

STATE V. DUNLAP

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**STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
DAVID A. DUNLAP, JR.,
Defendant-Appellant.**

NO. A-1-CA-36487

COURT OF APPEALS OF NEW MEXICO

March 5, 2018

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY, Karen L.
Townsend, District Judge

COUNSEL

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Bennett J. Baur, Chief Public Defender, Kathleen T. Baldrige, Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

LINDA M. VANZI, Chief Judge. WE CONCUR: J. MILES HANISEE, Judge, EMIL J. KIEHNE, Judge

AUTHOR: LINDA M. VANZI

MEMORANDUM OPINION

VANZI, Chief Judge.

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

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

{3} When determining whether Defendant’s conduct was unitary, we consider whether his actions were separated by sufficient indicia of distinctness. See *State v. DeGraff*, 2006-NMSC-011, ¶ 27, 139 N.M. 211, 131 P.3d 61. “Conduct is unitary when not sufficiently separated by time or place, and the object and result or quality and nature of the acts cannot be distinguished.” *Silvas*, 2015-NMSC-006, ¶ 10. “[W]e consider such factors as whether the acts were close in time and space, their similarity, the sequence in which they occurred, whether other events intervened, and [the] defendant’s goals for and mental state during each act.” *Ford*, 2007-NMCA-052, ¶ 12.

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

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

{ } **IT IS SO ORDERED.**

LINDA M. VANZI, Chief Judge

WE CONCUR:

J. MILES HANISEE, Judge

EMIL J. KIEHNE, Judge