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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

No. A-1-CA-41345

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

ARLIE GILLEAN,

Defendant-Appellant.

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

Raúl Torrez, Attorney General
Santa Fe, NM
Serena R. Wheaton, Assistant Solicitor General
Albuquerque, NM

for Appellee

Bennett J. Baur, Chief Public Defender
Mallory E. Harwood, Assistant Appellate Defender
Santa Fe, NM

for Appellant

MEMORANDUM OPINION

MEDINA, Chief Judge.

{1} An October 2021 criminal information charged Arlie Gillean (Defendant) with having committed several criminal offenses in September 2021. In 2023, a jury convicted Defendant of (1) aggravated battery (deadly weapon), a third degree felony, contrary to NMSA 1978, Section 30-3-5(C) (1969); (2) failure to give information/render aid (accident with no great bodily harm or death), a misdemeanor, contrary to NMSA 1978, Section 66-7-203 (1978); (3) leaving the scene of an accident (no great bodily

harm or death), a misdemeanor, contrary to NMSA 1978, Section 66-7-201(D) (1989); (4) resisting, evading or obstructing an officer, a misdemeanor, contrary to NMSA 1978, Section 30-22-1(D) (1981); (5) aggravated driving while under the influence of intoxicating liquor or drugs (refused testing) (aggravated DWI), a misdemeanor, contrary to NMSA 1978, Section 66-8-102(D)(3) (2016); (6) careless driving, a motor vehicle code misdemeanor, contrary to NMSA 1978, Section 66-8-114 (1969); and (7) criminal damage to property (over \$1,000), a fourth degree felony, contrary to NMSA 1978, Section 30-15-1 (1963).

{2} On appeal, Defendant argues three instructional errors rise to fundamental error and, further, when taken cumulatively amount to fundamental error. Defendant also alleges two double jeopardy violations, plain error as to an evidentiary issue, and insufficient evidence as to three convictions. Defendant prevails on his double jeopardy arguments, and we affirm on all other grounds.¹

DISCUSSION

I. Jury Instructions

{3} Defendant contends that the jury instructions given for his aggravated DWI, leaving the scene of the accident, and failure to give information/render aid convictions omitted essential elements and that reversal and remand for a new trial is required.

A. Standard of Review

{4} The standard of review we apply to jury instructions depends on preservation. “If the error has been preserved[,] we review the instructions for reversible error. If not, we review for fundamental error.” *State v. Benally*, 2001-NMSC-033, ¶ 12, 131 N.M. 258, 34 P.3d 1134 (citation omitted). Defendant did not object to the jury instructions so we review each of his claims for fundamental error. “Fundamental error exists if it would shock the court’s conscience to affirm the conviction, either because of the obvious innocence of the defendant, or because a mistake in the process makes a conviction fundamentally unfair notwithstanding the apparent guilt of the accused.” *State v. Sivils*, 2023-NMCA-080, ¶ 9, 538 P.3d 126, (alteration, internal quotation marks, and citation omitted).

{5} As to jury instructions, there are two steps to our fundamental error analysis. *Id.* ¶ 10. “First, we determine whether error occurred.” *Id.* To do so, we “determine whether a reasonable juror would have been confused or misdirected by the jury instruction.” *Id.* (internal quotation marks and citations omitted). “[J]uror confusion or misdirection may stem not only from instructions that are facially contradictory or ambiguous, but from instructions which, through omission or misstatement, fail to provide the juror with an accurate rendition of the relevant law.” *Id.* (quoting *Benally*, 2001-NMSC-033, ¶ 12).

¹This is a memorandum opinion limited to addressing only the dispute between the parties. Accordingly, we reserve discussion of any relevant facts to the analysis.

{6} “If we conclude that the jury instruction was erroneous, we move to step two, asking whether that error was fundamental.” *Sivils*, 2023-NMCA-080, ¶ 11. “[W]e review the entire record, placing the jury instructions in the context of the individual facts and circumstances of the case, to determine whether the defendant’s conviction was the result of a plain miscarriage of justice.” *Id.* (alteration, internal quotation marks, and citation omitted). “The failure to instruct the jury on an essential element, as opposed to a definition, ordinarily is fundamental error.” *Id.* (emphasis, internal quotation marks, and citation omitted); see *State v. Osborne*, 1991-NMSC-032, ¶ 38, 111 N.M. 654, 808 P.2d 624. “However, not every failure to instruct on an essential element amounts to fundamental error.” *Sivils*, 2023-NMCA-080, ¶ 11; see *State v. Orosco*, 1992-NMSC-006, ¶ 17, 113 N.M. 780, 833 P.2d 1146 (stating that “[it] cannot be said that every failure to instruct on an essential element necessarily renders a trial fundamentally unfair.”). There are two exceptions to the general rule where “the omission of an essential element does not amount to fundamental error.” *Sivils*, 2023-NMCA-080, ¶ 11; see *State v. Ocon*, 2021-NMCA-032, ¶¶ 9-12, 493 P.3d 448.

{7} “The first exception applies when the jury implicitly finds that the state has proven the omitted element.” *Sivils*, 2023-NMCA-080, ¶ 19; see *Ocon*, 2021-NMCA-032, ¶ 10. “This occurs when the jury makes a specific finding that—in the context of the facts and circumstances of the case—necessarily includes a finding of the omitted element.” *Sivils*, 2023-NMCA-080, ¶ 19; see generally *Ocon*, 2021-NMCA-032. “The second exception only applies when ‘the jury’s verdict, considered together with the given instructions and the parties’ legal and factual presentations, leaves no doubt that the jury would have found the omitted element if properly instructed.’” *Sivils*, 2023-NMCA-080, ¶ 21 (emphasis omitted) (quoting *Ocon*, 2021-NMCA-032, ¶ 11). The “second exception is narrow and will support affirmance only when ‘proof of the omitted element is so strong that no rational jury could have failed to find that element’ and, even if the evidence is that strong, the missing element was not ‘disputed’ or ‘in issue’ at trial.” *Sivils*, 2023-NMCA-080, ¶ 21 (quoting *Ocon*, 2021-NMCA-032, ¶ 12).

B. Aggravated DWI

{8} Defendant contends that the aggravated DWI jury instruction was erroneous by using “or” instead of “and” between the elements. Depending on the reading of the jury instruction in light of this error, Defendant argues “one alternative as instructed was a lesser offense, and the other was not a crime,” and this error was fundamental.

1. The Aggravated DWI Instruction Was Error

{9} Section 66-8-102(B) and (D)(3) defines aggravated DWI in relevant part as follows:

B. It is unlawful for a person who is under the influence of any drug to a degree that renders the person incapable of safely driving a vehicle to drive a vehicle within this state.

.....

D. Aggravated driving under the influence of intoxicating liquor or drugs consists of:

.....

(3) refusing to submit to chemical testing, as provided for in the Implied Consent Act[, NMSA 1978, §§ 66-8-105 to -112 (1978, as amended through 2025)], and in the judgment of the court, based upon evidence of intoxication presented to the court, the driver was under the influence of intoxicating liquor or drugs.

{10} These statutory subsections provide the basis for the applicable uniform jury instruction (UJI), UJI 14-4508 NMRA:

1. The defendant operated a motor vehicle;
2. At that time the defendant was under the influence of

[intoxicating liquor; that is, as a result of drinking liquor the defendant was less able to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to the person and the public;]

[or]

[drugs to such a degree that the defendant was incapable of safely driving a vehicle;]
3. The defendant refused to submit to chemical testing.

{11} Use note 4 of UJI 14-4508 instructs the state to use the applicable alternative as to whether a defendant is driving under the influence of intoxicating liquor *or* drugs. Here, as demonstrated by the instruction provided to the jury, the State's theory at trial was that Defendant was under the influence of intoxicating liquor, not the alternative option of under the influence of drugs. To properly follow the use note, one of the alternatives as well as the bracketed "or" should have been omitted. Instead, to convict Defendant of aggravated DWI in this case, the State was allowed to prove beyond a reasonable doubt "each of the following elements of the crime":

1. [D]efendant operated a motor vehicle;
2. At that time [D]efendant was under the influence of intoxicating liquor, that is, as a result of drinking liquor [D]efendant was less

able to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to the person and the public; *or*

3. [D]efendant refused to submit to chemical testing.

(Emphasis added.)

{12} By using the word “or” between elements two and three of the aggravated DWI instruction, the jury is led to understand that—to convict Defendant of aggravated DWI—they need only find either the influence of intoxicating liquor element *or* the refusal to submit to chemical testing element to convict. *See generally State v. Taylor*, 2024-NMSC-011, ¶ 16, 548 P.3d 82 (discussing juror confusion resulting from the use of “and/or”). This misstates the law, which requires the State prove both of these elements. *See Sivils*, 2023-NMCA-080, ¶ 10 (“[J]uror confusion or misdirection may stem not only from instructions that are facially contradictory or ambiguous, but from instructions which, through omission or misstatement, fail to provide the juror with an accurate rendition of the relevant law.” (internal quotation marks and citation omitted)); § 66-8-102.

{13} Our concern for juror confusion or misdirection here persists despite the instruction beginning with “the [S]tate must prove to your satisfaction beyond a reasonable doubt *each* of the following elements” as the State emphasizes on appeal. At the very least, the combination of the phrase “each of the following elements” and “or” placed between two of the elements creates ambiguity for the jury. Even if this were a mere clerical error as the State contends, it is an error of considerable import. It creates confusion as to what elements are required to convict Defendant of aggravated DWI. Accordingly, we consider this instruction erroneous and move on to analyze whether this error was fundamental.

2. The Aggravated DWI Instructional Error Was Not Fundamental

{14} Ordinarily, a failure to instruct the jury on an essential element rises to the level of fundamental error. *Sivils*, 2023-NMCA-080, ¶ 11. However, as mentioned above, there are two exceptions to this general rule.

{15} Here, the first exception does not apply. There is no implicit finding in the jury verdicts as to Defendant operating a motor vehicle while under the influence of intoxicating liquor or Defendant refusing to submit to chemical testing—the two elements put in issue by the instructional error. *See id.* ¶ 19 (“The first exception applies when the jury implicitly finds that the state has proven the omitted element.”).

{16} Next, we look to the second exception: whether the evidence presented “leaves no doubt that the jury would have found the omitted element if properly instructed.” *Id.* ¶ 21 (emphasis, internal quotation marks, and citation omitted). This exception requires that (1) “proof of the omitted element is so strong that no rational jury could have failed

to find that element;” and (2) “the missing element was not *disputed* or *in issue* at trial.” *Id.* (internal quotation marks and citation omitted). If these two components are satisfied, the second exception applies and the error is not fundamental. *Ocon*, 2021-NMCA-032, ¶ 12.

{17} Here, as to the evidence of intoxication, Defendant conceded that he was the driver of the truck observed by police that evening. He also conceded that he had been drinking before he drove the truck. Police officers testified to observing potentially impaired driving: swerving, running into medians, driving on the wrong side of the road, and running stop signs. Police also detected the odor of alcohol on Defendant’s breath.

{18} As to the refusal to take a chemical test, the jury was provided with the following instruction:

[D]efendant refused to submit to chemical testing if:

1. [D]efendant was arrested on reasonable grounds to believe that [D]efendant was driving while under the influence of intoxicating liquor or drugs;
2. [D]efendant was advised by a law enforcement officer that failure to submit to the test could result in the revocation of [D]efendant’s privilege to drive;
3. A law enforcement officer requested [D]efendant to submit to a chemical breath test;
4. [D]efendant was conscious and otherwise capable of submitting to a chemical breath test; and
5. [D]efendant willfully refused to submit to a breath test.

Relating to these elements, a police officer testified to, and the State showed video of an officer reading Defendant the implied consent advisory—pursuant to the New Mexico Implied Consent Act, NMSA 1978, § 66-8-107 (1993)—Defendant asking questions about the advisory, and Defendant refusing to submit to the chemical test. Proof of the influence of intoxicating liquor element and the refusal to submit to chemical testing element is so strong that no rational jury could have failed to find them.

{19} Still, we consider whether these omitted elements were in dispute or at issue at trial. See *Sivils*, 2023-NMCA-080, ¶ 21 (reasoning that even if the evidence is strong, this Court considers whether the “missing element was not *disputed* or *in issue* at trial” (internal quotation marks and citation omitted)). Defendant does not contest that evidence supports both the influence of intoxicating liquor element and the refusal to submit to chemical testing element. During closing, counsel for Defendant said, “Frequently, I’ll stand up here, talk to the jury at the end and ask them to come back not

guilty on all counts. I can't do that here. [Defendant] was drinking and driving." In his brief in chief, Defendant concedes that "[i]t is likely the jury would have found [he] was impaired if they had been properly instructed . . . because he admitted he had been drinking and there was clear evidence of impaired driving." Defendant continues, "if the jury found that [he] drove and was impaired, without a finding that he refused [a breath test], it was self-evidently legally insufficient to prove aggravated DWI." While this is an accurate statement of the law, the evidence presented related to Defendant's refusal is clear in the record and was not raised as an issue at trial. It is apparent that the person on video refusing the chemical test is Defendant.

{20} The evidence presented showing Defendant under the influence of intoxicating liquor and refusing to submit to the chemical test after being read the advisory was uncontested, and there is no doubt the jury would have made these findings if properly instructed here. See *Sivils*, 2023-NMCA-080, ¶ 21. Accordingly, this instructional error was not fundamental.

C. Temporal Element of the Leaving the Scene of an Accident Instruction

{21} Defendant next contends that the jury instruction given for leaving the scene of an accident amounted to fundamental error because it omitted the conditional/temporal aspect of Defendant's duty to remain on the scene only until he had provided information and assistance.

1. The Omission of the Temporal Element of the Leaving the Scene of an Accident Instruction Was Error

{22} Section 66-7-201(A), the hit-and-run statute applicable to leaving the scene of an accident involving death or personal injuries, provides:

The driver of any vehicle involved in an accident resulting in injury to or death of any person shall immediately stop the vehicle at the scene of the accident or as close thereto as possible, but shall then immediately return to and in every event shall remain at the scene of the accident until [they have] fulfilled the requirements of Section 66-7-203.

Section 66-7-203, in turn, provides:

The driver of any vehicle involved in an accident resulting in injury to or death of any person or damage to any vehicle which is driven or attended by any person shall give his name, address and the registration number of the vehicle he is driving and shall upon request exhibit his driver's license to the person struck or the driver or occupant of or person attending any vehicle collided with and shall render to any person injured in such accident reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that such

treatment is necessary or if such carrying is requested by the injured person.

{23} Depending on whether the accident resulted in “great bodily harm or death” and whether the driver “knowingly fail[ed] to stop or to comply with the requirements of Section 66-7-203,” the driver may be found guilty of a misdemeanor, a fourth degree felony, or a third degree felony. See § 66-7-201(B)-(D). Here, Defendant was convicted of a misdemeanor under Subsection (D) of Section 66-7-201 for “failing to stop or comply with the requirements of Section 66-7-203 . . . where the accident does not result in great bodily harm or death.” See § 66-7-201(D).

{24} At the time of this offense and conviction, there was no UJI for the crime of leaving the scene of an accident.² See *State v. Hertzog*, 2020-NMCA-031, ¶ 9, 464 P.3d 1090 (“[T]here are no [UJIs] for the crimes that Section 66-7-201 defines.”). Accordingly, the district court “was required to give an instruction that substantially follows the language of the statute in order to be deemed sufficient.” *State v. Luna*, 2018-NMCA-025, ¶ 21, 458 P.3d 457 (alteration, internal quotation marks, and citation omitted). The district court instructed the jury, in part, that to find Defendant guilty, the State must prove beyond a reasonable doubt that (1) “[D]efendant operated a motor vehicle”; (2) “[w]hile operating the motor vehicle [D]efendant was in an accident resulting in injury to [Victim]”; and (3) “[a]fter the accident [D]efendant left the scene and never returned.”

{25} Defendant argues and we agree that the omission of the temporal aspect of the statutory language was in error. See *State v. Montelongo Esparza*, 2020-NMCA-050, ¶ 14, 475 P.3d 815 (holding “that a driver’s failure to satisfy the requirements of Section 66-7-203 prior to leaving the scene is an essential element for a conviction of the crime of leaving the scene of an accident involving death or personal injuries.”). We agree that because the statute’s plain language requires someone involved in an accident to provide information before leaving the scene—pursuant to Section 66-7-203, the instructions to the jury here, which did not include such an element, were in error. See *Montelongo Esparza*, 2020-NMCA-050, ¶ 10 (agreeing that “[t]his temporal limitation on a driver’s criminal liability for leaving the scene of an accident . . . constituted an essential element that the jury was required to find beyond a reasonable doubt to convict him”). Having determined there was an instructional error, we next consider whether this error was fundamental.

²We observe that, beginning in 2024 subsequent to these proceedings, a UJI for the leaving the scene of an accident charge was adopted. The State supports its position as to the omission of the temporal aspect not being error by highlighting that the UJI adopted in 2024 for this conviction does not require the “failed to remain at the scene until defendant had [given his information]” element. UJI 14-4513 NMRA. The State articulates that this indicates “[our Supreme] Court only partially agreed with [*Montelongo Esparza*’s holding: under UJI 14-4513, the temporal requirement is *optional*, not mandatory” because the UJI identifies the temporal element as one of a number of alternatives by which to charge. 2020-NMCA-050, 475 P.3d 815. However, we rely on *Montelongo Esparza* as binding on the district court’s proceedings here, as opposed to a subsequently adopted UJI. Cf. *State v. Lucero*, 2007-NMSC-041, ¶ 14, 142 N.M. 102, 163 P.3d 489 (“We have held that the law, at the time of the commission of the offense, is controlling.” (internal quotation marks and citation omitted)).

2. The Omission of the Temporal Element of the Leaving the Scene of an Accident Instructional Error Was Not Fundamental

{26} As discussed above, there are two exceptions “under which the omission of an essential element does not amount to fundamental error.” *Ocon*, 2021-NMCA-032, ¶ 9. The first exception applies when the jury implicitly finds that the state has proven the omitted element. *Id.* Defendant concedes that in light of the jury finding on failure to give information/render aid, that “the jury implicitly [found] that the state has proven the omitted element.” See *Sivils*, 2023-NMCA-080, ¶ 19. While we are not bound to accept Defendant’s concession on appeal, we accept the concession here. See *State v. Anthony L.*, 2019-NMCA-003, ¶ 17, 433 P.3d 347 (acknowledging that this Court is not bound by a party’s concession).

{27} The jury found Defendant guilty of failure to give information/render aid. See *Montelongo Esparza*, 2020-NMCA-050, ¶¶ 21-23 (reasoning that it was “noteworthy [in determining fundamental error occurred] that the jury failed to convict Defendant of his standalone violation of Section 66-7-203 for failure to give information and render aid”). Accordingly, “the jury [made] a specific finding that—in the context of the facts and circumstances of the case—necessarily includes a finding of the omitted element.” *Sivils*, 2023-NMCA-080, ¶ 19; see generally *Ocon*, 2021-NMCA-032. Thus, while the instruction omitted an element, this omission does not “shock the court’s conscience to affirm th[is] conviction” on this ground. See *Sivils*, 2023-NMCA-080, ¶¶ 9-10 (alteration, internal quotation marks, and citation omitted). The jury indeed found that Defendant left the scene of the accident—and never returned—having not provided his information to Victim. Accordingly, this instructional error was not fundamental.

D. Leaving the Scene of an Accident and the Failure to Give Information and Render Aid

{28} Defendant contends that the district court committed fundamental error when it omitted a knowledge element from the leaving the scene of the accident instruction and the failure to give information/render aid instruction. The State responds that the instruction was not erroneous, because “at the time of Defendant’s trial there was no stock jury instruction for leaving the scene of an accident” and “[t]he statute does not contain a knowledge element.”

1. The Omission of a Knowledge Element From the Leaving the Scene of the Accident and Failure to Give Information and Render Aid Instructions Was Not Error

{29} First, we consider whether the challenged instructions amounted to error. Defendant’s challenge relates to the lack of a “knowledge” element for both convictions. The core consideration here is whether juror confusion could have resulted because of instructions “which, through omission or misstatement, fail to provide the juror with an accurate rendition of the relevant law.” See *id.* ¶ 10 (internal quotation marks and citation omitted). As with the crime of leaving the scene of the accident, there was no

UJI for the crime of failure to give information/render aid at the time of Defendant’s trial. See *Hertzog*, 2020-NMCA-031, ¶ 9 (“[T]here are no uniform jury instructions for the crimes that Section 66-7-201 defines.”). Thus, we must determine if the instruction given to the jury “substantially follow[ed] the language of the statute.” *Luna*, 2018-NMCA-025, ¶ 21 (alteration, internal quotation marks, and citation omitted).

{30} The statutory language of Section 66-7-203 has previously been set forth above and will not be reiterated here.

{31} The elements provided to the jury here on this charge were: (1) “[D]efendant operated a motor vehicle”; (2) “[w]hile operating the motor vehicle [D]efendant was in an accident resulting in injury to [Victim]”; and (3) “[a]fter the accident [D]efendant left the scene and never returned.”

{32} The crime of leaving the scene of an accident is set forth in Section 66-7-201. Section 66-7-201 requires satisfaction of the elements of Section 66-7-203—the failure to give information/render aid. In this case, Defendant was convicted under Subsection (D) of Section 66-7-201, the misdemeanor offense. The portions of Section 66-7-201 relevant to Defendant’s conviction state:

A. The driver of any vehicle involved in an accident resulting in injury to or death of any person shall immediately stop the vehicle at the scene of the accident or as close thereto as possible, but shall then immediately return to and in every event shall remain at the scene of the accident until [they have] fulfilled the requirements of Section 66-7-203 Every such stop shall be made without obstructing traffic more than is necessary.

. . . .

D. Any person failing to stop or comply with the requirements of Section 66-7-203 . . . where the accident does not result in great bodily harm or death is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Subsection A of [NMSA 1978, Section 31-19-1 (1984)].

{33} The question of whether a defendant was required to have knowledge that they were in an accident to be convicted under these statutes—at least under leaving the scene of an accident, Section 66-7-201—at the time of Defendant’s trial had not been resolved.³ See *Hertzog*, 2020-NMCA-031, ¶¶ 9-18 (determining that whether knowledge of the accident itself is a statutory requirement was not pertinent to the analysis as both

³Defendant directs this Court to UJI 14-4513, the current UJI for leaving the scene of an accident adopted after these proceedings, as well as UJI 14-4516 NMRA, the current UJI for failure to give information/render aid adopted after these proceedings. These subsequently adopted UJIs include more elements than what were provided to the jury at trial. Pertinent to this issue, the UJIs for both of these convictions now include a knowledge element. However, at the time of this trial in 2023, there were no UJIs available for these charges.

the state and the defendant had agreed to some form of a knowledge instruction and the issue related to whether “accident” should have a broader definition than “collision.”); *State v. Kuchan*, 1943-NMSC-025, ¶¶ 4-7, 47 N.M. 209, 139 P.2d 592 (declining to decide if, under a prior version of the statute, knowledge of the accident or knowledge that a person was struck or injured are elements of the crime). However, we find *State v. Guzman*, 2004-NMCA-097, 136 N.M. 253, 96 P.3d 1173, instructive.

{34} In *Guzman*, this Court determined that sufficient evidence supported a conviction under Section 66-7-201—an accident involving great bodily harm. 2004-NMCA-097, ¶ 24. The Court reasoned that

[i]n order to convict [the d]efendant of accidents involving death or personal injuries [under Section 66-7-201], the [s]tate was required to prove that [the d]efendant (1) operated a motor vehicle; (2) was involved in an accident which caused great bodily harm or death of the victim; (3) failed to stop and/or failed to remain at the scene of the accident; and (4) failed to render reasonable aid to the victim.”

Id. ¶ 20.

{35} Here, the jury instructions required the State to prove, among other things, “[a]fter the accident [D]efendant left the scene and never returned” as to the leaving the scene of an accident charge. Further, as to the failure to give information/render aid charge, the instructions required the State to prove “after the accident, [D]efendant failed to give his name, address and the registration number of the vehicle he [was] driving to [Victim]” and “Defendant failed to render aid to [Victim].” Neither the plain language of Section 66-7-201(D) nor Section 66-7-203 includes “knowledge” as an element such that the district court was required to include it here. *See State v. Trujillo*, 2009-NMSC-012, ¶ 11, 146 N.M. 14, 206 P.3d 125 (“[W]hen a statute contains clear and unambiguous language, we will heed that language and refrain from further statutory interpretation,” and “[w]e will not read into a statute any words that are not there, particularly when the statute is complete and makes sense as written.”). Accordingly, the instructions here follow the language of Section 66-7-201 and Section 66-7-203 and squarely track the instructions provided in *Guzman*. We conclude that these instructions did not “fail to provide the juror with an accurate rendition of the relevant law.” *Sivils*, 2023-NMCA-080, ¶ 10 (internal quotation marks and citation omitted); *see State v. Cumpston*, 2000-NMCA-033, ¶¶ 13-14, 129 N.M. 47, 1 P.3d 429 (rejecting the defendant’s argument that “there is no way to distinguish between the elements of . . . Section 66-7-201(B) and (C)” by reasoning that the statute “provides notice to a person of ordinary intelligence” that “Subsection (C) requires the additional element of knowing behavior not mentioned in the preceding [Subsection (B)]”).

{36} Thus, the omission of the knowledge element was not error and our analysis on this issue ends here.

E. Cumulative Error

{37} Finally, citing no authority, Defendant argues that cumulatively, the above instructional errors along with other “minor errors” not analyzed in the brief in chief require reversal and a new trial.⁴ Defendant contends these errors “underscore[] the likelihood of juror confusion.”

{38} This trial was not perfect. It is a cautionary tale to the State to ensure thoughtfulness of tact in crafting jury instructions. Still, overwhelming evidence was presented to the jury on these convictions including Defendant’s testimony. Specifically, evidence was presented showing that Defendant drank alcohol, got into his truck, drove into Victim’s garage and into Victim. There was also evidence that Defendant realized that he had been in an accident, but proceeded to drive away without providing aid or information to Victim. Defendant effectively conceded that all of the legally necessary elements were satisfied in closing and on appeal. Accordingly, we do not consider the two errors made to indicate a miscarriage of justice.

{39} As detailed above, there were instructional errors. However, none of them—alone or together—shock this Court’s conscious such that reversal on these grounds as to the aggravated DWI, failure to give information/render aid, and leaving the scene of an accident convictions is required. See *Sivils*, 2023-NMCA-080, ¶ 9.

II. Double Jeopardy

{40} We now turn to Defendant’s double jeopardy arguments. This case presents double description issues because it involves multiple punishments for convictions under different statutes. See *State v. Begaye*, 2023-NMSC-015, ¶ 12, 533 P.3d 1057. We review such issues de novo. *Id.* ¶ 11. As a double description case, this Court applies the two-part test set forth in *Swafford v. State*, 1991-NMSC-043, ¶ 25, 112 N.M. 3, 810 P.2d 1223. We first ask “whether the conduct underlying the offenses is unitary, i.e., whether the same conduct violates both statutes.” *Id.* “If it is unitary, we [then] consider whether it was the Legislature’s intent to punish the two crimes separately.” *State v. Swick*, 2012-NMSC-018, ¶ 11, 279 P.3d 747. “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[s] in the same trial.” *Swafford*, 1991-NMSC-043, ¶ 25.

A. Failure to Give Information and Render Aid and Leaving the Scene of an Accident Convictions

{41} Defendant contends that the conduct underlying the leaving the scene of an accident conviction and the failure to give information/render aid conviction is unitary as

⁴Defendant presents no analysis as to how these alleged “minor errors” are in fact errors, nor does Defendant articulate how these alleged errors may have amounted to fundamental error, so we do not address them. See *Deaton v. Gutierrez*, 2004-NMCA-043, ¶ 31, 135 N.M. 423, 89 P.3d 672 (noting that an “assertion of prejudice is not a showing of prejudice” (internal quotation marks and citation omitted)). Where no prejudice has been shown, this Court will not find reversible error. See *id.* (stating that in the absence of prejudice, there is no reversible error).

both rely on Defendant driving into Victim, his garage, and his vehicles, and causing damage and injury. The thrust of Defendant's argument is that both convictions relied on the same conduct, the Legislature did not intend multiple punishments for this act, and both convictions are of the same severity. Thus, Defendant argues, the case should be remanded for the district court to determine which conviction to vacate. See *State v. Comitz*, 2019-NMSC-011, ¶¶ 31, 53, 443 P.3d 1130 (deciding that where a double jeopardy violation is found with two charges of equal severity, the case is remanded to allow the trial court to choose which to vacate).

{42} The State responds that the conduct was not unitary, because Defendant's failure to give information/render aid occurred before Defendant left the scene of the accident indicating the failure to give information/render aid crime was complete before the leaving the scene of the accident crime. Further, the State contends without authority that each statute at issue here "works to protect a different aspect of the greater policy." One "ensures that bad driver[s] stay at the scene until they have provided their information and rendered aid" and the other "ensures that just because a bad driver stays at the scene, they do not stand there doing nothing while a victim is left unaided."

1. The Conduct Relied Upon for the Failure to Give Information/Render Aid and Leaving the Scene of an Accident Convictions Was Unitary

{43} Generally, in a unitary conduct analysis, the first step is to determine whether there is "sufficient indicia of distinctness" between the acts at issue. *Swafford*, 1991-NMSC-043, ¶ 26.

{44} We look to what the State was required to prove and what evidence was offered. The elements for both failure to give information/render aid and leaving the scene of an accident were outlined above. The State presented evidence that Defendant hit Victim with his truck and then left Victim's residence to satisfy the requirements of both of these charges. The State relied on the fact that Defendant's failure to provide his information or render aid to Victim is implicit in the other facts used to prove the leaving the scene of the accident charge. All of the facts required to prove the leaving the scene of the accident charge were also required to prove the failure to give information/render aid charge.

{45} Accordingly, indicia of distinctness are not apparent based on the evidence or the jury instructions relating to these convictions. As "it reasonably can be said that the conduct is unitary," we conclude it was here. See *State v. Porter*, 2020-NMSC-020, ¶ 12, 476 P.3d 1201 (quoting *Swafford*, 1991-NMSC-043, ¶ 28).

2. The Legislature Did Not Intend to Create Separately Punishable Offenses for Failure to Give Information and Render Aid and Leaving the Scene of an Accident

{46} Having determined that the conduct relied on to convict Defendant of the two offenses was unitary, we proceed to the second *Swafford* prong: “whether the Legislature intended to create separately punishable offenses.” *State v. Reed*, 2022-NMCA-025, ¶ 8, 510 P.3d 1261 (text only) (citation omitted). Because the failure to give information/render aid and leaving the scene of an accident statutes do not expressly permit multiple convictions, see §§ 66-7-201, -203, and can be violated in multiple ways, we consider whether the Legislature intended multiple punishments under the circumstances in this case, including a consideration of the State’s theory for each offense. See *Begaye*, 2023-NMSC-015, ¶¶ 21, 23-24. “If the state’s legal theory cannot be ascertained using the charging documents and jury instructions,” as is the case here, among other things, we look to “closing arguments to establish whether the same evidence supported a defendant’s convictions under both statutes.” *Id.* ¶ 24.

{47} As to what the State characterized as the “two leaving the scene crimes” during closing argument, the State highlighted, “Defendant again took the stand and admitted that he did leave the scene.” Further, the State emphasized:

Cops testified they found him almost a minute later or a few minutes later. . . . [Victim] testified that nobody was there to help him, nobody rendered aid. The first person there was the cop. So, I think the two leaving the scene charges regarding rendering aid and exchanging information are both pretty obvious as well.

The State’s theory failed to delineate a particular occurrence of failure to give information/render aid that was distinct from a particular occurrence of leaving the scene of an accident. The failure to give information/render aid conviction is subsumed into the leaving the scene of an accident conviction; thus, our “inquiry is over and the statutes are the same for double jeopardy purposes—punishment cannot be had for both.” See *Swafford*, 1991-NMSC-043, ¶ 30.

{48} Defendant was sentenced for a term of 364 days for each of these convictions. We remand to the district court to determine which of these convictions to vacate and to resentence accordingly. See *Comitz*, 2019-NMSC-011, ¶¶ 31, 53.

B. Aggravated DWI and Careless Driving Convictions

{49} Defendant also argues that “[t]he acts underlying the careless driving and DWI convictions were also unitary.” Defendant points to Defendant’s intoxication being continuous the entire time he was behind the wheel and that “it was one continuous act over a period of just a few minutes.” Further, the criminalization of both careless driving and DWI “seek[s] to provide safer roads for the public by punishing those that drive irresponsibly” and “[b]ecause reasonable minds can differ as to the [L]egislature’s intent in punishing these two crimes, the rule of lenity prevents multiple convictions for the unitary conduct supporting the DWI and careless driving charges.”

{50} Relying on the *Herron* factors, the State argues that the crimes were not unitary because (1) the crime of careless driving was complete when Defendant crashed into Victim’s garage, backed up and parked his truck; (2) the location of the Victim was distinct for each crime given that Victim was inside his residence when Defendant first crashed into Victim’s garage and was outside the residence when Defendant drove into and struck Victim and the garage; (3) as to an intervening event, Defendant verbally engaged with Victim when Victim stepped out of his residence and then placed his truck into drive and accelerated forward crashing into Victim and the garage for a second time; and (4) Victim was not present while the officers pursued and later arrested Defendant. Beyond the conduct not being unitary, the State argues that “[its] opening statement, the testimony given during the trial[,] and the associated evidence all support two crimes.”

1. The Conduct Relied Upon for the Aggravated DWI and Careless Driving Convictions Was Unitary

{51} As mentioned above, the first step in a unitary conduct analysis is to determine whether there is “sufficient indicia of distinctness” between the acts at issue. *Swafford*, 1991-NMSC-043, ¶ 26. In so doing, we look to what the State was required to prove and what evidence was offered. *See id.* ¶ 27. To find Defendant guilty of careless driving, the State was required to prove beyond a reasonable doubt: (1) “[D]efendant operated a motor vehicle on a public road”; and (2) “[w]hile operating the motor vehicle [D]efendant did so in a careless, inattentive or imprudent manner, without due regard for the width, grade, curves, corners, traffic, weather and road conditions[,] and all other attendant circumstances.”

{52} As stated above, the elements for Defendant’s aggravated DWI charge were:

1. [D]efendant operated a motor vehicle;
2. At that time [D]efendant was under the influence of intoxicating liquor, that is, as a result of drinking liquor [D]efendant was less able to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to the person and the public; or
3. [D]efendant refused to submit to chemical testing.

{53} Notably, the aggravated DWI conviction relied on an additional fact—the refusal of chemical testing—that was not required for the careless driving conviction. From there, the distinguishing characteristics of the conduct required to convict were (1) Defendant operated a vehicle on a public road—specified in careless driving—as opposed to an unspecified place; and (2) Defendant operated a vehicle in a “careless, inattentive or imprudent manner,” as opposed to Defendant operated a vehicle while under the influence of intoxicating liquor such that he “was less able to the slightest

degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety.”

{54} As to the first distinction, evidence was presented that Defendant operated a vehicle unsafely in Victim’s driveway—a nonpublic road. *Cf.* NMSA 1978, § 66-1-4.8 (B) (1991) (defining “highway” or “street” as “every way or place generally open to the use of the public as a matter of right for the purpose of vehicular travel, even though it may be temporarily closed or restricted for the purpose of construction, maintenance, repair or reconstruction”). In so doing, Defendant collided with a garage and into Victim. This is the only evidence offered regarding Defendant’s operation of a vehicle on a nonpublic road. Evidence was also presented that, while driving from Victim’s residence to Defendant’s residence, Defendant swerved in his lane, hit a median, and drove in the wrong lane—all testified to by police. This evidence is the only evidence offered that could support the careless driving conviction, which specified operation of a motor vehicle on a public road. *See State v. Brennan*, 1998-NMCA-176, ¶¶ 4-5, 126 N.M. 389, 970 P.2d 161 (recognizing that the offense of careless driving is limited to highways). However, in testimony by police, this evidence was explicitly linked to supporting that Defendant operated the vehicle while intoxicated.

{55} The State contends the careless driving was complete at the time that Defendant drove into the garage. However, as noted, the jury instructions preclude this theory. The instructions specify that the careless driving occurred on a public road. The only evidence of Defendant driving on a public road occurred after he crashed into Victim and his garage. And the State presented this evidence to support Defendant being impaired while driving. The State on appeal also identified Victim’s presence or lack thereof during these crimes as relevant here. However, these facts are irrelevant to the charges of aggravated DWI or careless driving.

{56} Accordingly, indicia of distinctness are not apparent based on the evidence or the jury instructions relating to these convictions. As “it reasonably can be said that the conduct is unitary,” we conclude it was here. *See Porter*, 2020-NMSC-020, ¶ 12 (quoting *Swafford*, 1991-NMSC-043, ¶ 28).

2. The Legislature Did Not Intend to Create Separately Punishable Offenses for Aggravated DWI and Careless Driving

{57} Having determined that the underlying conduct supporting these two offenses was unitary, we proceed to the second *Swafford* prong: “whether the Legislature intended to create separately punishable offenses.” *Reed*, 2022-NMCA-025, ¶ 8 (text only) (citation omitted). Because the aggravated DWI and careless driving statutes do not expressly permit multiple convictions, *see* §§ 66-8-102, -114, and can be violated in multiple ways, we consider whether the Legislature intended multiple punishments under the circumstances in this case, including a consideration of the State’s theory for each offense. *See Begaye*, 2023-NMSC-015, ¶¶ 21, 23-24. “If the state’s legal theory cannot be ascertained using the charging documents and jury instructions,” as is the

case here, among other things, we look to “closing arguments to establish whether the same evidence supported a defendant’s convictions under both statutes.” *Id.* ¶ 24.

{58} During closing, the State pointed to the same conduct to support the careless driving as it did to support the aggravated DWI conviction. The State argued, Defendant “admits that he was driving that day, admits he was behind the wheel, admits he was driving all over the road running the stop signs. It’s clearly him in the video being read the New Mexico Implied Consent Advisory, acknowledging it, and refusing it. I feel like the DWI, the careless driving are pretty obvious.” Accordingly, the State failed to delineate a particular occurrence of careless driving that was distinct from a particular occurrence of aggravated DWI. They are subsumed into each other; thus, our “inquiry is over and the statutes are the same for double jeopardy purposes—punishment cannot be had for both.” See *id.*; see also *State v. Arguello*, 2024-NMCA-074, ¶¶ 1, 31, 557 P.3d 1018 (holding that convictions for careless driving, § 66-8-114(B), and driving under the influence of intoxicating liquor, impaired to the slightest degree, § 66-8-102(A), are violative of the defendant’s right to be free from double jeopardy).

{59} The elements of careless driving are subsumed into the elements of aggravated DWI, and Defendant’s conviction for careless driving must be vacated. See *id.* ¶ 31 (holding that careless driving is subsumed into driving under the influence of intoxicating liquor); see also *State v. Montoya*, 2013-NMSC-020, ¶ 55, 306 P.3d 426 (“[W]here one of two otherwise valid convictions must be vacated to avoid violation of double jeopardy protections, we must vacate the conviction carrying the shorter sentence).

III. Evidentiary Issue

{60} Defendant contends that witness testimony regarding actions and statements by Defendant in videos violated the “silent witness” theory, was highly prejudicial, and amounted to plain error. Specifically, “[n]one of these lay witnesses was better suited than any juror to determine what was said or done in these videos” and “[i]nterpreting [Defendant’s] behavior and statements was central to the jury’s role, particularly with regard to the specific-intent crimes.” In contrast to the standard of review he initially argues, Defendant then argues this was not harmless error. Because Defendant did not preserve this argument, we review it for plain error. *State v. Chavez*, 2024-NMSC-023, ¶ 10, 562 P.3d 521.

{61} The doctrine of plain error, arising from our Rules of Evidence, applies to evidentiary matters and permits a court to “take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.” Rule 11-103(E) NMRA. “Because plain error is an exception to the general rule that parties must raise timely objection to improprieties at trial, it is to be used sparingly.” *Chavez*, 2024-NMSC-023, ¶ 10 (text only) (citation omitted). “To find plain error, the Court must be convinced that admission of the testimony constituted an injustice that created grave doubts concerning the validity of the verdict.” *State v. Montoya*, 2015-NMSC-010, ¶ 46, 345 P.3d 1056 (internal quotation marks and citation omitted); see also *State v. Lucero*,

1993-NMSC-064, ¶ 13, 116 N.M. 450, 863 P.2d 1071 (explaining that “[t]he predicate for review on the basis of plain error is less stringent than for fundamental error”).

{62} “The burden is on the defendant asserting plain error to establish prejudice.” *State v. Muller*, 2022-NMCA-024, ¶ 43, 508 P.3d 960. Relating to prejudice, Defendant asserts that “[a]llowing th[e] testimony was not harmless error because the videos were the primary evidence of every crime with which [Defendant] was charged, and he contested the [S]tate’s arguments that he intended to hit [Victim] and his house and that he resisted arrest.” Defendant continues, “the jury was likely to be swayed by the police officers’ and [V]ictim’s commentary, essentially telling them what to see and hear.” Defendant’s contentions on this issue are mere assertions of prejudice. Such assertions, however, carry no weight in the absence of specifics. See *Deaton v. Gutierrez*, 2004-NMCA-043, ¶ 31, 135 N.M. 423, 89 P.3d 672 (noting that an “assertion of prejudice is not a showing of prejudice” (internal quotation marks and citation omitted)). Where no prejudice has been shown, this Court will not find reversible error, let alone plain error. See *id.* (stating that “in the absence of prejudice, there is no reversible error” (alteration, internal quotation marks, and citation omitted)).

{63} Although the testimony Defendant cites may have influenced the jury, the State merely supplemented the showing of the video footage by eliciting clarifying narration. More compellingly, none of the challenged statements relate to Defendant’s intent or include witnesses speculating as to Defendant’s intent, nor do they directly relate to the resisting arrest charge, as Defendant suggests. Accordingly, the jury’s ability to weigh the credibility of the witnesses and the significance of the videos to determine the ultimate issues was not unduly influenced. This testimony did not invade the province of the jury such that there is grave doubt as to the validity of the verdict here. See *Chavez*, 2024-NMSC-023, ¶ 11; *State v. Sweat*, 2017-NMCA-069, ¶ 21, 404 P.3d 20 (discussing the defendant’s contention that officer testimony “‘invaded the province of the jury’ by opining that [the d]efendant was the person pictured”).

IV. Sufficiency of the Evidence

{64} Defendant raises insufficiency of the evidence regarding three convictions: (1) aggravated battery with a deadly weapon; (2) criminal damage to property over \$1,000; and (3) resisting, evading, or obstructing an officer. We address each below.

{65} “The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction.” *Montoya*, 2015-NMSC-010, ¶ 52 (internal quotation marks and citation omitted). The reviewing court “view[s] the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict.” *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. We disregard all evidence and inferences that support a different result. See *State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829. “Jury instructions become the law of the case

against which the sufficiency of the evidence is to be measured.” *State v. Smith*, 1986-NMCA-089, ¶ 7, 104 N.M. 729, 726 P.2d 883.

A. There Was Sufficient Evidence of Intent for the Aggravated Battery and Criminal Damage to Property Convictions

{66} Defendant was convicted of both aggravated battery and criminal damage to property. On appeal, Defendant claims there was insufficient evidence to prove the intent element for both of these convictions, so we address them together. Specifically, Defendant argues that the State did not present sufficient evidence that Defendant intended to injure Victim, because “the [S]tate failed to prove beyond a reasonable doubt . . . that [Defendant] was capable of forming the specific intents required and that he did in fact form those intents.”

1. Jury Instructions as to Intent

{67} To prove intent for aggravated battery, the State was required to prove that “[D]efendant intended to injure [Victim]” and “[D]efendant was not intoxicated from [the] use of alcohol at the time the offense was committed to the extent of being incapable of forming an intention to injure [Victim.]” To prove intent for criminal damage to property, the State was required to prove that “[D]efendant intentionally damaged property of [Victim]” and “[D]efendant was not intoxicated from [the] use of alcohol at the time the offense was committed to the extent of being incapable of forming an intention to damage [Victim]’s property.” These instructions track the UJIs for the charges and each set of instructions included an element related to inability to form intent as provided by the UJI use note. See UJI 14-322 NMRA (aggravated battery); UJI 14-1501 NMRA (criminal damage to property); UJI 14-5111 NMRA (inability to form intent); UJI 14-5111 use note 1.

{68} The jury was also provided with a number of jury instructions related to intoxication and intent that track the UJIs. As to intoxication, the jury was provided with the following instruction:

An issue you must consider in this case is whether [D]efendant was intoxicated from the use of alcohol. You must determine whether or not [D]efendant was intoxicated from the use of alcohol and, if so, what effect this had on [D]efendant’s ability to form the intent to injure [Victim].

The burden is on the [S]tate to prove beyond a reasonable doubt that [D]efendant was capable of forming an intention to injure [Victim]. If you have a reasonable doubt as to whether [D]efendant was capable of forming such an intention, you must find [D]efendant not guilty of aggravated battery with a deadly weapon.

{69} The criminal damage to property elements instruction was also followed by an instruction dedicated to the issue of intoxication and intent that tracked the above

intoxication and intent instruction almost verbatim except for language about the operant differences between the elements of the charges.

{70} Another jury instruction informed the jury as to which charges require that “the State must prove to your satisfaction beyond a reasonable doubt that [D]efendant acted intentionally when he committed the crime.” This instruction listed both the aggravated battery charge and the criminal damage to property charge at issue here. The instruction explained:

A person acts intentionally when he purposely does an act which the law declares to be a crime, even though he may not know that his act is unlawful. Whether [D]efendant acted intentionally may be inferred from all of the surrounding circumstances, such as the manner in which he acts, the means used and any statements made by him.

{71} The jury instructions provided here clearly articulate the issue of intent and how it relates to the charges.

2. Evidence as to Defendant’s Intent

{72} “Voluntary intoxication provides a defense to specific-intent crimes ‘where the intoxication is to such a degree as would negate the possibility of the necessary intent.’” *State v. Hernandez*, 2003-NMCA-131, ¶ 20, 134 N.M. 510, 79 P.3d 1118 (quoting *State v. Lovato*, 1990-NMCA-047, ¶ 4, 110 N.M. 146, 793 P.2d 276). If evidence supporting voluntary intoxication is put forward, a defendant is entitled to the instruction, as occurred here. *Id.* However, evidence that a defendant is intoxicated to any degree does not necessarily rise to the level of evidence of intoxication “to the point that [affects their] ability to form the necessary mental state for a specific-intent crime.” *See id.* ¶ 21. Instead, “an accused’s state of mind or intent can be inferred [from their] acts, conduct and words.” *State v. Gattis*, 1986-NMCA-121, ¶ 22, 105 N.M. 194, 730 P.2d 497. As to this sufficiency challenge relating to Defendant’s intent and level of voluntary intoxication, we assess whether “the jury’s decisions are supportable by evidence in the record, rather than mere guess or conjecture.” *See State v. Ford*, 2019-NMCA-073, ¶ 8, 453 P.3d 471 (internal quotation marks and citation omitted). “[W]e distinguish between conclusions based on speculation and those based on inferences.” *Id.* (internal quotation marks and citation omitted). “A reasonable inference is a conclusion arrived at by a process of reasoning which is a rational and logical deduction from facts admitted or established by the evidence.” *Id.* (internal quotation marks and citation omitted).

{73} It is not our Court’s role to reweigh the evidence or put ourselves in the place of the fact-finder. *See State v. Wilson*, 1998-NMCA-084, ¶ 18, 125 N.M. 390, 962 P.2d 636 (“Fact-finding is a function of the district court.”). The jury was well apprised that the issue of intent—and whether it was incapable of being formed due to voluntary intoxication as to these charges—was contested by the parties. Defendant and the State argued the intoxication and intent issue at length during their closing remarks. Defendant struck Victim’s garage causing Victim to wake up and go to see what

happened. Defendant and Victim proceeded to have a verbal altercation, and then Defendant accelerated forward again, striking Victim. The jury had an opportunity to review multiple videos from the night depicting this interaction, Defendant's driving, and Defendant's behavior with police officers. The jury also heard testimony from many officers, Victim, and Defendant himself as to the events that took place that night. From this evidence, the jury could reasonably infer Defendant's intent. See *Ford*, 2019-NMCA-073, ¶ 8.

{74} Based on the language of the jury instructions and the verdict forms, the jury was well equipped to consider and did so find that Defendant was "less able to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to the person and the public [as a result of drinking liquor]," such to be convicted of aggravated DWI. At the same time, the jury determined Defendant "was not intoxicated from [the] use of alcohol at the time the [aggravated battery] was committed to the extent of being incapable of forming an intention to injure [Victim.]" Further, the jury determined Defendant "was not intoxicated from [the] use of alcohol at the time the [criminal damage to property] was committed to the extent of being incapable of forming an intention to damage [Victim]'s property." The law does not support a proposition that if you are less able to the slightest degree to safely drive, you are necessarily too intoxicated to form an intent to hurt people or damage property. See *Hernandez*, 2003-NMCA-131, ¶ 21. The jury, in finding the Defendant intended these acts, was satisfied by the video evidence of Defendant's behavior and Victim's testimony as to the circumstances of the evening that Defendant had the requisite intent. See *Cunningham*, 2000-NMSC-009, ¶ 26. Accordingly, we conclude sufficient evidence supports the convictions for aggravated battery with a deadly weapon and criminal damage to property and therefore affirm.

B. There Was Sufficient Evidence for the Resisting a Police Officer Conviction

{75} Defendant contends that his conduct was neither "abuse" nor "resisting" as required by the case law interpreting Section 30-22-1(D). Specifically, Defendant argues that the facts here fall short of the "protracted instances of an individual repeatedly, overtly refusing to comply with clear orders" that occurred in See *State v. Diaz*, 1995-NMCA-137, ¶¶ 4-6, 121 N.M. 28, 908 P.2d 258.

{76} The jury convicted Defendant of resisting, evading, or obstructing an officer, contrary to Section 30-22-1(D). Section 30-22-1 contains four alternatives to charge a defendant. Each alternative requires proof of three common elements, and then a fourth element unique to the particular subsection charged. To convict a defendant under Section 30-22-1(D), requires proof that "the defendant resisted or abused [the officer]." *State v. Jimenez*, 2017-NMCA-039, ¶ 29, 392 P.3d 668 (internal quotation marks and citation omitted).

{77} "[A] person can violate [Section 30-22-1](D) . . . by avoiding doing something required, including refusing to comply with an officer's orders." *Jimenez*, 2017-NMCA-039, ¶ 39. "[A] defendant who is effectively 'cornered,' i.e., whose apprehension is

imminent, but who, nonetheless chooses to challenge or forestall [their] arrest—either by physical battery, refusing to comply with orders, or verbally—violates [Section 30-22-1](D).” *Jimenez*, 2017-NMCA-039, ¶ 40.

{78} In *Diaz*, the jury was provided with instructions for aggravated assault on a peace officer but not a lesser included offense of resisting or abusing an officer. See 1995-NMCA-137, ¶ 1. There, the defendant failed to obey repeated orders to drop a knife as he backed away from officers down a street for approximately 150 to 200 yards. *Id.* ¶¶ 4-6. In that case, we determined the “[district] court erred in failing to instruct the jury on the lesser included offense,” because “if the jury disbelieved the [s]tate’s evidence and found [the d]efendant’s version of events credible, it could have found that [the d]efendant was at most resisting and abusing the officers.” *Id.* ¶¶ 1, 16. We do not understand *Diaz* and other case law cited by Defendant on appeal to articulate that a minimum threshold of “resisting” under Subsection (D) of Section 30-22-1 requires a particular number of instructions that do not go heeded by a defendant. See also *City of Roswell v. Smith*, 2006-NMCA-040, ¶¶ 1-2, 139 N.M. 381, 133 P.3d 271 (considering an obstructing an officer conviction under Roswell City Code, this Court determined there was sufficient evidence to support the conviction in part because the defendant failed to comply with repeated instructions). Nor do we understand the case law to require a particular clarity of those orders nor a particular length of time of a defendant “resisting” the officers.

{79} Here, testimony from police officers and body camera footage from the night demonstrate that Defendant refused to comply with commands by police officers and yelled verbal abuse at them. Defendant “[chose] to challenge or forestall his arrest . . . by . . . refusing to comply with orders,” and this violates Section 30-22-1(D). See *Jimenez*, 2017-NMCA-039, ¶ 40. Because this conviction is sufficiently supported by evidence that Defendant resisted the police officer here and this is sufficient in itself to affirm the conviction under Subsection (D), we do not address Defendant’s arguments as to whether Defendant abused the officer under Section 30-22-1.

CONCLUSION

{80} For the foregoing reasons, we remand for the district court to vacate the violative convictions and to resentence accordingly. We affirm on all other grounds.

{81} **IT IS SO ORDERED.**

JACQUELINE R. MEDINA, Chief Judge

WE CONCUR:

SHAMMARA H. HENDERSON, Judge

GERALD E. BACA, Judge