

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

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,

4 v.

5 **ROBERT LEE MEEKS,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF TORRANCE COUNTY**

8 **Matthew G. Reynolds, District Court Judge**

9 Raúl Torrez, Attorney General

10 Emily C. Tyson-Jorgenson, Assistant Attorney General

11 Santa Fe, NM

12 for Appellee

13 Bennett J. Baur, Chief Public Defender

14 Charles D. Agoos, Assistant Appellate Defender

15 Santa Fe, NM

16 for Appellant

17 **MEMORANDUM OPINION**

18 **DUFFY, Judge.**

19 {1} The memorandum opinion filed on February 2, 2023, is hereby withdrawn,

20 and this opinion is substituted in its place. Defendant appeals the district court's

21 judgment and sentence, convicting him of two counts of homicide by vehicle due to

22 reckless driving, two counts of great bodily harm by vehicle due to reckless driving,

23 one count of causing or permitting an unsafe vehicle to be moved, and one count of

Court of Appeals of New Mexico  
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Mark Reynolds

**No. A-1-CA-38842**

1 driving under a foreign license during suspension or revocation. We issued a notice  
2 proposing to summarily affirm. Defendant filed a response to our notice that  
3 persuaded us to reverse his convictions for vehicular homicide by reckless driving  
4 and great bodily harm by reckless driving, based on the district court's refusal to  
5 give a lesser included offense instruction on careless driving. We also granted  
6 Defendant's motion to amend the docketing statement to challenge his illegal  
7 sentence for driving under a foreign license during suspension or revocation and  
8 proposed to vacate the sentence and remand for resentencing.

9 {2} Defendant filed a second response to our notice in partial support of our  
10 second notice, and the State filed its first memorandum in opposition along with a  
11 motion to strike Defendant's second memorandum in opposition or to allow the State  
12 an opportunity to listen to the recording of the trial. We denied the motion to strike,  
13 but allowed the State to listen to the recording and file an amended memorandum in  
14 opposition. The State has filed its amended memorandum in opposition to our  
15 second notice. Having considered all the relevant materials, we reverse Defendant's  
16 four reckless driving-based convictions, vacate his sentence for driving under a  
17 foreign license during suspension or revocation, and remand for resentencing on the  
18 latter conviction and for retrial on his convictions for vehicular homicide and great  
19 bodily harm by vehicle.

1 {3} The State’s amended memorandum in opposition concedes that Defendant  
2 preserved his request for a lesser included offense instruction on careless driving as  
3 a step-down charge to the reckless driving offenses. [Amended MIO 6] The State  
4 pivots to arguing that the definition of careless driving was given to the jury, and,  
5 therefore, the jury considered the difference between reckless and careless driving,  
6 and rejected the theory of careless driving by convicting Defendant of reckless  
7 driving. [Amended MIO 2, 9-10] This argument lacks merit.

8 {4} A district court’s failure to instruct the jury on a lesser included offense, when  
9 requested to do so, will constitute reversible error where: “(1) the lesser offense is  
10 included in the greater, charged offense; [and] (2) there is evidence tending to  
11 establish the lesser included offense and that evidence establishes that the lesser  
12 offense is the highest degree of crime committed.” *State v. Jernigan*, 2006-NMSC-  
13 003, ¶ 21, 139 N.M. 1, 127 P.3d 537; *see also State v. Skippings*, 2011-NMSC-021,  
14 ¶ 25, 150 N.M. 216, 258 P.3d 1008 (explaining that we will consider the request for  
15 an instruction to preserve the issue for appeal where the trial court understood what  
16 was being requested).

17 {5} The parties’ responses suggest the district court believed that careless driving  
18 could not be a lesser included offense for great bodily harm by vehicle or for  
19 vehicular homicide because the driving caused great bodily harm or death; thus, the  
20 only question was whether the driving was careless or reckless, which would result

1 in a verdict of either not guilty or guilty of these reckless driving-based offenses.  
2 [Defendant’s 2d MIO 7; Amended MIO 7] Proceeding under this belief, the district  
3 court included a definitional instruction on “operating a motor vehicle in a careless  
4 manner” immediately after an instruction on the mens rea required for reckless  
5 driving. [2 RP 501-02; Amended MIO 7; Defendant’s 2d MIO 7] The instructions  
6 did not allow the jury to convict Defendant of careless driving as opposed to  
7 vehicular homicide or great bodily harm by vehicle [2 RP 492-509] and did not  
8 explain any relationship between the definition of careless driving and the charges  
9 against him [2 RP 501-02].

10 {6} New Mexico case law does not support the district court’s belief or approach.  
11 Our Supreme Court has stated that although there is no such crime as involuntary  
12 manslaughter by careless driving, “a misdemeanor traffic violation may indeed be  
13 the highest degree of crime committed and that a defendant charged with homicide  
14 by vehicle may be entitled under the ‘cognate approach’ to an instruction on the  
15 lesser[ ]included offen[se].” *State v. Yarborough*, 1996-NMSC-068, ¶ 25, 122 N.M.  
16 596, 930 P.2d 131. The State provides no basis in the law for its contention that a  
17 definitional instruction, in lieu of submitting a lesser-included-offense instruction, is  
18 adequate, and we are not persuaded. [Amended MIO 2, 9-10] Where a defendant  
19 demonstrates entitlement to an instruction on a lesser included offense, it must be  
20 given. *See Jernigan*, 2006-NMSC-003, ¶ 21; *State v. Sotelo*, 2013-NMCA-028, ¶ 9,

1 296 P.3d 1232 (stating that a successful application of the test in *State v. Meadors*,  
2 1995-NMSC-073, 121 N.M. 38, 908 P.2d 731, “entitles a defendant to a  
3 lesser[]included offense instruction when the evidence supports the lesser[]included  
4 offense”).


5 {7} The State also does not persuade us that no rational jury could find that  
6 careless driving was the highest offense committed. [Amended MIO 12-13] For the  
7 reasons stated in our second notice, we remain persuaded that Defendant  
8 demonstrated his entitlement to a lesser included offense instruction on careless  
9 driving and hold that the district court erred by denying his request. [CN2 6-7] We  
10 also remain persuaded that sufficient evidence supports Defendant’s convictions for  
11 vehicular homicide and great bodily harm by vehicle, such that he may be retried for  
12 these offenses without running afoul of the Double Jeopardy Clause. *See State v.*  
13 *Sanchez*, 2000-NMSC-021, ¶ 30, 129 N.M. 284, 6 P.3d 486 (stating that sufficiency  
14 of the evidence to support a conviction is reviewed on appeal, even if reversal is  
15 required on other grounds, because the Double Jeopardy Clause would bar retrial if  
16 convictions were not supported by sufficient evidence). Accordingly, we reverse  
17 Defendant’s convictions for vehicular homicide by reckless driving and great bodily  
18 harm by reckless driving and remand for a new trial.

19 {8} Lastly, the State does not oppose our proposal to vacate Defendant’s sentence  
20 for driving under a foreign license during suspension or revocation on grounds that

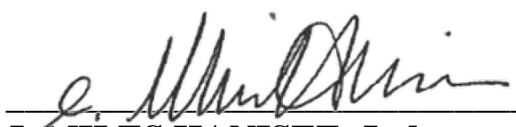
1 it is a misdemeanor for which Defendant was sentenced as if it were a felony.  
2 [Amended MIO 2 n.1] Based on the analysis in our second notice, we vacate  
3 Defendant's sentence for driving under a foreign license during suspension or  
4 revocation and remand for resentencing on that offense. [CN2 7-9]

5 {9} For the foregoing reasons, we reverse Defendant's convictions for vehicular  
6 homicide by reckless driving and great bodily harm by reckless driving, remand for  
7 retrial, vacate his sentence for driving under a foreign license during suspension or  
8 revocation, and remand for resentencing on that conviction.

9 {10} **IT IS SO ORDERED.**

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11 \_\_\_\_\_  
MEGAN P. DUFFY, Judge

12 **WE CONCUR:**

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14 \_\_\_\_\_  
J. MILES HANISEE, Judge

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16 \_\_\_\_\_  
JANE B. YOHALEM, Judge