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

2 Opinion Number: _____

3 Filing Date: May 23, 2022

4 **No. A-1-CA-38923**

5 **STATE OF NEW MEXICO,**

6 Plaintiff-Appellee,

7 v.

8 **JUANA AMADOR DELAO,**

9 Defendant-Appellant.

10 **APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY**

11 **Steven Blankinship, District Judge**

12 Hector H. Balderas, Attorney General

13 Maris Veidemanis, Assistant Attorney General

14 Santa Fe, NM

15 for Appellee

16 Bennett J. Baur, Chief Public Defender

17 MJ Edge, Assistant Appellate Defender

18 Santa Fe, NM

19 for Appellant

1 **OPINION**

2 **WRAY, Judge.**

3 {1} Defendant Juana Amador DeLaO appeals her convictions for four counts of
4 fraud, contrary to NMSA 1978, Section 30-16-6(E) (2006), and thirteen counts of
5 failing to disclose facts to obtain public assistance, contrary to NMSA 1978, Section
6 30-40-1(D), (E) (2006).¹ The charges related to Defendant’s application for and
7 receipt of several forms of public assistance benefits: Supplemental Security Income
8 (SSI), Social Security Disability Insurance (SSDI), Medicaid, and food stamps
9 (SNAP). Defendant invites us to reverse her convictions based on her contentions
10 that the charges under Section 30-16-6 and Section 30-40-1 are either entirely
11 preempted by federal law or they are duplicative. Alternatively, Defendant seeks
12 remand for “a new and fair trial before a properly instructed jury.” We conclude that
13 under these circumstances, convictions pursuant to both Section 30-16-6 (fraud) and
14 Section 30-40-1 (failure to disclose facts to obtain public assistance) impose multiple
15 unsanctioned punishments. We therefore affirm in part, reverse in part, and remand
16 for the district court to vacate Defendant’s convictions under Section 30-40-1.
17 Otherwise, we affirm.

¹The State charged eighteen counts and dismissed one count before trial. The counts were renumbered in the jury instructions and the verdicts. In this opinion, we generally refer to the renumbered counts that the jury considered and decided.

1 **BACKGROUND**

2 {2} At the outset, we provide general background for SSI, SSDI, Medicaid, and
3 SNAP benefits. SSI “is a federal income maintenance program for the aged, blind,
4 or disabled” and eligibility is based on “need and a showing that the applicant’s
5 earning capacity is impaired by either age, blindness or other disability.” *Sheets v.*
6 *Sheets*, 1987-NMCA-128, ¶ 15, 106 N.M. 451, 744 P.2d 924. To qualify, the
7 applicant must show income “below the statutory maximum” and awarded benefits
8 “are subject to periodic review.” *Id.* SSDI, however, is “an earned insurance
9 proceed” that is “directly related to the amount the insured has paid into the
10 program.” *In re Marriage of Taber*, 280 P.3d 234, 238 (Kan. Ct. App. 2012). A
11 person who has “previously worked and contributed to the program by paying taxes
12 on earned income” is entitled to benefits if she subsequently “suffer[s] from a
13 physical or mental disability and [is] no longer able to work.” *Id.* Medicaid is a
14 “federal-state program providing medical services to the needy.” *Starko, Inc. v.*
15 *Gallegos*, 2006-NMCA-085, ¶ 2, 140 N.M. 136, 140 P.3d 1085. New Mexico has
16 adopted a “managed care system to provide cost-efficient, preventive, primary and
17 acute care for medicaid recipients.” NMSA 1978, § 27-2-12.6(A) (1994). The state
18 contracts with other entities, “which in turn provide health care to Medicaid
19 recipients.” *Starko*, 2006-NMCA-085, ¶ 3. Last, SNAP is “a federal-state program,”
20 8.139.100.9(A) NMAC, that is “designed to promote the general welfare and to

1 safeguard the health and well-being of the nation’s population by raising the levels
2 of nutrition among low-income households.” 8.139.100.11(A) NMAC. With this as
3 background, we turn to the facts of the present case.

4 {3} The evidence at trial established that in 2012, Defendant submitted an
5 application for and received SSI and SSDI benefits. Defendant reported either only
6 social security income or did not disclose a current employer. As a result of her SSI
7 application, Defendant additionally was determined to be eligible for Medicaid and
8 received Medicaid benefits. In late 2013, Defendant also applied for SNAP benefits
9 but reported no income or employment on those applications. Defendant, however,
10 had income and was working for Dollar Cab between 2009 and 2012, and again
11 between 2013 and 2017.

12 {4} Defendant received SSDI, SSI, and Medicaid benefits between 2012 and
13 2017, and SNAP benefits between 2013 and 2017. Defendant, as a recipient of
14 benefits from each of these programs, was obligated to report any income or
15 employment changes to administering agencies. Despite reapplications and notice
16 of her ongoing reporting obligations, Defendant did not report her Dollar Cab
17 income or employment during the period that she received benefits from each of the
18 programs. In 2018, Defendant was charged with multiple counts of fraud and failure
19 to disclose facts to obtain public assistance. The jury convicted Defendant on all
20 counts. Defendant appeals.

1 **DISCUSSION**

2 {5} On appeal, Defendant argues that (1) the multiple convictions violate double
3 jeopardy, and (2) the district court improperly refused to instruct the jury on mistake
4 of fact.² We address each of these arguments in turn.

5 **I. Double Jeopardy**

6 {6} Defendant contends that the jury’s seventeen convictions violate
7 constitutional double jeopardy protections. We review double jeopardy claims de
8 novo. *State v. Bernal*, 2006-NMSC-050, ¶ 6, 140 N.M. 644, 146 P.3d 289. In the
9 context of the present case, double jeopardy protections prevent citizens from being
10 subject to multiple punishments. *See id.* ¶ 7. “Multiple punishment problems can
11 arise from both ‘double-description’ claims, in which a single act results in multiple

²Defendant additionally argues that the entire state prosecution was preempted by federal law. Federal preemption is a principle arising from “the basic structure of our federal system,” dual state and federal sovereignty, and the limits placed on the states by the Supremacy Clause of the United States Constitution. *State v. Herrera*, 2014-NMCA-003, ¶ 6, 315 P.3d 311 (internal quotation marks and citation omitted). Federal preemption can be express or implied, and two distinct forms of implied preemption involve two separate well-established analyses. *Id.* ¶¶ 7, 9. All this to say, preemption is complicated. Defendant, however, neither identified an applicable form of preemption nor applied any specific preemption analysis to the particular statutes at issue in this case. Defendant has extensively set forth the law of federal preemption, but has not sufficiently developed any argument that allows us to apply the law to the circumstances of this case without significant extrapolation. *See Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 70, 309 P.3d 53 (“To rule on an inadequately briefed issue, this Court would have to develop the arguments itself, effectively performing the parties’ work for them . . . [and creating] a substantial risk of error.” (citation omitted)). Accordingly, we decline to address Defendant’s preemption argument.

1 charges under different criminal statutes, and ‘unit-of-prosecution’ claims, in which
 2 an individual is convicted of multiple violations of the same criminal statute.” *Id.*
 3 Defendant raises both double description and unit of prosecution claims, but we
 4 begin with a brief overview of the charges.

5 {7} The jury considered four counts of fraud and thirteen counts of public
 6 assistance fraud (PA fraud). The following charts summarize the evidence at trial in
 7 relation to the instructions for the charges:

The Medicaid Counts		
Count/ Charge	Date Range/Amount charged	Amount Obtained
1: Fraud	1/1/13–12/31/17 > \$2,500	\$16,517.83
2: PA fraud	7/1/12–6/30/13 > \$2,500	\$2,527.22
3: PA fraud	7/1/13–6/30/14 > \$2,500	\$5,289.34
4: PA fraud	7/1/14–6/30/15 > \$2,500	\$2,801.34
5: PA fraud	7/1/15–6/30/16 > \$2,500	\$3,169.66
6: PA fraud	7/1/16–6/30/17 > \$2,500	\$2,770.27

The SSI Counts		
Count/Charge	Date Range/Amount charged	Amount Obtained
7: Fraud	6/1/12–6/30/17 > \$2,500	\$13,355.92
8: PA fraud	7/1/13–6/30/14 > \$2,500	\$2,508.00
9: PA fraud	7/1/14–6/30/15 > \$2,500	\$3,180.00
10: PA fraud	7/1/15–6/30/16 > \$2,500	\$3,204.00
11: PA fraud	7/1/16–6/30/17 > \$2,500	\$2,942.00

The SSDI Count		
Count/Charge	Date Range/Amount Charged	Amount Obtained
12: Fraud	7/1/12–6/30/17 > \$2,500	\$11,185.00

The SNAP Counts		
Count/Charge	Date Range/Amount Charged	Amount Obtained
13: Fraud	11/1/13–10/31/17 > \$2,500	\$8,168.00
14: PA fraud	11/1/13–10/31/14 > \$2,500	\$1,878.00
15: PA fraud	11/1/14–10/31/15 > \$2,500	\$1,631.00
16: PA fraud	11/1/15–10/31/16 > \$2,500	\$2,328.00
17: PA fraud	11/1/16–10/31/17 > \$2,500	\$2,328.00

1 {8} With this as background, we consider whether Defendant was subjected to
2 multiple punishments in violation of her double jeopardy rights, first if the fraud and
3 PA fraud convictions resulted from wrongful double description and second whether
4 the seventeen separate counts—multiple convictions under the same statute—are
5 unacceptable units of prosecution.

6 **A. The Double Description Claim**

7 {9} To analyze a double description claim, we first consider “whether the conduct
8 underlying the offenses was unitary, i.e., whether the same conduct violates both
9 statutes,” and if the conduct is unitary, we proceed “to analyze whether the
10 [L]egislature intended to create separately punishable offenses.” *State v. Gutierrez*,
11 2011-NMSC-024, ¶ 51, 150 N.M. 232, 258 P.3d 1024 (internal quotation marks and
12 citation omitted). “Only if the first part of the test is answered in the affirmative, and
13 the second in the negative, will the double jeopardy clause prohibit multiple
14 punishment in the same trial.” *Swafford v. State*, 1991-NMSC-043, ¶ 25, 112 N.M.
15 3, 810 P.2d 1223. Defendant argues that the PA fraud convictions must be vacated,
16 because the same conduct supported those convictions that supported the fraud
17 convictions, and the Legislature “did not intend to punish both general fraud against
18 the government and [PA] fraud for unitary conduct.” The State responds that the jury
19 was clearly instructed on seventeen counts for “separate and distinct conduct,”
20 because the fraud instruction related to misrepresentation of a fact to different

1 agencies during four-year periods and the PA fraud instruction required a failure to
2 disclose a material fact to different agencies in single-year periods. We agree with
3 Defendant and begin our analysis with whether the conduct in question was unitary.

4 **1. Unitary Conduct**

5 {10} To determine whether conduct is unitary, we look to whether a defendant’s
6 acts are sufficiently distinct and “separated by time or space, looking to the quality
7 and nature of the acts, the objects and results involved, and the defendant’s mens
8 rea and goals during each act.” *State v. Saiz*, 2008-NMSC-048, ¶ 30, 144 N.M. 663,
9 191 P.3d 521, *abrogated on other grounds by State v. Belanger*, 2009-NMSC-025,
10 ¶ 36 n.1, 146 N.M. 357, 210 P.3d 783. We also consider “the elements of the charged
11 offenses, the facts presented at trial, and the instructions given to the jury,” *State v.*
12 *Sena*, 2020-NMSC-011, ¶ 46, 470 P.3d 227, and attempt to discern “an identifiable
13 point at which one of the charged crimes ha[s] been completed and the other not yet
14 committed.” *State v. DeGraff*, 2006-NMSC-011, ¶ 27, 139 N.M. 211, 131 P.3d 61.

15 For the reasons that follow, we conclude that Defendant’s conduct supporting the
16 fraud charges and the PA fraud charges was unitary, because (1) the fraud was not
17 complete before the PA fraud was committed and the time and space for each
18 overlapped, (2) the quality and nature of the acts was the same, (3) the object and
19 results of the acts were the same, and (4) the mens rea for the fraud and the PA fraud

1 were the same. *See Saiz*, 2008-NMSC-048, ¶ 30. We begin our explanation with the
2 Medicaid Counts.³

3 {11} The fraud count associated with Medicaid, Count 1, related to acts between
4 January 1, 2013 and December 31, 2017, which resulted in the wrongful receipt of
5 more than \$2,500 in Medicaid benefits. The five Medicaid PA fraud counts related
6 to twelve-month periods within roughly the same time period, July 1, 2012 through
7 December 31, 2017. The fraud count related to Medicaid is therefore not “separated
8 by time” but instead overlaps the Medicaid PA fraud counts. *Id.* The quality and
9 nature of the acts underlying Count 1, and Defendant’s mens rea, are the same as
10 those underlying the Medicaid PA fraud counts. In closing argument, the State
11 explained that Count 1, for Medicaid fraud, resulted in a total of \$16,517.83 benefits
12 to which Defendant was not entitled and pointed to State’s Exhibits J-1, J-2, and J-
13 3, which represented the total overpaid Medicaid benefits. The Medicaid PA fraud
14 counts represent the failure to disclose information in order to obtain the same
15 benefits for individual twelve-month periods between 2012 (six months before the
16 fraud date range) and June 30, 2017 (the same year the fraud charge was completed).
17 The same Exhibits, J-1 through J-3, used to calculate the \$16,517.83 for Count 1,
18 also provided the year-by-year totals for the amounts of benefits obtained for Counts

³Because the SSDI fraud count, Count 12, has no corresponding PA fraud counts, we do not evaluate Count 12 for double description problems.

1 2 through 6, the five Medicaid PA fraud charges. The Medicaid Counts all achieved
2 the same results—the same benefits. *See id.* No more than \$16,517.83 in Medicaid
3 benefits were overpaid in the time between January 1, 2013 and December 31, 2017.
4 With the same time, intent, acts, and results, the Medicaid fraud and Medicaid PA
5 fraud counts in the present case encompass unitary conduct. *See id.*

6 {12} The SSI Counts were charged with slightly different time frames. The SSI
7 fraud charge, Count 7, runs from June 1, 2012 through June 30, 2017. The first SSI
8 PA fraud charge, Count 8, does not begin to run until July 1, 2013—almost a year
9 after the SSI fraud count begins. As a result, during the SSI fraud charge time frame,
10 Defendant received a little over \$1,500 in SSI benefits that were not associated with
11 any SSI PA fraud counts. That amount, however, does not meet the statutory
12 minimum for third degree fraud as charged, because it is less than \$2,500. *See* § 30-
13 16-6(E). The overpayment of benefits associated with SSI fraud, Count 7, did not
14 exceed \$2,500 until the PA fraud charging period began, and the amounts of benefits
15 and time periods attributable to both Counts 7 and 8 overlapped. Thus, despite the
16 period of time in which the benefits did not overlap, Count 7 was ongoing at the time
17 Count 8 began and, like the Medicaid fraud count, overlapped the PA fraud time
18 periods. The conduct charged for the SSI Counts was therefore unitary, like the
19 Medicaid Counts, because the time periods were the same, the quality and nature of
20 the acts (submitting the applications) was the same, the objects and results (the

1 benefits obtained) were the same, and the mens rea was the same. *See Saiz*, 2008-
2 NMSC-048, ¶ 30.

3 {13} The time periods and benefits for Count 13 (SNAP fraud) and Counts 14
4 through 17 (SNAP PA fraud) overlap completely, and again, the acts, benefits
5 obtained, and mens rea are the same. The conduct for those counts is also unitary.
6 The State argues that the conduct is not unitary because it presented evidence that
7 Defendant submitted multiple renewal documents with misrepresentations or
8 omissions related to income and employment. This evidence, however, does not
9 distinguish the Medicaid, SSI, and SNAP fraud counts on the one hand from the
10 corresponding PA fraud counts on the other. Each fraud count (1) covered essentially
11 the same time period as the individual PA fraud counts, (2) involved the same acts
12 as the PA fraud counts, (3) obtained the same benefits as the PA fraud counts, and
13 (4) was performed with the same mens rea. *See id.* The conduct was unitary, we
14 therefore consider whether the Legislature intended for multiple punishments under
15 Section 30-16-6 and Section 30-40-1. *See Swafford*, 1991-NMSC-043, ¶ 25.

16 **2. Legislative Intent**

17 {14} The Legislature has not expressly authorized multiple punishments for fraud
18 and PA fraud, and so we apply the test outlined in *Blockburger v. United States*, 284
19 U.S. 299 (1932), in order to determine whether such Legislative intent can be
20 inferred. *See Gutierrez*, 2011-NMSC-024, ¶ 55. In this analysis, we look to the

1 “distinct statutory provisions . . . to determine . . . whether each provision requires
2 proof of a fact which the other does not.” *Id.* ¶ 56 (internal quotation marks and
3 citation omitted). When “the *Blockburger* test establishes that one statute is
4 subsumed within the other, the inquiry is over and the statutes are the same for
5 double jeopardy purposes—punishment cannot be had for both.” *Id.* (internal
6 quotation marks and citation omitted). If a statute is “multi-purposed and written
7 with many alternatives, or is vague and unspecific,” we apply the *Blockburger* test
8 with “reference to the [s]tate’s legal theory of the case.” *Gutierrez*, 2011-NMSC-
9 024, ¶ 59 (emphasis, internal quotation marks, and citation omitted). “The reason for
10 this approach is that a statute that serves several purposes and has been written in
11 the alternative may have many meanings and a wide range of deterrent possibilities.”
12 *Id.* ¶ 58 (internal quotation marks and citation omitted).

13 {15} The fraud statute is a vague and unspecific statute. Section 30-16-6(A) defines
14 “fraud” as “the intentional misappropriation or taking of anything of value that
15 belongs to another by means of fraudulent conduct, practices or representations.”
16 Our Supreme Court has explained that ambiguous phrases like “anything of value”
17 render a statute “vague and unspecific.” *Gutierrez*, 2011-NMSC-024, ¶ 59. As a
18 result, we must “ascertain the operation and deterrent purposes of such statutes for
19 double jeopardy purposes by determining the elements—the legal theory—that
20 constitute the criminal causes of action in the case at hand.” *Id.* (internal quotation

1 marks and citation omitted). Having already laid out the statutory requirements for
2 fraud, we consider the requirements for PA fraud.

3 {16} Section 30-40-1(A) defines PA fraud as follows:

4 [K]nowingly failing to disclose a material fact known to be necessary
5 to determine eligibility for public assistance or knowingly failing to
6 disclose a change in circumstances for the purpose of obtaining or
7 continuing to receive public assistance to which the person is not
8 entitled or in amounts greater than that to which the person is entitled.

9 The classifications of the crime are defined by the value of the public assistance
10 wrongfully received. *See* § 30-40-1(B)-(F) (ranging from petty misdemeanor to
11 second degree felony based on the value of public assistance received). Similarly,
12 fraud is classified by the value of the property misappropriated, *see* § 30-16-6(B)-
13 (G), and further requires that the victim rely on the misrepresentation. *See* UJI 14-
14 1640 NMRA. We consider the requirements of both crimes more closely as they
15 relate to each other.

16 {17} To commit PA fraud, an individual must first knowingly either (1) fail to
17 disclose a material fact necessary to determine eligibility, or (2) fail to disclose a
18 change in circumstances. *See* § 30-40-1(A). Either of those PA fraud elements
19 satisfies the general fraud requirement that the individual act by “means of
20 fraudulent conduct, practices or representations.” Section 30-16-6(A). Next, for PA
21 fraud, the facts must be withheld “for the purpose of obtaining or continuing to
22 receive public assistance to which the person is not entitled or in amounts greater

1 than that to which the person is entitled.” Section 30-40-1(A). This PA fraud element
2 satisfies two additional general fraud requirements. First, the nondisclosure must be
3 for the purpose of obtaining benefits to which the person is not entitled, *see* § 30-40-
4 1(A), indicating that the benefits would not be dispersed if the disclosure had been
5 made. Put another way, the government agency must have relied on the
6 nondisclosure to disperse the benefits. *See* UJI 14-1640 (requiring reliance for
7 fraud). Second, because the facts were not disclosed in order to obtain benefits to
8 which the person was not entitled, the withholding of the facts is an “intentional
9 misappropriation or taking of anything of value that belongs to another.” Section 30-
10 16-6(A).

11 {18} Both statutes further require, in the context of the State’s theory in the present
12 case, that Defendant “obtained” the same benefits. By their language, the statutes
13 appear to have different requirements: fraud requires only that the defendant obtain
14 generally “anything of value,” § 30-16-6(A), while PA fraud requires that the
15 defendant “obtain public assistance.” Section 30-40-1(A). Because, however, fraud
16 is a “vague and unspecific” statute, in order to determine whether these are the same
17 or different requirements, we must return to the State’s theory of the case. *Gutierrez*,
18 2011-NMSC-024, ¶ 59. The four fraud convictions (Counts 1, 7, 12, and 13) required
19 proof of the taking of public assistance benefits—the same public assistance that
20 formed the basis for the PA fraud charges. Thus, the PA fraud convictions are

1 subsumed within the fraud convictions, and “punishment cannot be had for both.”
2 *Id.* ¶ 56 (internal quotation marks and citation omitted). The PA fraud convictions
3 must therefore be vacated.

4 **B. Unit of Prosecution**

5 {19} Defendant additionally argues that the four fraud convictions⁴ also violate
6 double jeopardy based on multiple units of prosecution. For a unit of prosecution
7 claim, we first “review the statutory language for guidance on the unit of
8 prosecution,” and if the statutory language does not spell out the unit of prosecution,
9 “then we move to the second step, in which we determine whether a defendant’s acts
10 are separated by sufficient ‘indicia of distinctness’ to justify multiple punishments
11 under the same statute.” *Bernal*, 2006-NMSC-050, ¶ 14. As to the first step, the fraud
12 statute “does not clearly define its unit of prosecution.” *State v. Boergadine*, 2005-
13 NMCA-028, ¶ 20, 137 N.M. 92, 107 P.3d 532. We therefore turn to Defendant’s
14 argument that “the conduct underlying the fraud convictions lack these indicia of
15 distinctness.”

16 {20} To evaluate “distinctness,” the parties do not dispute that we apply the factors
17 set forth in *Herron v. State*, 1991-NMSC-012, ¶ 15, 111 N.M. 357, 805 P.2d 624,
18 including “(1) temporal proximity of the acts; (2) location of the victim(s) during

⁴Because we have determined the thirteen PA fraud convictions must be vacated, we do not consider whether those convictions are improper units of prosecution that violate double jeopardy.

1 each act; (3) existence of an intervening event; (4) sequencing of acts; (5) [the]
2 defendant’s intent as evidenced by his [or her] conduct and utterances; and (6) the
3 number of victims.” *Boergadine*, 2005-NMCA-028, ¶ 21 (internal quotation marks
4 and citation omitted). We may additionally consider whether a defendant’s acts
5 “were performed independently of the other acts in an entirely different manner, or
6 whether such acts were of a different nature.” *Id.* (internal quotation marks and
7 citation omitted). In the context of a particular case, some factors are not useful in
8 application. *Id.* ¶ 23. For example, the second and fourth factors are particularly
9 relevant to sexual assault cases, but are not tailored to every offense. *Id.* Defendant
10 contends that she withheld the same information from the same victim—which she
11 defines as “the United States”—and that these actions happened “at the same times
12 for each of the programs, with the same intent, conduct and utterances.” We evaluate
13 the *Herron* factors and conclude that they support the four separate charges under
14 these circumstances. We begin by addressing Counts 7, 12, and 13.

15 {21} Counts 7, 12, and 13, related to SSI, SSDI, and SNAP benefits, are separated
16 from each other in time, the first *Herron* factor. The SSI and SSDI applications
17 relevant to the charging period were submitted on the same day, May 7, 2012, but
18 the applications were submitted at different times of day. The SSDI application
19 indicates submission at just after 9:00 a.m. and the SSI application was submitted at
20 nearly 2:00 p.m., hours later. The trial exhibits further demonstrate that the SNAP

1 applications were submitted on entirely different dates than the SSI and SSDI
2 applications: September 29, 2013, November 26, 2013, November 25, 2014,
3 September 17, 2015, and October 28, 2016. More than a year separated the first
4 SNAP applications from the SSI and SSDI applications. *See Boergadine, 2005-*
5 *NMCA-028*, ¶ 22 (“The greater the interval between acts the greater the likelihood
6 of separate offenses.” (alteration, internal quotation marks, and citation omitted)).
7 The time intervals between the different applications are all different, but the
8 separations in time nevertheless demonstrate distinct acts by Defendant.

9 {22} These three counts—for SSI, SSDI, and SNAP—are also distinguished by
10 Defendant’s intent, manner of committing the fraud, and the number of victims. *See*
11 *id.* ¶ 21 (outlining these unit of prosecution considerations). All three applications
12 were for different benefits, indicating Defendant’s separate intents to obtain different
13 benefits. *See id.* ¶ 25 (noting that separate requests for money for different purposes,
14 accompanied by “various assurances and justifications” supported separate intents
15 to defraud). Defendant committed the frauds in a different manner, because the three
16 benefits programs involved different qualifying criteria and imposed separate
17 requirements on Defendant. *See id.* ¶ 21 (“We may also consider whether [the
18 d]efendant’s acts were performed independently of the other acts in an entirely
19 different manner.” (internal quotation marks and citation omitted)). For example, the
20 Social Security Administration communicated with Defendant separately about SSI

1 and SSDI benefits, which caused Defendant to engage in different renewal processes
2 for the two benefits programs. SNAP involved yet a different renewal process. The
3 manner of committing each fraud was therefore different against three separate
4 programs, and three separate programs gave Defendant benefits as a result of her
5 applications and her failures to report income and employment. *See id.* ¶ 27
6 (“[M]ultiple victims will likely give rise to multiple offenses.” (internal quotation
7 marks and citation omitted)). The conduct for Counts 7, 12, and 13 was distinct and
8 supported separate fraud charges.

9 {23} We separately consider whether Counts 1 and 7 were sufficiently distinct,
10 because at trial, a special agent with the Office of the Inspector General for the Social
11 Security Administration testified that a successful application for SSI automatically
12 qualifies a person to receive Medicaid benefits. This raises the question of whether
13 Defendant’s actions in obtaining Medicaid (Count 1) were sufficiently distinct from
14 her actions in obtaining SSI benefits (Count 7).

15 {24} We turn again to those *Herron* factors that are relevant to determine the
16 distinctness of the fraud charges. Defendant’s act of applying for Medicaid was
17 simultaneous with the act of applying for SSI benefits. The conduct is therefore not
18 temporally distinct. *See Boergadine*, 2005-NMCA-028, ¶ 21. Defendant, however,
19 received different Medicaid and SSI benefits, which shows a different manner of
20 committing an independent fraud. *See id.* We explain. The Medicaid billing records

1 indicate that Defendant received coverage for many individual medical needs—
2 prescriptions, doctor visits—for many years after the Social Security Administration
3 forwarded the approved SSI application to the state for Medicaid approval. Those
4 medical benefits received and accepted by Defendant when she sought medical care,
5 show “acts of a different nature” than receiving SSI needs-based monthly financial
6 assistance in the form of a payment. *Id.* (internal quotation marks and citation
7 omitted).

8 {25} Defendant further demonstrated distinct intent—another *Herron*
9 consideration—by her conduct because it is reasonable to infer that Defendant knew
10 she received Medicaid coverage, her extensive medical expenses were covered for a
11 period of five years, and in July 2012 Defendant was explicitly informed that her
12 Medicaid eligibility was dependent on her income levels, SSI eligibility, and ability
13 to pay. Defendant received and accepted (1) health coverage and (2) monthly SSI
14 payments, with knowledge that she was working, had not reported the employment
15 or income, and eligibility for each of the benefits was income-dependent.
16 Defendant’s acts and intent were directed at separate benefits programs, indicating
17 separate victims. *See id.* ¶ 27. The SSI benefits stemmed from a federal program,
18 and Defendant’s Medicaid benefits came from both federal and state agencies.
19 Although Defendant obtained separate benefits from a single application, the
20 remaining factors demonstrate that Defendant’s acts related to the ongoing receipt

1 of Medicaid and SSI benefits were sufficiently distinct in intent, manner of receipt,
2 and variety of victims. As a result, the multiple convictions for fraud related to
3 Medicaid and SSI benefits do not violate double jeopardy.

4 **II. Jury Instructions**

5 {26} Last, Defendant argues that the district court improperly refused to give the
6 jury a mistake of fact instruction. “The propriety of jury instructions is a mixed
7 question of law and fact,” which we review de novo. *State v. Romero*, 2005-NMCA-
8 060, ¶ 8, 137 N.M. 456, 112 P.3d 1113. Defendant preserved the request for the
9 instruction, and so we consider whether the refusal to give the instruction was
10 reversible error. *State v. Anderson*, 2021-NMCA-031, ¶ 14, 493 P.3d 434. The
11 failure to instruct is reversible error if the “evidence at trial supports the giving of an
12 instruction on a defendant’s theory of the case.” *State v. Contreras*, 2007-NMCA-
13 119, ¶ 8, 142 N.M. 518, 167 P.3d 966 (internal quotation marks and citation
14 omitted). “When considering a defendant’s requested instructions, we view the
15 evidence in the light most favorable to the giving of the requested instruction.”
16 *Romero*, 2005-NMCA-060, ¶ 8.

17 {27} A mistake of fact instruction permits the jury to find that the defendant
18 believed particular facts and requires the state to prove that “the defendant did not
19 have an honest and reasonable belief in the existence of those facts at the time of the
20 alleged conduct.” UJI 14-5120 NMRA. The district court need not “offer duplicate

1 instructions if the instructions given adequately apprise the jury of the controlling
2 law.” *State v. Bunce*, 1993-NMSC-057, ¶ 8, 116 N.M. 284, 861 P.2d 965.
3 Specifically, the district court “need not give a mistake of fact instruction where the
4 intent element of the crime is adequately defined by the other instructions given.”
5 *Id.* ¶ 9. The question before us is whether fraud⁵ instructions adequately define the
6 requisite intent. *See id.* ¶ 10.

7 {28} We conclude they do. The fraud instructions, which were modeled on the
8 uniform jury instruction and are not challenged on appeal, required the jury to find
9 that Defendant intended to deceive or cheat the Social Security Administration and
10 HSD. *See State v. Hornbeck*, 2008-NMCA-039, ¶ 34, 143 N.M. 562, 178 P.3d 847
11 (noting the conviction for fraud required the jury to find the defendant
12 misrepresented a fact “with intent to deceive or cheat” (citing UJI 14-1640)).
13 Defendant’s mistake of fact theory was that she mistakenly believed that by
14 separately reporting her income to HSD to satisfy a child support obligation, she
15 satisfied all of her reporting obligations. The jury heard evidence that Defendant
16 believed she had appropriately reported. If the jury believed that Defendant
17 mistakenly did not report specifically to HSD or the Social Security Administration,
18 the jury could not have convicted Defendant for fraud because the requisite intent to

⁵Because we have concluded the PA fraud convictions must be vacated, we do not address whether the PA fraud instructions adequately defined the requisite intent.

1 “deceive or cheat” would have been absent. Thus, the fraud instruction adequately
2 apprised the jury of the intent element of the crime and allowed it to consider
3 Defendant’s theory, and the district court did not err by refusing to give Defendant’s
4 requested instruction.

5 **CONCLUSION**

6 {29} For the reasons stated herein, we affirm in part, reverse in part, and remand
7 for the district court to vacate Defendant’s convictions for violation of Section 30-
8 40-1.

9 {30} **IT IS SO ORDERED.**

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11

KATHERINE A. WRAY, Judge

12 **WE CONCUR:**

13
14

JACQUELINE R. MEDINA, Judge

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16

ZACHARY A. IVES, Judge