

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

Court of Appeals of New Mexico
Filed 3/31/2021 1:34 PM

2 **Opinion Number:** _____

3 **Filing Date: MARCH 31, 2021**



Mark Reynolds

4 **Nos. A-1-CA-38091 and A-1-CA-37936**
5 **(consolidated for purpose of the opinion)**

6 **STATE OF NEW MEXICO,**

7 Plaintiff-Appellee,

8 **v.**

9 **TOBBY TWOFEATHERS ANDERSON,**

10 Defendant-Appellant.

11 and

12 **STATE OF NEW MEXICO,**

13 Plaintiff-Appellee,

14 **v.**

15 **DUSTIN LEE WILSON,**

16 Defendant-Appellant.

17 **APPEALS FROM THE DISTRICT COURT OF OTERO COUNTY**

18 **Angie K. Schneider, District Judge**

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4 for Appellee

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1 **OPINION**

2 **HANISEE, Chief Judge.**

3 {1} In this opinion, we consider two appeals: those of Dustin Lee Wilson and
4 Toby Twofeathers Anderson (collectively, Defendants).¹ Defendants were among
5 several inmates in Pod D-2 of the Otero County Detention Center who defied an
6 order to lock down during a shift change of correction officers on April 30, 2017.
7 Both were convicted of unlawful assault on a jail, contrary to NMSA 1978, Section
8 30-22-19 (1963). On appeal, Defendants contend that (1) the assault on a jail statute
9 is unconstitutionally vague; (2) the assault on a jail instruction failed to provide the
10 jury with an accurate rendition of the relevant law; and (3) the evidence was
11 insufficient to support convictions. Anderson additionally asserts that the district
12 court committed reversible error by (1) refusing to instruct the jury on lesser included
13 offenses and (2) denying his motion to continue. We affirm.

BACKGROUND

14 {2} On April 30, 2017, Defendants were among several inmates who defied a
15 lockdown order arising from events that began when a guard forcibly ended an
16 inmate’s phone call. Some inmates refused to lock down during the ensuing routine
17 shift change, prompting the shift supervisor to summon additional law enforcement

¹This opinion resolves case numbers A-1-CA-37936 and A-1-CA-38091. Because these cases raise related issues arising from the same incident, we consolidate the cases for decision. Rule 12-317(B) NMRA.

1 officers. Realizing their pod was to be raided, those inmates attempted to block the
2 entrance to it with a mattress and plastic cots, and one squirted liquid soap on the
3 stairs and floor leading to the pod. As officers ascended the stairs to the pod, inmates
4 used the mattress to try to push them backward. In Defendants’ separate trials, the
5 State presented still imagery from a stationary surveillance camera that depicts
6 Defendants participating in the conflict. The conflict lasted only about ninety
7 seconds and ended when officers deployed pepper spray, tasers, and shock shields
8 to regain control of the inmates and pod. Convicted of all counts with which they
9 were charged,² Defendants now appeal their convictions for assault on a jail.

10 **DISCUSSION**

11 **I. Overview of Relevant History of Section 30-22-19**

12 {3} This case requires examination of New Mexico’s assault on a jail statute. *See*
13 § 30-22-19. We briefly outline its legislative history before addressing Defendants’
14 arguments on appeal. The assault on a jail statute originated shortly after the
15 Territory of New Mexico was established. At the time, led by the likes of Billy the
16 Kid, penetrations of jail premises by outside actors were common, to the chagrin of
17 sheriffs like Pat Garrett, and evidently the New Mexico Legislature. *See* Richard H.
18 Underwood, *A Riff on Billy the Kid*, 32 *Touro. L. Rev.* 225, 230-31 (2016). A ban

²Both Defendants were convicted of assault on a jail. Wilson was also convicted of fourth degree battery upon a peace officer, contrary to NMSA 1978, Section 30-22-24 (1971), but does not appeal from that conviction.

1 on such activities was passed into law when the Legislature criminalized both
2 intended and actual assaults on jails, defining the former as that “intended to be
3 committed on the jail . . . for the purposes of procuring the homicide or escape of
4 any or several of the prisoners which may be in jail,” and the latter as actual
5 penetration “by force and with violence, into any jail” with the same intended
6 objective. Laws of the Territory of N.M. 1857-58, ch. 8, §§ 1, 4. This language
7 remained largely intact even after New Mexico obtained statehood in 1912. *See*
8 N.M. Stat. Ann. §§ 3056, 3059 (1915).

9 {4} In 1963, as part of a general revision of the entire criminal code, *see State v.*
10 *Fellhauer*, 1997-NMCA-064, ¶ 6, 123 N.M. 476, 943 P.2d 123, the Legislature
11 enacted the current iteration of Section 30-22-19, repealing the historic requirement
12 that in order for an assault on a jail to be criminal in nature it must occur to achieve
13 “the homicide or escape of any or several of the prisoners.” *Compare* § 30-22-19,
14 *with* Laws of the Territory of N.M. 1857-58, ch. 8, § 1. Indeed, the current statute
15 expands its applicability by requiring no such specific purpose associated with the
16 proscribed act. Yet even after 1963, jury instructions in cases prosecuting violations
17 of the statute continued to unnecessarily include a specific intent element related to
18 the removed language, thereby heightening the evidentiary burden necessary for the
19 state to attain conviction. *See State v. Tijerina (Tijerina I)*, 1972-NMCA-169, ¶ 44,
20 84 N.M. 432, 504 P.2d 642 (requiring the jury to find that the defendant acted with

1 the “purpose and intent of procuring the escape” of prisoners), *transferred to State*
2 *v. Tijerina (Tijerina II)*, 1973-NMSC-105, 86 N.M. 31, 519 P.2d 127; *see also* UJI
3 14-2227 NMRA comm. cmt. (“Although the statutory elements do not include any
4 specific intent to procure the escape of prisoners, that intent was included in jury
5 instructions in the prosecution for the Tierra Amarilla courthouse raid of 1967.”).

6 {5} As presently codified, Section 30-22-19 states:

7 Unlawful assault on any jail consists of any person or group of
8 persons assaulting or attacking any jail, prison or other public building
9 or place of confinement of prisoners held in lawful custody or
10 confinement.

11 Whoever commits unlawful assault on any jail, prison or other
12 public building or place of confinement of prisoners held in lawful
13 custody or confinement is guilty of a third degree felony.

14 We observe that while the Legislature saw fit to remove the intent element, it
15 retained the penalty classification for the offense as a third degree felony. *State v.*
16 *Chavez*, 2009-NMSC-035, ¶ 16, 146 N.M. 434, 211 P.3d 891 (stating that a third-
17 degree felony classification indicates that “our Legislature anticipated that criminal
18 prosecution would be reserved for the most serious occurrences, and not for minor
19 or theoretical dangers”).

20 {6} Defendants contend that in recent years at the district court level, Section 30-
21 22-19 has been broadly applied and employed to charge multiple inmates who jointly
22 participated in incidents that commenced not outside of, but within, jail or prison

1 facilities.³ See *Criminal Complaint, State v. Gurule*, No. T-4-CR-2015-002791
2 (Bernalillo Cnty. Metro. Ct. Mar. 1, 2015) (alleging that the defendant kicked a metal
3 cage and blocked tasers with his clothing); *Criminal Complaint, State v. Cordero*,
4 No. T-4-CR-2015-002792 (Bernalillo Cnty. Metro. Ct. Mar. 1, 2015) (arising from
5 the same incident and alleging that the defendant broke a window and used a
6 mattress to block chemical agents). Thus, the focus of the statute’s use by
7 prosecutors has shifted from raid to uprising.

8 **II. The Assault on a Jail Statute Is Not Unconstitutionally Vague**

9 {7} Defendants contend that “in the absence of a requirement of a forcible entry
10 into a jail, the assault on a jail statute is unconstitutionally vague.” Specifically,
11 Defendants assert that “[a]bsent a limiting construction, the statute . . . fail[s] to
12 sufficiently apprise defendants of what conduct the statute criminalizes.” Defendants
13 argue that “the vagueness of the term ‘assault,’ which can be read so broadly as to
14 include non-compliance, dignitary slights, and even omissions, and the term ‘jail,’
15 which can be read so broadly as to encompass an operation or a metaphysical
16 institution . . . could potentially render the statute unconstitutionally vague.”
17 Defendants also raise policy concerns, arguing that the statute unconstitutionally

³Importantly, New Mexico’s appellate courts have had few opportunities to hear challenges to the assault on a jail statute. Our authoritative case law regarding the statute is limited to the following: *Tijerina I*, 1972-NMCA-169, *Tijerina II* 1973-NMSC-105, *State v. Sanchez*, 2008-NMSC-066, 145 N.M. 311, 198 P.3d 337. None address Section 30-22-19 from the standpoint of constitutional vagueness.

1 delegates standardless discretion to law enforcement officers who may then
2 “arbitrarily decide to felonize almost any conduct that they subjectively perceive to
3 be in any way ‘assaultive.’ ” The State answers that Defendants’ vagueness
4 challenge fails because “the plain language of Section 30-22-19 proscribes
5 Defendant[s’] acts.”

6 {8} We review a vagueness challenge de novo “in light of the facts of the case and
7 the conduct which is prohibited by the statute.” *State v. Smile*, 2009-NMCA-064,
8 ¶ 17, 146 N.M. 525, 212 P.3d 413 (internal quotation marks and citation omitted).

9 “[W]e review void-for-vagueness constitutional claims even when they are not
10 preserved below.” *State v. Chavez*, 2019-NMCA-068, ¶ 11, 451 P.3d 115. We apply

11 “a two-part test for vagueness, considering whether the statute (1) fails to provide
12 persons of ordinary intelligence using ordinary common sense a fair opportunity to
13 determine whether their conduct is prohibited, or (2) fails to create minimum
14 guidelines for enforcement and thus encourages subjective and ad hoc application of

15 the law.” *State v. Tsosie*, 2011-NMCA-115, ¶ 31, 150 N.M. 754, 266 P.3d 34
16 (alterations, omissions, internal quotation marks, and citation omitted). Our case law

17 requires that we exercise the “strong presumption of constitutionality [that] underlies
18 each legislative enactment, and [hold] the party challenging constitutionality [to its]
19 burden of proving [the] statute is unconstitutional beyond all reasonable doubt.”

20 *State v. Laguna*, 1999-NMCA-152, ¶ 24, 128 N.M. 345, 992 P.2d 896. “Appellate

1 courts have a duty to construe a statute in such a manner that it is not void for
2 vagueness if a reasonable and practical construction can be given to its language.”
3 *State v. Duttie*, 2017-NMCA-001, ¶ 13, 387 P.3d 885 (internal quotation marks and
4 citation omitted).

5 {9} Applying the first part of the vagueness test, we disagree with Defendants that
6 the assault on a jail statute fails to “provide persons of ordinary intelligence using
7 ordinary common sense a fair opportunity to determine whether their conduct is
8 prohibited[.]” *Tsosie*, 2011-NMCA-115, ¶ 31 (internal quotation marks and citation
9 omitted). Defendants ask us to conclude that absent a requirement of external
10 forcible entry into a jail, the assault on a jail statute fails to sufficiently apprise
11 defendants of what conduct the statute criminalizes. But the conduct prohibited by
12 the statute—“assaulting or attacking any jail”—is actually quite straightforward.
13 Section 30-22-19. “Assault” in this context is given its non-law dictionary definition
14 and, when used as a transitive verb, means “to attack violently.” UJI 14-2227 use note 2;
15 *Assault*, *Merriam-Webster Dictionary*, <http://www.merriam-webster.com/dictionary/assault>
16 (last visited Feb. 19, 2021); *see also State v. Barber*, 2004-NMSC-019, ¶ 10 n.1, 135
17 N.M. 621, 92 P.3d 633 (stating that use notes promulgated by the New Mexico
18 Supreme Court are binding authority). Applying this evaluative threshold, we
19 conclude that a person of ordinary intelligence using common sense would
20 understand that Section 30-22-19 prohibits a violent attack on a jail’s facilities or

1 operations, regardless of whether the attack originates inside or outside of the jail.
2 As applied in this case, we have no difficulty in determining that Section 30-22-19
3 provided fair warning that Defendants’ conduct—barricading a door with a mattress
4 and plastic cot and “rushing” officers with the mattress to push them back down
5 soaped-up stairs in an effort to prevent prison officials, law enforcement, or facility
6 personnel from entering a pod—constituted unlawful assault on a jail.

7 {10} While Defendants correctly point out that “prosecutions for assault on a jail
8 have departed from the historical understanding of the crime[.]” nothing in our
9 jurisprudence or the language of the statute itself permits us to add to that required
10 to trigger the statute’s applicability so as to the “narrow construction of Section 30-
11 22-19 . . . requir[ing] an external invasion into the physical boundaries of a jail for
12 the purpose of procuring the escape of prisoners or similarly interfering with the
13 lawful confinement of prisoners” sought by Defendants. Had the Legislature
14 intended to exclusively criminalize such external invasions by outside actors, it
15 could just as easily have said so as when it removed the former specific purpose
16 Defendants wish to restore. *See* § 30-22-19. Indeed, Committee Commentary
17 regarding Section 30-22-19 indicates that the Legislature intentionally opted not to
18 include a specific intent element in the current iteration of the assault on a jail statute.
19 *See* UJI 14-2227 comm. cmt. (“[T]he statutory elements do not include any specific
20 intent to procure the escape of prisoners[.]”). “The Legislature knows how to include

1 language in a statute if it so desires.” *State v. Greenwood*, 2012-NMCA-017, ¶ 38,
2 271 P.3d 753 (alteration, internal quotation marks, and citation omitted). Distilled to
3 its essence, Defendants ask this Court to add statutory elements that the Legislature
4 chose not to include, something we will not do. “We may only add words to a statute
5 where it is necessary to make the statute conform to the [L]egislature’s clear intent,
6 or to prevent the statute from being absurd.” *State v. Maestas*, 2007-NMSC-001,
7 ¶ 15, 140 N.M. 836, 149 P.3d 933.

8 {11} Turning to the second part of the void-for-vagueness test, which asks whether
9 the statute fails to provide minimum guidelines for enforcement, *see Tsosie*, 2011-
10 NMCA-115, ¶ 31, we are similarly unpersuaded. To satisfy this query, a defendant
11 “can demonstrate that the statute permits police officers, prosecutors, judges, or
12 juries to engage in arbitrary and discriminatory enforcement of the statute, which
13 occurs because the statute has no standards or guidelines and therefore allows, if not
14 encourages, subjective and ad hoc application.” *Smile*, 2009-NMCA-064, ¶ 18
15 (emphasis, internal quotation marks, and citation omitted). In *Coates v. City of*
16 *Cincinnati*, for example, the United States Supreme Court declared a statute
17 unconstitutionally vague because it criminalized conduct that “annoyed” police
18 officers. 402 U.S. 611, 614 (1971). The Supreme Court determined that, not only
19 did the statute fail to put individuals on notice of what conduct would annoy a police
20 officer, but it also gave the police arbitrary discretion to charge an individual with a

1 violation of the statute using a vague and subjective standard. *See id.* (“Conduct that
2 annoys some people does not annoy others. Thus, the ordinance is vague, not in the
3 sense that it requires a person to conform his conduct to an imprecise but
4 comprehensible normative standard, but rather in the sense that no standard of
5 conduct is specified at all.”).

6 {12} Unlike the nearly limitless discretion given to law enforcement officials with
7 differing levels of patience by the City of Cincinnati and taken away by the Supreme
8 Court, New Mexico’s assault on a jail statute has guidelines prohibiting certain
9 conduct, whether by persons incarcerated or not, related to jails—conduct that has
10 nothing to do with an official’s subjective feelings about a given action or behavior.
11 Section 30-22-19 forbids assaulting or attacking facilities where inmates are
12 imprisoned in New Mexico. This to us means actions that physically damage, alter
13 or destroy a facility, and suffices to provide adequate parameters to prosecutorial
14 determinations. Indeed, the State’s decision to charge Defendants with assault on a
15 jail entailed no application of discretion, much less of an arbitrary nature, beyond
16 that inherent to many such decisions. *See Grayned v. City of Rockford*, 408 U.S. 104,
17 114 (1972) (“As always, enforcement [of a criminal statute] requires the exercise of
18 some degree of police judgment.”). We hold that the assault on a jail statute is not
19 unconstitutionally vague.

1 **II. The District Court Did Not Commit Fundamental Error in Instructing**
2 **the Jury Regarding Assault on a Jail**

3 {13} Defendants contend that the elements included in the jury instruction defining
4 assault on a jail failed to provide the jury with an accurate rendition of the law and
5 therefore constituted fundamental error. Defendants assert as well that because the
6 challenges to the jury instruction raise questions of statutory construction, we should
7 review them de novo. The State argues that Defendants failed to preserve the jury
8 instruction issue at trial and therefore are not entitled to de novo review, asserting
9 that instead fundamental error review applies.

10 {14} “The standard of review we apply to jury instructions depends on whether the
11 issue has been preserved. If the error has been preserved[,] we review the instructions
12 for reversible error. If not, we review for fundamental error.” *State v. Benally*, 2001-
13 NMSC-033, ¶ 12, 131 N.M. 258, 34 P.3d 1134 (citation omitted). “The primary
14 purposes of the preservation requirement are (1) to alert the trial court to a claim of
15 error so that it has an opportunity to correct any mistake, and (2) to give the opposing
16 party a fair opportunity to respond and show why the court should rule against the
17 objector.” *State v. Montoya*, 2005-NMCA-005, ¶ 7, 136 N.M. 674, 104 P.3d 540
18 (internal quotation marks and citation omitted). Generally, “to preserve error it is
19 necessary either to tender a correct instruction and to alert the mind of the trial court
20 to the fact that the tendered instruction corrects the defect complained of or to point
21 out the specific vice in the instruction given by proper objection thereto.” *Zamora v.*

1 *Smalley*, 1961-NMSC-004, ¶ 13, 68 N.M. 45, 358 P.2d 362. “[M]ere assertion that
2 the given instruction is not an accurate statement of the law is insufficient to alert
3 the mind of the trial judge to the claimed vice of the instruction.” *Grassie v. Roswell*
4 *Hosp. Corp.*, 2011-NMCA-024, ¶ 36, 150 N.M. 283, 258 P.3d 1075 (internal
5 quotation marks and citation omitted). Here, neither defense counsel objected to the
6 jury instruction given at both trials which defined that necessary to convict
7 Defendants for assault on a jail, nor did they tender a competing instruction, and
8 consequently Defendants’ challenge to that instruction was not preserved. We
9 therefore review for fundamental error.

10 {15} “Under the doctrine of fundamental error, an appellate court has the discretion
11 to review an error that was not preserved in the trial court to determine if a
12 defendant’s conviction shocks the conscience because either (1) the defendant is
13 indisputably innocent, or (2) a mistake in the process makes a conviction
14 fundamentally unfair notwithstanding the apparent guilt of the accused.” *State v.*
15 *Astorga*, 2015-NMSC-007, ¶ 14, 343 P.3d 1245 (alteration, internal quotation
16 marks, and citation omitted). “Under this standard, we must determine whether a
17 reasonable juror would have been confused or misdirected . . . from instructions
18 which, through omission or misstatement, fail to provide the juror with an accurate
19 rendition of the relevant law.” *State v. Samora*, 2016-NMSC-031, ¶ 27, 387 P.3d
20 230 (internal quotation marks and citation omitted). “When reviewing for

1 fundamental error, we first determine if error occurred; if so, we next determine
2 whether that error was fundamental.” *Astorga*, 2015-NMSC-007, ¶ 14 (internal
3 quotation marks and citation omitted).

4 {16} We focus on whether the absence of an instruction defining the word
5 “assault”—as challenged by Defendants in arguing that the range of proscribed
6 conduct is unknowable under Section 30-22-19—constitutes fundamental error.⁴

7 Our courts have stated that a missing definition generally “cannot result in the sort
8 of ‘fundamental unfairness’ that undermines the integrity of the judicial system[,]”

9 *Barber*, 2004-NMSC-019, ¶ 20, unless the missing definition is “akin to a missing
10 elements instruction.” *State v. Mascareñas*, 2000-NMSC-017, ¶ 20, 129 N.M. 230,

11 4 P.3d 1221 (holding that “the jury instructions should have included a definition of
12 ‘reckless disregard’ to prevent confusion of the standard necessary to sustain a

13 conviction” and that “the trial court’s failure to provide the instruction was a critical
14 determination akin to a missing elements instruction”). Defendants assert that “[t]he

15 vagueness of the jury instructions given below is ‘akin to a missing elements
16 instruction’ because, on appellate review, there is no way to know whether the jury

⁴Defendants also challenge the absence of a definition as to the word “jail” but fail to develop an argument as to that contention, arguing only vaguely that the statute could somehow apply to a “non-physical corporate form” without explaining whether or if the prison facility in this case might be considered such or elaborating upon how such differences might relate to the applicability of Section 30-22-19. We do not consider such unclear or undeveloped arguments. *State v. Guerra*, 2012-NMSC-014, ¶ 21, 278 P.3d 1031.

1 actually found the statutory elements of an assault on a jail beyond a reasonable
2 doubt.”

3 {17} Here, though, the missing definition of assault does not implicate a critical
4 determination akin to a missing elements instruction. We are guided by *State v.*
5 *Luna*, which elaborates that the “failure to give a definitional instruction when the
6 term being defined has a legal meaning *different from* the commonly understood lay
7 interpretation of the term may result in jury confusion that could place the verdict in
8 doubt.” 2018-NMCA-025, ¶ 22, 458 P.3d 457 (emphasis added) (alteration, internal
9 quotation marks, and citation omitted). The jury was instructed that in order to
10 convict it must find that Defendants “assaulted or attacked Otero County Detention
11 Center, a jail.” In its closing arguments, the State urged members of the jury to use
12 their “common understanding” of assault and attack. Because the use notes make
13 clear that the meaning of “assaulted” in the assault on a jail statute represents the lay
14 meaning is thus rooted in common discourse, the definition of is not “akin to a
15 missing elements instruction.” See *Mascareñas*, 2000-NMSC-017, ¶ 20. Compare
16 *State v. Ervin*, 1981-NMCA-068, ¶ 5, 96 N.M. 366, 630 P.2d 765 (holding that no
17 evidence presented that the failure to define “dwelling” in connection with a burglary
18 charge was a critical determination), with *Luna*, 2018-NMCA-025, ¶ 26 (concluding
19 there to be fundamental error where the jury may have applied the “common

1 understandings of the terms ‘nudity’ and ‘harmful to minors’ rather than their
2 statutory definitions”).

3 {18} Defendants contend that “the misalignment between the meaning of the
4 statute and the range of conduct covered by the elements instruction given to the jury
5 constitutes ‘a mistake in the process which makes a conviction fundamentally
6 unfair.’ ” Specifically, Defendants assert that despite not having sought any
7 instruction beyond that given by the district court in each trial, “the [juries were]
8 extremely confused about what [they were] being asked to find,” noting that in
9 Anderson’s trial the jury sought clarification on the definition of assault. As we have
10 explained, the use notes to UJI 14-2227, the instruction given at both trials, states,
11 “if the jury asks for a definition of ‘assaulted,’ use a non-law dictionary definition.”
12 UJI 14-2227 use note 2. There is no indication in the record that a definition of
13 “assaulted” was given to the jury in either of Defendants’ trials, despite Anderson’s
14 jury having so requested. Defendants argue that “the failures to define the terms
15 ‘assault’ and ‘jail’ as well as to instruct the jury as to the requisite intent ‘implicate
16 a fundamental unfairness within the system that would undermine judicial integrity
17 if left unchecked.’ ”

18 {19} It is clear at the outset that, given it gave no definition of assault when asked
19 to do so by the jury, the district court failed to appropriately respond to the jury’s
20 inquiry. *See* UJI 14-2227 use note 2. “[W]hen a jury requests clarification regarding

1 the legal principals governing a case, the trial court has a duty to respond promptly
2 and completely to the jury’s inquiry.” *State v. Juan*, 2010-NMSC-041, ¶ 16, 148
3 N.M. 747, 242 P.3d 314. Nonetheless, such error alone does not constitute
4 fundamental error. “Error that is fundamental must be such error as goes to the
5 foundation or basis of a defendant’s rights or must go to the foundation of the case
6 or take from the defendant a right which was essential to his defense[.]” *State v.*
7 *Cunningham*, 2000-NMSC-009, ¶ 13, 128 N.M. 711, 998 P.2d 176; *see Barber*,
8 2004-NMSC-019, ¶¶ 13-14 (holding that the trial court’s failure to sua sponte
9 instruct the jury on the definition of possession did not constitute fundamental error).
10 We exercise our discretion to apply fundamental error “very guardedly, and only
11 where some fundamental right has been invaded, and never in aid of strictly legal,
12 technical, or unsubstantial claims.” *Cunningham*, 2000-NMSC-009, ¶ 12 (internal
13 quotation marks and citation omitted). Because the juries received an elements
14 instruction on assault on a jail that provided them with an opportunity to decide
15 whether there was an assault applying their common sense as to the word’s meaning,
16 the given instructions did not constitute fundamental error.

17 {20} We are also not persuaded that the jury was “confused or misdirected by the
18 jury instruction.” *Luna*, 2018-NMCA-025, ¶ 19 (internal quotation marks and
19 citation omitted). We note as well that, while the jury in Anderson’s trial requested
20 a definition of assault, they were encouraged to do so by defense counsel’s closing

1 arguments, in which defense counsel stated, “What is assault? I don’t know. There’s
2 no definition. When you’re back in the jury room, if you have questions about things,
3 your foreman can send a note out here to the judge.”⁵ The jury in Wilson’s trial did
4 not ask for a definition. Additionally, because the definition of assault that would
5 have been provided was a non-law dictionary definition, such a definition would not
6 have meaningfully, and certainly not technically, added to the jurors’ understanding
7 of the relevant law. *See* UJI 14-2227 use note 2.

8 {21} The evidence presented at trial further persuades us that there is no reasonable
9 likelihood that the jury was confused by the instruction. The juries in both trials
10 observed both Defendants participating in the conflict through surveillance footage.
11 To reiterate, the juries saw video evidence depicting the inmates refusing to lock
12 down, pouring liquid soap onto the floor near the stairs, misusing a mattress and
13 plastic cot to attempt to block the pod entrance, and physically resisting the advance
14 of law enforcement officers attempting to restore order in the pod and enforce a
15 lockdown. Given such trial evidence, Defendants’ convictions do not “shock[] the

⁵We take a moment to note that encouraging a jury to question the district court regarding an instruction to which defense counsel neither objected nor requested definitional supplementation appears to invite error, which cannot be a basis for reversal. *See State v. Collins*, 2007-NMCA-106, ¶ 27, 142 N.M. 419, 166 P.3d 480 (stating “to allow a defendant to invite error and to subsequently complain about that very error would subvert the orderly and equitable administration of justice” (alteration, internal quotation marks, and citation omitted)).

1 conscience.” *Astorga*, 2015-NMSC-007, ¶ 14 (internal quotation marks and citation
2 omitted). We hold that the district court did not commit fundamental error in
3 instructing the jury on the assault on a jail instruction.

4 **III. The District Court Did Not Commit Reversible Error in Refusing**
5 **Anderson’s Request to Instruct the Jury on Lesser Included Offenses**

6 {22} In addition to the arguments raised by both Defendants, Anderson also argues
7 that because the district court denied his requests for lesser included offense
8 instructions of disorderly conduct and evading or obstructing an officer, the district
9 court committed reversible error. If the alleged error has been preserved, we review
10 for reversible error. *Benally*, 2001-NMSC-033, ¶ 12. A claim of error is generally
11 preserved by “[t]he tender but refusal of an instruction.” *Apodaca v. AAA Gas Co.*,
12 2003-NMCA-085, ¶ 40, 134 N.M. 77, 73 P3d 215.

13 {23} “When considering a defendant’s requested instructions, we view the
14 evidence in the light most favorable to the giving of the requested instructions.” *State*
15 *v. Cardenas*, 2016-NMCA-042, ¶ 5, 380 P.3d 866 (alteration, internal quotation
16 marks, and citation omitted).

17 A failure to instruct the jury on a lesser included offense is reversible
18 error if: (1) the lesser offense is included in the greater, charged offense;
19 (2) there is evidence tending to establish the lesser included offense and
20 that evidence establishes that the lesser offense is the highest degree of
21 crime committed; and (3) the defendant has tendered appropriate
22 instructions preserving the issue.

1 *State v. Hill*, 2001-NMCA-094, ¶ 16, 131 N.M. 195, 34 P.3d 139 (alteration, internal
2 quotation marks, and citation omitted).

3 {24} We first address preservation—the third *Hill* criterion. The State contends that
4 Anderson did not tender either of the lesser included jury instructions requested at
5 trial. Citing *State v. Jernigan*, 2006-NMSC-003, ¶ 10, 139 N.M. 1, 127 P.3d 537,
6 Anderson argues that because “the record reflects that the judge clearly understood
7 the type of instruction [Anderson] wanted,” the issue is sufficiently preserved for
8 appellate review. Having reviewed the trial audio and considered the nature of the
9 conversation between Anderson’s attorney and the district court, we assume without
10 deciding that Anderson properly preserved this argument. Nonetheless, we find no
11 error.

12 {25} Regarding the first *Hill* criterion—whether the lesser offenses are included in
13 the greater, charged offenses—the State asserts that neither disorderly conduct nor
14 evading or obstructing an officer is a lesser included offense of Section 30-22-19,
15 and further, that neither charge fits Anderson’s conduct. As to the lesser included
16 instruction of disorderly conduct, the State asserts that the crime is not intended to
17 apply to inmate behavior. “Disorderly conduct consists of . . . engaging in violent,
18 abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly
19 conduct which tends to disturb the peace[.]” NMSA 1978, § 30-20-1(A) (1967). The
20 New Mexico Supreme Court has “defined ‘disturbing the peace’ as a disturbance of

1 public order by an act of violence, or by any act likely to produce violence, or which,
2 by causing consternation and alarm, disturbs the peace and quiet of the community.”
3 *State v. Correa*, 2009-NMSC-051, ¶ 22, 147 N.M. 291, 222 P.3d 1 (internal
4 quotation marks and citation omitted). “[T]he standard is whether [a] defendant’s
5 conduct tends to disturb the *public peace*.” *Id.* (emphasis added) (emphasis, internal
6 quotation marks, and citation omitted). The State argues that Anderson’s conduct
7 does not fit the crime because “[t]he use of the words ‘community’ in the statute and
8 ‘peace and quiet’ ” indicate that the statute is intended to foster calm in public spaces.
9 We agree. Anderson’s conduct did not occur in a public place, nor were his actions
10 an act of violence capable of disturbing a community of the sort protected from such
11 by Section 30-22-19. Accordingly, that which the statute prohibits is not triggered
12 by the instant circumstance. *See State v. Meadors*, 1995-NMSC-073, ¶ 17, 121 N.M.
13 38, 908 P.2d 731 (“[A]n offense is a lesser[]included offense only if the defendant
14 cannot commit the greater offense in the manner described in the charging document
15 without also committing the lesser offense.”).

16 {26} The State similarly argues that Anderson’s actions did not resist, evade, or
17 obstruct an officer given that Anderson “had already been apprehended and arrested
18 when he participated in the assault on the jail.” Anderson argues that the jury could
19 have found he “intentionally fled or attempted to evade an officer but did not actually
20 engage in an assault on a jail.” Again, we agree with the State. In New Mexico,

1 resisting or evading arrest is defined in relevant part as “intentionally fleeing,
2 attempting to evade or evading an officer of this state when the person committing
3 the act of fleeing, attempting to evade or evasion has knowledge that the officer *is*
4 *attempting to apprehend or arrest him[.]*” NMSA 1978, § 30-22-1(B) (1981)
5 (emphasis added). At trial, Anderson argued that his actions constituted “moving
6 away” despite video evidence that he ran up the stairs to join fellow inmates in using
7 jail property designed for another purpose to repel law enforcement officers back
8 down the stairs leading to the pod. Regardless, we do not consider Anderson’s
9 actions to equate with an effort to avoid apprehension or arrest as contemplated by
10 Section 30-22-1(B). Because we determine that neither disorderly conduct nor
11 resisting arrest is a lesser included offense of assault on a jail, we decline to address
12 the final *Hill* criteria. We conclude that the district court did not commit reversible
13 error in denying the lesser included instructions sought by Anderson.

14 **IV. The State Presented Sufficient Evidence to Support Defendants’**
15 **Convictions**

16 {27} Defendants challenge the sufficiency of the evidence as to their convictions
17 for assault on a jail. “The test for sufficiency of the evidence is whether substantial
18 evidence of either a direct or circumstantial nature exists to support a verdict of guilt
19 beyond a reasonable doubt with respect to every element essential to a conviction.”
20 *State v. Cabezuela*, 2015-NMSC-016, ¶ 14, 350 P.3d 1145 (internal quotation marks
21 and citation omitted). “Substantial evidence is relevant evidence that a reasonable

1 mind might accept as adequate to support a conclusion.” *State v. Largo*, 2012-
2 NMSC-015, ¶ 30, 278 P.3d 532 (internal quotation marks and citation omitted). Our
3 review employs a two-step process in which we first “view the evidence in the light
4 most favorable to the guilty verdict, indulging all reasonable inferences and
5 resolving all conflicts in the evidence in favor of the verdict.” *Cunningham*, 2000-
6 NMSC-009, ¶ 26. We then consider “whether the evidence, so viewed, supports the
7 verdict beyond a reasonable doubt.” *State v. Garcia*, 2016-NMSC-034, ¶ 24, 384
8 P.3d 1076. “We do not reweigh the evidence or substitute our judgment for that of
9 the fact[-]finder as long as there is sufficient evidence to support the verdict.” *State*
10 *v. Gipson*, 2009-NMCA-053, ¶ 4, 146 N.M. 202, 207 P.3d 1179.

11 {28} Defendants argue that the “State presented no evidence of actual property
12 damage, physical injury to anyone other than the prisoners, entry or penetration into
13 the jail, or intent to assist in the killing or escape of prisoners.” The State answers
14 that a “conviction under Section 30-22-19 does not require actual property damage,
15 physical injury to a person, or an element of [specific] intent. The State needed only
16 to prove that Defendant[s] assaulted or attacked the Otero County Jail, which the
17 State unequivocally did.” We have already held that no such requirement as those
18 argued by Defendants appear in the statute and therefore need not have appeared in
19 the jury instructions as to the elements of the offense, and given the absence of legal
20 error, the “[j]ury instructions become the law of the case against which the

1 sufficiency of the evidence is to be measured.” *State v. Smith*, 1986-NMCA-089,
2 ¶ 7, 104 N.M. 729, 726 P.2d 883. Under the instruction given, the State need only
3 have established that Defendants assaulted or attacked the jail they were in on the
4 date alleged in the indictments.

5 {29} Our review of the State’s evidence reveals it bore directly upon that required
6 by Section 30-22-19 and the instruction given. As stated, during both trials the State
7 presented video evidence that showed inmates’ efforts to disobey the shift change
8 lockdown order by misusing jail property to disable access into the pod by prison
9 officials and law enforcement officers arriving to assist them. The surveillance
10 footage clearly depicted Anderson participating in that conflict. In Wilson’s trial, the
11 State presented the same footage, along with additional still images depicting Wilson
12 reaching his arm over a misused mattress and striking one of the approaching
13 officers.

14 {30} Viewing this “evidence in the light most favorable to the guilty verdict,
15 indulging all reasonable inferences and resolving all conflicts in the evidence in
16 favor of the verdict[,]” it is sufficient to support Defendants’ convictions.
17 *Cunningham*, 2000-NMSC-009, ¶ 26. Defendants’ collective actions attacked the
18 jail and imperiled the function and safety of the facility in a dangerous and
19 destructive manner that satisfied the State’s burden under Section 30-22-19, as well
20 as the elements jury instruction provided by the district court. As such, we hold that

1 the State presented sufficient evidence to support Defendants’ convictions of assault
2 on a jail. *See State v. Vargas*, 2016-NMCA-038, ¶ 27, 368 -P.3d 1232 (“New Mexico
3 appellate courts will not invade the jury’s province as fact-finder by second-guessing
4 the jury’s decision concerning the credibility of- witnesses, reweighing the evidence,
5 or substituting its judgment for that of the jury.” (internal quotation marks and
6 citation omitted)).

7 **V. The District Court Did Not Commit Reversible Error in Denying**
8 **Anderson’s Motion to Continue**

9 {31} Anderson finally argues that the district court erred in denying his motion for
10 a continuance. We review the district court’s denial of a continuance for an abuse of
11 discretion. *State v. Salazar*, 2007-NMSC-004, ¶ 10, 141 N.M. 148, 152 P.3d 135
12 (stating that “[t]he grant or denial of a continuance is within the sound discretion of
13 the trial court, and the burden of establishing abuse of discretion rests with the
14 defendant”). “An abuse of discretion occurs when the ruling is clearly against the
15 logic and effect of the facts and circumstances of the case. We cannot say the trial
16 court abused its discretion by its ruling unless we can characterize it as clearly
17 untenable or not justified by reason.” *State v. Rojo*, 1999-NMSC-001, ¶ 41, 126
18 N.M. 438, 971 P.2d 829 (internal quotation marks and citation omitted). It is a
19 defendant’s burden to establish an abuse of discretion, and further, “that the abuse
20 was to the injury of the defendant.” *Salazar*, 2007-NMSC-004, ¶ 10 (internal
21 quotation marks and citation omitted).

1 {32} A district court evaluates a motion for continuance by applying factors set
2 forth by our New Mexico Supreme Court in *State v. Torres*, 1999-NMSC-010, ¶ 10,
3 127 N.M. 20, 976 P.2d 20. Anderson contends that to “consider” the factors, the
4 district court must “think about [this] evidence with a degree of care and caution.”
5 Because the district court gave no indication of its consideration of the *Torres*
6 factors, Anderson argues, the district court failed to apply *Torres* and thereby abused
7 its discretion. The State answers that the “trial court was not obligated to expressly
8 weigh the *Torres* factors on the record.”

9 {33} The seven factors are:

10 the length of the requested delay, the likelihood that a delay would
11 accomplish the movant’s objectives, the existence of previous
12 continuances in the same matter, the degree of inconvenience to the
13 parties and the court, the legitimacy of the motives in requesting the
14 delay, the fault of the movant in causing a need for the delay, and the
15 prejudice to the movant in denying the motion.

16 *Id.* It has not been held, however, that the district court is required to set forth the
17 factual basis of its decision to deny or grant the motion, and we will not presume
18 from the absence of stated findings in the record that it failed to apply *Torres*. *See*
19 *State v. Gonzales*, 1999-NMCA-027, ¶ 11, 126 N.M. 742, 975 P.2d 355 (“No rule
20 of criminal procedure requires the district court to set forth the factual basis of its
21 decision.”); *see also State v. Finnell*, 1984-NMSC-064, ¶ 23, 101 N.M. 732, 688
22 P.2d 769 (“Abuse of discretion must be shown and will not be presumed.”).

1 {34} Applying the *Torres* factors, we conclude that the district court did not abuse
2 its discretion in denying the motion for a continuance. We briefly explain. Regarding
3 the first factor—the length of the desired continuance—Anderson requested a
4 continuance until the district court’s next scheduled trial setting, which would have
5 been three months later. *Compare Torres*, 1999-NMSC-010, ¶ 15 (holding that a
6 requested delay of a week or less weighed in favor of granting a continuance), *with*
7 *State v. Salazar*, 2006-NMCA-066, ¶ 24, 139 N.M. 603, 136 P.3d 1013 (holding that
8 the denial of a continuance was appropriate where the delay was likely at least two
9 months). Regarding the second factor—the likelihood that a delay would accomplish
10 the movant’s objectives—a delay would arguably have helped Anderson accomplish
11 his objectives given his stated desire to prepare a constitutional challenge to the
12 assault on a jail statute. As to the third factor, there was one prior continuance. *See*
13 *State v. Gonzales*, 2017-NMCA-080, ¶ 36, 406 P.3d 534 (explaining that prior
14 continuances delaying trial by three months weighed against the defendant on the
15 third *Torres* factor).

16 {35} The fourth factor—the degree of inconvenience to the parties and the court—
17 strongly supports the denial of Anderson’s motion because defense counsel proposed
18 the continuance on the morning of trial. *See id.* (noting that “we presume resetting
19 the trial date on the day trial is supposed to begin is inconvenient for the parties and
20 for the court”); *see also State v. Aragon*, 1997-NMCA-087, ¶ 22, 123 N.M. 803, 945

1 P.2d 1021 (“[A]s a general rule, a motion for continuance filed at the last minute is
2 not favored.”). The fifth and sixth factors—whether the continuance was requested
3 in bad faith and the fault of the movant in causing a need for the delay—favor
4 granting Anderson’s motion, given the absence of evidence of bad faith and the fact
5 that Anderson’s attorney had joined her law firm twenty-one days prior to the trial
6 and only received notice of the trial two weeks prior. *See State v. Stefani*, 2006-
7 NMCA-073, ¶¶ 12, 16, 139 N.M. 719, 137 P.3d 659 (assignment of the case to the
8 public defender was confirmed only twenty-eight days prior to trial weighed in favor
9 of granting motion to continue).


10 {36} As to the final *Torres* factor, we conclude that Anderson suffered no prejudice
11 in the denial of his motion. “No more prejudice need be shown than that the trial
12 court’s order may have made a potential avenue of defense unavailable to the
13 defendant.” *Salazar*, 2007-NMSC-004, ¶ 16 (internal quotation marks and citation
14 omitted). “We do not ask whether the evidence was critical but, instead, whether the
15 defendant made a plausible showing of how the . . . testimony would have been both
16 material and favorable to his defense.” *Id.* (alteration, internal quotation marks, and
17 citation omitted). The morning of the trial, defense counsel raised concerns of
18 constitutional vagueness stating, “I would like to bring to the court’s attention that
19 it’s really difficult for an attorney to understand what an assault on a jail might be,
20 let alone a lay person . . . moving forward, there might be a constitutionally unjust

1 vague statute at issue here.” While Anderson asserts that the district court order
2 prejudiced him because he was not able to present his constitutional vagueness
3 argument, we disagree. To the contrary, defense counsel successfully raised, and we
4 fully address, that very contention in this opinion. Moreover, Anderson points to no
5 additional witnesses or evidence that he would have presented had the motion for a
6 continuance been granted. Under the abuse of discretion standard, where legal
7 principals are correctly applied and their application can yield multiple outcomes,
8 we give deference to the district court’s ruling. *See State v. Ferry*, 2018-NMSC-004,
9 ¶ 2, 409 P.3d 918. Under these circumstances, we conclude that the district court did
10 not abuse its discretion in denying Anderson’s motion for a continuance. *See In re*
11 *Camino Real Env’t Ctr., Inc.*, 2010-NMCA-057, ¶ 23, 148 N.M. 776, 242 P.3d 343
12 (“When reasons both supporting and detracting from a decision exist, there is no
13 abuse of discretion.”).

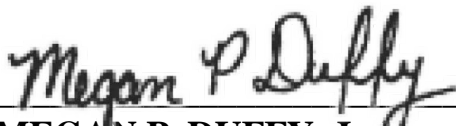
14 **CONCLUSION**

15 {37} For the foregoing reasons, we affirm Defendants convictions for assault on a
16 jail.

17 {38} **IT IS SO ORDERED.**

18 
19 **J. MILES HANISEE, Chief Judge**

1 **WE CONCUR:**

2 

3 **MEGAN P. DUFFY, Judge**

4 

5 **SHAMMARAH. HENDERSON, Judge**