

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

Court of Appeals of New Mexico

2 **STATE OF NEW MEXICO,**

Filed 3/31/2026 8:11 AM

3 Plaintiff-Appellee,



Mark Reynolds

4 v.

No. A-1-CA-41345

5 **ARLIE GILLEAN,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY**

8 **Karen L. Townsend, District Court Judge**

9 Raúl Torrez, Attorney General

10 Santa Fe, NM

11 Serena R. Wheaton, Assistant Solicitor General

12 Albuquerque, NM

13 for Appellee

14 Bennett J. Baur, Chief Public Defender

15 Mallory E. Harwood, Assistant Appellate Defender

16 Santa Fe, NM

17 for Appellant

18 **MEMORANDUM OPINION**

19 **MEDINA, Chief Judge.**

20 {1} An October 2021 criminal information charged Arlie Gillean (Defendant)

21 with having committed several criminal offenses in September 2021. In 2023, a jury

22 convicted Defendant of (1) aggravated battery (deadly weapon), a third degree

23 felony, contrary to NMSA 1978, Section 30-3-5(C) (1969); (2) failure to give

1 information/render aid (accident with no great bodily harm or death), a
2 misdemeanor, contrary to NMSA 1978, Section 66-7-203 (1978); (3) leaving the
3 scene of an accident (no great bodily harm or death), a misdemeanor, contrary to
4 NMSA 1978, Section 66-7-201(D) (1989); (4) resisting, evading or obstructing an
5 officer, a misdemeanor, contrary to NMSA 1978, Section 30-22-1(D) (1981); (5)
6 aggravated driving while under the influence of intoxicating liquor or drugs (refused
7 testing) (aggravated DWI), a misdemeanor, contrary to NMSA 1978, Section 66-8-
8 102(D)(3) (2016); (6) careless driving, a motor vehicle code misdemeanor, contrary
9 to NMSA 1978, Section 66-8-114 (1969); and (7) criminal damage to property (over
10 \$1,000), a fourth degree felony, contrary to NMSA 1978, Section 30-15-1 (1963).

11 {2} On appeal, Defendant argues three instructional errors rise to fundamental
12 error and, further, when taken cumulatively amount to fundamental error. Defendant
13 also alleges two double jeopardy violations, plain error as to an evidentiary issue,
14 and insufficient evidence as to three convictions. Defendant prevails on his double
15 jeopardy arguments, and we affirm on all other grounds.¹

¹This is a memorandum opinion limited to addressing only the dispute between the parties. Accordingly, we reserve discussion of any relevant facts to the analysis.

1 **DISCUSSION**

2 **I. Jury Instructions**

3 {3} Defendant contends that the jury instructions given for his aggravated DWI,
4 leaving the scene of the accident, and failure to give information/render aid
5 convictions omitted essential elements and that reversal and remand for a new trial
6 is required.

7 **A. Standard of Review**

8 {4} The standard of review we apply to jury instructions depends on preservation.
9 “If the error has been preserved[,] we review the instructions for reversible error. If
10 not, we review for fundamental error.” *State v. Benally*, 2001-NMSC-033, ¶ 12, 131
11 N.M. 258, 34 P.3d 1134 (citation omitted). Defendant did not object to the jury
12 instructions so we review each of his claims for fundamental error. “Fundamental
13 error exists if it would shock the court’s conscience to affirm the conviction, either
14 because of the obvious innocence of the defendant, or because a mistake in the
15 process makes a conviction fundamentally unfair notwithstanding the apparent guilt
16 of the accused.” *State v. Sivils*, 2023-NMCA-080, ¶ 9, 538 P.3d 126, (alteration,
17 internal quotation marks, and citation omitted).

18 {5} As to jury instructions, there are two steps to our fundamental error analysis.
19 *Id.* ¶ 10. “First, we determine whether error occurred.” *Id.* To do so, we “determine
20 whether a reasonable juror would have been confused or misdirected by the jury

1 instruction.” *Id.* (internal quotation marks and citations omitted). “[J]uror confusion
2 or misdirection may stem not only from instructions that are facially contradictory
3 or ambiguous, but from instructions which, through omission or misstatement, fail
4 to provide the juror with an accurate rendition of the relevant law.” *Id.* (quoting
5 *Benally*, 2001-NMSC-033, ¶ 12).

6 {6} “If we conclude that the jury instruction was erroneous, we move to step two,
7 asking whether that error was fundamental.” *Sivils*, 2023-NMCA-080, ¶ 11. “[W]e
8 review the entire record, placing the jury instructions in the context of the individual
9 facts and circumstances of the case, to determine whether the defendant’s conviction
10 was the result of a plain miscarriage of justice.” *Id.* (alteration, internal quotation
11 marks, and citation omitted). “The failure to instruct the jury on an essential element,
12 as opposed to a definition, ordinarily is fundamental error.” *Id.* (emphasis, internal
13 quotation marks, and citation omitted); *see State v. Osborne*, 1991-NMSC-032, ¶ 38,
14 111 N.M. 654, 808 P.2d 624. “However, not every failure to instruct on an essential
15 element amounts to fundamental error.” *Sivils*, 2023-NMCA-080, ¶ 11; *see State v.*
16 *Orosco*, 1992-NMSC-006, ¶ 17, 113 N.M. 780, 833 P.2d 1146 (stating that “[it]
17 cannot be said that every failure to instruct on an essential element necessarily
18 renders a trial fundamentally unfair.”). There are two exceptions to the general rule
19 where “the omission of an essential element does not amount to fundamental error.”

1 *Sivils*, 2023-NMCA-080, ¶ 11; *see State v. Ocon*, 2021-NMCA-032, ¶¶ 9-12, 493
2 P.3d 448.

3 {7} “The first exception applies when the jury implicitly finds that the state has
4 proven the omitted element.” *Sivils*, 2023-NMCA-080, ¶ 19; *see Ocon*, 2021-
5 NMCA-032, ¶ 10. “This occurs when the jury makes a specific finding that—in the
6 context of the facts and circumstances of the case—necessarily includes a finding of
7 the omitted element.” *Sivils*, 2023-NMCA-080, ¶ 19; *see generally Ocon*, 2021-
8 NMCA-032. “The second exception only applies when ‘the jury’s verdict,
9 considered together with the given instructions and the parties’ legal and factual
10 presentations, leaves no doubt that the jury would have found the omitted element if
11 properly instructed.’” *Sivils*, 2023-NMCA-080, ¶ 21 (emphasis omitted) (quoting
12 *Ocon*, 2021-NMCA-032, ¶ 11). The “second exception is narrow and will support
13 affirmance only when ‘proof of the omitted element is so strong that no rational jury
14 could have failed to find that element’ and, even if the evidence is that strong, the
15 missing element was not ‘disputed’ or ‘in issue’ at trial.” *Sivils*, 2023-NMCA-080,
16 ¶ 21 (quoting *Ocon*, 2021-NMCA-032, ¶ 12).

17 **B. Aggravated DWI**

18 {8} Defendant contends that the aggravated DWI jury instruction was erroneous
19 by using “or” instead of “and” between the elements. Depending on the reading of
20 the jury instruction in light of this error, Defendant argues “one alternative as

1 instructed was a lesser offense, and the other was not a crime,” and this error was
2 fundamental.

3 **1. The Aggravated DWI Instruction Was Error**

4 {9} Section 66-8-102(B) and (D)(3) defines aggravated DWI in relevant part as
5 follows:

6 B. It is unlawful for a person who is under the influence of
7 any drug to a degree that renders the person incapable of safely driving
8 a vehicle to drive a vehicle within this state.

9
10

11 D. Aggravated driving under the influence of intoxicating
12 liquor or drugs consists of:

13
14

15 (3) refusing to submit to chemical testing, as provided
16 for in the Implied Consent Act[, NMSA 1978, §§ 66-8-105 to -112
17 (1978, as amended through 2025)], and in the judgment of the court,
18 based upon evidence of intoxication presented to the court, the driver
19 was under the influence of intoxicating liquor or drugs.

20 {10} These statutory subsections provide the basis for the applicable uniform jury
21 instruction (UJI), UJI 14-4508 NMRA:

- 22 1. The defendant operated a motor vehicle;
- 23 2. At that time the defendant was under the influence of
- 24 [intoxicating liquor; that is, as a result of drinking liquor the defendant
25 was less able to the slightest degree, either mentally or physically, or
26 both, to exercise the clear judgment and steady hand necessary to
27 handle a vehicle with safety to the person and the public;]

1 [or]

2 [drugs to such a degree that the defendant was incapable of safely
3 driving a vehicle;]

4 3. The defendant refused to submit to chemical testing.

5 {11} Use note 4 of UJI 14-4508 instructs the state to use the applicable alternative
6 as to whether a defendant is driving under the influence of intoxicating liquor *or*
7 drugs. Here, as demonstrated by the instruction provided to the jury, the State’s
8 theory at trial was that Defendant was under the influence of intoxicating liquor, not
9 the alternative option of under the influence of drugs. To properly follow the use
10 note, one of the alternatives as well as the bracketed “or” should have been omitted.
11 Instead, to convict Defendant of aggravated DWI in this case, the State was allowed
12 to prove beyond a reasonable doubt “each of the following elements of the crime”:

13 1. [D]efendant operated a motor vehicle;

14 2. At that time [D]efendant was under the influence of intoxicating
15 liquor, that is, as a result of drinking liquor [D]efendant was less
16 able to the slightest degree, either mentally or physically, or both,
17 to exercise the clear judgment and steady hand necessary to
18 handle a vehicle with safety to the person and the public; *or*

19 3. [D]efendant refused to submit to chemical testing.

20 (Emphasis added.)

21 {12} By using the word “or” between elements two and three of the aggravated
22 DWI instruction, the jury is led to understand that—to convict Defendant of
23 aggravated DWI—they need only find either the influence of intoxicating liquor

1 element *or* the refusal to submit to chemical testing element to convict. *See generally*
2 *State v. Taylor*, 2024-NMSC-011, ¶ 16, 548 P.3d 82 (discussing juror confusion
3 resulting from the use of “and/or”). This misstates the law, which requires the State
4 prove both of these elements. *See Sivils*, 2023-NMCA-080, ¶ 10 (“[J]uror confusion
5 or misdirection may stem not only from instructions that are facially contradictory
6 or ambiguous, but from instructions which, through omission or misstatement, fail
7 to provide the juror with an accurate rendition of the relevant law.” (internal
8 quotation marks and citation omitted)); § 66-8-102.

9 {13} Our concern for juror confusion or misdirection here persists despite the
10 instruction beginning with “the [S]tate must prove to your satisfaction beyond a
11 reasonable doubt *each* of the following elements” as the State emphasizes on appeal.
12 At the very least, the combination of the phrase “each of the following elements”
13 and “or” placed between two of the elements creates ambiguity for the jury. Even if
14 this were a mere clerical error as the State contends, it is an error of considerable
15 import. It creates confusion as to what elements are required to convict Defendant
16 of aggravated DWI. Accordingly, we consider this instruction erroneous and move
17 on to analyze whether this error was fundamental.

1 **2. The Aggravated DWI Instructional Error Was Not Fundamental**

2 {14} Ordinarily, a failure to instruct the jury on an essential element rises to the
3 level of fundamental error. *Sivils*, 2023-NMCA-080, ¶ 11. However, as mentioned
4 above, there are two exceptions to this general rule.

5 {15} Here, the first exception does not apply. There is no implicit finding in the
6 jury verdicts as to Defendant operating a motor vehicle while under the influence of
7 intoxicating liquor or Defendant refusing to submit to chemical testing—the two
8 elements put in issue by the instructional error. *See id.* ¶ 19 (“The first exception
9 applies when the jury implicitly finds that the state has proven the omitted
10 element.”).

11 {16} Next, we look to the second exception: whether the evidence presented
12 “leaves no doubt that the jury would have found the omitted element if properly
13 instructed.” *Id.* ¶ 21 (emphasis, internal quotation marks, and citation omitted). This
14 exception requires that (1) “proof of the omitted element is so strong that no rational
15 jury could have failed to find that element;” and (2) “the missing element was not
16 *disputed* or *in issue* at trial.” *Id.* (internal quotation marks and citation omitted). If
17 these two components are satisfied, the second exception applies and the error is not
18 fundamental. *Ocon*, 2021-NMCA-032, ¶ 12.

19 {17} Here, as to the evidence of intoxication, Defendant conceded that he was the
20 driver of the truck observed by police that evening. He also conceded that he had

1 been drinking before he drove the truck. Police officers testified to observing
2 potentially impaired driving: swerving, running into medians, driving on the wrong
3 side of the road, and running stop signs. Police also detected the odor of alcohol on
4 Defendant's breath.

5 {18} As to the refusal to take a chemical test, the jury was provided with the
6 following instruction:

7 [D]efendant refused to submit to chemical testing if:

- 8 1. [D]efendant was arrested on reasonable grounds to believe that
9 [D]efendant was driving while under the influence of
10 intoxicating liquor or drugs;
- 11 2. [D]efendant was advised by a law enforcement officer that
12 failure to submit to the test could result in the revocation of
13 [D]efendant's privilege to drive;
- 14 3. A law enforcement officer requested [D]efendant to submit to a
15 chemical breath test;
- 16 4. [D]efendant was conscious and otherwise capable of submitting
17 to a chemical breath test; and
- 18 5. [D]efendant willfully refused to submit to a breath test.

19 Relating to these elements, a police officer testified to, and the State showed video
20 of an officer reading Defendant the implied consent advisory—pursuant to the New
21 Mexico Implied Consent Act, NMSA 1978, § 66-8-107 (1993)—Defendant asking
22 questions about the advisory, and Defendant refusing to submit to the chemical test.
23 Proof of the influence of intoxicating liquor element and the refusal to submit to

1 chemical testing element is so strong that no rational jury could have failed to find
2 them.

3 {19} Still, we consider whether these omitted elements were in dispute or at issue
4 at trial. *See Sivils*, 2023-NMCA-080, ¶ 21 (reasoning that even if the evidence is
5 strong, this Court considers whether the “missing element was not *disputed* or *in*
6 *issue* at trial” (internal quotation marks and citation omitted)). Defendant does not
7 contest that evidence supports both the influence of intoxicating liquor element and
8 the refusal to submit to chemical testing element. During closing, counsel for
9 Defendant said, “Frequently, I’ll stand up here, talk to the jury at the end and ask
10 them to come back not guilty on all counts. I can’t do that here. [Defendant] was
11 drinking and driving.” In his brief in chief, Defendant concedes that “[i]t is likely
12 the jury would have found [he] was impaired if they had been properly
13 instructed . . . because he admitted he had been drinking and there was clear
14 evidence of impaired driving.” Defendant continues, “if the jury found that [he]
15 drove and was impaired, without a finding that he refused [a breath test], it was self-
16 evidently legally insufficient to prove aggravated DWI.” While this is an accurate
17 statement of the law, the evidence presented related to Defendant’s refusal is clear
18 in the record and was not raised as an issue at trial. It is apparent that the person on
19 video refusing the chemical test is Defendant.

1 {20} The evidence presented showing Defendant under the influence of
2 intoxicating liquor and refusing to submit to the chemical test after being read the
3 advisory was uncontested, and there is no doubt the jury would have made these
4 findings if properly instructed here. *See Sivils*, 2023-NMCA-080, ¶ 21. Accordingly,
5 this instructional error was not fundamental.

6 **C. Temporal Element of the Leaving the Scene of an Accident Instruction**

7 {21} Defendant next contends that the jury instruction given for leaving the scene
8 of an accident amounted to fundamental error because it omitted the
9 conditional/temporal aspect of Defendant’s duty to remain on the scene only until
10 he had provided information and assistance.

11 **1. The Omission of the Temporal Element of the Leaving the Scene of an**
12 **Accident Instruction Was Error**

13 {22} Section 66-7-201(A), the hit-and-run statute applicable to leaving the scene of
14 an accident involving death or personal injuries, provides:

15 The driver of any vehicle involved in an accident resulting in injury to
16 or death of any person shall immediately stop the vehicle at the scene
17 of the accident or as close thereto as possible, but shall then
18 immediately return to and in every event shall remain at the scene of
19 the accident until [they have] fulfilled the requirements of Section 66-
20 7-203.

21 Section 66-7-203, in turn, provides:

22 The driver of any vehicle involved in an accident resulting in injury to
23 or death of any person or damage to any vehicle which is driven or
24 attended by any person shall give his name, address and the registration
25 number of the vehicle he is driving and shall upon request exhibit his

1 driver's license to the person struck or the driver or occupant of or
2 person attending any vehicle collided with and shall render to any
3 person injured in such accident reasonable assistance, including the
4 carrying, or the making of arrangements for the carrying, of such person
5 to a physician, surgeon or hospital for medical or surgical treatment if
6 it is apparent that such treatment is necessary or if such carrying is
7 requested by the injured person.

8 {23} Depending on whether the accident resulted in “great bodily harm or death”
9 and whether the driver “knowingly fail[ed] to stop or to comply with the
10 requirements of Section 66-7-203,” the driver may be found guilty of a
11 misdemeanor, a fourth degree felony, or a third degree felony. *See* § 66-7-201(B)-
12 (D). Here, Defendant was convicted of a misdemeanor under Subsection (D) of
13 Section 66-7-201 for “failing to stop or comply with the requirements of Section 66-
14 7-203 . . . where the accident does not result in great bodily harm or death.” *See* §
15 66-7-201(D).

16 {24} At the time of this offense and conviction, there was no UJI for the crime of
17 leaving the scene of an accident.² *See State v. Hertzog*, 2020-NMCA-031, ¶ 9, 464

²We observe that, beginning in 2024 subsequent to these proceedings, a UJI for the leaving the scene of an accident charge was adopted. The State supports its position as to the omission of the temporal aspect not being error by highlighting that the UJI adopted in 2024 for this conviction does not require the “failed to remain at the scene until defendant had [given his information]” element. UJI 14-4513 NMRA. The State articulates that this indicates “[our Supreme] Court only partially agreed with [*Montelongo*] *Esparza*’s holding: under UJI 14-4513, the temporal requirement is *optional*, not mandatory” because the UJI identifies the temporal element as one of a number of alternatives by which to charge. 2020-NMCA-050, 475 P.3d 815. However, we rely on *Montelongo Esparza* as binding on the district

1 P.3d 1090 (“[T]here are no [UJIs] for the crimes that Section 66-7-201 defines.”).
2 Accordingly, the district court “was required to give an instruction that substantially
3 follows the language of the statute in order to be deemed sufficient.” *State v. Luna*,
4 2018-NMCA-025, ¶ 21, 458 P.3d 457 (alteration, internal quotation marks, and
5 citation omitted). The district court instructed the jury, in part, that to find Defendant
6 guilty, the State must prove beyond a reasonable doubt that (1) “[D]efendant
7 operated a motor vehicle”; (2) “[w]hile operating the motor vehicle [D]efendant was
8 in an accident resulting in injury to [Victim]”; and (3) “[a]fter the accident
9 [D]efendant left the scene and never returned.”

10 {25} Defendant argues and we agree that the omission of the temporal aspect of the
11 statutory language was in error. *See State v. Montelongo Esparza*, 2020-NMCA-050,
12 ¶ 14, 475 P.3d 815 (holding “that a driver’s failure to satisfy the requirements of
13 Section 66-7-203 prior to leaving the scene is an essential element for a conviction
14 of the crime of leaving the scene of an accident involving death or personal
15 injuries.”). We agree that because the statute’s plain language requires someone
16 involved in an accident to provide information before leaving the scene—pursuant
17 to Section 66-7-203, the instructions to the jury here, which did not include such an

court’s proceedings here, as opposed to a subsequently adopted UJI. *Cf. State v. Lucero*, 2007-NMSC-041, ¶ 14, 142 N.M. 102, 163 P.3d 489 (“We have held that the law, at the time of the commission of the offense, is controlling.” (internal quotation marks and citation omitted)).

1 element, were in error. *See Montelongo Esparza*, 2020-NMCA-050, ¶ 10 (agreeing
2 that “[t]his temporal limitation on a driver’s criminal liability for leaving the scene
3 of an accident . . . constituted an essential element that the jury was required to find
4 beyond a reasonable doubt to convict him”). Having determined there was an
5 instructional error, we next consider whether this error was fundamental.

6 **2. The Omission of the Temporal Element of the Leaving the Scene of an**
7 **Accident Instructional Error Was Not Fundamental**

8 {26} As discussed above, there are two exceptions “under which the omission of
9 an essential element does not amount to fundamental error.” *Ocon*, 2021-NMCA-
10 032, ¶ 9. The first exception applies when the jury implicitly finds that the state has
11 proven the omitted element. *Id.* Defendant concedes that in light of the jury finding
12 on failure to give information/render aid, that “the jury implicitly [found] that the
13 state has proven the omitted element.” *See Sivils*, 2023-NMCA-080, ¶ 19. While we
14 are not bound to accept Defendant’s concession on appeal, we accept the concession
15 here. *See State v. Anthony L.*, 2019-NMCA-003, ¶ 17, 433 P.3d 347 (acknowledging
16 that this Court is not bound by a party’s concession).

17 {27} The jury found Defendant guilty of failure to give information/render aid. *See*
18 *Montelongo Esparza*, 2020-NMCA-050, ¶¶ 21-23 (reasoning that it was
19 “noteworthy [in determining fundamental error occurred] that the jury failed to
20 convict Defendant of his standalone violation of Section 66-7-203 for failure to give
21 information and render aid”). Accordingly, “the jury [made] a specific finding that—

1 in the context of the facts and circumstances of the case—necessarily includes a
2 finding of the omitted element.” *Sivils*, 2023-NMCA-080, ¶ 19; *see generally Ocon*,
3 2021-NMCA-032. Thus, while the instruction omitted an element, this omission
4 does not “shock the court’s conscience to affirm th[is] conviction” on this ground.
5 *See Sivils*, 2023-NMCA-080, ¶¶ 9-10 (alteration, internal quotation marks, and
6 citation omitted). The jury indeed found that Defendant left the scene of the
7 accident—and never returned—having not provided his information to Victim.
8 Accordingly, this instructional error was not fundamental.

9 **D. Leaving the Scene of an Accident and the Failure to Give Information**
10 **and Render Aid**

11 {28} Defendant contends that the district court committed fundamental error when
12 it omitted a knowledge element from the leaving the scene of the accident instruction
13 and the failure to give information/render aid instruction. The State responds that the
14 instruction was not erroneous, because “at the time of Defendant’s trial there was no
15 stock jury instruction for leaving the scene of an accident” and “[t]he statute does
16 not contain a knowledge element.”

17 **1. The Omission of a Knowledge Element From the Leaving the Scene of**
18 **the Accident and Failure to Give Information and Render Aid**
19 **Instructions Was Not Error**

20 {29} First, we consider whether the challenged instructions amounted to error.
21 Defendant’s challenge relates to the lack of a “knowledge” element for both
22 convictions. The core consideration here is whether juror confusion could have

1 resulted because of instructions “which, through omission or misstatement, fail to
2 provide the juror with an accurate rendition of the relevant law.” *See id.* ¶ 10 (internal
3 quotation marks and citation omitted). As with the crime of leaving the scene of the
4 accident, there was no UJI for the crime of failure to give information/render aid at
5 the time of Defendant’s trial. *See Hertzog*, 2020-NMCA-031, ¶ 9 (“[T]here are no
6 uniform jury instructions for the crimes that Section 66-7-201 defines.”). Thus, we
7 must determine if the instruction given to the jury “substantially follow[ed] the
8 language of the statute.” *Luna*, 2018-NMCA-025, ¶ 21 (alteration, internal quotation
9 marks, and citation omitted).

10 {30} The statutory language of Section 66-7-203 has previously been set forth
11 above and will not be reiterated here.

12 {31} The elements provided to the jury here on this charge were: (1) “[D]efendant
13 operated a motor vehicle”; (2) “[w]hile operating the motor vehicle [D]efendant was
14 in an accident resulting in injury to [Victim]”; and (3) “[a]fter the accident
15 [D]efendant left the scene and never returned.”

16 {32} The crime of leaving the scene of an accident is set forth in Section 66-7-201.
17 Section 66-7-201 requires satisfaction of the elements of Section 66-7-203—the
18 failure to give information/render aid. In this case, Defendant was convicted under
19 Subsection (D) of Section 66-7-201, the misdemeanor offense. The portions of
20 Section 66-7-201 relevant to Defendant’s conviction state:

1 A. The driver of any vehicle involved in an accident resulting
2 in injury to or death of any person shall immediately stop the vehicle at
3 the scene of the accident or as close thereto as possible, but shall then
4 immediately return to and in every event shall remain at the scene of
5 the accident until [they have] fulfilled the requirements of Section 66-
6 7-203 Every such stop shall be made without obstructing traffic
7 more than is necessary.

8

9 D. Any person failing to stop or comply with the
10 requirements of Section 66-7-203 . . . where the accident does not result
11 in great bodily harm or death is guilty of a misdemeanor and shall be
12 sentenced pursuant to the provisions of Subsection A of [NMSA 1978,
13 Section 31-19-1 (1984)].

14 {33} The question of whether a defendant was required to have knowledge that they
15 were in an accident to be convicted under these statutes—at least under leaving the
16 scene of an accident, Section 66-7-201—at the time of Defendant’s trial had not been
17 resolved.³ See *Hertzog*, 2020-NMCA-031, ¶¶ 9-18 (determining that whether
18 knowledge of the accident itself is a statutory requirement was not pertinent to the
19 analysis as both the state and the defendant had agreed to some form of a knowledge
20 instruction and the issue related to whether “accident” should have a broader
21 definition than “collision.”); *State v. Kuchan*, 1943-NMSC-025, ¶¶ 4-7, 47 N.M.

³Defendant directs this Court to UJI 14-4513, the current UJI for leaving the scene of an accident adopted after these proceedings, as well as UJI 14-4516 NMRA, the current UJI for failure to give information/render aid adopted after these proceedings. These subsequently adopted UJIs include more elements than what were provided to the jury at trial. Pertinent to this issue, the UJIs for both of these convictions now include a knowledge element. However, at the time of this trial in 2023, there were no UJIs available for these charges.

1 209, 139 P.2d 592 (declining to decide if, under a prior version of the statute,
2 knowledge of the accident or knowledge that a person was struck or injured are
3 elements of the crime). However, we find *State v. Guzman*, 2004-NMCA-097, 136
4 N.M. 253, 96 P.3d 1173, instructive.

5 {34} In *Guzman*, this Court determined that sufficient evidence supported a
6 conviction under Section 66-7-201—an accident involving great bodily harm. 2004-
7 NMCA-097, ¶ 24. The Court reasoned that

8 [i]n order to convict [the d]efendant of accidents involving death or
9 personal injuries [under Section 66-7-201], the [s]tate was required to
10 prove that [the d]efendant (1) operated a motor vehicle; (2) was
11 involved in an accident which caused great bodily harm or death of the
12 victim; (3) failed to stop and/or failed to remain at the scene of the
13 accident; and (4) failed to render reasonable aid to the victim.”

14 *Id.* ¶ 20.

15 {35} Here, the jury instructions required the State to prove, among other things,
16 “[a]fter the accident [D]efendant left the scene and never returned” as to the leaving
17 the scene of an accident charge. Further, as to the failure to give information/render
18 aid charge, the instructions required the State to prove “after the accident,
19 [D]efendant failed to give his name, address and the registration number of the
20 vehicle he [was] driving to [Victim]” and “Defendant failed to render aid to
21 [Victim].” Neither the plain language of Section 66-7-201(D) nor Section 66-7-203
22 includes “knowledge” as an element such that the district court was required to
23 include it here. *See State v. Trujillo*, 2009-NMSC-012, ¶ 11, 146 N.M. 14, 206 P.3d

1 125 (“[W]hen a statute contains clear and unambiguous language, we will heed that
2 language and refrain from further statutory interpretation,” and “[w]e will not read
3 into a statute any words that are not there, particularly when the statute is complete
4 and makes sense as written.”). Accordingly, the instructions here follow the
5 language of Section 66-7-201 and Section 66-7-203 and squarely track the
6 instructions provided in *Guzman*. We conclude that these instructions did not “fail
7 to provide the juror with an accurate rendition of the relevant law.” *Sivils*, 2023-
8 NMCA-080, ¶ 10 (internal quotation marks and citation omitted); *see State v.*
9 *Cumpton*, 2000-NMCA-033, ¶¶ 13-14, 129 N.M. 47, 1 P.3d 429 (rejecting the
10 defendant’s argument that “there is no way to distinguish between the elements of
11 . . . Section 66-7-201(B) and (C)” by reasoning that the statute “provides notice to a
12 person of ordinary intelligence” that “Subsection (C) requires the additional element
13 of knowing behavior not mentioned in the preceding [Subsection (B)]”).

14 {36} Thus, the omission of the knowledge element was not error and our analysis
15 on this issue ends here.

16 **E. Cumulative Error**

17 {37} Finally, citing no authority, Defendant argues that cumulatively, the above
18 instructional errors along with other “minor errors” not analyzed in the brief in chief

1 require reversal and a new trial.⁴ Defendant contends these errors “underscore[] the
2 likelihood of juror confusion.”

3 {38} This trial was not perfect. It is a cautionary tale to the State to ensure
4 thoughtfulness of tact in crafting jury instructions. Still, overwhelming evidence was
5 presented to the jury on these convictions including Defendant’s testimony.
6 Specifically, evidence was presented showing that Defendant drank alcohol, got into
7 his truck, drove into Victim’s garage and into Victim. There was also evidence that
8 Defendant realized that he had been in an accident, but proceeded to drive away
9 without providing aid or information to Victim. Defendant effectively conceded that
10 all of the legally necessary elements were satisfied in closing and on appeal.
11 Accordingly, we do not consider the two errors made to indicate a miscarriage of
12 justice.

13 {39} As detailed above, there were instructional errors. However, none of them—
14 alone or together—shock this Court’s conscious such that reversal on these grounds
15 as to the aggravated DWI, failure to give information/render aid, and leaving the
16 scene of an accident convictions is required. *See Sivils*, 2023-NMCA-080, ¶ 9.

⁴Defendant presents no analysis as to how these alleged “minor errors” are in fact errors, nor does Defendant articulate how these alleged errors may have amounted to fundamental error, so we do not address them. *See Deaton v. Gutierrez*, 2004-NMCA-043, ¶ 31, 135 N.M. 423, 89 P.3d 672 (noting that an “assertion of prejudice is not a showing of prejudice” (internal quotation marks and citation omitted)). Where no prejudice has been shown, this Court will not find reversible error. *See id.* (stating that in the absence of prejudice, there is no reversible error).

1 **II. Double Jeopardy**

2 {40} We now turn to Defendant’s double jeopardy arguments. This case presents
3 double description issues because it involves multiple punishments for convictions
4 under different statutes. *See State v. Begaye*, 2023-NMSC-015, ¶ 12, 533 P.3d 1057.
5 We review such issues de novo. *Id.* ¶ 11. As a double description case, this Court
6 applies the two-part test set forth in *Swafford v. State*, 1991-NMSC-043, ¶ 25, 112
7 N.M. 3, 810 P.2d 1223. We first ask “whether the conduct underlying the offenses
8 is unitary, i.e., whether the same conduct violates both statutes.” *Id.* “If it is unitary,
9 we [then] consider whether it was the Legislature’s intent to punish the two crimes
10 separately.” *State v. Swick*, 2012-NMSC-018, ¶ 11, 279 P.3d 747. “Only if the first
11 part of the test is answered in the affirmative, and the second in the negative, will
12 the double jeopardy clause prohibit multiple punishment[s] in the same trial.”
13 *Swafford*, 1991-NMSC-043, ¶ 25.

14 **A. Failure to Give Information and Render Aid and Leaving the Scene of an**
15 **Accident Convictions**

16 {41} Defendant contends that the conduct underlying the leaving the scene of an
17 accident conviction and the failure to give information/render aid conviction is
18 unitary as both rely on Defendant driving into Victim, his garage, and his vehicles,
19 and causing damage and injury. The thrust of Defendant’s argument is that both
20 convictions relied on the same conduct, the Legislature did not intend multiple
21 punishments for this act, and both convictions are of the same severity. Thus,

1 Defendant argues, the case should be remanded for the district court to determine
2 which conviction to vacate. *See State v. Comitz*, 2019-NMSC-011, ¶¶ 31, 53, 443
3 P.3d 1130 (deciding that where a double jeopardy violation is found with two
4 charges of equal severity, the case is remanded to allow the trial court to choose
5 which to vacate).

6 {42} The State responds that the conduct was not unitary, because Defendant’s
7 failure to give information/render aid occurred before Defendant left the scene of the
8 accident indicating the failure to give information/render aid crime was complete
9 before the leaving the scene of the accident crime. Further, the State contends
10 without authority that each statute at issue here “works to protect a different aspect
11 of the greater policy.” One “ensures that bad driver[]s stay at the scene until they
12 have provided their information and rendered aid” and the other “ensures that just
13 because a bad driver stays at the scene, they do not stand there doing nothing while
14 a victim is left unaided.”

15 **1. The Conduct Relied Upon for the Failure to Give Information/Render**
16 **Aid and Leaving the Scene of an Accident Convictions Was Unitary**

17 {43} Generally, in a unitary conduct analysis, the first step is to determine whether
18 there is “sufficient indicia of distinctness” between the acts at issue. *Swafford*, 1991-
19 NMSC-043, ¶ 26.

20 {44} We look to what the State was required to prove and what evidence was
21 offered. The elements for both failure to give information/render aid and leaving the

1 scene of an accident were outlined above. The State presented evidence that
2 Defendant hit Victim with his truck and then left Victim’s residence to satisfy the
3 requirements of both of these charges. The State relied on the fact that Defendant’s
4 failure to provide his information or render aid to Victim is implicit in the other facts
5 used to prove the leaving the scene of the accident charge. All of the facts required
6 to prove the leaving the scene of the accident charge were also required to prove the
7 failure to give information/render aid charge.

8 {45} Accordingly, indicia of distinctness are not apparent based on the evidence or
9 the jury instructions relating to these convictions. As ““it reasonably can be said that
10 the conduct is unitary,”” we conclude it was here. *See State v. Porter*, 2020-NMSC-
11 020, ¶ 12, 476 P.3d 1201 (quoting *Swafford*, 1991-NMSC-043, ¶ 28).

12 **2. The Legislature Did Not Intend to Create Separately Punishable Offenses**
13 **for Failure to Give Information and Render Aid and Leaving the Scene**
14 **of an Accident**

15 {46} Having determined that the conduct relied on to convict Defendant of the two
16 offenses was unitary, we proceed to the second *Swafford* prong: “whether the
17 Legislature intended to create separately punishable offenses.” *State v. Reed*, 2022-
18 NMCA-025, ¶ 8, 510 P.3d 1261 (text only) (citation omitted). Because the failure to
19 give information/render aid and leaving the scene of an accident statutes do not
20 expressly permit multiple convictions, *see* §§ 66-7-201, -203, and can be violated in
21 multiple ways, we consider whether the Legislature intended multiple punishments

1 under the circumstances in this case, including a consideration of the State’s theory
2 for each offense. *See Begaye*, 2023-NMSC-015, ¶¶ 21, 23-24. “If the state’s legal
3 theory cannot be ascertained using the charging documents and jury instructions,”
4 as is the case here, among other things, we look to “closing arguments to establish
5 whether the same evidence supported a defendant’s convictions under both statutes.”
6 *Id.* ¶ 24.

7 {47} As to what the State characterized as the “two leaving the scene crimes”
8 during closing argument, the State highlighted, “Defendant again took the stand and
9 admitted that he did leave the scene.” Further, the State emphasized:

10 Cops testified they found him almost a minute later or a few minutes
11 later. . . . [Victim] testified that nobody was there to help him, nobody
12 rendered aid. The first person there was the cop. So, I think the two
13 leaving the scene charges regarding rendering aid and exchanging
14 information are both pretty obvious as well.

15 The State’s theory failed to delineate a particular occurrence of failure to give
16 information/render aid that was distinct from a particular occurrence of leaving the
17 scene of an accident. The failure to give information/render aid conviction is
18 subsumed into the leaving the scene of an accident conviction; thus, our “inquiry is
19 over and the statutes are the same for double jeopardy purposes—punishment cannot
20 be had for both.” *See Swafford*, 1991-NMSC-043, ¶ 30.

1 {48} Defendant was sentenced for a term of 364 days for each of these convictions.
2 We remand to the district court to determine which of these convictions to vacate
3 and to resentence accordingly. *See Comitz*, 2019-NMSC-011, ¶¶ 31, 53.

4 **B. Aggravated DWI and Careless Driving Convictions**

5 {49} Defendant also argues that “[t]he acts underlying the careless driving and
6 DWI convictions were also unitary.” Defendant points to Defendant’s intoxication
7 being continuous the entire time he was behind the wheel and that “it was one
8 continuous act over a period of just a few minutes.” Further, the criminalization of
9 both careless driving and DWI “seek[s] to provide safer roads for the public by
10 punishing those that drive irresponsibly” and “[b]ecause reasonable minds can differ
11 as to the [L]egislature’s intent in punishing these two crimes, the rule of lenity
12 prevents multiple convictions for the unitary conduct supporting the DWI and
13 careless driving charges.”

14 {50} Relying on the *Herron* factors, the State argues that the crimes were not
15 unitary because (1) the crime of careless driving was complete when Defendant
16 crashed into Victim’s garage, backed up and parked his truck; (2) the location of the
17 Victim was distinct for each crime given that Victim was inside his residence when
18 Defendant first crashed into Victim’s garage and was outside the residence when
19 Defendant drove into and struck Victim and the garage; (3) as to an intervening
20 event, Defendant verbally engaged with Victim when Victim stepped out of his

1 residence and then placed his truck into drive and accelerated forward crashing into
2 Victim and the garage for a second time; and (4) Victim was not present while the
3 officers pursued and later arrested Defendant. Beyond the conduct not being unitary,
4 the State argues that “[its] opening statement, the testimony given during the trial[,]
5 and the associated evidence all support two crimes.”

6 **1. The Conduct Relied Upon for the Aggravated DWI and Careless Driving**
7 **Convictions Was Unitary**

8 {51} As mentioned above, the first step in a unitary conduct analysis is to determine
9 whether there is “sufficient indicia of distinctness” between the acts at issue.
10 *Swafford*, 1991-NMSC-043, ¶ 26. In so doing, we look to what the State was
11 required to prove and what evidence was offered. *See id.* ¶ 27. To find Defendant
12 guilty of careless driving, the State was required to prove beyond a reasonable doubt:
13 (1) “[D]efendant operated a motor vehicle on a public road”; and (2) “[w]hile
14 operating the motor vehicle [D]efendant did so in a careless, inattentive or imprudent
15 manner, without due regard for the width, grade, curves, corners, traffic, weather
16 and road conditions[,] and all other attendant circumstances.”

17 {52} As stated above, the elements for Defendant’s aggravated DWI charge were:

- 18 1. [D]efendant operated a motor vehicle;
- 19 2. At that time [D]efendant was under the influence of intoxicating
20 liquor, that is, as a result of drinking liquor [D]efendant was less
21 able to the slightest degree, either mentally or physically, or both,
22 to exercise the clear judgment and steady hand necessary to
23 handle a vehicle with safety to the person and the public; or

1 3. [D]efendant refused to submit to chemical testing.

2 {53} Notably, the aggravated DWI conviction relied on an additional fact—the
3 refusal of chemical testing—that was not required for the careless driving
4 conviction. From there, the distinguishing characteristics of the conduct required to
5 convict were (1) Defendant operated a vehicle on a public road—specified in
6 careless driving—as opposed to an unspecified place; and (2) Defendant operated a
7 vehicle in a “careless, inattentive or imprudent manner,” as opposed to Defendant
8 operated a vehicle while under the influence of intoxicating liquor such that he “was
9 less able to the slightest degree, either mentally or physically, or both, to exercise
10 the clear judgment and steady hand necessary to handle a vehicle with safety.”

11 {54} As to the first distinction, evidence was presented that Defendant operated a
12 vehicle unsafely in Victim’s driveway—a nonpublic road. *Cf.* NMSA 1978, § 66-1-
13 4.8 (B) (1991) (defining “highway” or “street” as “every way or place generally open
14 to the use of the public as a matter of right for the purpose of vehicular travel, even
15 though it may be temporarily closed or restricted for the purpose of construction,
16 maintenance, repair or reconstruction”). In so doing, Defendant collided with a
17 garage and into Victim. This is the only evidence offered regarding Defendant’s
18 operation of a vehicle on a nonpublic road. Evidence was also presented that, while
19 driving from Victim’s residence to Defendant’s residence, Defendant swerved in his
20 lane, hit a median, and drove in the wrong lane—all testified to by police. This

1 evidence is the only evidence offered that could support the careless driving
2 conviction, which specified operation of a motor vehicle on a public road. *See State*
3 *v. Brennan*, 1998-NMCA-176, ¶¶ 4-5, 126 N.M. 389, 970 P.2d 161 (recognizing that
4 the offense of careless driving is limited to highways). However, in testimony by
5 police, this evidence was explicitly linked to supporting that Defendant operated the
6 vehicle while intoxicated.

7 {55} The State contends the careless driving was complete at the time that
8 Defendant drove into the garage. However, as noted, the jury instructions preclude
9 this theory. The instructions specify that the careless driving occurred on a public
10 road. The only evidence of Defendant driving on a public road occurred after he
11 crashed into Victim and his garage. And the State presented this evidence to support
12 Defendant being impaired while driving. The State on appeal also identified
13 Victim’s presence or lack thereof during these crimes as relevant here. However,
14 these facts are irrelevant to the charges of aggravated DWI or careless driving.

15 {56} Accordingly, indicia of distinctness are not apparent based on the evidence or
16 the jury instructions relating to these convictions. As “it reasonably can be said that
17 the conduct is unitary,” we conclude it was here. *See Porter*, 2020-NMSC-020, ¶ 12
18 (quoting *Swafford*, 1991-NMSC-043, ¶ 28).

1 **2. The Legislature Did Not Intend to Create Separately Punishable Offenses**
2 **for Aggravated DWI and Careless Driving**

3 {57} Having determined that the underlying conduct supporting these two offenses
4 was unitary, we proceed to the second *Swafford* prong: “whether the Legislature
5 intended to create separately punishable offenses.” *Reed*, 2022-NMCA-025, ¶ 8 (text
6 only) (citation omitted). Because the aggravated DWI and careless driving statutes
7 do not expressly permit multiple convictions, *see* §§ 66-8-102, -114, and can be
8 violated in multiple ways, we consider whether the Legislature intended multiple
9 punishments under the circumstances in this case, including a consideration of the
10 State’s theory for each offense. *See Begaye*, 2023-NMSC-015, ¶¶ 21, 23-24. “If the
11 state’s legal theory cannot be ascertained using the charging documents and jury
12 instructions,” as is the case here, among other things, we look to “closing arguments
13 to establish whether the same evidence supported a defendant’s convictions under
14 both statutes.” *Id.* ¶ 24.

15 {58} During closing, the State pointed to the same conduct to support the careless
16 driving as it did to support the aggravated DWI conviction. The State argued,
17 Defendant “admits that he was driving that day, admits he was behind the wheel,
18 admits he was driving all over the road running the stop signs. It’s clearly him in the
19 video being read the New Mexico Implied Consent Advisory, acknowledging it, and
20 refusing it. I feel like the DWI, the careless driving are pretty obvious.” Accordingly,
21 the State failed to delineate a particular occurrence of careless driving that was

1 distinct from a particular occurrence of aggravated DWI. They are subsumed into
2 each other; thus, our “inquiry is over and the statutes are the same for double
3 jeopardy purposes—punishment cannot be had for both.” *See id.*; *see also State v.*
4 *Arguello*, 2024-NMCA-074, ¶¶ 1, 31, 557 P.3d 1018 (holding that convictions for
5 careless driving, § 66-8-114(B), and driving under the influence of intoxicating
6 liquor, impaired to the slightest degree, § 66-8-102(A), are violative of the
7 defendant’s right to be free from double jeopardy).

8 {59} The elements of careless driving are subsumed into the elements of aggravated
9 DWI, and Defendant’s conviction for careless driving must be vacated. *See id.* ¶ 31
10 (holding that careless driving is subsumed into driving under the influence of
11 intoxicating liquor); *see also State v. Montoya*, 2013-NMSC-020, ¶ 55, 306 P.3d 426
12 (“[W]here one of two otherwise valid convictions must be vacated to avoid violation
13 of double jeopardy protections, we must vacate the conviction carrying the shorter
14 sentence).

15 **III. Evidentiary Issue**

16 {60} Defendant contends that witness testimony regarding actions and statements
17 by Defendant in videos violated the “silent witness” theory, was highly prejudicial,
18 and amounted to plain error. Specifically, “[n]one of these lay witnesses was better
19 suited than any juror to determine what was said or done in these videos” and
20 “[i]nterpreting [Defendant’s] behavior and statements was central to the jury’s role,

1 particularly with regard to the specific-intent crimes.” In contrast to the standard of
2 review he initially argues, Defendant then argues this was not harmless error.
3 Because Defendant did not preserve this argument, we review it for plain error. *State*
4 *v. Chavez*, 2024-NMSC-023, ¶ 10, 562 P.3d 521.

5 {61} The doctrine of plain error, arising from our Rules of Evidence, applies to
6 evidentiary matters and permits a court to “take notice of a plain error affecting a
7 substantial right, even if the claim of error was not properly preserved.” Rule 11-
8 103(E) NMRA. “Because plain error is an exception to the general rule that parties
9 must raise timely objection to improprieties at trial, it is to be used sparingly.”
10 *Chavez*, 2024-NMSC-023, ¶ 10 (text only) (citation omitted). “To find plain error,
11 the Court must be convinced that admission of the testimony constituted an injustice
12 that created grave doubts concerning the validity of the verdict.” *State v. Montoya*,
13 2015-NMSC-010, ¶ 46, 345 P.3d 1056 (internal quotation marks and citation
14 omitted); *see also State v. Lucero*, 1993-NMSC-064, ¶ 13, 116 N.M. 450, 863 P.2d
15 1071 (explaining that “[t]he predicate for review on the basis of plain error is less
16 stringent than for fundamental error”).

17 {62} “The burden is on the defendant asserting plain error to establish prejudice.”
18 *State v. Muller*, 2022-NMCA-024, ¶ 43, 508 P.3d 960. Relating to prejudice,
19 Defendant asserts that “[a]llowing th[e] testimony was not harmless error because
20 the videos were the primary evidence of every crime with which [Defendant] was

1 charged, and he contested the [S]tate’s arguments that he intended to hit [Victim]
2 and his house and that he resisted arrest.” Defendant continues, “the jury was likely
3 to be swayed by the police officers’ and [V]ictim’s commentary, essentially telling
4 them what to see and hear.” Defendant’s contentions on this issue are mere assertions
5 of prejudice. Such assertions, however, carry no weight in the absence of specifics.
6 *See Deaton v. Gutierrez*, 2004-NMCA-043, ¶ 31, 135 N.M. 423, 89 P.3d 672 (noting
7 that an “assertion of prejudice is not a showing of prejudice” (internal quotation
8 marks and citation omitted)). Where no prejudice has been shown, this Court will
9 not find reversible error, let alone plain error. *See id.* (stating that “in the absence of
10 prejudice, there is no reversible error” (alteration, internal quotation marks, and
11 citation omitted)).

12 {63} Although the testimony Defendant cites may have influenced the jury, the
13 State merely supplemented the showing of the video footage by eliciting clarifying
14 narration. More compellingly, none of the challenged statements relate to
15 Defendant’s intent or include witnesses speculating as to Defendant’s intent, nor do
16 they directly relate to the resisting arrest charge, as Defendant suggests.
17 Accordingly, the jury’s ability to weigh the credibility of the witnesses and the
18 significance of the videos to determine the ultimate issues was not unduly
19 influenced. This testimony did not invade the province of the jury such that there is
20 grave doubt as to the validity of the verdict here. *See Chavez*, 2024-NMSC-023,

1 ¶ 11; *State v. Sweat*, 2017-NMCA-069, ¶ 21, 404 P.3d 20 (discussing the defendant’s
2 contention that officer testimony “‘invaded the province of the jury’ by opining that
3 [the d]efendant was the person pictured”).

4 **IV. Sufficiency of the Evidence**

5 {64} Defendant raises insufficiency of the evidence regarding three convictions:
6 (1) aggravated battery with a deadly weapon; (2) criminal damage to property over
7 \$1,000; and (3) resisting, evading, or obstructing an officer. We address each below.

8 {65} “The test for sufficiency of the evidence is whether substantial evidence of
9 either a direct or circumstantial nature exists to support a verdict of guilty beyond a
10 reasonable doubt with respect to every element essential to a conviction.” *Montoya*,
11 2015-NMSC-010, ¶ 52 (internal quotation marks and citation omitted). The
12 reviewing court “view[s] the evidence in the light most favorable to the guilty
13 verdict, indulging all reasonable inferences and resolving all conflicts in the
14 evidence in favor of the verdict.” *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128
15 N.M. 711, 998 P.2d 176. We disregard all evidence and inferences that support a
16 different result. *See State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d
17 829. “Jury instructions become the law of the case against which the sufficiency of
18 the evidence is to be measured.” *State v. Smith*, 1986-NMCA-089, ¶ 7, 104 N.M.
19 729, 726 P.2d 883.

1 **A. There Was Sufficient Evidence of Intent for the Aggravated Battery and**
2 **Criminal Damage to Property Convictions**

3 {66} Defendant was convicted of both aggravated battery and criminal damage to
4 property. On appeal, Defendant claims there was insufficient evidence to prove the
5 intent element for both of these convictions, so we address them together.
6 Specifically, Defendant argues that the State did not present sufficient evidence that
7 Defendant intended to injure Victim, because “the [S]tate failed to prove beyond a
8 reasonable doubt . . . that [Defendant] was capable of forming the specific intents
9 required and that he did in fact form those intents.”

10 **1. Jury Instructions as to Intent**

11 {67} To prove intent for aggravated battery, the State was required to prove that
12 “[D]efendant intended to injure [Victim]” and “[D]efendant was not intoxicated
13 from [the] use of alcohol at the time the offense was committed to the extent of being
14 incapable of forming an intention to injure [Victim.]” To prove intent for criminal
15 damage to property, the State was required to prove that “[D]efendant intentionally
16 damaged property of [Victim]” and “[D]efendant was not intoxicated from [the] use
17 of alcohol at the time the offense was committed to the extent of being incapable of
18 forming an intention to damage [Victim]’s property.” These instructions track the
19 UJIs for the charges and each set of instructions included an element related to
20 inability to form intent as provided by the UJI use note. *See* UJI 14-322 NMRA

1 (aggravated battery); UJI 14-1501 NMRA (criminal damage to property); UJI 14-
2 5111 NMRA (inability to form intent); UJI 14-5111 use note 1.

3 {68} The jury was also provided with a number of jury instructions related to
4 intoxication and intent that track the UJIs. As to intoxication, the jury was provided
5 with the following instruction:

6 An issue you must consider in this case is whether [D]efendant
7 was intoxicated from the use of alcohol. You must determine whether
8 or not [D]efendant was intoxicated from the use of alcohol and, if so,
9 what effect this had on [D]efendant’s ability to form the intent to injure
10 [Victim].

11 The burden is on the [S]tate to prove beyond a reasonable doubt
12 that [D]efendant was capable of forming an intention to injure [Victim].
13 If you have a reasonable doubt as to whether [D]efendant was capable
14 of forming such an intention, you must find [D]efendant not guilty of
15 aggravated battery with a deadly weapon.

16 {69} The criminal damage to property elements instruction was also followed by
17 an instruction dedicated to the issue of intoxication and intent that tracked the above
18 intoxication and intent instruction almost verbatim except for language about the
19 operant differences between the elements of the charges.

20 {70} Another jury instruction informed the jury as to which charges require that
21 “the State must prove to your satisfaction beyond a reasonable doubt that
22 [D]efendant acted intentionally when he committed the crime.” This instruction
23 listed both the aggravated battery charge and the criminal damage to property charge
24 at issue here. The instruction explained:

1 A person acts intentionally when he purposely does an act which the
2 law declares to be a crime, even though he may not know that his act is
3 unlawful. Whether [D]efendant acted intentionally may be inferred
4 from all of the surrounding circumstances, such as the manner in which
5 he acts, the means used and any statements made by him.

6 {71} The jury instructions provided here clearly articulate the issue of intent and
7 how it relates to the charges.

8 **2. Evidence as to Defendant’s Intent**

9 {72} “Voluntary intoxication provides a defense to specific-intent crimes ‘where
10 the intoxication is to such a degree as would negate the possibility of the necessary
11 intent.’” *State v. Hernandez*, 2003-NMCA-131, ¶ 20, 134 N.M. 510, 79 P.3d 1118
12 (quoting *State v. Lovato*, 1990-NMCA-047, ¶ 4, 110 N.M. 146, 793 P.2d 276). If
13 evidence supporting voluntary intoxication is put forward, a defendant is entitled to
14 the instruction, as occurred here. *Id.* However, evidence that a defendant is
15 intoxicated to any degree does not necessarily rise to the level of evidence of
16 intoxication “to the point that [affects their] ability to form the necessary mental state
17 for a specific-intent crime.” *See id.* ¶ 21. Instead, “an accused’s state of mind or
18 intent can be inferred [from their] acts, conduct and words.” *State v. Gattis*, 1986-
19 NMCA-121, ¶ 22, 105 N.M. 194, 730 P.2d 497. As to this sufficiency challenge
20 relating to Defendant’s intent and level of voluntary intoxication, we assess whether
21 “the jury’s decisions are supportable by evidence in the record, rather than mere
22 guess or conjecture.” *See State v. Ford*, 2019-NMCA-073, ¶ 8, 453 P.3d 471

1 (internal quotation marks and citation omitted). “[W]e distinguish between
2 conclusions based on speculation and those based on inferences.” *Id.* (internal
3 quotation marks and citation omitted). “A reasonable inference is a conclusion
4 arrived at by a process of reasoning which is a rational and logical deduction from
5 facts admitted or established by the evidence.” *Id.* (internal quotation marks and
6 citation omitted).

7 {73} It is not our Court’s role to reweigh the evidence or put ourselves in the place
8 of the fact-finder. *See State v. Wilson*, 1998-NMCA-084, ¶ 18, 125 N.M. 390, 962
9 P.2d 636 (“Fact-finding is a function of the district court.”). The jury was well
10 apprised that the issue of intent—and whether it was incapable of being formed due
11 to voluntary intoxication as to these charges—was contested by the parties.
12 Defendant and the State argued the intoxication and intent issue at length during
13 their closing remarks. Defendant struck Victim’s garage causing Victim to wake up
14 and go to see what happened. Defendant and Victim proceeded to have a verbal
15 altercation, and then Defendant accelerated forward again, striking Victim. The jury
16 had an opportunity to review multiple videos from the night depicting this
17 interaction, Defendant’s driving, and Defendant’s behavior with police officers. The
18 jury also heard testimony from many officers, Victim, and Defendant himself as to
19 the events that took place that night. From this evidence, the jury could reasonably
20 infer Defendant’s intent. *See Ford*, 2019-NMCA-073, ¶ 8.

1 {74} Based on the language of the jury instructions and the verdict forms, the jury
2 was well equipped to consider and did so find that Defendant was “less able to the
3 slightest degree, either mentally or physically, or both, to exercise the clear judgment
4 and steady hand necessary to handle a vehicle with safety to the person and the public
5 [as a result of drinking liquor],” such to be convicted of aggravated DWI. At the
6 same time, the jury determined Defendant “was not intoxicated from [the] use of
7 alcohol at the time the [aggravated battery] was committed to the extent of being
8 incapable of forming an intention to injure [Victim.]” Further, the jury determined
9 Defendant “was not intoxicated from [the] use of alcohol at the time the [criminal
10 damage to property] was committed to the extent of being incapable of forming an
11 intention to damage [Victim]’s property.” The law does not support a proposition
12 that if you are less able to the slightest degree to safely drive, you are necessarily too
13 intoxicated to form an intent to hurt people or damage property. *See Hernandez,*
14 *2003-NMCA-131, ¶ 21.* The jury, in finding the Defendant intended these acts, was
15 satisfied by the video evidence of Defendant’s behavior and Victim’s testimony as
16 to the circumstances of the evening that Defendant had the requisite intent. *See*
17 *Cunningham, 2000-NMSC-009, ¶ 26.* Accordingly, we conclude sufficient evidence
18 supports the convictions for aggravated battery with a deadly weapon and criminal
19 damage to property and therefore affirm.

1 **B. There Was Sufficient Evidence for the Resisting a Police Officer**
2 **Conviction**

3 {75} Defendant contends that his conduct was neither “abuse” nor “resisting” as
4 required by the case law interpreting Section 30-22-1(D). Specifically, Defendant
5 argues that the facts here fall short of the “protracted instances of an individual
6 repeatedly, overtly refusing to comply with clear orders” that occurred in *See State*
7 *v. Diaz*, 1995-NMCA-137, ¶¶ 4-6, 121 N.M. 28, 908 P.2d 258.

8 {76} The jury convicted Defendant of resisting, evading, or obstructing an officer,
9 contrary to Section 30-22-1(D). Section 30-22-1 contains four alternatives to charge
10 a defendant. Each alternative requires proof of three common elements, and then a
11 fourth element unique to the particular subsection charged. To convict a defendant
12 under Section 30-22-1(D), requires proof that “the defendant resisted or abused [the
13 officer].” *State v. Jimenez*, 2017-NMCA-039, ¶ 29, 392 P.3d 668 (internal quotation
14 marks and citation omitted).

15 {77} “[A] person can violate [Section 30-22-1](D) . . . by avoiding doing
16 something required, including refusing to comply with an officer’s orders.” *Jimenez*,
17 2017-NMCA-039, ¶ 39. “[A] defendant who is effectively ‘cornered,’ i.e., whose
18 apprehension is imminent, but who, nonetheless chooses to challenge or forestall
19 [their] arrest—either by physical battery, refusing to comply with orders, or
20 verbally—violates [Section 30-22-1](D).” *Jimenez*, 2017-NMCA-039, ¶ 40.

1 {78} In *Diaz*, the jury was provided with instructions for aggravated assault on a
2 peace officer but not a lesser included offense of resisting or abusing an officer. *See*
3 1995-NMCA-137, ¶ 1. There, the defendant failed to obey repeated orders to drop a
4 knife as he backed away from officers down a street for approximately 150 to 200
5 yards. *Id.* ¶¶ 4-6. In that case, we determined the “[district] court erred in failing to
6 instruct the jury on the lesser included offense,” because “if the jury disbelieved the
7 [s]tate’s evidence and found [the d]efendant’s version of events credible, it could
8 have found that [the d]efendant was at most resisting and abusing the officers.” *Id.*
9 ¶¶ 1, 16. We do not understand *Diaz* and other case law cited by Defendant on appeal
10 to articulate that a minimum threshold of “resisting” under Subsection (D) of Section
11 30-22-1 requires a particular number of instructions that do not go heeded by a
12 defendant. *See also City of Roswell v. Smith*, 2006-NMCA-040, ¶¶ 1-2, 139 N.M.
13 381, 133 P.3d 271 (considering an obstructing an officer conviction under Roswell
14 City Code, this Court determined there was sufficient evidence to support the
15 conviction in part because the defendant failed to comply with repeated instructions).
16 Nor do we understand the case law to require a particular clarity of those orders nor
17 a particular length of time of a defendant “resisting” the officers.

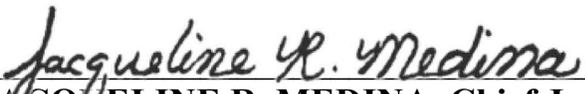
18 {79} Here, testimony from police officers and body camera footage from the night
19 demonstrate that Defendant refused to comply with commands by police officers
20 and yelled verbal abuse at them. Defendant “[chose] to challenge or forestall his

1 arrest . . . by . . . refusing to comply with orders,” and this violates Section 30-22-
2 1(D). *See Jimenez*, 2017-NMCA-039, ¶ 40. Because this conviction is sufficiently
3 supported by evidence that Defendant resisted the police officer here and this is
4 sufficient in itself to affirm the conviction under Subsection (D), we do not address
5 Defendant’s arguments as to whether Defendant abused the officer under Section
6 30-22-1.

7 **CONCLUSION**

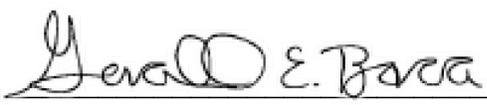
8 {80} For the foregoing reasons, we remand for the district court to vacate the
9 violative convictions and to resentence accordingly. We affirm on all other grounds.

10 {81} **IT IS SO ORDERED.**

11 
12 JACQUELINE R. MEDINA, Chief Judge

13 **WE CONCUR:**

14 
15 SHAMMARA H. HENDERSON, Judge

16 
17 GERALD E. BACA, Judge