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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-42084**

5 **STATE OF NEW MEXICO,**

6 Plaintiff-Appellant,

7 v.

8 **KEVIN E.-O.,**

9 Child-Appellee.

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

11 **Catherine Begaye, District Court Judge**

12 Raúl Torrez, Attorney General

13 Santa Fe, NM

14 Tyler Sciara, Assistant Solicitor General

15 Albuquerque, NM

16 for Appellant

17 Lisa Torraco

18 Albuquerque, NM

19 for Appellee

1 **OPINION**

2 **MEDINA, Judge.**

3 {1} The State appeals the district court’s dismissal of Count 1 of a three-count
4 delinquency petition in which Child Kevin E.-O. was accused of committing the
5 delinquent act of homicide by vehicle (reckless driving), contrary to NMSA 1978
6 Section 66-8-101(A) (2016). The district court found that the alleged delinquent act
7 was based solely on speeding and therefore could not support a prima facie case for
8 homicide by vehicle. The State argues that the district court’s grant of Child’s Rule
9 5-601(E) NMRA pretrial motion to dismiss was error because the district court: (1)
10 misapplied the language of Section 66-8-101, which prohibits treating speeding as a
11 per se violation of the reckless driving statute, NMSA 1978, § 66-8-113 (1987); (2)
12 disregarded the State’s circumstantial evidence that Child drove recklessly; (3) failed
13 to consider the totality of the circumstances; and (4) decided a factual issue reserved
14 for the jury. Because the question of whether Child drove recklessly is an issue of
15 fact for the jury to decide and the State presented circumstantial evidence that Child
16 drove in a reckless manner, we reverse and remand to the district court to reinstate
17 the homicide by vehicle charge.

18 **BACKGROUND**

19 {2} On the evening of the events leading to the delinquency petition in this case,
20 Child possessed a driver’s permit that required a parent or guardian to be in the

1 vehicle with him when he drove. Despite the limitation of his permit, Child drove a
2 vehicle without a parent or guardian on the incline of an unlit road. The posted speed
3 limit on that section of the road was 40 mph. Child struck a pedestrian at the top of
4 the incline while driving between 96 and 102 mph. The event data recorder (EDR)
5 from the vehicle indicated that five seconds before the collision, Child drove at 90
6 mph, 1.5 seconds prior to the collision, increased to 104 mph, and then remained at
7 103 mph until half a second before the collision. The EDR further indicated no
8 evidence that Child applied the vehicle's brakes at any time before the collision,
9 which killed the pedestrian. Child was charged by petition for delinquency with
10 homicide by vehicle, contrary to Section 66-8-101(A); reckless driving, contrary to
11 Section 66-8-113; and restricted license violation, contrary to NMSA 1978, Section
12 66-5-19 (2016, amended 2023).

13 {3} Child filed a Rule 5-601 motion to dismiss Count 1 of the petition, homicide
14 by vehicle, arguing that it was inappropriate as a matter of law under *State v.*
15 *Foulenfont*, 1995-NMCA-028, ¶ 6, 119 N.M. 788, 895 P.2d 1329. Child argued,
16 based on the pretrial interviews,¹ the speed of the vehicle was the sole reason
17 deputies charged Child with vehicular homicide. During the motion hearing, Child
18 stipulated to the facts set forth above for purposes of the motion hearing.

¹During a pretrial interview the arresting officer stated that he based the reckless driving on the speed Child was driving.

1 {4} The district court adopted all of the facts as true and uncontroverted. However,
2 in ruling on the motion, the district court found that Child’s driving status was not
3 relevant and “the grading of the road and the lack of lighting are not elements of a
4 reckless driving charge” and “the only moving violation is the speeding offense.”
5 The district court then found as a matter of law the vehicular homicide charge could
6 not stand because the charge relied on speeding alone to establish reckless driving
7 and dismissed Count 1 of the delinquency petition, the homicide by vehicle (reckless
8 driving) count. This appeal followed.

9 **DISCUSSION**

10 {5} “[A] district court may dismiss [charges in a delinquency petition] when guilt
11 turns on a ‘purely legal issue’ and any relevant ‘factual predicate underlying the
12 charges’ is undisputed by the state.” *State v. Pacheco*, 2017-NMCA-014, ¶ 2, 388
13 P.3d 307 (quoting *Foulenfont*, 1995-NMCA-028, ¶ 6); *see* Rule 5-601(C) (“Any
14 defense, objection or request which is capable of determination without a trial on the
15 merits may be raised before trial by motion.”). The “underlying question” the district
16 court must answer in deciding a *Foulenfont* motion, is “whether the undisputed
17 facts—whether stipulated to by the [s]tate or alleged in the indictment or
18 information—show that the [s]tate cannot prove the elements of the charged offense
19 at trial, thereby making a trial on the merits unnecessary.” *Pacheco*, 2017-NMCA-
20 014, ¶ 10. Often the answer to this question turns on “whether the [s]tate could

1 reasonably assert the availability of additional evidence.” *Id.* (internal quotation
2 marks and citation omitted). “Questions of fact, however, are the unique purview of
3 the jury and, as such, should be decided by the jury alone.” *State v. LaPietra*, 2010-
4 NMCA-009, ¶ 7, 147 N.M. 569, 226 P.3d 668. “Whether a district court properly
5 grants or denies a [child’s] motion to dismiss a[count in a delinquency petition] on
6 purely legal grounds presents a question of law that we review de novo.” *State v.*
7 *Winn*, 2019-NMCA-011, ¶ 9, 435 P.3d 1247. To the extent we are required to
8 interpret statutes, we do so under a de novo standard of review. *See State v.*
9 *Gutierrez*, 2023-NMSC-002, ¶ 22, 523 P.3d 560.

10 {6} In order to adjudicate Child for committing the delinquent act of homicide by
11 vehicle (reckless driving), the State would be required to prove beyond a reasonable
12 doubt the following elements of homicide by vehicle (reckless driving): (1) Child
13 “operated a motor vehicle in a reckless manner”; and (2) Child’s “reckless driving
14 caused the death of [the] victim.” UJI 14-240C NMRA; *see* § 66-8-101(D). In order
15 to prove Child drove in a reckless manner the State would have to prove beyond a
16 reasonable doubt the following element of reckless driving: “[Child] drove with
17 willful disregard of the safety of others and at a speed or in a manner that endangered
18 or was likely to endanger any person.” UJI 14-241 NMRA; *see* § 66-8-113(A).

19 {7} The State contends the district court erred in dismissing Count 1 of the
20 petition, homicide by vehicle (reckless driving), because the district court: (1)

1 “misapplied the language of Section 66-8-101, . . . prohibiting [reliance solely on a]
2 violation of speeding laws as a per se violation of reckless driving under Section 66-
3 8-113”; (2) failed to consider “the State’s circumstantial evidence of Child’s reckless
4 driving,” finding that this evidence was not relevant to the “elements of [the] reckless
5 driving charge”; and (3) decided a factual issue that is reserved for the jury. Child
6 responds that the district court properly dismissed the vehicular homicide charge
7 because the plain language of Section 66-8-101(A) prohibits reliance on a violation
8 of speeding laws as a per se violation of reckless driving.

9 {8} We turn first to the plain language of the homicide by vehicle statute. Section
10 66-8-101(D) provides in part:

11 A person who commits homicide by vehicle while violating Section 66-
12 8-113 . . . [Reckless Driving] is guilty of a third degree felony and shall
13 be sentenced . . . , provided that violation of speeding laws as set forth
14 in the Motor Vehicle Code [Chapter 66, Articles 1 to 8 NMSA 1978]
15 shall not per se be a basis for violation of Section 66-8-113 . . .
16 [Reckless Driving].

17 {9} “It is well-settled that words in a statute take their ordinary meaning absent
18 legislative intent to the contrary.” *State v. Holt*, 2016-NMSC-011, ¶ 12, 368 P.3d
19 409. Therefore, we agree that the plain language of Section 66-8-101(D) prohibits
20 relying solely on a violation of the speeding laws as a per se reckless driving. “Per
21 se” is defined as “standing alone, without reference to additional facts,” *Per se*,
22 *Black’s Law Dictionary* (12th ed. 2024).

1 {10} Our Legislature defines reckless driving as:

2 Any person who drives any vehicle carelessly and heedlessly in [a]
3 willful or wanton disregard of the rights or safety of others *and* without
4 due caution and circumspection and at a speed or in a manner so as to
5 endanger or be likely to endanger any person or property is guilty of
6 reckless driving.

7 Section 66-8-113(A) (emphasis added).

8 {11} The plain language of Section 66-8-113(A) requires two elements to convict
9 of reckless driving: proof of driving “without due caution and circumspection,”
10 which can be established by driving either “at a speed or in a manner so as to
11 endanger or be likely to endanger any person or property.” Our Supreme Court has
12 clarified that speeding alone is not enough to convict—reckless driving also requires
13 proof that the speed or manner of driving was engaged in “willfully.” The term
14 “‘willfully’ concerns a[n accused’s] state of mind” and “denotes the doing of an act
15 without just cause or lawful excuse,” *State v. Masters*, 1982-NMCA-166, ¶ 8, 99
16 N.M. 58, 653 P.2d 889, a necessary element for conviction of reckless driving. Our
17 Supreme Court has held that where a driver is shown to be speeding to a degree or
18 in a manner likely to endanger persons or property and done so “willfully,” a
19 conviction for reckless driving is not based on speeding alone. *See State v. Simpson*,
20 1993-NMSC-073, ¶ 21, 116 N.M. 768, 867 P.2d 1150. In *Simpson*, the Court
21 approved a jury instruction for reckless driving that instructed the jury that it must
22 find that the defendant “drove with willful disregard of the rights or safety of others

1 *and* at a speed or in a manner which endangered or was likely to endanger any person
2 or property.” *Id.* (internal quotation marks and citation omitted). The Court
3 concluded that the jury was adequately instructed that speeding alone was not a per
4 se basis for conviction of reckless driving—to find a defendant guilty of reckless
5 driving under this instruction, the jury had to find, in addition to speeding, that the
6 defendant “drove with willful disregard of the rights or safety of others.” *Id.* (internal
7 quotation marks omitted). This Court recently concluded, relying on *Simpson*, that
8 “our jurisprudence supports a totality of the circumstances approach in which a jury
9 considers all contributing factors to determine whether a defendant acted
10 recklessly.” *State v. Doyal*, 2023-NMCA-015, ¶ 18, 525 P.3d 412, *cert. denied*, (S-
11 1-SC-39674, Jan. 20, 2023).

12 {12} In *Doyal*, this Court concluded that the facts that the collision occurred
13 immediately after the defendant passed warning signs, that it was dark, and that “[the
14 d]efendant was unfamiliar with the road [were] compelling circumstances from
15 which a reasonable jury could infer that [the d]efendant was not only speeding but
16 that [the defendant] also willfully disregarded the warnings and the condition of the
17 roadway.” *Id.* ¶ 20. Moreover, this Court concluded that it was “reasonable for the
18 jury to find that disregarding the warnings and the hazardous road . . . while
19 accelerating to almost twice the speed limit constituted a disregard for the rights and
20 safety of others.” *Id.*

1 {13} Here, in addition to Child’s speeding, the State asserted facts regarding (1)
2 Child’s driving in violation of the terms of his permit; (2) Child increasing his speed
3 despite the grade of the road, which impaired the visibility of the top of the incline;
4 (3) Child’s disregard of the posted speed limit of 40 mph; (4) Child’s disregard of
5 the lack of lighting on the road; (5) Child’s driving at a speed more than double the
6 posted speed limit; and (6) the EDR data from Child’s vehicle, showing Child failing
7 to brake seconds before the crash. This evidence gives rise to questions of fact for
8 the jury about whether Child was speeding to a degree or in a manner likely to have
9 endangered persons or property and whether Child did so with willful disregard of
10 the rights or safety of others. A conviction of reckless driving would rely on the
11 jury’s findings as to these facts and the inferences from them, and not solely on
12 Child’s violation of the speeding laws. “When an issue involves a specific
13 determination or finding, especially when it is an element of the offense, it is a
14 question that is within the unique purview of the jury” to decide. *LaPietra*, 2010-
15 NMCA-009, ¶ 10.

16 {14} During the motion hearing, the State made clear that its claim of reckless
17 driving resulting in the death of a pedestrian was based on more than a speeding
18 violation standing alone. The jury would be asked to make factual findings both
19 about whether Child was driving in a manner “likely to endanger any person or
20 property” and whether Child did so “with willful or wanton disregard for the rights

1 and safety of others.” Section 66-8-113(A). The district court’s ruling on the motion
2 to dismiss was error because the question of whether the Child drove with willful
3 “disregard of the rights of the safety of others and without due caution and
4 circumspection” was a determination for the jury not the district court to decide. *See*
5 *Doyal*, 2023-NMCA-015, ¶ 8; *LaPietra*, 2010-NMCA-009, ¶ 10; *State v. Munoz*,
6 2014-NMCA-101, ¶ 8, 336 P.3d 424.

7 {15} To the extent the district court found that the evidence of Child’s driving status
8 and “the grading of the road and the lack of lighting are not elements of a reckless
9 driving” allegation, and that only Child’s act of speeding was relevant, we disagree.
10 Although these excluded facts are not independent elements of reckless driving, they
11 are “contributing factors” a jury would be entitled to rely on in deciding whether
12 Child drove recklessly. *See Doyal*, 2023-NMCA-015, ¶ 18 (recognizing that “our
13 jurisprudence supports a totality of the circumstances approach in which a jury
14 considers all contributing factors to determine whether a[n accused] acted
15 recklessly”); *Munoz*, 2014-NMCA-101, ¶ 10 (observing that “speeding can
16 constitute recklessness if the speeding created a danger for others and additional
17 conduct establishes that a driver willfully disregarded the safety of others”).

18 **CONCLUSION**

19 {16} Based on the forgoing, we conclude the district court erred in granting Child’s
20 motion to dismiss and reverse.

1 {17} IT IS SO ORDERED.

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JACQUELINE R. MEDINA, Judge

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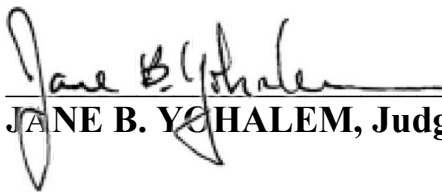
4 WE CONCUR:

5



6 KRISTINA BOCARDUS, Judge

7



8 JANE B. YCHALEM, Judge