

1 **VIGIL, Justice.**

2 {1} This direct appeal having come before the full Court, the Justices having read
3 the briefs of the parties and otherwise having fully informed themselves on the issues
4 and applicable law as raised by the parties; and

5 {2} All of the Justices having concurred that there is no reasonable likelihood that
6 a written decision or opinion would affect the disposition of this appeal or advance the
7 law of the state;

8 **IT IS, THEREFORE, ADJUDGED THAT:**

9 {3} Defendant appeals from his convictions for felony murder, burglary, and
10 tampering with evidence. Defendant raises three issues on appeal. Defendant's first
11 issue raises a number of challenges to the jury instructions as a matter of fundamental
12 error. Defendant's second issue raises a claim of ineffective assistance of counsel
13 arising from the erroneous jury instructions given in this case. And Defendant's third
14 issue challenges the district court's denial of Defendant's motion to suppress evidence
15 based on Defendant's claims of a faulty search warrant process. For the reasons that
16 follow, we reverse Defendant's convictions for felony murder and burglary, affirm his
17 conviction for tampering with evidence, and remand for a new trial.

18 **Defendant's Convictions for Felony Murder and Burglary Must Be Reversed and**
19 **Remanded for a New Trial Because of Errors in the Instructions Given to the**

1 **Jury**

2 {4} Defendant argues that the jury was erroneously instructed because (1) the
3 essential elements instruction for the felony murder charge did not include the
4 essential elements of the predicate offense of attempted armed robbery; (2) the
5 intoxication instruction given with the felony murder charge also refers to attempted
6 armed robbery but fails to accurately set forth the intent element for that crime; (3) the
7 duress instruction given to the jury refers to both attempted robbery and armed
8 robbery but does not define either crime; (4) the aggravated burglary instruction uses
9 armed robbery as the predicate offense but does not set forth the elements of the
10 crime; (5) the intoxication instruction given with the aggravated burglary charge refers
11 to an unparticularized felony and refers to “theft” even though theft was not included
12 as a basis for aggravated burglary; and (6) the lesser-included offense of burglary uses
13 robbery as the predicate felony even though the court did not provide the jury with the
14 essential elements for that crime.

15 **Felony Murder and Related Instructions Fail to Provide the Essential Elements**
16 **for the Predicate Offense of Attempted Armed Robbery**

17 {5} The State concedes error in the felony murder instruction because the essential
18 elements of the predicate offense, attempted armed robbery, were not given. And
19 although the intoxication and duress instructions that were given with the felony

1 murder instruction reference the predicate felony of attempted armed robbery, neither
2 of those instructions sets forth the essential elements for attempted armed robbery.

3 {6} We agree that the felony murder instruction was erroneous. As Use Note 3 to
4 UJI 14-202 NMRA provides, the jury must be instructed on the essential elements of
5 the predicate offense for felony murder. There is no dispute that attempted armed
6 robbery was the predicate offense at issue in this case and that the jury was not
7 instructed on the essential elements for that offense. As such, notwithstanding any
8 failure to object to the adequacy of the instructions that were given, we agree with
9 Defendant's contention—and the State's concession—that the failure to instruct the
10 jury on the essential elements of the predicate felony of attempted armed robbery
11 amounts to fundamental error requiring the reversal of Defendant's felony murder
12 conviction and remand for a new trial on that charge. *See State v. Contreras*, 1995-
13 NMSC-056, ¶ 17, 120 N.M. 486, 903 P.2d 228 (recognizing that, when armed robbery
14 is the predicate felony for felony murder, proof of armed robbery is a necessary
15 element of felony murder); *State v. Barber*, 2004 NMSC-019, ¶ 20, 135 N.M. 621, 92
16 P.3d 633 (recognizing that the failure to instruct the jury on an essential element is
17 ordinarily fundamental error even when the defendant fails to object); *see also* UJI 14-
18 1621 NMRA (providing the essential elements for armed robbery); UJI 14-2801

1 NMRA (providing the essential elements for attempt to commit a felony). Because we
2 reverse Defendant’s felony murder conviction on this basis, we need not address
3 Defendant’s claims that the felony murder instruction also failed to include an element
4 related to his defenses of intoxication and duress.

5 **Defendant’s Claim of Error By the Aggravated Burglary Instruction Is Moot**

6 {7} Defendant also argues that the aggravated burglary instruction given to the jury
7 was erroneous because it too used attempted armed robbery as the predicate felony but
8 failed to set forth the essential elements of that crime. But as the State points out,
9 Defendant was implicitly acquitted of aggravated burglary when the jury convicted
10 Defendant of the lesser-included offense of burglary. We therefore agree that any
11 claimed error on this point is moot and need not be addressed further. *See State v.*
12 *Melton*, 1984-NMCA-115, ¶ 14, 102 N.M. 120, 692 P.2d 45 (noting that claims of
13 instructional error need not be addressed when related to a charge upon which the jury
14 acquitted).

15 **The Instructional Errors Related to Defendant’s Burglary Conviction Require**
16 **Reversal**

17 {8} As the parties note, “[b]urglary is a specific intent crime.” *See State v. Jennings*,
18 1984-NMCA-051, ¶ 14, 102 N.M. 89, 691 P.2d 882. Although the intoxication
19 instruction given to the jury for aggravated burglary provided the jury should acquit

1 Defendant if it found that he was too intoxicated to form the specific intent, the jury
2 was not similarly instructed with regard to the non-aggravated burglary charge. But
3 as the State concedes, the failure to instruct the jury in this regard was error because
4 burglary is also a specific intent crime for which the defense of intoxication also
5 applies. *See* UJI 14-5111 NMRA Use Note 1. We therefore agree that Defendant's
6 burglary conviction must be reversed and remanded for a new trial. *See State v. Leyba*,
7 2012-NMSC-037, ¶ 44, 289 P.3d 1215 (recognizing that UJI 14-5111 must be given
8 as an element of the offense for which intent can be negated rather than as a separate
9 instruction). Because his burglary conviction is reversed on this basis, we need not
10 address Defendant's other claimed errors with regard to the burglary charge itself.

11 **Claims of Ineffective Assistance of Counsel Need Not Be Addressed**

12 {9} Defendant's claims of ineffective assistance of counsel relate to trial counsel's
13 failures to properly object to the instructional defects discussed above. But because
14 we have already concluded that Defendant's convictions for felony murder and
15 burglary must be reversed because of instructional error, Defendant's claims of
16 ineffective assistance of counsel will not provide him with any greater relief. We
17 therefore do not address his ineffective assistance of counsel issues any further. *See*
18 *generally State v. Almanza*, 2007-NMCA-073, ¶ 5, 141 N.M. 751, 160 P.3d 932

1 (recognizing that an appellate court will not address other issues that will not result
2 in greater relief than that afforded by issues upon which relief is already granted).

3 **The District Court Did Not Err in Denying Defendant's Motion to Suppress**
4 **Evidence Based on Technical Defects in the Search Warrant Process**

5 {10} Although the reversal of Defendant's convictions for felony murder and
6 burglary makes it unnecessary to address his suppression issue to the extent it
7 implicates those convictions, Defendant's claims of erroneous jury instructions and
8 ineffective assistance of counsel do not relate to his tampering with evidence
9 conviction. We will therefore proceed to address whether the district court's denial of
10 Defendant's motion to suppress evidence was error that would require the reversal of
11 his conviction for tampering with evidence.

12 {11} During the second day of trial, defense counsel first challenged the validity of
13 the search warrant on the basis that (1) the search warrant was dated December 31,
14 2011, even though the victim was not killed until January 2, 2012, and (2) the
15 detective did not sign the statement of probable cause prior to the issuance of the
16 search warrant and only did so after the warrant was issued upon direction by the
17 judge who issued the warrant to do so. With regard to the matter of the date on the
18 warrant, Detective Naylor testified that the incorrect date was a typographical error.
19 The detective testified that he took the warrant application to the warrant judge at her

1 house early on the morning of January 4, 2012. At that time, the detective testified that
2 the judge placed him under oath and he swore that the contents of the search warrant
3 affidavit were true. Later that day, the detective testified that another officer told him
4 he had forgotten to sign the search warrant application, at which time he contacted the
5 issuing judge to ask her what to do about it. The detective testified that the judge
6 noted that he had been sworn in by her and advised him to sign it and submit it to the
7 clerk's office, which he immediately did.

8 {12} We agree with the State that the constitutional requirements for a search
9 warrant, namely an oath or affirmation and written statement of probable cause, were
10 met in this case. *See* U.S. Const. amend. IV; N.M. Const. art. II, § 10. Suppression for
11 technical violations in securing and executing a search warrant is only required when
12 “the defendant can show prejudice or if there was a deliberate disregard of the rule.”
13 *See State v. Malloy*, 2001-NMCA-067, ¶ 11, 131 N.M. 222, 34 P.3d 611. We agree
14 with the State that no such showing has been made in this case. We therefore hold that
15 the district court did not err in denying Defendant's motion to suppress. *Id.* at ¶ 23
16 (concluding that there is no reason to suppress evidence obtained pursuant to a search
17 warrant notwithstanding technical violations without a showing of prejudice to the
18 defendant or a deliberate violation of the rule).

1 **CONCLUSION**

2 {13} Because the district court did not err in denying Defendant’s motion to suppress
3 and Defendant has not raised any other claims of error with regard to his tampering
4 with evidence conviction, that conviction is affirmed. For the reasons set forth above,
5 however, Defendant’s felony murder and burglary convictions must be reversed
6 because of errors in the jury instructions that amounted to fundamental error. And
7 because Defendant has not challenged the sufficiency of the evidence to support his
8 convictions for felony murder and burglary, this case is remanded to the district court
9 for a new trial on those charges.

10 {14} **IT IS SO ORDERED.**

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12 **BARBARA J. Vigil, Justice**

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14 **CHARLES W. DANIELS, Chief Justice**

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16 **PETRA JIMENEZ MAES, Justice**

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EDWARD L. CHÁVEZ, Justice

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JUDITH K. NAKAMURA, Justice