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1 **IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

2 Opinion Number:

3 Filing Date: March 4, 2024

4 **NO. S-1-SC-38910**

5 **STATE OF NEW MEXICO,**

6 Plaintiff-Respondent/Cross-Petitioner,

7 v.

8 **CLIVE DALTON PHILLIPS,**

9 Defendant-Petitioner/Cross-Respondent.

10 **ORIGINAL PROCEEDING ON CERTIORARI**

11 **Clara Moran, District Judge**

12 Bennett J. Baur, Chief Public Defender

13 Caitlin C.M. Smith, Assistant Appellate Defender

14 Santa Fe, NM

15 for Petitioner/Cross-Respondent

16 Hector H. Balderas, Attorney General

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18 Santa Fe, NM

19 for Respondent/Cross-Petitioner

1 **OPINION**

2 **THOMSON, Justice.**

3 {1} Defendant Clive Phillips was convicted of six counts of aggravated battery
4 and pleaded guilty to one count of voluntary manslaughter after he violently attacked
5 Adrian Carriaga and Alexzandria Buhl (Allie), killing Adrian and severely injuring
6 Allie. Defendant challenges his convictions, arguing that double jeopardy bars the
7 multiple convictions with the exception of one count of battery for attacking Allie
8 and one count of manslaughter for attacking and killing Adrian. We conclude that
9 the manslaughter conviction and the challenged battery convictions are each based
10 on distinct conduct and therefore do not violate Defendant’s right against double
11 jeopardy. We reverse, in part, and affirm, in part, the Court of Appeals.

12 **I. BACKGROUND**

13 {2} Defendant, Allie, Adrian, and Sean Madrid were close friends and shared a
14 four-bedroom house. Defendant and Allie had been in an on-and-off relationship
15 since high school and had a baby together. In the summer of 2013, Allie broke up
16 with Defendant and moved into her own bedroom in the house with the baby. Shortly
17 thereafter, Allie and Adrian began a romantic relationship.

18 {3} Early one morning, Sean became suspicious that Allie and Adrian were
19 sleeping together and called Defendant, who was not home at the time, to inform

1 him of his suspicions. Defendant drove to the house, walked into Allie’s room with
2 a baseball bat, and discovered Allie and Adrian in bed together.

3 {4} Armed with the bat, Defendant struck the two numerous times, and a struggle
4 ensued. Defendant eventually dropped the baseball bat and left Allie’s room to
5 retrieve a handgun. Allie immediately shut and locked her bedroom door, but
6 Defendant came back, shot the door handle, and kicked the door open. Upon
7 reentering Allie’s room, Defendant shot Adrian once in the chest and once in his
8 right armpit. Out of ammunition, Defendant left Allie’s room, and Allie called 911.
9 Defendant returned to the room soon after with a rifle. He asked Adrian, “Are you
10 ready?”, placed the rifle under Adrian’s chin, and fired, killing Adrian.

11 {5} Defendant then turned to Allie and shot her once in her shin and inserted his
12 finger into her bullet wound. Defendant grabbed Allie’s phone, which was still
13 connected to 911, and before ending the call described to the operator what had
14 happened. He then resumed his assault on Allie by punching her in the face. The two
15 struggled before Defendant pushed Allie against the wall in the hallway and choked
16 her, causing her to lose consciousness. The police arrived at the home shortly
17 thereafter.

18 {6} For Defendant’s attack on Adrian, the jury could not reach a verdict on the
19 murder charge or on the lesser-included offense of manslaughter for the killing of

1 Adrian. *See* NMSA 1978, § 30-2-1 (1994) (murder); NMSA 1978, § 30-2-3 (1994)
2 (manslaughter). However, the jury convicted Defendant of two counts of aggravated
3 battery with a deadly weapon—one for striking Adrian with the baseball bat and one
4 for shooting Adrian with the handgun. *See* NMSA 1978, § 30-3-5 (1969) (aggravated
5 battery); NMSA 1978, § 31-18-16 (1993, amended 2022) (firearm enhancement).
6 For his attack on Allie, the jury convicted Defendant of four counts of aggravated
7 battery against a household member—one for striking Allie with the baseball bat
8 (deadly weapon), one for shooting her with the rifle (deadly weapon), one for
9 punching her, and one for strangling her (great bodily harm). *See* NMSA 1978, § 30-
10 3-16 (2008, amended 2018) (aggravated battery against a household member); § 31-
11 18-16 (1993) (firearm enhancement). Following an appeal to this Court regarding
12 the scope of retrial on the murder charge, *see State v. Phillips (Phillips I)*, 2017-
13 NMSC-019, 396 P.3d 153, Defendant pleaded guilty to voluntary manslaughter for
14 the death of Adrian. At sentencing, Defendant argued that his convictions for
15 attacking Adrian and Allie were based on unitary conduct and therefore violated the
16 protections afforded by the double jeopardy clause. The district court disagreed and
17 sentenced Defendant to twenty-five years imprisonment, suspending seven years.

18 {7} Defendant appealed, contending (1) that he should only be convicted of one
19 count of battery for attacking Adrian and one count of battery for attacking Allie and

1 (2) that his battery conviction for shooting Adrian with the handgun should be
2 vacated because it was based on the same conduct as the manslaughter conviction.
3 *State v. Phillips (Phillips II)*, 2021-NMCA-062, ¶¶ 1, 9, 17, 31, 499 P.3d 648. The
4 Court of Appeals affirmed Defendant’s convictions for the two batteries against
5 Adrian as they were not based on unitary conduct and therefore, did not violate
6 double jeopardy. *Id.* ¶ 16. However, the Court concluded that the battery (handgun)
7 and manslaughter convictions violated double jeopardy because a reasonable jury
8 could have found either unitary conduct or distinct acts. *Id.* ¶¶ 23-26, 29.
9 Therefore, the Court presumed that the conduct was unitary as required by *State v.*
10 *Foster*, 1999-NMSC-007, ¶ 28, 126 N.M. 646, 974 P.2d 140 (holding that we must
11 presume a defendant’s conduct is unitary if the jury convicted the defendant under a
12 general verdict and the record does not indicate whether the jury relied on a legally
13 inadequate alternative that would result in double jeopardy), *abrogated on other*
14 *grounds by Kersey v. Hatch*, 2010-NMSC-020, ¶ 17, 148 N.M. 381, 237 P.3d 683.
15 *Id.* ¶¶ 26-29. Finally, the three battery convictions for hitting Allie with the baseball
16 bat, shooting her with the rifle, and strangling her were affirmed. *See Phillips II*,
17 2021-NMCA-062, ¶¶ 1, 33. The Court accepted the State’s concession that the
18 battery conviction for punching Allie was violative of double jeopardy and reversed
19 that conviction. *Id.* ¶¶ 34-35. That reversal is not at issue in this appeal.

1 {8} Defendant petitioned for certiorari, contending that his two battery
2 convictions for attacking Adrian (baseball bat and handgun) and his three battery
3 convictions for attacking Allie (baseball bat, rifle, and strangulation) all violate
4 double jeopardy. The State cross-petitioned, arguing that the Court of Appeals erred
5 by vacating the conviction for battery of Adrian with a handgun. We granted both
6 petitions. We affirm Defendant’s manslaughter conviction and all five of his
7 aggravated battery convictions. We further conclude that the Court of Appeals erred
8 in its application of the presumption announced in *Foster*. Additionally, we clarify
9 that in conducting a double jeopardy analysis for a conviction rendered by a guilty
10 plea, a reviewing court should examine what the record shows about whether a
11 defendant’s acts are distinct rather than what a reasonable jury could have found.

12 **II. DISCUSSION**

13 {9} The Fifth Amendment to the United States Constitution provides that “[n]o
14 person shall . . . be subject for the same offense to be twice put in jeopardy of life or
15 limb.” The double jeopardy clause prohibits a court from “imposing multiple
16 punishments for the same offense.” *State v. Porter*, 2020-NMSC-020, ¶ 5, 476 P.3d

1 1201 (text only)¹ (citation omitted). There are two types of multiple punishment
2 cases: “those cases in which a defendant is charged with multiple violations of a
3 single statute based on a single course of conduct (unit of prosecution cases) and
4 those cases in which a defendant is charged with violating different statutes in a
5 single course of conduct (double-description cases).” *State v. Sena*, 2020-NMSC-
6 011, ¶ 44, 470 P.3d 227 (text only) (citation omitted). “While the analysis for each
7 type of case focuses on whether the Legislature intended multiple punishments, the
8 particular canons of construction we apply in ascertaining the Legislature’s intent
9 depend on the specific type of multiple punishment case in front of us.” *State v.*
10 *Benally*, 2021-NMSC-027, ¶ 11, 493 P.3d 366 (text only) (citation omitted). We
11 review this question of constitutional law de novo. *Porter*, 2020-NMSC-020, ¶ 11.
12 {10} This case involves both unit of prosecution and double description analyses.
13 Defendant raises a unit of prosecution argument, contending that his multiple battery
14 convictions violate double jeopardy because “he attacked [Adrian] and [Allie]
15 during a single episode, which took place in a small space and a short amount of
16 time, and therefore he should not have been convicted of more than one count of

¹The “text only” parenthetical as used herein indicates the omission of all of the following—internal quotation marks, ellipses, and brackets—that are present in the quoted source, leaving the quoted text itself otherwise unchanged.

1 battery against each of them.” The State argues under a double-description challenge
2 that Defendant’s convictions for aggravated battery with a handgun and
3 manslaughter stemming from his attack on Adrian were not based on unitary
4 conduct, and therefore we should reverse the Court of Appeals’ determination that
5 these convictions violate double jeopardy. We address Defendant’s unit of
6 prosecution challenge first.

7 **A. Unit of Prosecution**

8 {11} In a unit of prosecution case, we focus on “whether a defendant has received
9 more punishments than the number of punishments that the Legislature intended to
10 authorize under the facts and circumstances of the case.” *Benally*, 2021-NMSC-027,
11 ¶ 12. This is a two-part test. *Id.* First, “we must analyze the statute to determine
12 whether the Legislature has defined the unit of prosecution.” *Id.* ¶ 13 (text only)
13 (citation omitted). We do this by considering “all markers of legislative intent . . .
14 including the wording, structure, legislative history, legislative purpose, and
15 quantum of punishment prescribed under the statutory scheme.” *Id.* If the statute
16 defines the unit of prosecution, “our inquiry is complete.” *Id.* ¶ 14. “However, if the
17 statute remains insurmountably ambiguous as to its intended unit of prosecution,
18 then we apply . . . the rule of lenity—and construe the statute in favor of the
19 defendant.” *Id.* (internal quotation marks and citation omitted). “The rule of lenity

1 requires us to presume that the Legislature did not intend to separately punish
2 discrete acts in a defendant’s course of conduct absent proof that each act was in
3 some sense distinct from the others.” *Id.* ¶ 16 (text only) (citation omitted). “After
4 applying the rule of lenity . . . , we then turn to the second step of our analysis.” *Id.*

5 {12} The second step requires us to “determine whether a defendant’s acts are
6 separated by sufficient indicia of distinctness to justify multiple punishments under
7 the same statute.” *State v. Ramirez*, 2018-NMSC-003, ¶ 56, 409 P.3d 902 (text only)
8 (citation omitted). To determine whether a defendant’s acts are sufficiently distinct,
9 we consider the *Herron* factors: (1) temporal proximity of the acts, (2) location of
10 the victim during each act, (3) the existence of intervening events, (4) the sequencing
11 of the acts, (5) the defendant’s intent as evidenced by his conduct and utterances,
12 and (6) the number of victims. *Herron v. State*, 1991-NMSC-012, ¶ 15, 111 N.M.
13 357, 805 P.2d 624. “[T]he six *Herron* [factors] serve as a general policy for
14 examining distinctness, but in undertaking this analysis courts should examine the
15 elements of the offense and any policy underlying the specific statute.” *Benally*,
16 2021-NMSC-027, ¶ 19 (internal quotation marks and citation omitted).

17 {13} In applying the *Herron* factors, Defendant urges us to adopt “a general rule or
18 rebuttable presumption” that “[w]hen there is an incident that occurs in a short time
19 in a single place, the State should generally be limited to proving one purely

1 assaultive crime for each victim.” We decline to do so. We continue to hold that no
2 *Herron* factor is dispositive, but instead that all factors should be considered together
3 in light of the facts and circumstances of each case. *See Herron*, 1991-NMSC-012,
4 ¶ 15 (“[N]one of these factors alone is a panacea, but collectively they will assist in
5 guiding future prosecutions under [the relevant charging statute].”); *Swafford v.*
6 *State*, 1991-NMSC-043, ¶ 28, 112 N.M. 3, 810 P.2d 1223 (adopting the *Herron*
7 factors in the unitary conduct inquiry for double description cases and noting that
8 time and space may easily distinguish acts in some cases, but not in every case, and
9 that courts should consider every factor); *State v. Handa*, 1995-NMCA-042, ¶ 26
10 n.2, 120 N.M. 38, 897 P.2d 225 (“[T]he time between each act is not dispositive.”).
11 We also reject Defendant’s argument that some, but not all, of the principles applied
12 in double description cases for a unitary conduct inquiry apply in a unit of
13 prosecution analysis. *See, e.g., State v. DeGraff*, 2006-NMSC-011, ¶ 27, 139 N.M.
14 211, 131 P.3d 61 (considering whether one crime had been completed before another
15 was committed); *State v. Cooper*, 1997-NMSC-058, ¶¶ 60-61, 124 N.M. 277, 949
16 P.2d 660 (considering the initial use of force against a victim as separable by “an
17 intervening event” from subsequent but different uses of force and weapons that
18 resulted in the victim’s death). In both unit of prosecution and double description
19 cases, “we attempt to determine, based upon the specific facts of each case, whether

1 a defendant’s activity is better characterized as one unitary act, or multiple, distinct
2 acts, consistent with legislative intent.” *State v. Bernal*, 2006-NMSC-050, ¶ 16, 140
3 N.M. 644, 146 P.3d 289. This necessarily requires us to consider general guideposts,
4 such as the nature of a defendant’s acts and whether one crime was completed before
5 another. Double jeopardy jurisprudence in New Mexico is a tangled and often
6 laborious analysis. It should be this Court’s goal to simplify rather than complicate
7 it. Therefore, we reaffirm our conclusion in *Bernal* that “we are doing a substantially
8 similar analysis when we conduct a unitary conduct inquiry in double description
9 cases as when we conduct a unit-of-prosecution inquiry.” *Id.*

10 {14} If a defendant’s acts are sufficiently distinct, “then we will presume that the
11 defendant has not received more punishments than were statutorily authorized.”
12 *Benally*, 2021-NMSC-027, ¶ 23. However, “[i]f a defendant’s acts are not
13 sufficiently distinct, then we will return to our lenient construction of the statute and
14 presume that the defendant has received more punishments than were statutorily
15 authorized.” *Id.* We now apply this two-step framework to Defendant’s multiple
16 battery convictions.

1 **1. Defendant’s two battery convictions for attacking Adrian do not violate**
2 **double jeopardy**

3 **a. The aggravated battery statute does not define the unit of prosecution**

4 {15} Section 30-3-5(A) defines aggravated battery as “the unlawful touching or
5 application of force to the person of another with intent to injure that person or
6 another.” The offense is heightened to a third-degree felony if the aggravated battery
7 is committed with a deadly weapon, as it was in this case. Section 30-3-5(C).
8 Analyzing the plain language of the statute, the Court of Appeals held that the unit
9 of prosecution for the aggravated battery statute is ambiguous. *Phillips II*, 2021-
10 NMCA-062, ¶¶ 10-11 (relying on *State v. Mares*, 1991-NMCA-052, ¶ 24, 112 N.M.
11 193, 812 P.2d 1341, for the proposition that “the aggravated battery statute d[oes]
12 not separately punish each act of unlawful touching occurring during a continuous
13 attack unless the acts are sufficiently distinct”). We agree and focus our analysis on
14 the plain language and purpose of the aggravated battery statute. *State v. Olsson*,
15 2014-NMSC-012, ¶ 18, 324 P.3d 1230 (“The plain language of the statute is the
16 primary indicator of legislative intent.”); NMSA 1978, § 12-2A-19 (1997)
17 (providing that a statute’s text is “the primary, essential source of its meaning”).

18 {16} Both parties rely on *Ramirez*, 2018-NMSC-003, ¶ 53, for their unit of
19 prosecution analyses to different ends. In *Ramirez*, the defendant was convicted of
20 three counts of child abuse after shooting into a vehicle that contained three children.

1 *Id.* ¶¶ 3-4. There, we considered whether the child abuse by endangerment statute
2 specified the unit of prosecution. *Id.* ¶ 48. We first observed that the statute’s
3 intended unit of prosecution could be the conduct of causing or permitting a child to
4 be endangered regardless of the number of victims because the statute focused on
5 prohibiting a course of conduct. *Id.* ¶ 51. However, we later noted that the statute
6 could be read to indicate that the unit of prosecution was per victim because it
7 prohibited endangering “a child.” *Id.* ¶¶ 52-53. We provided that “[it] is well
8 established . . . that where a statute prohibits the doing of some act to a victim
9 specified by a singular noun, ‘a person’ for example, then ‘the person’ is the unit of
10 prosecution.” *Id.* ¶ 53. Ultimately, we held that the statute was ambiguous because
11 there were two plausible readings of the statute as to its intended unit of prosecution.
12 *Id.* ¶ 55.

13 {17} Defendant argues that under *Ramirez*, the usual unit of prosecution for the
14 aggravated battery statute is per victim, but argues that the statute is still ambiguous
15 as to whether a defendant may be convicted of multiple counts of battery against the
16 same victim during a continuous attack. The State similarly relies on *Ramirez*,

1 arguing that the plain language of the statute specifies the unit of prosecution as per
2 deadly weapon.²

3 {18} We conclude that *Ramirez* does not resolve the question before us. Section
4 30-3-5 prohibits touching or applying force “to the person of another,” which may
5 suggest that the unit of prosecution is per victim. However, the statute still does not
6 specify whether someone can be punished separately for *multiple* acts of touching
7 or applying force to the *same* victim during a continuous attack. This factual
8 situation was not considered in *Ramirez*. See 2018-NMSC-003. Similarly, *Ramirez*
9 does not support the State’s interpretation that use of different deadly weapons
10 allows for separate units of prosecution. In *Ramirez*, we explained that when a statute
11 contains a single, direct object that is the recipient of the prohibited conduct, the unit
12 of prosecution is by object. *Id.* ¶ 52 (“Stated grammatically, the statute contains a
13 direct object that is the recipient of the actions of [its] verbs, and that direct object is
14 a singular noun. This suggests that our Legislature intended the protections of [the
15 statute] to attach to *each child* endangered, and this, in turn, suggests that the unit of
16 prosecution for [the statute] is *by child*.”) Here, Section 30-3-5(C) simply heightens

²We note that in the Court of Appeals, the State contended that Section 30-3-5 does not specify the unit of prosecution and argued that *Ramirez* was inapplicable, but the State now changes its position arguing that the statute does so specify.

1 the offense if it is committed “with a deadly weapon.” The statute’s use of the term
2 “with a deadly weapon” is not to define the direct object or focus of the statute.
3 Instead, it serves as an aggravating factor. Neither *Ramirez* nor any other
4 pronouncement of this Court established a rule that if a defendant uses multiple
5 weapons or objects during an attack, the Legislature, as a matter of law, intended to
6 impose separate punishments. *See Herron*, 1991-NMSC-012, ¶ 13 (“[S]eparate
7 [acts] can occur within sufficient temporal proximity to raise doubt whether the
8 legislature intended separate punishments for those acts which could equally be
9 inspired by a single criminal intent bent on a single assaultive episode.”).

10 {19} The State further argues that a separate punishment for each deadly weapon
11 used is supported by the purpose of the aggravated battery statute, suggesting that
12 the “statute is directed at preserving the integrity of a person’s body against serious
13 injury.” *State v. Vallejos*, 2000-NMCA-075, ¶ 18, 129 N.M. 424, 9 P.3d 668; *see*
14 *also State v. Neatherlin*, 2007-NMCA-035, ¶ 16, 141 N.M. 328, 154 P.3d 703 (“The
15 purpose of aggravating the charge and enhancing the sentence for use of a weapon
16 is to minimize injury to human beings no matter how the injury is inflicted and
17 discourage people from using objects to injure another.” (text only) (citation
18 omitted)). We disagree. While in some circumstances, the use of multiple deadly

1 weapons may increase the risk of injury or death to a victim, that alone is not
2 supportive that such an assault is always deemed nonunitary.

3 {20} Our analysis is better guided by *Herron*. In *Herron*, we addressed whether a
4 former version of the criminal sexual penetration statute allowed a defendant to be
5 punished for each act of sexual penetration occurring during an incident of sexual
6 assault. 1991-NMSC-012, ¶¶ 6, 8. Concluding that the language of the statute was
7 ambiguous on this point, we applied the rule of lenity and held that the statute
8 “cannot be said as a matter of law to evince a legislative intent to punish separately
9 each penetration occurring during a continuous attack absent proof that each act of
10 penetration is in some sense distinct from the others.” *Id.* ¶¶ 8, 15. Later, in *Mares*,
11 the Court of Appeals relied on and adopted our approach in *Herron* to conclude that
12 under the aggravated battery statute, the Legislature did not intend to punish each
13 act of battery occurring during a continuous attack unless each act was distinct from
14 the others. 1991-NMCA-052, ¶ 24. We agree with the *Mares* Court that the plain
15 language of the aggravated battery statute does not clearly indicate whether a
16 defendant can be punished for each act of battery inflicted on the same victim during
17 a continuous attack. Therefore, we apply the rule of lenity and conclude that the
18 Legislature did not intend to punish multiple acts of battery in these circumstances
19 unless each act is distinct. *See Herron*, 1991-NMSC-012, ¶ 15; *Mares*, 1991-

1 NMCA-052, ¶ 24. We now move to the second step of the unit of prosecution
2 analysis and determine whether Defendant’s acts of hitting Adrian with the baseball
3 bat and shooting him with the handgun were separated by sufficient indicia of
4 distinctness by applying the six *Herron* factors.

5 **b. The batteries on Adrian were sufficiently distinct**

6 {21} In the most recent Court of Appeals proceedings, the parties agreed that the
7 time, location, and number-of-victims factors supported unitary conduct. *Phillips II*,
8 2021-NMCA-062, ¶ 12. The Court of Appeals focused on the remaining three
9 *Herron* factors and held that Defendant committed two distinct acts of battery
10 because he “used separate and discrete acts of force against Adrian, separated by an
11 intervening event and a change in intent.” *Phillips II*, 2021-NMCA-062, ¶ 16. The
12 State no longer concedes the timing and location factors, arguing now that they are
13 “neutral” and do not weigh in favor of unitary conduct. We step back to analyze all
14 six *Herron* factors to determine whether Defendant’s acts were sufficiently distinct.

15 {22} The attack unfolded with Defendant walking into Allie’s room and striking
16 Adrian and Allie with the baseball bat. There was a struggle over the bat, and Sean
17 immediately called 911. Defendant left the room to retrieve a handgun. Allie locked
18 the door behind him. Approximately one minute and forty seconds into Sean’s 911

1 call, Defendant shot the door handle to get back into Allie's room and shot Adrian
2 twice.

3 {23} The one minute and forty second gap between the battery with the baseball
4 bat and the battery with the handgun was, in this case, a significant elapse of time.
5 This, however, is not the only evidence that supports distinct conduct. *Cf. State v.*
6 *Demongey*, 2008-NMCA-066, ¶ 15, 144 N.M. 333, 187 P.3d 679 (concluding that a
7 time elapse of two minutes between two acts did not support distinct conduct
8 because there was no evidence indicating a change in intent or nature of the acts).
9 There were multiple intervening events between the batteries in this case. First was
10 the struggle over the baseball bat. Next, Defendant left Allie's bedroom after
11 dropping the bat and retrieved the handgun. *See, e.g., DeGraff*, 2006-NMSC-011, ¶
12 30 (providing that a defendant's struggle with the victim constitutes an intervening
13 event). Finally, Defendant shot the door handle and kicked the door open before
14 shooting Adrian.

15 {24} Defendant also used two different weapons to attack Adrian. *See, e.g., Foster*,
16 1999-NMSC-007, ¶ 34 (concluding that the use of different weapons indicates
17 distinct conduct). Each application of force, as well as the injuries inflicted, were
18 also distinct; the baseball bat assault was nonfatal, whereas the two handgun shots

1 inflicted more serious injuries. *See Bernal*, 2006-NMSC-050, ¶ 21 (stating that
2 different uses of force support distinct acts).

3 {25} Furthermore, we agree with the Court of Appeals that there was evidence that
4 Defendant’s intent had changed from the time he attacked Adrian with the baseball
5 bat to the time that he shot Adrian with the handgun, thus evincing distinct conduct.
6 *Phillips II*, 2021-NMCA-062, ¶ 15 (citing *Demongey*, 2008-NMCA-066, ¶ 15).

7 After his arrest, Defendant told police that when he hit Adrian with the baseball bat,
8 he did not think that he was going to shoot or kill anybody. However, Defendant
9 explained that after he battered Adrian, he remembered Adrian usually slept with a
10 gun nearby, so he went to his bedroom to retrieve the handgun to immobilize or kill
11 Adrian. Defendant argues that the Court of Appeals’ separate-intent analysis rested
12 on a “factual conclusion about [Defendant’s intent to kill] that the jury rejected.” We
13 disagree mainly because Defendant was not acquitted of murder; the jury simply did
14 not reach a verdict. Additionally, Defendant’s argument that the jury did not make
15 an express finding regarding his intent to kill has no bearing on our analysis. *See*
16 *Herron*, 1991-NMSC-012, ¶ 15 (providing that courts determine intent “as
17 evidenced by [the defendant’s] conduct and utterances”). Defendant’s conduct and
18 statements to police demonstrate that he had not formulated an intent to kill Adrian

1 with the baseball bat but that he had formulated this intent when shooting Adrian
2 with the handgun. Therefore, there was a clear change in intent between each attack.

3 {26} We recognize that Adrian was the only victim in both of these attacks and that
4 he remained in the same location for each. However, we decline to place great weight
5 on the latter fact given that Adrian stayed or was forced to stay in one location, in
6 the room with the door that Allie locked, to avoid further harm from Defendant’s
7 attacks.

8 {27} Therefore, we conclude that four of the *Herron* factors strongly support that
9 Defendant’s two convictions of battery for the injuries he inflicted on Adrian do not
10 violate double jeopardy as Defendant’s two attacks were distinct. *See State v.*
11 *Jackson*, 2020-NMCA-034, ¶ 33, 468 P.3d 901 (“[A]lthough [the v]ictim and
12 location of [the d]efendant’s kidnappings overlap, there was sufficient evidence that
13 the two kidnappings were separated by . . . sufficient indicia of distinctness . . . and,
14 as a result, . . . do not violate double jeopardy.”).

15 **2. The three battery convictions for the injuries inflicted on Allie do not**
16 **violate double jeopardy**

17 **a. The aggravated battery against a household member statute at issue did**
18 **not clearly specify the unit of prosecution**

19 {28} The language of the statutes for aggravated battery and aggravated battery
20 against a household member is almost identical, and, consistent with our previous

1 references herein, the parties advance the same arguments as to the intended unit of
2 prosecution for the aggravated battery statute as for the aggravated battery against a
3 household member statute, *see* Section II.A.1, paragraph 17, *supra*. The latter
4 requires that the offense be committed against “a household member” while the
5 former requires the offense be committed against “another.” *Compare* § 30-3-16(A)
6 (2008)³, *with* § 30-3-5(A). The State added one additional argument: each
7 application of force that caused or could have caused great bodily harm, *see* §§ 30-
8 3-5(C), 30-3-16(C) (2008), creates an alternative unit of prosecution.

9 {29} Like the aggravated battery statute, the plain language of the aggravated
10 battery against a household member statute does not clearly indicate whether a
11 defendant can be punished separately for each act of battery against the same
12 household member during a continuous attack. *See* Section II.A.1, paragraph 20,
13 *supra*; *Herron*, 1991-NMSC-012, ¶ 15; *Mares*, 1991-NMCA-052, ¶ 24. Similar to
14 our previous rejection of this very argument from the State applied to aggravated
15 battery, we reject the State’s argument that the aggravated battery against a
16 household member statute defines the unit of prosecution as per deadly weapon or

³Defendant was convicted under the 2008 version of Section 30-3-16. However, the Legislature’s 2018 amendments to the statute do not affect our analysis.

1 by each application of force that caused or could have caused great bodily harm.
2 Therefore, we apply the rule of lenity and conclude that the statute does not
3 separately punish each act of battery inflicted on the same victim during a continuous
4 attack unless each act is sufficiently distinct.

5 **b. Defendant’s acts of battery against Allie are separated by sufficient**
6 **indicia of distinctness**

7 {30} We apply the six *Herron* factors to the attack on Allie and begin by examining
8 Allie’s location during each battery. Allie remained in her room when first attacked
9 with the baseball bat and later attacked with the rifle; however, she changed locations
10 within the room. *Herron* recognizes that movement of a victim in between a
11 defendant’s acts supports distinct conduct. *See* 1991-NMSC-012, ¶ 15
12 (“[M]ovement or repositioning of the victim between [acts] tends to show separate
13 offenses.”). Further, similar to our analysis regarding the batteries on Adrian, we
14 decline to weigh in favor of unitary conduct the fact that Allie remained in her room,
15 which she locked after the first attack in an effort to protect herself and Adrian from
16 a subsequent assault.

17 {31} In addition, Allie was in a different location of the home for the battery with
18 the rifle than where she was for the battery by punching and strangulation. Defendant
19 first shot Allie in the leg with the rifle in her room, and then he moved her into the
20 hallway where he punched and strangled her. *See, e.g., Bernal*, 2006-NMSC-050, ¶

1 21 (stating that the use of force “in different parts of the [victim’s] house” supports
2 distinct conduct).

3 {32} The interval of time between the attacks remains significant to our analysis of
4 whether the batteries were distinct. *Cf. Demongey*, 2008-NMCA-066, ¶ 15. Based
5 on audio recordings of Sean’s and Allie’s separate 911 calls placed during these
6 attacks, there was an approximate two-minute break after both the first and second
7 of the three successive batteries inflicted on Allie.

8 {33} During each break between the batteries, there were also numerous
9 intervening events. After hitting Allie with the baseball bat and before shooting her
10 with the rifle, Defendant struggled with both victims, left Allie’s room to retrieve
11 the handgun, shot Allie’s door, kicked the door open, shot Adrian twice with the
12 handgun, left the room again to retrieve the rifle, and then killed Adrian by shooting
13 him in the head. And after shooting Allie with the rifle, Defendant talked with the
14 911 operator Allie had phoned for approximately two minutes describing the attacks
15 before he began punching and strangling Allie.

16 {34} Defendant also committed each act in a distinct manner. Defendant used
17 different weapons for each battery against Allie, *see, e.g., Foster*, 1999-NMSC-007,
18 ¶ 34, and Defendant used different degrees of force by hitting her with the baseball

1 bat all over her body, shooting her in the leg with a rifle, and then punching and
2 strangling her until she lost consciousness, *see Bernal*, 2006-NMSC-050, ¶ 21.

3 {35} Defendant’s intent to harm Allie may have remained the same throughout the
4 attack, but the evidence shows that Defendant ceased his actions and reformulated
5 this intent between each battery. *Cf. Demongey*, 2008-NMCA-066, ¶ 16 (concluding
6 there was no evidence indicating that the defendant rethought his actions or ceased
7 his actions and then reformulated his intent); *State v. Garcia*, 2009-NMCA-107, ¶
8 14, 147 N.M. 150, 217 P.3d 1048 (stating there was no evidence that the defendant’s
9 intent to batter the victim was “interrupted, altered, or changed”). After hitting Allie
10 with the baseball bat, Defendant ceased his attack, left the room multiple times, shot
11 and killed Adrian, and then shot Allie with the rifle. Defendant again ceased his
12 attack on Allie when he talked with the 911 operator before renewing a separate
13 battery in the hallway.

14 {36} Defendant’s batteries against Allie were clearly distinct, and his three
15 convictions for aggravated battery against a household member do not violate double
16 jeopardy.

17 **B. Double Description**

18 {37} On cross-appeal, the State challenges the Court of Appeals’ determination that
19 Defendant’s convictions for aggravated battery with the handgun and manslaughter

1 violate double jeopardy. In double description cases, we again apply “a two-part
2 analysis for deciding whether the same offense was committed.” *Sena*, 2020-NMSC-
3 011, ¶ 45. “The first part focuses on the conduct and asks whether the conduct
4 underlying the offenses is unitary, i.e., whether the same conduct violates multiple
5 statutes.” *Id.* (text only) (citation omitted). If the conduct is unitary, “we proceed to
6 the second part, which focuses on the statutes at issue to determine whether the
7 legislature intended to create separately punishable offenses.” *Id.* (text only) (citation
8 omitted). A defendant’s double jeopardy rights are violated only “when (1) the
9 conduct is unitary and (2) it is determined that the Legislature did not intend multiple
10 punishments.” *Id.* If a defendant’s double jeopardy rights are violated, courts must
11 “vacate the conviction carrying the shorter sentence.” *State v. Torres*, 2018-NMSC-
12 013, ¶ 28, 413 P.3d 467. Both parties agree that the Court of Appeals’ holding on
13 legislative intent is not before us, and therefore our focus is limited to whether
14 Defendant’s conduct was unitary.

15 {38} A defendant’s conduct is unitary “if the acts are not separated by sufficient
16 indicia of distinctness.” *Porter*, 2020-NMSC-020, ¶ 12 (text only) (citation omitted).

17 As previously noted, we apply the six *Herron* factors in the double description
18 analysis to determine whether a defendant’s acts are unitary or distinct. *Swafford*,
19 1991-NMSC-043, ¶ 28. We consider “the elements of the charged offenses, the facts

1 presented at trial, and the instructions given to the jury.” *Sena*, 2020-NMSC-011, ¶
2 46; *Porter*, 2020-NMSC-020, ¶ 12. “Unitary conduct is not present when one crime
3 is completed before another is committed, or when the force used to commit a crime
4 is separate from the force used to commit another crime.” *Sena*, 2020-NMSC-011,
5 ¶ 46. However, “if it reasonably can be said that the conduct is unitary, then we must
6 conclude that the conduct was unitary.” *Porter*, 2020-NMSC-020, ¶ 12 (text only)
7 (citation omitted).

8 {39} In this case, the instruction for aggravated battery with the handgun required
9 the jury to find that Defendant “touched or applied force to Adrian . . . by shooting
10 him in the torso with a handgun.” However, the instruction for manslaughter
11 required the jury to find that Defendant “killed Adrian.” Thus, although the jury
12 instruction for the aggravated battery charge specified the conduct that formed the
13 basis of the charge, the manslaughter instruction did not. The jury convicted
14 Defendant of the aggravated battery charge but hung on the manslaughter charge.
15 Defendant’s subsequent guilty plea for manslaughter did not specify a factual basis
16 for his plea.

17 {40} As a result, the Court of Appeals applied the *Foster* presumption. *See Phillips*
18 *II*, 2021-NMCA-062, ¶¶ 26-29. In *Foster*, we held that “we must presume that a
19 conviction under a general verdict requires reversal if the jury is instructed on an

1 alternative basis for the conviction that would result in double jeopardy, and the
2 record does not disclose whether the jury relied on this legally inadequate
3 alternative.” 1999-NMSC-007, ¶ 28. We adopted this presumption because “we
4 cannot assume that jurors will know to avoid an alternative basis for reaching a guilty
5 verdict that would result in a violation of the Double Jeopardy Clause.” *Id.* However,
6 in *Sena*, we clarified that “*Foster* does not require a further presumption that the
7 same conduct was then relied upon by the jury in convicting [a d]efendant of each
8 crime—particularly when the record indicates [distinct crimes] were committed.”
9 2020-NMSC-011, ¶ 54. Thus, the *Foster* presumption can be “rebutted by evidence
10 that each crime was completed before the other crime occurred.” *Id.* After reviewing
11 the evidence presented at trial, the Court of Appeals in this case conclusively
12 presumed that Defendant’s conduct was unitary because it was “unable to determine
13 whether the manslaughter was accomplished by the rifle shot alone or by multiple
14 gunshots.” *Phillips II*, 2021-NMCA-062, ¶¶ 21-26, 29 & n.1.⁴

⁴The Court of Appeals relied on our decision in *State v. Franco*, 2005-NMSC-013, ¶¶ 9-11, 137 N.M. 447, 112 P.3d 1104, where we conclusively applied the *Foster* presumption despite evidence that each act was distinct. *Phillips II*, 2021-NMCA-062, ¶¶ 26-29 & n.1. In *Sena*, we clarified that the *Foster* presumption should not be applied conclusively, but is instead rebutted by evidence in the record supporting distinct conduct. 2020-NMSC-011, ¶ 54. Therefore, *Sena*, rather than *Franco*, is the proper analysis.

1 {41} As an initial matter, we note that our appellate courts have never applied the
2 *Foster* presumption to convictions based on guilty pleas. However, we assume
3 without deciding that the *Foster* presumption applies in this case because the jury
4 instructions and guilty plea for the manslaughter conviction do not specify what
5 conduct forms the basis of the manslaughter conviction.⁵ Therefore, we agree with
6 the Court of Appeals that “the only reasonable inference . . . is that the factual basis
7 for Defendant’s guilty plea and resulting conviction is the same as the evidence
8 presented at trial.” *Phillips II*, 2021-NMCA-062, ¶ 19; *see State v. Sanchez*, 1996-
9 NMCA-089, ¶ 11, 112 N.M. 280, 923 P.2d 1165 (explaining that a double jeopardy
10 challenge based on a guilty plea could be resolved on the facts placed in the record).
11 The Court of Appeals, however, viewed the evidence through the wrong lens. It
12 viewed the evidence from the perspective of what a *reasonable jury could have*
13 *concluded* during the trial despite the fact that Defendant’s manslaughter conviction
14 was a result of a guilty plea. *Phillips II*, 2021-NMCA-062, ¶¶ 24-25 (stating that the

⁵The State argues that “Defendant has the burden of creating the factual record for a double jeopardy claim,” and because he did not specify within his guilty plea “whether the underlying factual basis was the rifle shot alone or all the gunshots, the Court of Appeals should have resolved any lack of clarity on that issue against Defendant.” Although our case law requires a defendant who pleads guilty to “provide a sufficient record for the court to determine unitary conduct,” *see State v. Sanchez*, 1996-NMCA-089, ¶ 11, 122 N.M. 280, 923 P.2d 1165, the record in this case is sufficient to do so.

1 jury could have reasonably found two distinct acts or one unitary act for the
2 aggravated battery and manslaughter convictions). This approach is mistaken. The
3 proper analysis is not what a reasonable jury could have concluded but whether there
4 are “sufficient facts in the record” to support distinct conduct which would defeat a
5 double jeopardy claim. *Sanchez*, 1996-NMCA-089, ¶ 11.

6 {42} The evidence in the record shows nonunitary conduct in Defendant’s acts.
7 Defendant explained to police that he wanted to “immobilize” Adrian, so he shot
8 Adrian twice in the torso with the handgun. Adrian was still alive when Defendant
9 ran out of ammunition, and Defendant left the room to exchange the handgun for a
10 rifle. Eighteen seconds later, Defendant returned to Allie’s room with the rifle,
11 placed the rifle under Adrian’s chin, asked Adrian, “Are you ready?”, and then
12 pulled the trigger. Adrian immediately stopped speaking and died.

13 {43} Forensic pathologist, Doctor Linda Syzmanski, who performed Adrian’s
14 autopsy, testified at trial that the two handgun shots to Adrian’s torso caused
15 “multiple rib fractures,” lacerated Adrian’s lungs, and caused internal bleeding in
16 Adrian’s chest cavity. She explained that “with time,” these injuries “would be
17 fatal,” but if Adrian had received medical attention, the injuries “most likely would
18 have been curable” and Adrian could have survived. Dr. Syzmanski testified that the
19 rifle shot caused extensive brain damage and “could be instantaneously fatal” or

1 would have killed Adrian “within a couple of minutes.” When asked which injury
2 killed Adrian, Dr. Syzmanski responded: “The injury that was most fatal was the one
3 to the head.” She concluded that “[t]he gunshot *wound* was the cause of death.”
4 (Emphasis added.)

5 {44} Defendant urges us to rely on Dr. Syzmanski’s later testimony that “[t]he
6 cause of death was multiple gunshot *wounds*, and the manner of death was
7 homicide.” (Emphasis added.) Defendant highlights this testimony to argue that the
8 cause of death was multiple gunshot wounds, and therefore, the manslaughter
9 conviction encompassed the two handgun shots and the rifle shot. We disagree. It is
10 clear from Dr. Syzmanski’s testimony that the rifle shot was the fatal shot that killed
11 Adrian.

12 {45} Additionally, based on the evidence presented, the battery was completed
13 before the manslaughter was committed. *See Sena*, 2020-NMSC-011, ¶ 46. The
14 battery was accomplished when Defendant shot Adrian twice in the torso using the
15 handgun. Then, the manslaughter was accomplished when Defendant left the room,
16 came back, and shot Adrian under the chin with the rifle, killing him. The two acts
17 were separated by approximately eighteen seconds and the intervening event of
18 Defendant leaving Allie’s room to exchange the handgun for the rifle. *See Cooper*,
19 1997-NMSC-058, ¶ 61 (concluding that a defendant’s conduct was distinct where

1 the defendant used different weapons and that the “death was not the consequence
2 of the initial act of battery” but was followed by an intervening event). Significantly,
3 Defendant also used different weapons for each attack and applied distinct uses of
4 force with each. Even though Adrian remained in Allie’s room for both acts, we
5 again decline to weigh the location factor in favor of unitary conduct because Adrian
6 was severely injured, confining him to one location.

7 {46} Defendant argues that his conduct was unitary because of a common intent to
8 “immobilize” or kill Adrian during both acts. We disagree. When Defendant left the
9 room, exchanged the handgun with the rifle, came back to the room, and placed the
10 rifle under Adrian’s chin, he reformulated an intent to kill Adrian and to do so
11 immediately. *See Herron*, 1991-NMSC-012, ¶ 15 (providing that a change in the
12 defendant’s intent supports distinct conduct); *cf. Demongey*, 2008-NMCA-066, ¶ 16
13 (stating that there was no evidence indicating that the defendant rethought his actions
14 or ceased his actions and then reformulated his intent); *Garcia*, 2009-NMCA-107, ¶
15 14 (stating that there was no evidence that the defendant’s intent to batter the victim
16 was “interrupted, altered, or changed”).

17 {47} Therefore, we conclude that the *Foster* presumption was rebutted because
18 there was evidence that distinct conduct supported the battery and manslaughter
19 convictions. The Court of Appeals erred by conclusively presuming unitary conduct

1 when the record indicated that one crime was completed before the other and that
2 each act was sufficiently distinct. *See Sena*, 2020-NMSC-011, ¶ 54. Because
3 Defendant’s conduct is not unitary, there is no double jeopardy violation, and we
4 reverse the Court of Appeals’ determination on this issue.

5 **III. CONCLUSION**

6 {48} For the foregoing reasons, we hold that Defendant’s two convictions of
7 aggravated battery for attacking Adrian, one conviction of manslaughter for killing
8 Adrian, and three convictions of aggravated battery against a household member for
9 his attack on Allie do not violate double jeopardy. Therefore, we affirm the Court of
10 Appeals in upholding two counts of aggravated battery for attacking Adrian
11 (baseball bat, handgun), and upholding three counts of aggravated battery for
12 attacking Allie (baseball bat, rifle, strangulation). However, we reverse the Court of
13 Appeals in vacating the aggravated battery conviction for shooting Adrian with the
14 handgun. We remand to the district court for further proceedings consistent with this
15 opinion.

16 {49} **IT IS SO ORDERED.**

17
18

DAVID K. THOMSON, Justice

1 **WE CONCUR:**

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C. SHANNON BACON, Chief Justice

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MICHAEL E. VIGIL, Justice

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7

BRIANA H. ZAMORA, Justice

8

9

T. GLENN ELLINGTON, Judge

10 **Sitting by designation**