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

2 Opinion Number: _____

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

4 **No. A-1-CA-40816**

5 **STATE OF NEW MEXICO,**

6 Plaintiff-Appellant,

7 v.

8 **JOSEPH L. GONZALES,**

9 Defendant-Appellee.

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

11 **Robert A. Aragon, District Court Judge**

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19 Santa Fe, NM

20 for Appellee

1 **OPINION**

2 **IVES, Judge.**

3 {1} The State appeals the district court’s order granting Defendant Joseph
4 Gonzales’s pretrial motion to dismiss one of two counts of possession of a firearm
5 by a felon in violation of NMSA 1978, Section 30-7-16 (2022) based on double
6 jeopardy principles. We consider two questions. The first is whether our Legislature
7 intended to categorically authorize a separate conviction and punishment for each
8 firearm in every case under Section 30-7-16, or if it instead intended for courts to
9 determine, based on the facts of each case, whether the defendant engaged in distinct
10 acts of possession that warrant a separate conviction and punishment for each
11 firearm. After applying the requisite canons of statutory construction, we are left
12 with a reasonable doubt about whether the Legislature intended to categorically
13 allow a separate conviction and punishment for each firearm in every case, and we
14 therefore conclude that Section 30-7-16 is insurmountably ambiguous with respect
15 to the unit of prosecution. *See State v. Benally*, 2021-NMSC-027, ¶¶ 13-15, 493 P.3d
16 366. Applying the rule of lenity, we hold that courts must determine on a case-by-
17 case basis whether defendants may be convicted and punished separately for each
18 firearm. *See id.* ¶ 16. That is, separate convictions and punishments under Section
19 30-7-16 are only allowed if the facts of the case indicate that the defendant engaged
20 in distinct acts of possession. This brings us to the second question: whether the

1 district court erred by concluding—before trial and based only on the facts in the
2 State’s criminal complaint—that Defendant did not engage in distinct acts of
3 possession. We conclude that Rule 5-601(C) NMRA, as well as *State v. Foulenfont*,
4 1995-NMCA-028, 119 N.M. 788, 895 P.2d 1329, and its progeny, barred the district
5 court from resolving the issue based on the limited record before it. We therefore
6 reverse.

7 **BACKGROUND**

8 {2} On January 14, 2022, Agent Timothy Hughte of the Gallup Police
9 Department, along with members of the Narcotics Division and Emergency
10 Response Team, executed a search warrant at Defendant’s residence. After locating
11 Defendant and detaining him, the officers proceeded to search the home, locating
12 two firearms in the master bedroom. The first, a “black . . . Glock 43 (9mm)
13 handgun” with “custom purple inlay lettering” and a legible serial number “was
14 found in a top dresser drawer.” The second firearm, “a black . . . Smith and Wesson
15 M&P (9mm) handgun,” was found under the bed. This weapon had “custom red
16 inlay lettering,” a laser attachment, was loaded, and had no legible serial number.
17 After conducting a background check, Agent Hughte determined that Defendant had
18 been convicted of a felony within the last ten years and had completed probation
19 within the past year. Defendant was subsequently charged with two counts of
20 possession of a firearm by a felon.

1 {3} Defendant moved to dismiss one of the two counts pretrial, pursuant to Rule
2 5-212 NMRA and *Foulenfont*, 1995-NMCA-028, for violating his right to be free
3 from double jeopardy. In his motion to dismiss, Defendant stipulated to the facts set
4 out by Agent Hughte in the criminal complaint, attaching a copy of the complaint to
5 his motion. At the hearing on Defendant's motion to dismiss, however, the State
6 refused to stipulate to the facts in its complaint. The parties did not present, or ask
7 to present, further evidence at the hearing. Although the district court initially denied
8 Defendant's motion in an oral ruling, the court ultimately reversed course and
9 entered a written order granting the motion. The State appeals.

10 **DISCUSSION**

11 **I. Section 30-7-16 Is Insurmountably Ambiguous as to the Unit of** 12 **Prosecution**

13 {4} The State argues that the plain language of Section 30-7-16 categorically
14 defines the unit of prosecution: each firearm supports a separate conviction and
15 punishment. The State further contends that the legislative history, legislative
16 purpose, and quantum of punishment under the statute support this conclusion.
17 Defendant argues that the statute's plain language does not define the unit of
18 prosecution, and that the legislative history, purpose, and quantum of punishment do
19 not provide any additional clarity. Because Defendant contends that the statute's unit
20 of prosecution is insurmountably ambiguous, he maintains that the rule of lenity
21 should be applied in his favor. For the reasons that follow, we agree with Defendant.

1 {5} The double jeopardy clauses of the United States and New Mexico
2 constitutions “protect defendants against multiple punishments for the same
3 offense.” *State v. Alvarez-Lopez*, 2004-NMSC-030, ¶ 38, 136 N.M. 309, 98 P.3d
4 699; *see* U.S. Const. amend. V; N.M. Const. art. II, § 15. We review double jeopardy
5 claims de novo. *State v. Swick*, 2012-NMSC-018, ¶ 10, 279 P.3d 747.

6 {6} “Multiple punishment problems can arise from both ‘double-description’
7 claims, in which a single act results in multiple charges under different criminal
8 statutes, and ‘unit-of-prosecution’ claims, in which an individual is convicted of
9 multiple violations of the same criminal statute.” *State v. Bernal*, 2006-NMSC-050,
10 ¶ 7, 140 N.M. 644, 146 P.3d 289. In unit of prosecution cases like this one, we
11 attempt to determine “whether the [L]egislature intended punishment for the entire
12 course of conduct or for each discrete act.” *Swafford v. State*, 1991-NMSC-043, ¶ 8,
13 112 N.M. 3, 810 P.2d 1223. In order to ascertain the legislative intent, we apply a
14 two-step analysis. *See Benally*, 2021-NMSC-027, ¶ 12.

15 {7} The first step requires us to determine “whether the Legislature has defined
16 the unit of prosecution,” *id.* ¶ 13 (internal quotation marks and citation omitted)—
17 that is, whether it has defined “[t]he number of separate acts that may be prosecuted
18 under one criminal statute.” *State v. Sena*, 2016-NMCA-062, ¶ 8, 376 P.3d 887. To
19 do so, we consider “all markers of legislative intent”; these include “the wording,
20 structure, legislative history, legislative purpose, and quantum of punishment

1 prescribed under the statutory scheme.” *Benally*, 2021-NMSC-027, ¶ 13. If, after
2 applying the relevant canons of statutory construction, “we are able to decipher the
3 Legislature’s intended unit of prosecution, then our inquiry is complete.” *Id.* ¶ 14.
4 However, if the unit of prosecution remains “insurmountably ambiguous,” we apply
5 the rule of lenity and “construe the statute in favor of the defendant.” *Id.* (internal
6 quotation marks and citation omitted). “[L]enity is reserved for those situations in
7 which a reasonable doubt persists about a statute’s intended scope even *after* resort
8 to the language and structure, legislative history, and motivating policies of the
9 statute.” *Id.* ¶ 15 (internal quotation marks and citation omitted).

10 {8} If the rule of lenity applies, we move to the second step of the unit of
11 prosecution analysis. Our task is then to “determine whether a defendant’s acts are
12 separated by sufficient indicia of distinctness to justify multiple punishments under
13 the same statute.” *Id.* ¶ 17 (internal quotation marks and citation omitted).

14 **A. Plain Language**

15 {9} We look first to the plain language of the statute. *See State v. Olsson*, 2014-
16 NMSC-012, ¶ 18, 324 P.3d 1230 (“The plain language of the statute is the primary
17 indicator of legislative intent.”). Section 30-7-16(A) states, in pertinent part, that
18 “[i]t is unlawful” for “a felon” to “possess a firearm.” Because the statutory text
19 refers to “a firearm,” the State contends that “[t]he use of a singular term is

1 dispositive of the unit of prosecution.” For the reasons that follow, we are not
2 persuaded and hold that the statute’s plain language is ambiguous.

3 {10} As an initial matter, the State’s argument is premised on the idea that the word
4 “a” indicates a singular object. The State distinguishes “*a* firearm” from the use of
5 “*any* firearm” in the prior version of the statute, arguing that the use of “any”
6 previously indicated a plural object. Therefore, according to the State, when the
7 Legislature changed the language of the statute from “any” to “a,” it changed the
8 object from plural to singular, making clear that it intended to allow a separate
9 conviction and punishment for each firearm.

10 {11} We do not believe the State’s parsing of the statute is supported by New
11 Mexico law. Indeed, our Supreme Court rejected a very similar argument in *Olsson*,
12 concluding that the Legislature’s use of “any” in the statute criminalizing possession
13 of child pornography did not provide clarity regarding the unit of prosecution. 2014-
14 NMSC-012, ¶ 21. The statute at issue in *Olsson* makes it a crime to possess ““any
15 obscene visual or print medium.”” *Id.* ¶ 19 (quoting NMSA 1978, § 30-6A-3(A)
16 (2007, amended 2016)). The Court highlighted the variety of ways in which “any”
17 could be interpreted to mean either singular or plural, and the Court ultimately held
18 that the word “any” only “compound[ed] the ambiguity” of the statute and did not
19 provide clarity on the intended unit of prosecution. *Id.* ¶ 21.

1 {12} The dissent concludes that “any” must be plural and “a” must be singular,
2 relying heavily on our Supreme Court’s decision in *State v. Ramirez*, 2018-NMSC-
3 003, 409 P.3d 902. *See dissent* ¶¶ 40-45. We do not think *Ramirez* supports the
4 dissent’s conclusion. In *Ramirez*, our Supreme Court suggested that if the
5 Legislature had used the phrase “a child” instead of “any child,” the unit of
6 prosecution for child abuse would be “by child.” *Id.* ¶ 53. Critically, however, the
7 Court explained that its reasoning applied to crimes defined in relation to human
8 victims: “It is well established . . . that where a statute prohibits the doing of some
9 act to *a victim* specified by a singular noun, ‘a person for example, then ‘the person’
10 is the unit of prosecution.” *Id.* (emphasis added). In our view, this reasoning does
11 not apply when, as in this case, the statute at issue does not prohibit doing an act to
12 a victim but instead prohibits possession of an object. We therefore do not construe
13 *Ramirez* as overruling *Olsson* or calling its holding into question. And, under *Olsson*,
14 the word “any”—when used to define the unit of prosecution for possession of a
15 number of items, such as child pornography or firearms—is ambiguous.

16 {13} We therefore decline to conclude that the Legislature intended for the word
17 “any” to be plural in the context of the felon in possession statute. We conclude
18 instead that the use of “any” in the previous version of Section 30-7-16 only
19 contributes to the ambiguity of that version, making it impossible to draw any

1 inference about the current unit of prosecution based on the Legislature’s change
2 from “any firearm” to “a firearm.”

3 {14} However, even if we assume that “a” is singular and “any” is plural, the
4 distinction between plural and singular is not dispositive as to the unit of prosecution.
5 *See State v. Torres*, 2022-NMSC-024, ¶ 22, 521 P.3d 77 (“[T]he use of singular or
6 plural language is not always dispositive as to legislative intent.”); *State v. Neal*,
7 2007-NMCA-086, ¶ 20, 142 N.M. 487, 167 P.3d 935 (“[T]he fact that a statute does
8 not list items as plural does not necessarily establish that it does not apply to the
9 plural.”). This conclusion is supported by the Uniform Statute and Rule Construction
10 Act (USRCA), NMSA 1978, §§ 12-2A-1 to -20 (1997). Specifically, Section 12-2A-
11 5(A) of the USRCA states that the “[u]se of the singular number includes the plural,
12 and use of the plural number includes the singular.”

13 {15} The State argues that Section 12-2A-5(A) of the USRCA does not apply to
14 the felon in possession statute, Section 30-7-16. The State focuses our attention on
15 Section 12-2A-1(B) of the USRCA, which provides, in pertinent part, that the
16 USRCA applies to “a statute enacted or rule adopted on or after [the USRCA’s]
17 effective date.” The State observes that the USRCA took effect in 1997, *see* 1997
18 N.M. Laws, ch. 173, § 22, after the Legislature enacted the original version of the
19 felon in possession statute in 1981. *See* 1981 N.M. Laws, ch. 225, § 1.

1 {16} In support of its argument, the State relies on *State v. Garcia*, 2022-NMCA-
2 051, ¶ 9, 517 P.3d 281, in which this Court declined to apply Section 12-2A-5(A) to
3 NMSA 1978, Section 30-31-23 (2021), the statute prohibiting possession of
4 controlled substances. This Court reasoned that the USRCA was only applicable to
5 statutes enacted after 1997 and that the controlled substances statute had been
6 enacted in 1972. *Garcia*, 2022-NMCA-051, ¶ 9. Importantly, however, the phrase at
7 issue in *Garcia*—“a controlled substance”—had not been amended in the years since
8 the statute’s enactment. *Compare* 1972 N.M. Laws, ch. 84, § 23, *with* § 30-31-23.
9 In contrast, the specific phrase at issue here—“a firearm”—was amended in 2019,
10 well after the effective date of the USRCA. *See* 2019 N.M. Laws, ch. 253, § 1.
11 *Garcia* is therefore unhelpful in answering the question before us: whether the
12 USRCA applies only to statutes that were *originally* “enacted” before the USRCA’s
13 effective date in 1997, or whether it applies to *all* statutes “enacted” after that date,
14 including statutes that amend language that existed before the effective date of the
15 USRCA.

16 {17} We adopt the latter interpretation of Section 12-2A-1(B) because we believe
17 the statutory text clearly supports it and we see no reason not to apply the text as
18 written. *See Olsson*, 2014-NMSC-012, ¶ 18. Section 12-2A-1(B) does not include
19 the word “originally” or any similar limiting word, and no other language in the
20 statute suggests that the Legislature intended to exclude statutes that amend language

1 that was present before the USRCA took effect. We decline to add to the words
2 chosen by the Legislature because those words make sense without judicial
3 tinkering. *See State v. Torres*, 2006-NMCA-106, ¶ 8, 140 N.M. 230, 141 P.3d 1284.
4 We have considered the possibility that the limiting interpretation that would support
5 the State’s position could be implicit in the word “enact”—i.e., that “enact” means
6 only the legislative action that produced the original version of a statute. But we do
7 not find support for that interpretation in the USRCA itself, which does not define
8 “enact.” Nor do we find support in dictionary definitions, *see State v. Farish*, 2021-
9 NMSC-030, ¶ 12, 499 P.3d 622, which refer to the act of lawmaking in general and
10 which do not exclude lawmaking that amends existing statutes. *See Enact, Black’s*
11 *Law Dictionary* (12th ed. 2024) (defining “enact” as “mak[ing] into law by
12 authoritative act; to pass”); *Enact, Merriam-Webster Dictionary*,
13 <https://www.merriam-webster.com/dictionary/enact> (last visited June 7, 2024)
14 (defining “enact” as “establish[ing] by legal and authoritative act”); *Enact,*
15 *Cambridge Dictionary*, <https://dictionary.cambridge.org/us/dictionary/english/enact>
16 (last visited June 7, 2024) (defining “enact,” in relevant part, as “to make something
17 law”). We therefore conclude that when the Legislature amended the felon in
18 possession statute—Section 30-7-16—in 2019, the use of the singular and the use of
19 the plural were interchangeable under the USRCA and, as a consequence, the change
20 from “any” to “a” does not imply that the Legislature intended to allow a separate

1 conviction and punishment for each firearm in every case involving multiple
2 firearms, regardless of the facts of the case.

3 {18} In further support of its argument that the change from “any” to “a” is
4 dispositive of the unit of prosecution, the State relies on two cases: *Ramirez*, 2018-
5 NMSC-003, and *Garcia*, 2022-NMCA-051. In our view, neither precedent supports
6 the State’s position. We discuss each in turn.

7 {19} The State relies on the *Ramirez* Court’s distinction between statutes that are
8 focused on “outcome” versus “course of conduct,” *see* 2018-NMSC-003, ¶¶ 45, 51,
9 54-55, as evidence of Section 30-7-16’s unit of prosecution. We believe, however,
10 like the Court in *Ramirez*, that this distinction only contributes to the ambiguity of
11 the felon in possession statute. In *Ramirez*, our Supreme Court interpreted NMSA,
12 1978, Section 30-6-1(D)(1) (2009), which criminalizes “causing or permitting a
13 child” to be abused. *Ramirez*, 2018-NMSC-003, ¶¶ 44-58. Attempting to define the
14 unit of prosecution, the *Ramirez* Court noted that “there are two equally valid ways
15 of thinking about the unit of prosecution for [the] statute: either by conduct or by
16 outcome.” *Id.* ¶ 55. The Court reasoned that the unit of prosecution for “Section 30-
17 6-1(D)(1) is bound up in the verbs ‘causing’ or ‘permitting,’” suggesting that the
18 statute “prohibit[s] a course of conduct.” *Ramirez*, 2018-NMSC-003, ¶ 51. However,
19 an alternative reading of the statute—which “contains a direct object that is the
20 recipient of the actions of Section 30-6-1(D)(1)’s verbs, and that direct object is a

1 singular noun”—suggests that the unit of prosecution could be “by child.” *Ramirez*,
2 2018-NMSC-003, ¶ 52 (emphasis omitted). Because two equally valid ways of
3 interpreting the statute existed, the Court “conclude[d] that the statutory language is
4 ambiguous as to the unit of prosecution.” *Id.* ¶ 55.

5 {20} Here, the State contends that the felon in possession statute “does not contain
6 language similar to that in *Ramirez* evidencing that the Legislature intended a unit
7 of prosecution that is based on conduct” and that we should therefore hold that
8 Section 30-7-16 criminalizes the outcome of the unlawful act—possession—and that
9 the statute provides for a separate conviction and punishment for each firearm
10 possessed. We are not persuaded.

11 {21} Section 30-7-16(A) makes it illegal for a felon “to receive, transport or possess
12 a firearm”—i.e., a person commits this crime when they complete the act of
13 receiving, transporting or possessing a firearm. Like the statute at issue in *Ramirez*,
14 the felon in possession statute is bound up in enumerated verbs: to receive, to
15 transport, and to possess. However, it also contains a direct object that is the recipient
16 of those verbs’ action: a firearm. Arguably, both conduct and outcome are at issue
17 in the plain language of the statute; the act of possession is both the illegal conduct
18 and the unlawful outcome. We disagree with the State that we should adopt the
19 outcome-focused interpretation of the statute. Instead, like in *Ramirez*, we believe

1 that the conduct-outcome distinction does not provide clarity in deciphering the unit
2 of prosecution for Section 30-7-16.

3 {22} Turning to the second case relied upon by the State, we decline to apply
4 *Garcia* because we conclude that its reasoning is based on a factual predicate not
5 present here. In *Garcia*, this Court interpreted Section 30-31-23, the statute
6 prohibiting possession of a controlled substance. *See Garcia*, 2022-NMCA-051,
7 ¶¶ 4-10. Section 30-31-23(A) states, “It is unlawful for a person intentionally to
8 possess a controlled substance.” Importantly, this Court defined the unit of
9 prosecution as “each *distinct* controlled substance.” *Garcia*, 2022-NMCA-051, ¶ 6
10 (emphasis added). Relying on *Ramirez*, this Court reasoned that “a statute containing
11 a singular direct object that is the recipient of the action in the statute supports the
12 conclusion that the Legislature intended the unit of prosecution to be each individual
13 object.” *Garcia*, 2022-NMCA-051, ¶ 6. The *Garcia* Court “[held] that if the [s]tate
14 can prove a defendant simultaneously possessed *distinct controlled substances*, a
15 defendant can be charged and convicted for each *distinct* controlled substance in
16 [their] possession.” *Id.* (emphasis added). Because the state was able to prove that
17 the defendant possessed both heroin (a Schedule I controlled substance) and
18 methamphetamine (a Schedule II controlled substance), double jeopardy principles
19 did not prohibit the defendant from being separately convicted and punished for two
20 counts of possession. *Id.* ¶ 10. Additionally, as the *Garcia* Court noted, criminalizing

1 possession of each distinct substance is consistent with our case law. *Id.* ¶ 7 (citing
2 *State v. Smith*, 1980-NMSC-059, ¶ 11, 94 N.M. 379, 610 P.2d 1208 (allowing
3 multiple prosecution for trafficking “four separate drugs”) and *State v. Quick*, 2009-
4 NMSC-015, ¶¶ 21-22, 146 N.M. 80, 206 P.3d 985 (holding that two possession-
5 based convictions violated double jeopardy when they involved the same drug)).

6 {23} Unlike *Garcia*, this case involves possession of two of the *same* type of item
7 identified as contraband in the statute. Defendant was charged with possession of
8 two firearms, both described as “handguns” in the criminal information. *Garcia*
9 might be apt if Defendant was charged with one count of possessing a “firearm” and
10 one count of possessing a “destructive device”—such as a bomb, grenade, or mine—
11 which is a distinct item of contraband under the statute. *See* § 30-7-16(A), (E)(1)(a).
12 Because this case involves possession of two of the same type of item that the statute
13 identifies as contraband, unlike in *Garcia*, the use of a singular direct object in the
14 statute is not dispositive in this case.

15 {24} Having concluded that the plain language of the statute is ambiguous as to its
16 unit of prosecution, we must resort to the use of other tools of statutory construction
17 in the hope of discerning legislative intent. *See Benally*, 2021-NMSC-027, ¶ 27
18 (“[W]e do not confine our analysis to the language of the statute, . . . but also consider
19 [the statute]’s legislative history, purpose, and the quantum of punishment
20 prescribed.”).

1 **B. Legislative History**

2 {25} In support of its argument that the legislative history defines the intended unit
3 of prosecution, the State again relies on the 2019 statutory amendment, which
4 changed “any firearm” to “a firearm,” as evidence of a desire by the Legislature to
5 define the unit of prosecution as each individual firearm. The State reframes its point,
6 contending that the Legislature would have been aware of the “singular direct
7 object” language used in *Ramirez* and therefore the use of “singular language” when
8 amending the statute was a “conscious choice” to separately penalize the possession
9 of each firearm.

10 {26} This version of the argument is no more persuasive than the version we have
11 already rejected. For the reasons we have explained, the singular-plural distinction
12 on which the State relies does not clarify the unit of prosecution. The *Ramirez*
13 Court’s use of “singular direct object” does not apply in the context of Section 30-
14 7-16, and the singular and plural are interchangeable under the USRCA. Considering
15 the ambiguity discussed above regarding the singular and plural in the plain language
16 of the statute, we again decline to rely solely on the change from “any” to “a” as
17 evidence of the Legislature’s intent regarding the unit of prosecution. We do not
18 believe that this amendment sheds any light on whether the Legislature intended to
19 alter the unit of prosecution.

1 {27} The dissent opines that the 2019 Legislature must have amended the statute in
2 response to *Ramirez*. See *dissent* ¶¶ 44-45. Although we agree with the dissent that
3 we are required to presume that the Legislature was aware of *Ramirez*, we disagree
4 with the dissent about the ramifications of that presumption. As we have explained,
5 we understand *Ramirez* to say only that “a” is singular when it refers to the victim
6 of a crime. We presume that the Legislature was aware of that limited conclusion
7 and the basis for it: a firmly established principle about how to determine the unit of
8 prosecution when the statute uses a singular object to refer to a victim. See *Ramirez*,
9 2018-NMSC-003, ¶ 53. The dissent appears to presume that the Legislature was
10 *unaware* of this limitation in *Ramirez*—i.e., that the Legislature read *Ramirez* to
11 apply to all types of crimes, regardless of whether they have victims. We respectfully
12 disagree. *Ramirez* says nothing about whether “a” is singular or plural when used in
13 the context of crimes that involve a number of objects, rather than a number of
14 victims. We therefore decline to presume that the Legislature read *Ramirez* as
15 resolving a question never considered by our Supreme Court: whether the use of “a”
16 clearly defines the unit of prosecution when the crime involves possession of
17 contraband such as firearms. See *Fernandez v. Farmers Ins. Co. of Ariz.*, 1993-
18 NMSC-035, ¶ 15, 115 N.M. 622, 857 P.2d 22 (“The general rule is that cases are not
19 authority for propositions not considered.” (internal quotation marks and citation
20 omitted)).

1 **C. Legislative Purpose**

2 {28} The purpose of Section 30-7-16 is “to protect society by prohibiting the
3 possession of firearms by felons.” *State v. Calvillo*, 1991-NMCA-038, ¶ 6, 112 N.M.
4 140, 812 P.2d 794. The State argues that “[s]ociety would be better protected by
5 punishing the possession of a firearm by a felon on a per firearm basis because it
6 would deter felons from possessing more than one firearm and more firearms could
7 lead to more harm to society.” We are not persuaded.

8 {29} Although we acknowledge that Section 30-7-16 was designed, at least in part,
9 to deter people who have been convicted of felonies from possessing firearms,
10 nothing in the language or history of the statute or in the precedent interpreting it
11 suggests that the Legislature was especially concerned about deterring the
12 accumulation of multiple firearms. We decline to speculate about the Legislature’s
13 intent on this point, just as our Supreme Court declined to speculate about a closely
14 related point when it sought to discern the unit of prosecution for a similar possession
15 statute. In *Benally*, 2021-NMSC-027, ¶ 1, the Court considered the unit of
16 prosecution for NMSA 1978, Section 30-22-16 (1986), which prohibits possession
17 of a deadly weapon by a prisoner. The Court “agree[d] that one goal of the statute is
18 to minimize the availability of weapons in a prison facility” but “[did] not agree that
19 this goal establishe[d] the intended unit of prosecution.” *Benally*, 2021-NMSC-027,
20 ¶ 30. Importantly, the *Benally* Court pointed out that “the [s]tate’s argument assumes

1 that the Legislature was specifically concerned about a single prisoner’s
2 accumulation of deadly weapons; but there is no indication that such hoarding was
3 of particular concern.” *Id.* The Court reasoned that “nothing presented suggests that
4 the Legislature was more concerned about a single prisoner’s accumulation of
5 multiple weapons than it was concerned about other possible scenarios, such as
6 multiple prisoners possessing their own weapons individually.” *Id.* The Court
7 ultimately held that the legislative purpose of the statute did not provide guidance
8 on the unit of prosecution. *Id.* Because we conclude that our Supreme Court’s
9 reasoning applies with equal force to the possession statute at issue here, we do not
10 believe that the legislative purpose provides clarity regarding the unit of prosecution.

11 **D. Quantum of Punishment**

12 {30} Section 30-7-16 defines the applicable quantum of punishment as a third
13 degree felony which carries a basic sentence of three years, *see* § 30-7-16(B) (stating
14 “[a] felon found in possession of a firearm” is guilty of a third degree felony); NMSA
15 1978, § 31-18-15(A) (2024) (requiring a three year basic sentence for third degree
16 felonies), unless the individual has been convicted of a violent felony, in which case
17 the basic sentence is six years, *see* § 30-7-16(C). The State argues that “[r]ecent
18 amendments to Section 30-7-16 . . . show that the Legislature intended to increase
19 the quantum of punishment” and that this suggests that defining the unit of
20 prosecution by firearm would be in line with the Legislature’s desire to impose

1 harsher punishment. The State points to three recent amendments as support for this
2 argument: (1) in 2018, the Legislature increased the penalty under Section 30-7-16
3 if the person had previously been convicted of a capital felony or serious violent
4 offense, *see* 2018 N.M. Laws, ch. 74, § 4(B); (2) in 2020, violations of Section 30-
5 7-16 became third degree felonies instead of fourth degree felonies, *see* 2020 N.M.
6 Laws, ch.54, § 2(B); and (3) in 2022, the Legislature increased the basic sentence to
7 six years for individuals convicted of violent felonies, *see* 2022 N.M. Laws, ch. 56,
8 § 26(C). The State argues that “these amendments establish the intent to increase
9 punishment for felons who possess a firearm [and] . . . are consistent with a unit of
10 prosecution based on the number of firearms possessed because punishing violators
11 on a per firearm basis would lead to additional punishment.” Defendant contends,
12 however, that “this legislative history is equally consistent with the [L]egislature’s
13 decision that the defendant’s prior and present conduct is the focus” of the recent
14 amendments and that the various possible purposes of the amendments only
15 contribute to the statute’s ambiguity. We agree with Defendant that whether the
16 Legislature intended to change the unit of prosecution is unclear from the
17 amendments made to the quantum of punishment under Section 30-7-16 in recent
18 years. Although the Legislature has increased the punishment, none of those
19 increases are pertinent to the question here: whether the Legislature intended for the

1 increased punishment to be *multiplied* by the number of firearms in a defendant’s
2 possession.

3 {31} Because that question is not answered by either the quantum of punishment
4 or any of the other signs of legislative intent that we have discussed, we conclude
5 that a reasonable doubt persists about the Legislature’s intended unit of prosecution,
6 and we hold that Section 30-7-16 is “insurmountably ambiguous.” *See Benally*,
7 2021-NMSC-027, ¶ 35. This requires us to apply the rule of lenity in Defendant’s
8 favor. *See id.* ¶ 36. We therefore presume that the Legislature did not intend to punish
9 every defendant who possesses multiple firearms separately for each firearm and
10 hold that whether multiple punishments are allowed under Section 30-7-16 depends
11 on the specific facts of each case—whether sufficient indicia of distinctness separate
12 a defendant’s acts of possession. In other words, in cases involving multiple
13 firearms, whether multiple punishments are allowed hinges on the second step of the
14 unit of prosecution analysis.

15 **II. The District Court Erred by Ruling on the Double Jeopardy Issue Based**
16 **on the Limited Record at the Time of the Motion Hearing**

17 {32} The State argues that the district court made a procedural error by reaching
18 the second step of the analysis. Specifically, the State contends that the district court
19 ran afoul of Rule 5-601(C), which allows parties to raise defenses or objections
20 before trial if they are “capable of determination without a trial on the merits.” In
21 *State v. Foulenfont*, this Court held that dismissal pretrial is appropriate under Rule

1 5-601(C) if the district court is considering a “purely legal issue.” 1995-NMCA-028,
2 ¶ 6. The State argues that (1) its refusal to stipulate to the facts in its own charging
3 document barred the district court from ruling on Defendant’s motion; and (2) the
4 record at the time of the hearing did not include “enough undisputed facts to
5 determine whether Defendant’s acts were separated by sufficient indicia of
6 distinctness.” Although we reject the first argument, we accept the second and
7 therefore reverse.

8 {33} We reject the State’s first argument because precedent establishes that the
9 “undisputed facts” necessary for a *Foulenfont* motion can be “stipulated to by the
10 [s]tate *or* alleged in the indictment or information.” *State v. Pacheco*, 2017-NMCA-
11 014, ¶ 10, 388 P.3d 307 (emphasis added). This means that the state’s mere refusal
12 to stipulate to the facts in its own charging document does not always bar a district
13 court from ruling on a double jeopardy issue before trial. *See id.* In other words, if
14 the facts are not stipulated to by the state, the factual predicate alleged in the charging
15 document may—in some circumstances—suffice to narrow the issue to a purely
16 legal one such that a pretrial ruling on the merits of a motion is permissible. *See*
17 *Foulenfont*, 1995-NMCA-028, ¶ 6. The question is therefore not simply whether the
18 parties have stipulated to the facts, but instead whether the state pointed to any
19 practical purpose that would be served by an evidentiary hearing or a trial. *See id.*
20 (holding that when the state did not object to the defendant’s characterization of the

1 facts or proffer additional evidence, it “failed to point out any practical purpose that
2 would have been served by an evidentiary hearing or . . . a trial on the merits”); *State*
3 *v. Rendleman*, 2003-NMCA-150, ¶ 31, 134 N.M. 744, 82 P.3d 554 (holding that
4 dismissal was appropriate where “no practical purpose would be served by a trial on
5 the merits”), *overruled on other grounds by State v. Myers*, 2009-NMSC-016, ¶ 32,
6 146 N.M. 128, 207 P.3d 1105.

7 {34} That is the question raised by the State’s second argument, and our answer is
8 that there was a practical purpose for holding an evidentiary hearing or trial: to
9 ensure that the ruling on Defendant’s motion was based on all facts arguably
10 pertinent to determining whether Defendant’s conduct was distinct or unitary. To
11 make that determination, the district court was required to consider whether
12 sufficient indicia of distinctness established that Defendant engaged in two acts of
13 possession. *See Benally*, 2021-NMSC-027, ¶¶ 17-18. The indicia for weapons
14 possession charges are: (1) the timing of the gaining of possession of the weapons,
15 (2) the spacing between the weapons, (3) the quality or nature of the weapons, and
16 (4) the results of the possession. *Id.* ¶ 37. Importantly, the record does not adequately
17 address some of these indicia.

18 {35} For example, as to timing, although Defendant is correct that the criminal
19 complaint states that the firearms were found during the same search, it is unclear
20 whether Defendant *gained* possession of the firearms at the same time or at different

1 times. Evidence that Defendant gained possession at different times might support
2 the conclusion that Defendant engaged in distinct acts of possession. *See id.* ¶ 38
3 (observing that the timing did not establish distinct conduct because “no evidence
4 suggested that [the d]efendant came into possession of the weapons at different
5 times”). Because the record left “room for additional factual development,” *State v.*
6 *Fernandez*, 2007-NMCA-091, ¶¶ 5, 9, 142 N.M. 231, 164 P.3d 112, the State should
7 have been afforded the opportunity to marshal and present additional evidence to
8 establish that Defendant acquired the guns at different times.

9 {36} The State also should have been afforded the opportunity to present evidence
10 regarding the results of Defendant’s possession of the two guns. *See Benally*, 2021-
11 NMSC-027, ¶ 37. Defendant contends that the only result of the acts was the
12 possession itself of the two guns, and that “we cannot reasonably infer that
13 [Defendant’s] constructive possession of the two firearms in his bedroom was more
14 dangerous than his constructive possession of only one.” But the question before us
15 here is not whether such an inference is reasonable based on the facts in the criminal
16 complaint; it is whether such an inference might be possible after the presentation of
17 evidence. Whether possession of multiple weapons poses a greater danger than
18 possession of a single weapon hinges on the specific evidence in each case, as our
19 Supreme Court recognized in *Benally*. There, the state contended that each weapon
20 possessed by the defendant “increase[d] the risk of harm in [the prison], and thus

1 . . . the possession of ‘each additional weapon’ should itself be considered a distinct
2 offense.” *Id.* ¶ 41. The Court “agree[d] that the Legislature may have intended to
3 authorize multiple punishments when a defendant’s possession of a deadly weapon
4 had either the objective or result of a distinct decrease in prison safety,” and the
5 Court cited the example of a person who planned to use both weapons at once or
6 distribute the weapons to others. *Id.* ¶ 42. But the Court observed that there was no
7 evidence of that sort of objective or result. *Id.* ¶ 43. In the absence of such evidence,
8 the Court concluded that the defendant’s case “[was] not a case of the hypothetical
9 dual-wielding or stockpiling defendant.” *Id.* The Court therefore could not
10 “reasonably infer that [the d]efendant’s constructive possession of the two weapons
11 . . . was more dangerous than his constructive possession of only one.” *Id.* Here, the
12 criminal complaint did not indicate whether Defendant planned to use the two
13 firearms simultaneously or whether he was stockpiling the weapons in order to
14 distribute them, and the parties did not address those factual questions by entering
15 into stipulations or by presenting evidence. This is a gap in the record—one that
16 might be filled during an evidentiary hearing or a trial.

17 {37} Because the record regarding unitary conduct was not adequately developed
18 when the district court granted Defendant’s motion, we conclude that the district
19 court erred by ruling on the merits of the motion when it did. At the time of the
20 ruling, there were unanswered questions of fact pertinent to some of the indicia of

1 distinctness. We therefore hold that—without further development of the facts—
2 Defendant’s motion did not present a “purely legal issue,” *Foulenfont*, 1995-NMCA-
3 028, ¶ 6, resolvable under Rule 5-601(C).

4 **CONCLUSION**

5 {38} We reverse.

6 {39} **IT IS SO ORDERED.**

7
8 
ZACHARY A. IVES, Judge

9 **I CONCUR:**

10 
11 **JANE B. YOCHALEM, Judge**

12 **RICHARD C. BOSSON, Justice, retired, sitting by designation, concurring in**
13 **part and dissenting in part**

1 **BOSSON, Justice, retired, sitting by designation (concurring in part and**
2 **dissenting in part).**

3 {40} Although I concur with the disposition and the majority’s application of
4 *Foulenfont*, 1995-NMCA-028, to the facts of this case, I respectfully dissent with
5 regard to the majority’s interpretation of Section 30-7-16. In my view, the analysis
6 proposed by the majority, finding the statute to be “insurmountably ambiguous” as
7 to the unit of prosecution, undercuts the clear intent of the Legislature to make the
8 ownership of each individual firearm a separate felony.

9 {41} In 2018, our Supreme Court conducted a similar unit of prosecution analysis
10 in *Ramirez*. In *Ramirez*, 2018-NMSC-003, ¶ 3, the defendant fired a gun into a
11 vehicle with three children inside and was charged with three separate counts of
12 child abuse, contrary to Section 30-6-1(D)(1) (providing that “[a]buse of a child
13 consists of a person . . . causing or permitting a child to be . . . placed in a situation
14 that may endanger the child’s life or health”). The defendant argued that the three
15 counts of child abuse constituted a double jeopardy violation under a unit of
16 prosecution theory. *Id.* ¶ 44.

17 {42} Our Supreme Court concluded that there were two ways of construing the
18 plain language of the statute. *See id.* ¶¶ 51-55. First, the statute could be viewed as
19 punishing a specific course of conduct—the act of endangering a child—as
20 evidenced by the fact that “the statute prohibits *causing* or *permitting* a child to be
21 placed in a situation that endangers that child’s life or health.” *Id.* ¶ 51 (“[T]he unit

1 of prosecution for Section 30-6-1(D)(1) is bound up in the verbs ‘causing’ or
2 ‘permitting.’”). Second, the statute could be construed as punishing specific
3 outcomes—i.e. “*each child* endangered”—as evidenced by the statute’s specific
4 reference to “*a child*.” *Id.* ¶ 52 (reasoning that “the statute contains a direct object
5 that is the recipient or the actions of Section 30-6-1(D)(1)’s verbs, and that direct
6 object is a singular noun,” which indicates that “the unit of prosecution for Section
7 30-6-1(D)(1) is *by child*”). Under the first interpretation, only one charge could be
8 applied for the singular act of shooting into the vehicle. Under the second, three
9 charges could apply, one for each of the three children present in the car.

10 {43} The Court went on to explain that the use of the singular noun—“a child”—
11 along with policy considerations “support this latter interpretation of the statute,”
12 favoring multiple felonies. *See id.* ¶¶ 53-54. However, the Court ultimately
13 concluded that both interpretations were “equally valid ways of thinking about the
14 unit of prosecution” and “the statutory language is ambiguous as to the unit of
15 prosecution.” *See id.* ¶ 55.

16 {44} Similar to *Ramirez*, the statute at issue in the present case—Section 30-7-
17 16(A)—can be viewed in terms of punishing either conduct (criminalizing the act of
18 possessing firearms), or outcomes (criminalizing the ownership of each individual
19 firearm). The majority relies on the same reasoning as *Ramirez* to conclude that both
20 interpretations are equally valid. However, unlike in *Ramirez*, the legislative history

1 of Section 30-7-16 makes the intent of the Legislature clear, or at least clear enough
2 in my mind to make the possession of each gun a separate felony.

3 {45} Section 30-7-16(A) (2018) stated for many years that “[i]t is unlawful for a
4 felon to . . . possess *any* firearm or destructive device.” In 2019, subsequent to the
5 publication of *Ramirez*, the subsection of the statute was amended to change the
6 phrase “any firearm” to “a firearm.” *See* § 30-7-16(A) (2019). This was done soon
7 after the publication of *Ramirez* in late 2017, which contained the following analysis
8 of Section 30-6-1(D):

9 [O]ur Legislature chose not to employ the phrase “any
10 child” or the word “children” in place of “a child.” Had it
11 done so, Section 30-6-1(D)(1) would have expressly
12 contemplated that more than one child may be affected by
13 a single course of abuse by endangerment and this, in turn,
14 would suggest that the focus of the statute is the
15 prohibition of conduct towards a particular class of
16 persons. . . . Our Legislature did not do this and instead
17 specifically prohibited the commission of certain acts
18 against a singular and discrete entity: “a child.” It is well
19 established . . . that where a statute prohibits the doing of
20 some act to a victim specified by a singular noun, “a
21 person” for example, then “the person” is the unit of
22 prosecution.

23 *Ramirez*, 2018-NMSC-003, ¶ 53 (citation omitted). *Ramirez* became public in the
24 last days of 2017. The Legislature changed “any firearm” to “a firearm” during the
25 2019 legislative session. During the intervening session in 2018, our state
26 constitution would have precluded as nongermane any amendments to a substantive,
27 nonfiscal statute like Section 30-7-16(A). *See* N.M. Const. art. IV, § 5(B).

1 Accordingly, 2019 would have been the first opportunity for our Legislature to
2 respond to *Ramirez* and incorporate its meaning into Section 30-7-16(A).

3 {46} Out of respect to a separate but equal branch of government, we should
4 presume that the Legislature made the amendment to Section 30-7-16(A)
5 consciously and intentionally, aware of the above language in *Ramirez*. See *State v.*
6 *Chavez*, 2008-NMSC-001, ¶ 21, 143 N.M. 205, 174 P.3d 988 (providing that our
7 courts “presume[] that the Legislature is aware of existing case law and acts with
8 knowledge of it”); *State v. Morrison*, 1999-NMCA-041, ¶ 11, 127 N.M. 63, 976 P.2d
9 1015 (“When the [L]egislature amends a statute, we assume that it is aware of
10 existing law.”). We should therefore presume that the Legislature intended to rely
11 on the same logic as *Ramirez* when it amended the statute to penalize possession of
12 “a” rather than “any” firearm. In my view, it would be disrespectful of our
13 Legislature for this Court to conclude otherwise.

14 {47} The majority disagrees. First, the majority opinion relies on the logic of
15 *Olsson*, 2014-NMSC-012, ¶ 21, to argue that the word “any” is ambiguous and could
16 refer to either the singular or the plural, thus precluding any meaningful inference
17 from the shift from “any” to “a” in Section 30-7-16(A). I respectfully disagree. We
18 presume that the Legislature does not amend a statute unless it (1) intends to change
19 existing law, or (2) intends to clarify a statute that is otherwise ambiguous. See
20 *Aguilera v. Bd. of Educ. of Hatch Valley Schs.*, 2006-NMSC-015, ¶ 19, 139 N.M.

1 330, 132 P.3d 587. Under either analysis, the change from “any” to “a” has meaning:
2 either it represents a shift from the plural “any” to the singular “a,” or it resolves the
3 ambiguity in the term “any” by amending it to the singular “a.” Any other
4 interpretation renders the change meaningless and obsolete, which is contrary to our
5 principles of statutory interpretation. *See Diamond v. Diamond*, 2012-NMSC-022,
6 ¶ 29, 283 P.3d 260 (providing that our courts “must assume the [L]egislature chose
7 its words advisedly to express its meaning unless the contrary intent clearly appears”
8 (internal quotation marks and citation omitted)); *Aguilera*, 2006-NMSC-015, ¶ 19.
9 {48} The majority further argues that, even if there is a distinction between the
10 singular “a” and plural “any,” that such distinction is not dispositive as to the unit of
11 prosecution. The majority cites *Torres*, 2022-NMSC-024, ¶ 22 and *Neal*, 2007-
12 NMCA-086, ¶ 20. However, neither case stands for the proposition that singular or
13 plural language *cannot* be dispositive, only that it is not necessarily so. *See Torres*,
14 2022-NMSC-024, ¶ 22 (“[T]he use of singular or plural language is *not always*
15 dispositive as to legislative intent.” (emphasis added)); *Neal*, 2007-NMCA-086, ¶ 20
16 (“[T]he fact that a statute does not list items as plural *does not necessarily* establish
17 that it does not apply to the plural.” (emphasis added)). Furthermore, *Torres*
18 explicitly provides that “[a]s a general principle, the use of singular or plural
19 language in a criminal statute may, in some circumstances, clarify the intended unit
20 of prosecution.” 2022-NMSC-024, ¶ 22.

1 {49} Additionally, recent cases have found the issue of singular versus plural
2 language to be dispositive. In *Garcia*, 2022-NMCA-051, this Court analyzed the unit
3 of prosecution for Section 30-31-23 (2011), which criminalized the intentional
4 possession of *a* controlled substance. This Court found the singular language within
5 the statute to be dispositive, holding that “the unit of prosecution for Section 30-31-
6 23 is each distinct controlled substance.” *Garcia*, 2022-NMCA-051, ¶ 8.
7 Accordingly, the defendant could be separately charged for “the simultaneous
8 possession of two distinct controlled substances,” namely heroin and
9 methamphetamine. *Id.* ¶ 10. The majority attempts to distinguish *Garcia* from the
10 present case on a factual basis by drawing a distinction between the category of
11 “firearms” and the category of “controlled substances.” Specifically, the majority
12 argues that Defendant was charged with possession of two of the same type of
13 item—firearms—whereas in *Garcia* the defendant was charged with possession of
14 two *distinct* types of contraband. It is unclear from where the majority draws this
15 distinction, but given the broad descriptions, both of what constitutes a “firearm”
16 and what constitutes a “controlled substance,” I do not find the distinction
17 meaningful. *Compare* § 30-7-16(E)(4) (defining a “firearm” as “any weapon that
18 will or is designed to or may readily be converted to expel a projectile by the action
19 of an explosion or the frame or receiver of any such weapon”), *with* § 30-31-2(E)

1 (defining a “controlled substance” as “a drug or substance listed in Schedules I
2 through V of the Controlled Substances Act or rules adopted thereto”).

3 {50} Finally, the majority attempts to overcome the distinction between singular
4 and plural language by referencing the USRCA. Specifically, the majority relies on
5 Section 12-2A-5(A) which provides that, when engaging in statutory interpretation,
6 “[u]se of the singular number includes the plural, and use of the plural number
7 includes the singular.” Again, I do not find the argument persuasive. The principles
8 of the USRCA apply to a statute “unless . . . the context of its language requires
9 otherwise or the application of [the Act] to the statute or rule would be infeasible.”
10 Section 12-2A-1(B). Here, if the singular includes the plural and vice versa, the
11 change from “any” to “a” in Section 30-7-16(A) would be rendered meaningless, in
12 direct contravention of our established canons of statutory construction. *See State v.*
13 *Johnson*, 1998-NMCA-019, ¶ 22, 124 N.M. 647, 954 P.2d 79 (providing that our
14 courts “have always rejected an interpretation of a statute that would make parts of
15 it mere surplusage or meaningless” and it is the role of the courts “to construe
16 ambiguous language and to give it sensible construction”). In such a circumstance,
17 Section 12-2A-5(A) should not apply. *See* § 12-2A-1(B). After all, our canons of
18 statutory interpretation are useful tools to assist our courts in recognizing and
19 enforcing the goals of the Legislature. *See Torres*, 2006-NMCA-106, ¶ 8 (“Our
20 primary goal when interpreting statutory language is to give effect to the intent of


1 the [L]egislature.”) They should not be viewed as edicts to be mandatorily applied
2 in such a fashion so as to require the courts to reach conclusions and outcomes
3 clearly contrary to the Legislature’s otherwise apparent intent.

4 {51} In summary, our Legislature amended the statute so that it now criminalizes
5 possession of “a” firearm as opposed to “any” firearm. *Compare* § 30-7-16(A)
6 (2018), *with* § 30-7-16(A) (2019). There is only one interpretation that gives effect
7 and meaning to this change: that the Legislature intended for a felon unlawfully in
8 possession of a firearm to be subject to a charge for each individual firearm
9 possessed. Any other interpretation disregards the change, when, in my view, the
10 applicable law is to the contrary.

11 {52} Experience informs me that the legislative process is, by its nature, an
12 imperfect one. As a result, all statutes possess a certain amount of ambiguity. It is
13 the role of our courts, when possible, to resolve that ambiguity and “give effect to
14 the Legislature’s intent.” *See State v. Hall*, 2013-NMSC-001, ¶ 9, 294 P.3d 1235.

15 {53} Finally, although this issue may not arise again in the context of this case
16 given the majority’s disposition, it is an issue that will likely arise again in our
17 jurisprudence given the prominence of felon-in-possession prosecutions. As such, it
18 is an issue “capable of repetition yet evading review.” *See Republican Party of N.M.*
19 *v. N.M. Tax’n & Revenue Dep’t*, 2012-NMSC-026, ¶ 10, 283 P.3d 853. It is an issue

1 from which both our entire criminal law bar and judiciary would benefit from
2 intervention—and clarification—on the part of our Supreme Court.

3 
4 **RICHARD C. BOSSON, Justice, retired**
5 **Sitting by designation**