

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

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,

4 v.

5 **KENNETH L. VEST,**

6 Defendant-Appellant.

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

8 **James Lawrence Sanchez, District Court Judge**

9 Raúl Torrez, Attorney General
10 Teresa Ryan, Assistant Solicitor General
11 Santa Fe, NM

12 for Appellee

13 Bennett J. Baur, Chief Public Defender
14 Santa Fe, NM
15 Luz C. Valverde, Assistant Appellate Defender
16 Albuquerque, NM

17 for Appellant

18 **MEMORANDUM OPINION**

19 **DUFFY, Judge.**

20 {1} This matter was submitted to this Court on the brief in chief in the above-
21 entitled cause, pursuant to this Court's notice of assignment to the general calendar
22 with modified briefing. Following consideration of the brief in chief, this Court
23 assigned this matter to Track 2 for additional briefing, as defined in the

Court of Appeals of New Mexico
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Ramon J. Maestas
Chief Clerk

No. A-1-CA-40458

1 Administrative Order *In re Pilot Project for Criminal Appeals*, No. 2022-002,
2 effective November 1, 2022. Now having considered the brief in chief, answer brief,
3 and reply brief, we affirm for the following reasons.

4 {2} Defendant appeals the district court’s judgment and sentence, convicting him
5 of two counts of aggravated assault with a deadly weapon and one count of trespass.
6 Defendant contends: (1) it was fundamental error to not instruct the jury on
7 Defendant’s theory of self-defense [BIC 6-18]; (2) his counsel was ineffective for
8 failing to request a self-defense instruction [BIC 19-23]; and (3) insufficient
9 evidence supports Defendant’s convictions [BIC 24-27].

10 **I. Self-Defense Jury Instruction**

11 {3} Because Defendant did not request a self-defense jury instruction or preserve
12 any related error in the instructions, our review is for fundamental error. *See State v.*
13 *Barber*, 2004-NMSC-019, ¶ 8, 135 N.M. 621, 92 P.3d 633. A missing instruction
14 will rise to the level of fundamental error where such a mistake in the process shocks
15 the conscience, *id.* ¶ 17, and implicates “a fundamental unfairness within the system
16 that would undermine judicial integrity if left unchecked,” *id.* ¶ 18 (internal
17 quotation marks and citation omitted). Our review begins by examining whether
18 Defendant would have been entitled to the self-defense instruction based on the
19 evidence. *See id.* ¶ 9.

1 {4} The relevant trial testimony in the current case described different versions of
2 events. The parties do not dispute that on the evening in question, Defendant entered
3 the rural property of Shirley and Billie Winchester without permission and stood
4 inside the Winchesters' gate at around 10:00 p.m. [BIC 2-3, 5] At the time, the
5 Winchesters were outside having a small cookout and bonfire with guests. [BIC 3;
6 AB 2]

7 {5} In Shirley Winchester's version of events, she heard her two well-trained blue
8 heelers, horse- and cattle-rounding dogs, barking loudly. [BIC 3; AB 2] Shirley went
9 to see what was happening and saw Defendant inside the gate of their property and
10 the dogs barking at him. [BIC 3; AB 2] Shirley told Defendant that he was on private
11 property and had to leave, and Defendant refused. [AB 2-3] When she repeated that
12 he had to leave, Defendant pulled out a knife and, with demanding and slurred words,
13 stated that he was lost, thirsty and needed food and water. [AB 3; BIC 3] Shirley
14 explained that, at that point, her husband Billie Winchester joined her and also told
15 Defendant to leave. [AB 3] Rather than leave, Defendant lunged at them with a knife,
16 and in response, Billie shot Defendant in the hip. [AB 3] Shirley testified that she
17 was scared because she thought Defendant might use the knife on her. [AB 3]

18 {6} Billie Winchester testified to slightly different events. Billie stated that when
19 he came around the corner, he saw their dogs were "going crazy" [BIC 3] and
20 circling Defendant [BIC 4], and stated that he called the dogs off [BIC 3; AB 3].

1 Billie stated that Shirley was hollering at Defendant, and Defendant was cursing at
2 her and demanding water. [BIC 3; AB 3] Billie told Defendant where he could get
3 water and told him to leave. [BIC 3; AB 3] Billie testified that, instead of leaving,
4 Defendant walked toward them with a “crazy look in his eyes,” pulled a knife and
5 drew it over his head, ready to strike. [AB 3] Billie explained that, knowing there
6 were teenage girls in the house behind him, he did not want Defendant coming any
7 closer. [AB 3] When Defendant came within two or three feet of Shirley, he drew
8 his firearm and shot Defendant once in the hip [AB 3-4] with “snake shot”
9 ammunition that held about 200 tiny pellets [BIC 3].

10 {7} Defendant testified to a different version of events than either of the
11 Winchesters. Defendant explained that he was dehydrated, lost, and walked up to
12 the Winchesters to ask for a glass of water. [AB 4] Defendant stated that the
13 Winchesters refused to give him water and stated that they had a gun and would
14 shoot him if he did not leave. [AB 4] Defendant asked the Winchesters to call off
15 the dogs, which were circling him. [AB 4; BIC 4] Defendant testified that Shirley
16 told him the dogs were doing their job. [AB 4; BIC 4] Defendant stated that he felt
17 something behind him and thought it must have been the dogs circling behind him.
18 [BIC 4; AB 4] Defendant testified that, in response, he reached to pull his knife on
19 the dogs and to spin around, but was shot mainly on the back of his hip. [BIC 4; AB
20 4] Defendant stated that he was about fifteen feet from Mr. Winchester when he was

1 shot. [AB 4] Defendant explained that his actions were the result of his instinct and
2 training in the military and his belief that he needed to protect himself against the
3 dogs. [BIC 4; AB 4] Defendant stated that he would not pull a knife on someone
4 who had warned him that they had a gun; he pulled the knife on the dogs, not the
5 Winchesters. [BIC 4; AB 4]

6 {8} In short, in Defendant's version of events, he pulled a knife on the
7 Winchesters' dogs, who he claimed were circling him, when he was shot by Billie
8 Winchester from about fifteen feet away. [BIC 4; AB 4] Defendant claims
9 entitlement to a nonhomicide, deadly force self-defense instruction [BIC 11], which
10 would ask the jury whether the state disproved beyond a reasonable doubt that
11 "[t]here was an appearance of immediate danger of death or great bodily harm to the
12 defendant as a result of [an unlawful action, which would result in death or some
13 great bodily harm]; [t]he defendant was in fact put in fear of immediate death or
14 great bodily harm and [committed an act in defense of him or herself] because of
15 that fear; and [t]he apparent danger would have caused a reasonable person in the
16 same circumstances to act as the defendant did." UJI 14-5183 NMRA.

17 {9} In our determination of whether Defendant was entitled this nonhomicide,
18 deadly force self-defense instruction, we note that Defendant does not identify the
19 unlawful act that put him in fear, as is required by UJI 14-1583. Defendant claims
20 he pulled the knife because he felt something behind him. [BIC 12] Defendant

1 contends both that “[t]here was an appearance of immediate danger of great bodily
2 harm based on his testimony that the trained Blue Heelers were *circling* him,” and
3 that is “there was an appearance of immediate danger of death or great bodily harm
4 to [him] as a result of the Winchester’s dogs *mounting an attack*.” [BIC 12-13] But
5 while Defendant may have felt fear due to the presence of the dogs, Defendant has
6 not established that the dogs mounted an attack before he pulled the knife, nor has
7 he established that the dogs merely circling him or coming up behind him amounted
8 to an unlawful act necessary for purposes of the first element of a self-defense
9 instruction.

10 {10} Under these facts, even viewing the evidence in the light most favorable to
11 the giving of a self-defense instruction, we cannot conclude that the evidence is such
12 that reasonable minds could differ as to the first element of self-defense in
13 Defendant’s case. *State v. Baroz*, 2017-NMSC-030, ¶ 19, 404 P.3d 769; *State v.*
14 *Sutphin*, 2007-NMSC-045, ¶ 16, 142 N.M. 191, 164 P.3d 72 (“[F]undamental error
15 does not occur if the jury was not instructed on an element not at issue in the case.”).
16 Consequently, we are not persuaded that fundamental error occurred or that reversal
17 is required.

18 **II. Ineffective Assistance of Counsel Claim**

19 {11} Defendant contends that because the only defense at trial was that Defendant
20 acted in self-defense and his attorney failed to request self-defense instructions, he

1 was denied the effective assistance of counsel. [BIC 19-24] “In order to prevail on
2 an ineffective assistance of counsel claim, a defendant must show deficiency on the
3 part of counsel and that such deficiency resulted in prejudice.” *State v. Gonzales*,
4 2007-NMSC-059, ¶ 14, 143 N.M. 25, 172 P.3d 162. “There is a general presumption
5 that trial counsel provided effective assistance.” *Id.* “The presumption of effective
6 assistance will remain intact as long as there is a reasonable trial tactic explaining
7 counsel’s performance.” *Id.*

8 {12} The defense’s theory in the current case was that Defendant did not threaten
9 the Winchesters with a knife. As we discussed above, this trial strategy does not
10 support a defense to the charges against Defendant for the aggravated assaults the
11 State alleged he committed against the Winchesters. If defense counsel were to
12 request a self-defense instruction, it would have conflicted with Defendant’s version
13 of events that he did not commit aggravated assault with a deadly weapon against
14 the Winchesters. Thus, requesting the jury instruction on self-defense would not
15 have supported the defense trial strategy. If we were to hold that defense counsel
16 should have requested the instruction, then we would be second-guessing the trial
17 strategy, which our case law does not permit. *See id.* ¶ 14 (holding that where a jury
18 instruction would not support the defense trial strategy, we will not find ineffective
19 assistance of counsel because that would second-guess the trial strategy). For these

1 reasons, we conclude that Defendant has not demonstrated a prima facie claim of
2 ineffective assistance of counsel.

3 **III. Sufficiency of the Evidence**

4 {13} Lastly, Defendant challenges the sufficiency of the evidence to support his
5 convictions for aggravated assault with a deadly weapon against the Winchesters.

6 [BIC 24-28] Defendant asks us to assess the sufficiency of the State’s evidence of
7 the lawfulness of Defendant’s actions under a self-defense theory, arguing that the
8 evidence needs to be adequate under the law, not under inaccurate jury instructions.

9 [BIC 25-27] We are not persuaded that the jury instructions were inadequate and

10 there is no argument that the instructions conflict with the offense as defined by

11 statute. *Cf. State v. Stephenson*, 2017-NMSC-002, ¶¶ 2, 23-28, 389 P.3d 272

12 (measuring the sufficiency of the evidence based on the Court’s new interpretation

13 of the statute, not the inaccurate instructions given to the jury). Thus, we review the

14 sufficiency of the evidence under the instructions that were given. *See State v. Smith*,

15 1986-NMCA-089, ¶ 7, 104 N.M. 729, 726 P.2d 883 (“Jury instructions become the

16 law of the case against which the sufficiency of the evidence is to be measured.”).

17 {14} When assessing the sufficiency of the evidence, “we view the evidence in the

18 light most favorable to the guilty verdict, indulging all reasonable inferences and

19 resolving all conflicts in the evidence in favor of the verdict.” *State v. Samora*, 2016-

20 NMSC-031, ¶ 34, 387 P.3d 230 (internal quotation marks and citation omitted). We

1 disregard all evidence and inferences that support a different result. *State v. Rojo*,
2 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829. “We then determine whether
3 substantial evidence of either a direct or circumstantial nature exists to support a
4 verdict of guilt beyond a reasonable doubt with respect to every element essential to
5 a conviction.” *State v. Garcia*, 2016-NMSC-034, ¶ 15, 384 P.3d 1076 (internal
6 quotation marks and citation omitted). “Substantial evidence is relevant evidence
7 that a reasonable mind might accept as adequate to support a conclusion.” *State v.*
8 *Largo*, 2012-NMSC-015, ¶ 30, 278 P.3d 532 (internal quotation marks and citation
9 omitted).

10 {15} The jury instructions, in relevant part, asked whether the State proved beyond
11 a reasonable doubt that (1) Defendant raised a knife at Shirley and Billie Winchester,
12 which (2) caused the Winchesters to believe that Defendant was about to intrude on
13 their bodily integrity or personal safety by touching or applying force to them in a
14 rude, insolent or angry manner; (3) a reasonable person in the same circumstances
15 as the Winchesters would have had the same belief; and (4) Defendant used a knife.

16 [RP 105-06]

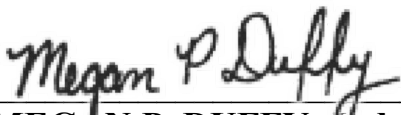
17 {16} As explained in detail above, the testimony established that while trespassing
18 on their property at night and appearing to be crazy or on drugs, Defendant rudely
19 demanded water and food, slurring his words. [BIC 3; AB 3] After repeatedly being
20 told to leave and where to get water, Defendant pulled a knife and lunged at the

1 Winchesters appearing ready to strike, which caused them fear. [BIC 3; AB 2-3]
2 Viewing the evidence through the lens of principles stated above, we hold that this
3 evidence is adequate to support Defendant’s convictions for aggravated assault with
4 a deadly weapon. *See, e.g., State v. Roybal*, 1992-NMCA-114, ¶ 9, 115 N.M. 27,
5 846 P.2d 333 (affirming the conviction on the basis of the testimony of a witness).

6 {17} To the extent Defendant complains that his convictions were based on
7 conflicting testimony [BIC 27-28], we are not persuaded that this constitute grounds
8 for reversal. “New Mexico appellate courts will not invade the jury’s province as
9 fact-finder by second-guessing the jury’s decision concerning the credibility of
10 witnesses, reweighing the evidence, or substituting its judgment for that of the jury.”
11 *State v. Garcia*, 2011-NMSC-003, ¶ 5, 149 N.M. 185, 246 P.3d 1057 (text only)
12 (citation omitted).

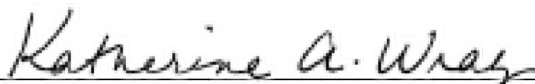
13 {18} For the foregoing reasons, we affirm Defendant’s convictions.

14 {19} **IT IS SO ORDERED.**

15 
16 MEGAN P. DUFFY, Judge

1 WE CONCUR:

2 
3 KRISTINA BOGARDUS, Judge

4 
5 KATHERINE A. WRAY, Judge