm.  
6 Defendant responded to our notice with a memorandum in opposition and a motion  
7 to amend the docketing statement to add two double jeopardy challenges to his  
8 convictions. We issued a second notice and granted the motion to amend to add one  
9 of Defendant's challenges and proposed to reverse in part and remand for the district  
10 court to vacate one of Defendant's convictions for resisting, evading or obstructing  
11 an officer for violation of double jeopardy. We were unpersuaded by Defendant's  
12 remaining arguments and again proposed to affirm as to all of Defendant's original  
13 issues.

14 {2} The State has filed a response to our second notice, informing the Court that it  
15 will not be opposing our proposal to reverse and remand for the district court to vacate  
16 one of Defendant's convictions for resisting, evading or obstructing an officer.  
17 Defendant has filed a second memorandum in opposition. We have considered this  
18 response, and remain unpersuaded as to Defendant's original issues. We affirm in part,

1 reverse in part, and remand for the district court to vacate one of Defendant's  
2 convictions for resisting, evading or obstructing an officer.

### 3 **Double Jeopardy**

4 {3} We agree with Defendant that his convictions for two counts of resisting,  
5 evading, or obstructing an officer under different subsections of the statute violate  
6 double jeopardy under the "double description" line of cases, based on this Court's  
7 opinion in *State v. LeFebre*, 2001-NMCA-009, ¶¶ 16-23, 130 N.M. 130, 19 P.3d 825.  
8 [1 MIO 4-9] In *LeFebre*, we held that the defendant's refusal to stop his vehicle when  
9 directed to do so by officers, his failure to safely exit the highway and the ensuing car  
10 accident, in addition to his subsequent act of exiting his vehicle and fleeing on foot,  
11 constituted unitary conduct with the singular purpose of evading officers. *Id.* ¶ 18.

12 {4} In the current case, Defendant was convicted for having violated the same  
13 statutory subsections of the offense of resisting, evading or obstructing an officer as  
14 was the defendant in *LeFebre*. *Id.* ¶ 20; *see* NMSA 1978, § 30-22-1(B) and (C)  
15 (1981). [RP 86-87] The officer named in the jury instructions is Jason Brown; [RP 86-  
16 87] thus, we look at Defendant's actions with respect to Officer Brown to determine  
17 whether Defendant's charged conduct was unitary. *See State v. Silvas*, 2015-NMSC-  
18 006, ¶ 10, 343 P.3d 616 (looking to the state's presentation of the evidence to the jury  
19 through argument and jury instructions to determine whether it relied on the same

1 conduct to support the offenses). Defendant refused to pull over after Officer Brown  
2 signaled him to do so, [1 MIO 7] and Defendant fled in his vehicle after having his  
3 tires flattened, and continued to drive on his rims, then stopped the truck, and ran  
4 away on the highway, in a constant attempt to flee from police. [DS unnumbered 3-4]  
5 We see no material distinction between the actions of Defendant and the actions of the  
6 defendant in *LeFebre* that would warrant a different conclusion as to the unitariness  
7 of Defendant’s conduct than that reached in *LeFebre*. 2001-NMCA-009. *See id.* ¶ 18  
8 (holding that the defendant’s “actions can only be reasonably deemed to constitute  
9 unitary conduct” and rejecting the State’s reasoning that his “failure to successfully  
10 negotiate an exit from the interstate highway and his ensuing automobile accident  
11 constitute an intervening event that ended the [d]efendant’s first act contrary to  
12 Section 30-22-1—his refusal to stop his vehicle when directed to do so by  
13 officers—and began a second act that is contrary to the statute, the evasion of the  
14 officers on foot”).

15 {5} In applying a modified strict elements test to determine whether the Legislature  
16 intended to impose multiple punishments for this unitary conduct, in *LeFebre*, we  
17 looked at the elements in Section 30-22-1(B) and (C) and the jury instructions and  
18 concluded that the State’s legal theory was simply that the defendant was attempting

1 to evade the police officers. *LeFebre*, 2001-NMCA-009, ¶¶ 20-23. The jury  
2 instructions in the current case [RP 86, 87] mirror the instructions in *LeFebre*. *Id.*  
3 ¶ 22. Thus, the State’s theory in the current case also was simply that Defendant was  
4 attempting to evade the police officer. Because this case is materially  
5 indistinguishable from *LeFebre*, the same result is required. We therefore reverse and  
6 remand to the district court to vacate one of Defendant’s convictions for resisting,  
7 evading or obstructing an officer for violation of double jeopardy.

8 {6} We note that, in his second memorandum in opposition, Defendant has re-raised  
9 the other double jeopardy argument that was presented in his motion to amend the  
10 docketing statement. [2 MIO 2-3] We have already denied the motion to amend to add  
11 this issue. We treat Defendant’s attempt to argue the issue again as a motion for  
12 rehearing, and deny it.

### 13 **Show-Up Identification**

14 {7} Defendant maintains that the district court erred by denying the suppression of  
15 Officer Frazier’s show-up identification of Defendant, but makes no responsive  
16 argument to our second notice. [2 MIO 4; 1 MIO 12-17] As we have stated, Officer  
17 Frazier’s show-up identification of Defendant was not necessary to establish  
18 Defendant’s identity, in light of the testimony of Officers Brown, Frazier, and Luthi  
19 and the circumstances that flowed from Defendant driving through the DWI

1 checkpoint. For the reasons provided in our previous notices, we hold that  
2 Defendant's convictions were unattributable to Officer's Frazier's identification of  
3 Defendant at the DWI checkpoint, given the information known to the testifying  
4 officers and Officer Brown's and Officer Luthi's personal observations of Defendant.  
5 *Cf. State v. Tollardo*, 2012-NMSC-008, ¶ 36, 275 P.3d 110 (stating that a  
6 constitutional error is harmless only "when there is no reasonable *possibility* it  
7 affected the verdict." (internal quotation marks and citation omitted)); *id.* ¶ 43 (stating  
8 that in determining "the likely effect of the error, courts should evaluate all of the  
9 circumstances surrounding the error. This requires an examination of the error itself,  
10 which [may] . . . include an examination of the source of the error and the emphasis  
11 placed upon the error."). On these grounds, we hold that Defendant has not  
12 demonstrated reversible error in the district court's denial of his motion to suppress  
13 the evidence.

#### 14 **Sufficiency of the Evidence**

15 {8} Defendant continues to argue that the circumstantial evidence was insufficient  
16 to support his conviction for aggravated DWI. [2 MIO 4; 1 MIO 17-18] Again,  
17 Defendant does not raise any responsive argument to our second notice.

18 {9} As we have previously stated in this case, to the extent that Defendant's  
19 challenge to the sufficiency of the evidence focuses on the identification of him as the

1 person who drove through the DWI checkpoint, we disagree that the evidence  
2 insufficiently identified Defendant based on the testimony of the officers, which  
3 shows that Defendant was continuously observed from the DWI checkpoint to his  
4 ultimate capture. The evidence established that Defendant fled the DWI checkpoint,  
5 fled after having his tires flattened, drove on his rims, stopped the truck, and ran away  
6 on the highway, in a constant attempt to flee from police. [DS unnumbered 3-4] This  
7 evidence of the extreme efforts Defendant took to avoid contact with police and  
8 capture supports an inference of a consciousness of guilt. *See, e.g., State v. Morales,*  
9 *2002-NMCA-052, ¶ 31, 132 N.M. 146, 45 P.3d 406, overruled on other grounds by*  
10 *Tollardo, 2012-NMSC-008, ¶ 37 n.6.* Also, a search of Defendant’s truck revealed  
11 several beer cans in the backseat. [DS unnumbered 4] After his arrest, Defendant  
12 refused to submit to a breath test. [DS unnumbered 4] *See State v. Marquez,*  
13 *2009-NMSC-055, ¶ 16, 147 N.M. 386, 223 P.3d 931* (noting that a jury can  
14 reasonably infer consciousness of guilt from defendant’s refusal to submit to a breath  
15 test), *overruled on other grounds by Tollardo, 2012-NMSC-008, ¶ 37 n.6; NMSA*  
16 *1978, Section 66-8-102(D)(3) (2016)* (“Aggravated driving under the influence of  
17 intoxicating liquor or drugs consists of . . . refusing to submit to chemical testing, as  
18 provided for in the Implied Consent Act, . . . and in the judgment of the court, based

1 upon evidence of intoxication presented to the court, the driver was under the  
2 influence of intoxicating liquor or drugs.”

3 {10} Viewing the evidence in the light most favorable to the verdict and indulging  
4 in all reasonable inferences, we hold that evidence was sufficient to support  
5 Defendant’s conviction for aggravated DWI. *See State v. Samora*, 2016-NMSC-031,  
6 ¶ 34, 387 P.3d 230 (stating our standard of review for assessing the sufficiency of the  
7 evidence).

8 **CONCLUSION**

9 {11} For the reasons stated in this opinion and in our previous notices, we affirm in  
10 part, reverse in part, and remand for the district court to vacate one of Defendant’s  
11 convictions for resisting, evading or obstructing an officer for violation of double  
12 jeopardy.

13 {12} **IT IS SO ORDERED.**

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**LINDA M. VANZI, Chief Judge**

16 **WE CONCUR:**

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**J. MILES HANISEE, Judge**



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2 **HENRY M. BOHNHOFF, Judge**