# IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO



**STATE OF NEW MEXICO,**

Plaintiff-Appellee,

v. **No. A-1-CA-41464**

**JUSTIN FERNANDEZ,**

Defendant-Appellant.

**APPEAL FROM THE DISTRICT COURT OF TAOS COUNTY**
**Emilio Chavez, District Court Judge**

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## MEMORANDUM OPINION

**MEDINA, Chief Judge.**

**{1}** Defendant Justin Fernandez appeals his conviction for involuntary manslaughter (accessory), contrary to NMSA 1978, Section 30-2-3(B) (1994). Defendant raises three issues on appeal: (1) the evidence is insufficient to support his conviction, (2) the district court's imposition of a firearm enhancement was error,

and (3) Defendant is entitled to additional days of presentence confinement credit. We affirm the involuntary manslaughter conviction and the firearm enhancement, but remand for the district court to apply the appropriate amount of presentence confinement credit.

## BACKGROUND

{2} In December 2021, Defendant's brother, Ray Rivera, became involved in a physical altercation with Antonio Martinez (Victim) inside an auto shop in Taos. Rivera eventually walked out of the shop and to his truck where he retrieved a gun. Rivera racked the gun and began walking back to the shop but, before reaching the shop, turned around and placed the gun on the front passenger seat of his truck. Rivera then drove away but returned to the shop with his brother, Defendant. According to witness testimony, surveillance footage, and Rivera, upon arriving back at the shop, Defendant got out of the truck, asked Victim why he hit Rivera, and started a physical altercation with Victim outside of the shop. Shortly thereafter, Rivera got out of the truck with a gun and began hitting Victim. The beating moved inside the doorway of the shop with the two brothers hitting Victim, and Rivera also kicking and hitting Victim with the gun. Others in the shop tried to separate Defendant from Victim. After others pulled Defendant away from Victim, Rivera struck Victim with the gun, which fired, killing Victim. Rivera testified that he kicked Victim a few times and when he went to punch Victim, the gun went off.

**{3}** The State charged Defendant with first-degree murder as an accessory and other battery related crimes. Rivera was charged, tried, and convicted of second-degree murder separately. The district court instructed the jury on accomplice liability for first-degree murder deliberate intent and alternatively by depraved mind and for the step-down offenses of second-degree murder, voluntary manslaughter, and involuntary manslaughter.

**{4}** The jury returned a verdict finding Defendant guilty of involuntary manslaughter (accessory) and not guilty on all other charges. The jury was also instructed to determine whether the crime was committed with the use of a firearm. The jury returned a special verdict form finding that "a firearm was discharged in the commission of the crime of involuntary manslaughter." We reserve discussion of the facts relevant to the enhancement of Defendant's sentence to our analysis of this issue.

## DISCUSSION

### I. Sufficient Evidence Supports Defendant's Involuntary Manslaughter Conviction

**{5}** Defendant argues that the evidence is insufficient to support his involuntary manslaughter conviction, because the jury instructions when read together indicate that the jury relied on misdemeanor battery conduct that did not cause the death of Victim and—by acquitting Defendant of second-degree murder—the jury found that Defendant was not an accomplice to Rivera's felony actions. The State responds that

the jury instructions relating to misdemeanor battery pertain to Defendant's intent for his accomplice to commit a misdemeanor battery, and because the death occurred "*during the course of* a dangerous battery with Defendant's help or encouragement," the evidence supported the involuntary manslaughter conviction.

**{6}** "The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Montoya*, 2015-NMSC-010, ¶ 52, 345 P.3d 1056 (internal quotation marks and citation omitted). We "view the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. We disregard all evidence and inferences that support a different result. *See State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829.

**{7}** The Legislature has defined involuntary manslaughter as "manslaughter committed in the commission of an unlawful act not amounting to [a] felony, or in the commission of a lawful act which might produce death in an unlawful manner or without due caution and circumspection." Section 30-2-3(B). Defendant's conviction was based on our accessory liability statute which provides, in pertinent part, that "[a] person may be charged with and convicted of the crime as an accessory

if [they] procure[], counsel[], aid[] or abet[] in its commission and although [they] did not directly commit the crime and although the principal who directly committed such crime has not been prosecuted or convicted, or has been convicted of a different crime or degree of crime, or has been acquitted." NMSA 1978, § 30-1-13 (1972). When a person aids or abets in the commission of a crime, that person is equally culpable as the principal. *State v. Carrasco*, 1997-NMSC-047, ¶ 6, 124 N.M. 64, 946 P.2d 1075. Under an accessory liability theory, "a jury must find a community of purpose for each crime of the principal." *Id.* ¶ 9.

**{8}** "[E]vidence of aiding and abetting may be as broad and varied as are the means of communicating thought from one individual to another; by acts, conduct, words, signs, or by any means sufficient to incite, encourage or instigate commission of the offense or calculated to make known that commission of an offense already undertaken has the aider's support or approval." *State v. Ochoa*, 1937-NMSC-051, ¶ 31, 41 N.M. 589, 72 P.2d 609. Being an accessory is not a distinct offense, but it is instead linked to the actions of the principal. *Carrasco*, 1997-NMSC-047, ¶ 6. "An accessory must share the criminal intent of the principal." *Id.* ¶ 7. However, under our accessory statute, depending on their states of mind, "the principal and accessory may each be convicted for different degrees of [crimes]." *State v. Gaitan*, 2002-NMSC-007, ¶ 12, 131 N.M. 758, 42 P.3d 1207; *see State v. Holden*, 1973-NMCA-092, ¶¶ 11-14, 85 N.M. 397, 512 P.2d 970 (affirming conviction for accessory to

involuntary manslaughter for procuring a misdemeanor battery by a third party who instead shot and killed the victim and was convicted of voluntary manslaughter).

**{9}** Any misdemeanor requiring a showing of at least criminal negligence, including simple battery, as was alleged in the jury instruction here, can serve as the predicate unlawful act for involuntary manslaughter. *See State v. Yarborough*, 1996-NMSC-068, ¶ 20, 122 N.M. 596, 930 P.2d 131; *see also Holden*, 1973-NMCA-092, ¶ 14 (recognizing that inflicting a beating is an unlawful act). "Criminal negligence exists where the defendant acts with willful disregard of the rights or safety of others and in a manner which endangers any person or property." *State v. Skippings*, 2011-NMSC-021, ¶ 18, 150 N.M. 216, 258 P.3d 1008 (alterations, internal quotation marks, and citation omitted); *see also* UJI 14-133 NMRA (defining negligence). In addition, "the defendant must possess subjective knowledge of the danger or risk to others posed by [their] actions." *Skippings*, 2011-NMSC-021, ¶ 18 (internal quotation marks and citation omitted).

**{10}** We look first to the jury instructions because they "become the law of the case against which the sufficiency of the evidence is to be measured." *State v. Smith*, 1986-NMCA-089, ¶ 7, 104 N.M. 729, 726 P.2d 883. We start with the instructions regarding accomplice liability and the elements of involuntary manslaughter. The jury was instructed as follows:

> [D]efendant may be found guilty of a crime even though [D]efendant did not do the acts constituting the crime, if the [S]tate

proves to your satisfaction beyond a reasonable doubt each of the following elements:

1. [D]efendant intended that another person commit the crime;

2. Another person committed the crime;

3. [D]efendant helped, encouraged, or caused the crime to be committed.

This instruction was patterned after UJI 14-2822 NMRA and accurately stated the law of accomplice liability. *See Carrasco*, 1997-NMSC-047, ¶ 7.

**{11}** With regard to the elements of involuntary manslaughter, Defendant's jury was instructed that it had to find beyond a reasonable doubt in part as follows:

> For you to find [D]efendant guilty of involuntary manslaughter as charged as a lesser included in Count 1, the [S]tate must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. [D]efendant . . . intended that another person commit the crime of battery not amounting to a felony;
>
> 2. Another person committed battery under circumstances or in a manner dangerous to human life;
>
> 3. [D]efendant . . . helped, encouraged, or caused the battery to be committed;
>
> 4. Defendant should have known of the danger involved by his and . . . Rivera's actions;
>
> 5. Defendant and or . . . Rivera acted with a willful disregard for the safety of others;
>
> 6. [Rivera]'s act caused the death of [Victim].

**{12}** The jury was therefore required to consider whether Defendant intended for Rivera to commit a battery. As such, we turn to the instruction given for the elements of misdemeanor battery.

> For determination of the intent of [Defendant,] the elements of misdemeanor battery are the following:
>
> 1. [D]efendant intentionally touched or applied force to [Victim] by striking him with fists and or feet;
>
> 2. [D]efendant acted in a rude, insolent or angry manner.

**{13}** Defendant contends that, because the jury was given an instruction for determining his intent that included he "intentionally touched or applied force" to Victim by "striking him with fists or feet," and this conduct did not cause Victim's death, "the elements found by the jury do not support a conviction for involuntary manslaughter." Defendant additionally argues that because the jury acquitted him of second-degree murder, the jury found that he was not an accomplice to Rivera's felony actions.

**{14}** The State responds that: (1) the misdemeanor battery instruction "merely set out the elements of misdemeanor battery for purposes of determining what type of battery Defendant intended be committed—it did not allege the precise conduct that caused [Victim's] death"; and (2) the conviction reveals that "the jury unequivocally determined that Defendant intended [that Rivera] commit a misdemeanor battery, that [Rivera] then committed a battery in a dangerous manner with Defendant's help

or encouragement, and that in doing so, [Rivera] killed [Victim]." For the reasons set forth below, we conclude that sufficient evidence supports Defendant's involuntary manslaughter conviction.

**{15}** In *Holden*, a jury convicted the defendant Holden of voluntary manslaughter and the defendant Spikes of involuntary manslaughter as an accessory. 1973-NMCA-092, ¶ 1. Relevant to this appeal, Spikes argued that his involuntary manslaughter conviction was not supported by substantial evidence. *Id.* ¶ 12. The evidence introduced during trial revealed that Holden had a physical fight with the victim the night before the shooting of the victim. *Id.* ¶ 4. After this, Holden went looking for victim, and the next morning after hearing about this fight, Spikes also went looking for the victim. *Id.* ¶ 5. When Spikes located the victim, Spikes "made a statement to the effect that he was going to get a man to beat the [victim] up; and shortly thereafter Spikes returned with Holden," who shot and killed the victim. *See id.* ¶¶ 5, 6, 12, 14. This Court concluded that "[t]he fact that Spikes did not bargain for the result[—the victim's death—]is not material. The material fact is that he did procure another to perform an unlawful act." *Id.* ¶ 14 (internal quotation marks omitted).

**{16}** Similarly, here, the evidence demonstrated that Rivera had a physical fight with Victim, drove away, and then returned to the scene with Defendant. Once at the scene, Defendant stepped out of Rivera's vehicle and began to beat Victim by

punching and kicking Victim. Rivera then joined in on the beating. Rivera kicked and repeatedly struck Victim with a gun. Defendant helped, encouraged, and participated in the two-on-one beating of Victim through his actions of continuing to beat Victim, and only stopping when others pulled him away from Victim. These facts present an inversion of the facts in *Holden* as to whom procured whom, but, nevertheless, provide substantial support that Defendant and Rivera shared "a community of purpose" to inflict a beating on Victim. *Carrasco*, 1997-NMSC-047, ¶ 9.

**{17}** While Defendant may have only intended that he and Rivera inflict a misdemeanor battery on Victim, there is no dispute that, during the beating of Victim, which including Victim being struck with a loaded gun, Rivera's acts resulted in Victim's death. As in *Holden*, even though Defendant may not have "bargain[ed] for the [deadly] result," the evidence that he instigated the beating of Victim when he arrived at the scene, and only stopped participating in the two-on-one beating when he was pulled away, was sufficient for the jury to conclude that Defendant encouraged, approved, and intended for Rivera to join him in committing a battery on Victim. *See Holden*, 1973-NMCA-092, ¶ 14; *see Ochoa*, 1937-NMSC-051, ¶ 31. Furthermore, tracking with the language of the jury instructions, Rivera's acts of kicking and striking Victim with a gun was sufficient for the jury to conclude that Rivera's acts constituted a battery "under circumstances or in a manner

dangerous to human life," that Defendant "should have known of the danger involved by his and . . . Rivera's actions" in committing the battery, that Defendant and "Rivera acted with a willful disregard for the safety of" Victim, and that "[Rivera]'s actions caused the death of [Victim]."

**{18}** Viewing the evidence in a light most favorable to the jury's verdict, we hold that the evidence sufficiently supports that Defendant intended for Rivera to commit a battery by way of striking Victim with his fists and feet, but that Rivera also struck Victim with a gun and that these actions resulted in the death of Victim. *See Cunningham*, 2000-NMSC-009, ¶ 26. The evidence supports the jury's finding that "[Defendant] intended that another person commit the crime of battery not amounting to a felony" and "[Rivera]'s act [during the commission of the battery] caused the death of [Victim]."

**{19}** To the extent Defendant contends *Gaitan*, 2002-NMSC-007, and *State v. Landgraf*, 1996-NMCA-024, 121 N.M. 445, 913 P.2d 252, require reversal as, he alleges, the State did not establish causation here, we disagree. Defendant's intent for Rivera to commit a misdemeanor battery, and whether Defendant therefore acted as an accomplice to Rivera when Rivera's "act caused the death of [Victim]" is at issue here. The issue is not, as Defendant claims, whether his participation in the altercation directly caused Victim's death. The jury relied in part on Defendant's

intent for Rivera to join him in striking Victim—not entirely on Defendant's striking of Victim—in reaching the conviction.

**{20}** As reasoned above, the State sufficiently demonstrated that Defendant intended for Rivera to beat Victim and that battery resulted in Victim's death. As a result, Defendant is criminally liable for involuntary manslaughter.

## II. The Firearm Enhancement

**{21}** Defendant contends that imposition of the firearm enhancement to his sentence was error because: (1) the jury did not make a finding that a firearm was "brandished," which was required under the firearm enhancement statute in effect at the time of the crime; and (2) the jury did not find and the State failed to prove accessory liability for brandishing a firearm. As a result, Defendant contends that the district court lacked statutory authority to impose the firearm enhancement, resulting in an illegal sentence. The State responds that in finding that a firearm was "used" or "discharged" the jury necessarily found that the firearm was "brandished" and alternatively, if the term "brandished" was omitted, such did not constitute fundamental error. We address the issue of accomplice liability for a firearm enhancement before considering whether the enhancement was error.

### A. An Accomplice Is Liable for a Principal's Brandishing of a Firearm

**{22}** We review de novo the legality of accomplice liability for a firearm enhancement based on a principal committing a crime with a firearm. *See State v.*

*Roque*, 1977-NMCA-094, ¶¶ 9-12, 91 N.M. 7, 569 P.2d 417 (analyzing whether an accessory is liable for an enhancement based on a principal's use of a firearm by conducting statutory interpretation).

**{23}** *Roque* informs our inquiry. *Id.* In *Roque*, this Court interpreted a prior version of the firearm enhancement statute, NMSA 1953, § 40A-29-3.1 (1975), and held that an accomplice to an armed robbery who had not used a firearm was subject to a firearm enhancement. *Roque*, 1977-NMCA-094, ¶¶ 9-12. The 1975 version of the enhancement statute required "a finding of fact 'that a firearm was used in the commission' of the crime." *Id.* ¶ 10 (quoting NMSA 1953, § 40A-29-3.1 (1975)). We reasoned that "[t]he statutory wording does not limit the enhanced sentence to situations where the defendant was the user of the firearm," as it considers only whether the firearm was used *in the commission* of the crime. *Id.* As such, this Court held that "the statute does not negate an enhanced sentence for an accessory when a firearm was used by the principal." *Id.*; *see also State v. Burdex*, 1983-NMCA-087, ¶ 10, 100 N.M. 197, 668 P.2d 313 (holding that "[a]rmed robbery is not a distinct offense from robbery; the offense is robbery, whether or not armed and whether or not one is an accessory[,]" and "the statute does not limit imposition of an enhanced sentence to situations where the defendant, and not a co[]defendant, used a firearm").

**{24}** Defendant asserts that *Roque* is inapplicable, because in that case, based on the elements of armed robbery, "there [was] no way to find the defendant guilty of

armed robbery as an accessory and not find that they encouraged the use of a firearm." Defendant suggests that this is distinguishable from the circumstances here, because "[t]he elements of the [involuntary manslaughter conviction] did not require the jury to find that [Defendant]'s accomplice liability included brandishing of a firearm by [Rivera]." The State responds, and we agree, that neither *Roque* nor *Burdex* suggest that accessory liability for firearm use is limited to defendants charged as accessories to crimes that include use of a firearm as an essential element.

**{25}** Defendant also relies on *Rosemond v. United States*, 572 U.S. 65 (2014), in its recognition that "[a]n active participant in a drug transaction has the intent needed to aid and abet a [firearm] violation when [they] know[] that one of [their] confederates will carry a gun" and its emphasis that "knowledge of the firearm must be advance knowledge." *Id.* at 77-78. The State responds, and we agree, that *Rosemond* "did not analyze a sentencing enhancement provision, but, rather, an actual crime—aiding and abetting the crime of using a firearm during a federal drug-trafficking offense—that required the use of a firearm as an element for conviction." *See id.* at 68-70. The State highlights that "[u]nder the applicable federal statute, 18 U.S.C. § 924(c), 'a defendant may be convicted of abetting a [statutory] violation only if his intent reaches beyond a simple drug sale, to an armed one.'" *Id.* at 76.

**{26}** *Rosemond*'s consideration of accomplice liability in the context of a federal armed drug-trafficking offense does not bind our analysis here, because New

Mexico's firearm enhancement statute is at issue and it applies beyond circumstances where the use of a firearm is an element of the base crime. Further, *Roque*'s analysis pertains to the firearm enhancement's statutory language broadly. In doing so, *Roque* does not limit the interpretation's application only to crimes where an accomplice's intent that a crime be carried out with the use of a firearm is at issue. 1977-NMCA-094, ¶¶ 9-12. Neither does the statute at issue here, NMSA 1978, § 31-18-16 (2020, amended 2022), limit the sentencing enhancement to situations where the defendant was the user of the firearm. Instead, it enables enhancement of a sentence where the "firearm was brandished in the commission of a noncapital felony." *Id.* Thus, under the 2020 version of the statute, a defendant may be liable for a principal brandishing a firearm during the commission of a crime.

{27} Despite Defendant's argument, the firearm enhancement here does not require that we consider at what point before or during the commission of the crime Defendant became aware of the firearm. We note, however, that Rivera possessed the firearm from the time he and Defendant left Rivera's truck and returned to the scene of the past conflict with Victim. Nor does the firearm enhancement require that we consider whether Defendant intended that Rivera brandish the firearm during the battery. If Rivera satisfied the requirements of brandishing at any point during the commission of the crime, Defendant's sentence may be enhanced pursuant to the 2020 version of Section 31-18-16, based upon accomplice liability.

## B. The Firearm Enhancement Instruction Did Not Amount to Fundamental Error

**{28}** Defendant did not object to the jury instruction or special verdict form. As such, we review his unpreserved instructional error claim for fundamental error. *See* Rule 12-321(B)(2)(c) NMRA; *State v. Valencia*, ___-NMSC-___, ¶¶ 57, 58, ___ P.3d ___ (S-1-SC-40141, July 14, 2025).[1] "The doctrine of fundamental error applies only under exceptional circumstances and only to prevent a miscarriage of justice." *State v. Barber*, 2004-NMSC-019, ¶ 8, 135 N.M. 621, 92 P.3d 633 (citation omitted). We begin by asking "whether a reasonable juror would have been confused or misdirected by the jury instruction." *Valencia*, ___-NMSC-___, ¶ 59; *State v. Lucero*, 2017-NMSC-008, ¶ 27, 389 P.3d 1039. Jury instructions cause confusion or misdirection when, "through omission or misstatement," they do not provide "an accurate rendition of the relevant law." *State v. Benally*, 2001-NMSC-033, ¶ 12, 131 N.M. 258, 34 P.3d 1134; *Valencia*, ___-NMSC-___, ¶ 59.

**{29}** "The first step in reviewing for fundamental error is to determine whether an error occurred. If that question is answered affirmatively, we then consider whether the error was fundamental." *State v. Cabezuela*, 2011-NMSC-041, ¶ 49, 150 N.M. 654, 265 P.3d 705 (internal quotation marks and citation omitted). Here, it is undisputed that the 2020 version of Section 31-18-16 was in effect at sentencing.

[1] *Valencia* was filed after the briefing in this case was complete.

The relevant portion of the 2020 version of Section 31-18-16(A) (2020) provided "[w]hen a separate finding of fact by the . . . jury shows that a firearm was brandished in the commission of a noncapital felony, the basic sentence of imprisonment . . . shall be increased by three years." The term "brandished" is defined as "displaying or making a firearm known to another person while the firearm is present on the person of the offending party with intent to intimidate or injure a person." Section 31-18-16(D) (2020). The record confirms that the jury was instructed in part that it must determine if the crime was committed with the "use" of a firearm and was provided with the related special verdict form stating in part that a firearm was "discharged" during the commission of the involuntary manslaughter. This was insufficient pursuant to the procedure mandated by Section 31-18-16(C) (2020). *See id.* (requiring a separate finding of fact by the jury that a firearm was brandished in the commission of a noncapital felony); *see also State v. Garrett*, ___-NMCA-___, ¶ 29, ___ P.3d ___ (A-1-CA-41455, June 11, 2025) (concluding that under the 2020 version of the firearm enhancement the court erred by failing to instruct the jury on brandishing a firearm and instead requiring the jury to find that a firearm was used). Consequently, the instruction and special verdict form for the firearm enhancement here failed to give an accurate rendition of the factual finding required by law. *See Valencia*, ___-NMSC-___, ¶ 60 (reasoning that because "a person can use a firearm without brandishing it" and because "'brandished' is narrower than 'used'" and the

jury was not given a statutory definition, "a reasonable juror would have been misdirected by the instruction").

**{30}** We next consider whether the jury instruction error was fundamental and thus requires reversal. There are two exceptions to such a determination in the context of instructional error. First, failure to instruct on an essential element is not fundamental error when the jury implicitly finds that the state has proven the omitted element. *Id.* ¶ 62. The record here does not support such a determination. We turn to the second exception—when "the omitted element is undisputed and indisputable such that any rational jury would have found the element to be true beyond a reasonable doubt if properly instructed." *Id.* (omission, internal quotation marks, and citation omitted). Here, there is no dispute that Rivera repeatedly struck Victim with a firearm and the firearm discharged, killing Victim during the battery. Therefore, the question is whether the jury would have found Rivera displayed or made the firearm known to Victim with intent to intimidate or injure Victim. *See* § 31-18-16(D) (2020) (defining "brandished").

**{31}** Here, if properly instructed, any rational jury would have found that Rivera brandished a firearm, and Rivera's brandishing of the firearm was not disputed by Defendant at trial. *See Valencia*, ___-NMSC-___, ¶ 62 ("This second exception is narrow and will support affirmance only when proof of the omitted element is so strong that no rational jury could have failed to find that element and, even if the

evidence is that strong, the missing element was not disputed or in issue at trial."). Photographic evidence and Rivera's testimony demonstrate that Rivera was swinging the firearm in the air as he struck Victim with it. As a result, any rational jury would have found that Rivera had the firearm on his person, made the firearm known to Victim, and intended to injure Victim in striking Victim with the firearm. *See id.* ¶ 63; *see also* § 31-18-16 (D) (2020) (defining "brandished"). Further, during opening statements, defense counsel told the jury that the evidence would show Rivera grabbed the gun from his truck intending to "pistol whip" Victim and that Rivera hit Victim so hard that it broke the trigger guard. During closing statements, defense counsel did not dispute that Rivera struck Victim with the firearm several times. Thus, proof of these requirements satisfying the brandishing enhancement is so strong that no rational jury could have failed to find them, and they were not put in issue during trial.

**{32}** Under these facts, we determine it to be beyond dispute that any rational juror would find Defendant liable as an accomplice for Rivera's brandishing of a firearm in the commission of the crime. *See State v. Padilla*, 1997-NMSC-022, ¶ 8, 123 N.M. 216, 937 P.2d 492. Accordingly, the second exception applies, and we affirm the sentencing enhancement.

## III. Defendant's Presentence Confinement Credit

**{33}** Defendant argues he was entitled to more presentence confinement credit than he was awarded and, as a result, the sentence is illegal. "A person held in official confinement on suspicion or charges of the commission of a felony shall, upon conviction of that or a lesser included offense, be given credit for the period spent in presentence confinement against any sentence finally imposed for that offense." NMSA 1978, § 31-20-12 (1967). We review de novo the determination of presentence confinement credit. *State v. French*, 2021-NMCA-052, ¶ 9, 495 P.3d 1198.

**{34}** At the sentencing hearing, the district court informed Defendant his presentence confinement time on house arrest would be credited toward his sentence, and the State conceded that about eighteen months had already passed with Defendant on house arrest. Subsequently, the judgment and sentence awarded Defendant 463 days of presentence confinement credit. On appeal, Defendant argues he is due an additional 161 days of credit for house arrest and two days of pretrial incarceration credit for a total of 163 days of additional presentence credit.

**{35}** Our review of the record reveals that Defendant was arrested on December 14, 2021, and released on an unsecured appearance bond under house arrest with GPS monitoring on December 16, 2021. The district court continued Defendant's house arrest upon arraignment. A jury convicted Defendant and a sentence was

imposed on September 1, 2023. Six hundred twenty-six days elapsed from Defendant's December 14, 2021 arrest, to his September 1, 2023 sentencing.

**{36}** The State asserts that it does not appear that Defendant's conditions of release changed prior to trial and that the period of time between Defendant's arrest and sentencing is longer than the 463 days of credit Defendant received. The State does not argue that Defendant is not entitled to credit for the period of time Defendant spent under house arrest. Rather, the State argues that a district court's failure to accurately credit a defendant's presentence confinement credit does not make a sentence illegal. Because Defendant is entitled to credit for any time served in custody or under house arrest prior to imposition of a sentence, *see French*, 2021-NMCA-052, ¶ 9 (noting that Section 31-20-12 "requires the district court to grant presentence confinement credit against a final sentence" (internal quotation marks and citation omitted), we remand to the district court to determine the amount of presentence confinement credit Defendant is due and to amend the judgment accordingly.

## CONCLUSION

**{37}** We affirm the involuntary manslaughter conviction and firearm enhancement, but remand to the district court to determine and award the appropriate amount of presentence confinement credit.

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

Jacqueline R. Medina

**JACQUELINE R. MEDINA, Chief Judge**

**WE CONCUR:**

J. Miles Hanisee

**J. MILES HANISEE, Judge**

Megan P Duffy

**MEGAN P. DUFFY, Judge**