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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico
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Mark Reynolds

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v. **No. A-1-CA-42690**

ISAAC JEREMIAH HERRERA,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY
Daylene A. Marsh, District Court Judge

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for Appellant

MEMORANDUM OPINION

WRAY, Judge.

{1} This matter was submitted to the Court on Defendant's brief in chief pursuant to the Administrative Order for Appeals in Criminal Cases from the Second, Eleventh, and Twelfth Judicial District Courts in *In re Pilot Project for Criminal Appeals*, No. 2022-002, effective November 1, 2022. Following consideration of the

brief in chief, the Court assigned this matter to Track 2 for additional briefing. Now having considered the brief in chief, answer brief, and reply brief, we reverse for the following reasons.

{2} Following a jury trial, Defendant was convicted of one count each of (1) battery upon a peace officer, contrary to NMSA 1978, Section 30-22-24 (1971); (2) resisting, evading or obstructing an officer, contrary to NMSA 1978, Section 30-22-1(D) (1981) (resisting or abusing); and (3) concealing identity, contrary to NMSA 1978, Section 30-22-3 (1963). [RP 3, 4, 113, 119] On appeal, Defendant challenges only his convictions for battery upon a peace officer and resisting or abusing an officer, arguing those convictions violate double jeopardy. [BIC 1, 4-8]

{3} "A double jeopardy challenge is a constitutional question of law which we review de novo." *State v. Swick*, 2012-NMSC-018, ¶ 10, 279 P.3d 747. Here, Defendant asserts a double description double jeopardy violation, which occurs when "a single act results in multiple charges under different criminal statutes." *State v. Jackson*, 2020-NMCA-034, ¶ 27, 468 P.3d 901 (internal quotation marks and citation omitted). "The pivotal question in multiple punishment cases is whether the defendant is being punished twice for the same offense." *State v. Sandoval*, ___-NMCA-___, ¶ 28, ___ P.3d ___ (A-1-CA-40454, July 13, 2026) (internal quotation marks and citation omitted). "[T]o establish a double jeopardy violation in double[ ]description cases, a defendant must demonstrate that the conduct is unitary

and that the Legislature did not intend separate punishments for the offenses at issue." *State v. Cardenas*, 2025-NMSC-020, ¶ 52, 572 P.3d 958.

{4} "A defendant's conduct is unitary if the acts are not separated by sufficient indicia of distinctness." *State v. Phillips*, 2024-NMSC-009, ¶ 38, 548 P.3d 51 (internal quotation marks and citation omitted). To determine whether Defendant's actions were sufficiently distinct, we apply the six factors identified in *Herron v. State*, 1991-NMSC-012, ¶ 15, 111 N.M. 357, 805 P.2d 624, which include: "(1) temporal proximity of the acts, (2) location of the victim during each act, (3) the existence of intervening events, (4) the sequencing of the acts, (5) the defendant's intent as evidenced by his conduct and utterances, and (6) the number of victims." *See Phillips*, 2024-NMSC-009, ¶ 12; *see id.* ¶ 38 (applying the *Herron* factors "in the double description analysis to determine whether a defendant's acts are unitary or distinct"). Where the conduct is "not sufficiently separated by time or place, and the object and result or quality and nature of the acts cannot be distinguished," then the conduct is unitary. *State v. Silvas*, 2015-NMSC-006, ¶ 10, 343 P.3d 616; s*ee Phillips*, 2024-NMSC-009, ¶ 38 ("[I]f it reasonably can be said that the conduct is unitary, then we must conclude that the conduct was unitary." (internal quotation marks and citation omitted)).

{5} To aid in our analysis of whether the underlying conduct was unitary, this Court also looks to "the elements of the charged offenses, the facts presented at trial,

and the instructions given to the jury" as well as "whether the facts presented at trial establish that the jury reasonably could have inferred independent factual bases for the charged offenses." *State v. Vasquez*, 2024-NMCA-020, ¶ 8, 542 P.3d 806 (internal quotation marks and citation omitted); *see State v. Franco*, 2005-NMSC-013, ¶ 7, 137 N.M. 447, 112 P.3d 1104 ("The conduct question depends to a large degree on the elements of the charged offenses and the facts presented at trial." (internal quotation marks and citation omitted)); *id.* ¶¶ 8-10 (examining the jury instructions to determine the evidence on which the jury could have relied in returning a guilty verdict).

{6} This additional review of the elements and jury instructions is specifically relevant where, as here, the jury instructions provide alternative legal bases for conviction of an offense, and the record is silent as to which legal alternative the jury relied on in reaching its verdict. *See State v. Neal*, ___-NMSC-___, ¶ 15, ___ P.3d ___ (S-1-SC-40407, Apr. 6, 2026). In such circumstances, we apply the presumption "that a conviction under a general verdict requires reversal if the jury is instructed on an alternative basis for the conviction that would result in double jeopardy, and the record does not disclose whether the jury relied on this legally inadequate alternative." *State v. Foster*, 1999-NMSC-007, ¶ 28, 126 N.M. 646, 974 P.2d 140, *abrogated on other grounds as recognized by Kersey v. Hatch*, 2010-NMSC-020, ¶ 17, 148 N.M. 381, 237 P.3d 683; *see State v. Sena*, 2020-NMSC-011, ¶ 47, 470

P.3d 227 ("[B]ecause we cannot assume that jurors will know how to reach a verdict without violating the Double Jeopardy Clause, we must presume that a conviction under a general verdict requires reversal if the jury is instructed on an alternative basis for the conviction that would result in double jeopardy, and the record does not disclose whether the jury relied on this legally inadequate alternative." (internal quotation marks and citations omitted)); *Neal*, ___-NMSC-___, ¶ 15 (explaining that our appellate courts rely on the *Foster* presumption where applicable because "a jury is not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law" (internal quotation marks and citation omitted)).

{7} "The *Foster* presumption provides guidance in discerning which legal theories to compare when the state relies on a general verdict with general jury instructions without presenting a clear legal theory for the conviction by general verdict." *Neal*, ___-NMSC-___, ¶ 16. Though analysis of the *Foster* presumption is distinct from analysis of the *Herron* factors, both relate to the question of whether a defendant's conduct was unitary. *Neal*, ___-NMSC-___, ¶ 16 (providing that "if the *Herron* factors are the tools used to discern whether the conduct itself is unitary, the *Foster* presumption is the lens through which the Court views the *Herron* factors"). The *Foster* presumption can be rebutted by evidence that the underlying conduct involved "two events separated by time or space, or events separated by other indicia

of distinctness" that would render the conduct not unitary. *State v. Vigil*, 2021-NMCA-024, ¶ 21, 489 P.3d 974; *see Neal*, ___-NMSC-___, ¶ 31 ("[T]he *Foster* presumption can be rebutted by evidence that each crime was completed before the other crime occurred." (internal quotation marks and citation omitted)).

{8} Here, the evidence presented at trial established that on July 3, 2023, Defendant and his girlfriend got into an argument while at another couple's house. [5/16/24 CD 10:55:14-49] The husband of the other couple repeatedly asked Defendant and his girlfriend to leave but they refused and their argument became aggressive, which prompted the other couple to call the police to remove Defendant from their property. [5/16/24 CD 10:55:46-56:16, 10:57:08-30, 11:47:28-45] When law enforcement officers arrived at the scene, Defendant was on the front porch of the house. [5/16/24 CD 11:42:50-43:00, 11:44:00-15, 11:45:22-30, 11:48:32-46, 11:48:57-49:08] Having learned that Defendant was the subject of active warrants, the officers attempted to arrest Defendant and a struggle ensued. [5/16/24 CD 11:50:45-51:02, 11:51:15-30, 11:51:45-52:05, 11:53:07-44]

{9} Officer Ashburn testified that although he was initially able to place one of Defendant's wrists in handcuffs, he was not immediately able to fully handcuff Defendant because Defendant refused to follow any commands, would not bring his hands behind him, and "kept tensing up his arms and pulling away." [5/16/24 CD 11:53:50-54:30, 11:54:36-55:00] Officer Ashburn testified that during the struggle,

Defendant grabbed the officer's arm between his wrist and forearm in an attempt to restrain the officer and the struggle escalated. [5/16/24 CD 11:55:00-25] Officer Ashburn confirmed that the battery upon a peace officer charge was based on Defendant grabbing his arm. [5/16/24 CD 1:26:15-25] Officer Ashburn stated that the struggle continued from this point, with the officers tipping back the chair that Defendant was sitting on and landing on top of Defendant, which turned into a "wrestling match on the front porch," after which the officers were eventually able to fully handcuff Defendant. [5/16/24 CD 11:59:30-12:00:20] Officer Ashburn testified that he was not injured by Defendant's conduct, nor did he see Defendant touch or cause any injury to Officer Harper. [5/16/24 CD 11:55:44-50, 12:00:28-58] Consistent with Officer Ashburn's testimony, Officer Harper provided detailed testimony regarding his efforts to assist Officer Ashburn in getting handcuffs on Defendant, and Defendant's resistance to the officers' attempts to handcuff him. [5/16/24 CD 1:35:00-08, 1:43:47-46:59, 1:53:28-56:48]

{10} At trial, the jury was instructed that in order to find Defendant guilty of battery on a peace officer, the State was required to prove, in pertinent part, that: (1) Defendant "intentionally touched or applied force to [Officer] Ashburn by grabbing his wrist"; (2) Defendant's "act was unlawful"; (3) "[a]t the time, [Officer] Ashburn was a peace officer and was performing the duties" thereof; (4) Defendant "knew [Officer] Ashburn was a peace officer"; (5) Defendant's "conduct caused an actual

threat to the safety of [Officer] Ashburn or a meaningful challenge to" his authority; and (6) Defendant "acted in a rude, insolent or angry manner." [RP 81] *See* § 30-22-24; UJI 14-2211 NMRA. The jury was further instructed that in order to find Defendant guilty of resisting or abusing an officer, the State was required to prove, in pertinent part, that: (1) Officer Ashburn and Officer Harper "were peace officers in the lawful discharge of duties"; (2) Defendant "knew [Officer] Ashburn and [Officer] Harper were peace officers"; and (3) Defendant "resisted or abused [Officer] Ashburn or [Officer] Harper in the lawful discharge of duties." [RP 82] *See* § 30-22-1(D); UJI 14-2215 NMRA.

{11} On appeal, Defendant argues that because the resisting or abusing an officer jury instructions provided alternative bases for conviction, it cannot be known on which alternative basis the jury relied to enter its general verdict finding Defendant guilty of the resisting or abusing charge and reversal is therefore required under the *Foster* presumption. [BIC 8] Defendant further argues that the *Foster* presumption is not rebutted in this case, and the underlying conduct was unitary, asserting that the evidence demonstrates that (1) his acts occurred as part of a single ongoing struggle between himself and the officers; (2) the entire incident was over quickly and took place only on the front porch; (3) and there was no evidence of any intervening events, nor was there evidence of any interruptions to or changes in Defendant's intent to resist the officers' efforts to arrest him. [BIC 5; RB 8]

{12} The State argues that the *Foster* presumption is either inapplicable in this case or rebutted by evidence that the underlying conduct was not unitary. [AB 10-12] The State contends that the underlying conduct was not unitary because this case involves two victims, and while Defendant resisted both officers, Defendant "committed a discrete battery" against only Officer Ashburn. [AB 8] Relatedly, the State asserts that because both officers were victims in this case, "the jury had an independent factual basis to find that Defendant resisted or abused Officer Harper, . . . apart from the battery on Officer Ashburn, even if this occurred during the struggle with both victims." [AB 8] The State further contends that although "the temporal proximity was not precisely quantified," Officer Ashburn's testimony that the struggle was "extended" indicates that the temporal proximity was attenuated such that the applicable *Herron* factor weighs in the State's favor. [AB 7]

{13} This Court has made clear that a defendant's right to be free from double jeopardy is violated where the State relies on unitary conduct to convict the defendant of both battery upon a peace officer and resisting or abusing an officer. *See State v. Jones*, 2020-NMCA-029, ¶ 13, 464 P.3d 1079; *see also State v. Ford*, 2007-NMCA-052, ¶¶ 18-23, 141 N.M. 512, 157 P.3d 77 (concluding that the defendant's convictions, based on unitary conduct, for battery upon a peace officer and resisting or abusing an officer violated double jeopardy because resisting or abusing an officer is a lesser-included offense of battery upon a peace officer);

id. ¶ 19 ("The only difference is that battery requires the resisting or abusing to have culminated in a touching, while resisting also prohibits lesser forms of resisting."); *State v. Diaz*, 1995-NMCA-137, ¶ 13, 121 N.M. 28, 908 P.2d 258 ("Since a defendant cannot resist or abuse an officer without being rude, insolent, or angry, the difference between Section 30-22-24 and Section 30-22-1(D) is that a violation of the former culminates in an offensive touching while a violation of the latter does not. Thus, a defendant cannot commit peace officer battery without having also resisted or abused an officer." (citations omitted)). Accordingly, our sole inquiry on appeal is whether Defendant's conduct was unitary.

{14} In conducting this inquiry, we apply the *Foster* presumption, because as we explain, at least one of the multiple legal alternatives in the resisting or abusing instruction implicated conduct that is unitary with the battery upon a peace officer charge. *See State v. Vasquez*, 2024-NMSC-020, ¶ 15, 542 P.3d 806 (describing the *Foster* presumption). It is uncontested that the factual basis for the battery upon a peace officer charge was Defendant's act of grabbing Officer Ashburn's arm. [5/16/24 CD 1:26:15-25] The resisting or abusing an officer instruction required the State to prove that Defendant "resisted *or* abused [Officer] Ashburn *or* [Officer] Harper in the lawful discharge of duties." [RP 82] In other words, the instruction permitted the jury to find Defendant guilty of resisting or abusing an officer based on a number of potential alternative findings: that Defendant (1) resisted Officer

Ashburn; (2) abused Officer Ashburn; (3) resisted Officer Harper; or (4) abused Officer Harper. For these charges, the jury returned general verdicts, preventing us from being able to discern on which alternative legal basis permitted by the resisting or abusing instruction the jury relied in reaching its verdict. Defendant's act of grabbing Officer Ashburn's arm falls within the scope of the "abused" alternative set forth in the given jury instruction, based on the applicable definition of word. *See Abuse*, *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/abuse (last visited Oct. 9, 2026) (defining "abuse," in pertinent part, as "to use or treat so as to injure or damage"). Given that the act of grabbing Officer Ashburn's arm could satisfy the elements of both battery upon a peace officer and resisting or abusing an officer—specifically, the "abuse" alternative as conveyed by the resisting or abusing an officer instruction—we presume that the jury relied on unitary conduct to convict Defendant on both charges. *See Foster*, 1999-NMSC-007, ¶ 28; *Sena*, 2020-NMSC-011, ¶ 47. Reversal is required "if either alternative basis is legally inadequate," unless that presumption of unitary conduct can be rebutted by relevant evidence. *Neal*, ___-NMSC-___, ¶ 31; *see id.* ¶ 19 ("Because the jury returned a guilty verdict that contains alternative legal bases for conviction, we apply the *Foster* presumption to determine whether the conduct was unitary with another offense.").

{15} In this case, we conclude that the *Foster* presumption is not rebutted. Based on the facts presented at trial, we conclude that Defendant's act of grabbing Officer Ashburn's arm is the only basis upon which the jury reasonably could have found that Defendant "abused" either officer. *Cf. Sena,* 2020-NMSC-011, ¶¶ 53-56 (determining that the presumption was rebutted by evidence presented at trial that multiple batteries were each completed before the other occurred). In this context, the term "[a]buse" encompasses to verbally or physically "attack or injure." *See State v. Wade*, 1983-NMCA-084, ¶ 6, 100 N.M. 152, 667 P.2d 459 (considering verbal abuse of a police officer). The evidence demonstrated that Defendant ignored the officers' verbal directives, moved away from them, and physically resisted being handcuffed throughout the altercation. This conduct does not fall within the term "abuse." As such, we conclude that the jury would not have been able to reasonably infer independent factual bases for the battery of Officer Ashburn and the abuse alternative, based on the evidence presented at trial. *See Franco*, 2005-NMSC-013, ¶ 7.

{16} The State argues that the *Foster* presumption is rebutted in this case based on evidence demonstrating that "Defendant resisted or abused both officers by tensing up, resisting commands to show his hands to allow him to be handcuffed and similar actions." [AB 11] The State's argument in this regard, however, does not address how such evidence would suffice to rebut the *Foster* presumption. In *Sena*, the

"presumption" that was rebutted was that the jury relied on unitary conduct to convict. 2020-NMSC-011, ¶¶ 54-56. Our Supreme Court did not, however, evaluate the evidence against any of the other possible *legal* alternatives to rebut the presumption. Instead, the Court looked to whether the evidence showed separate conduct to satisfy the overlapping legal alternatives. *Id.* ¶ 54 ("Although the instructions allowed the jury to convict under the battery alternative for each crime, the *Foster* presumption is rebutted by evidence that each crime was completed before the other crime occurred."). Viewed in this light, the central question in analyzing whether the *Foster* presumption is rebutted is not whether the evidence demonstrated that Defendant resisted or abused two officers, but rather whether any evidence demonstrated distinct conduct to establish that an officer was battered and an officer was abused—that the offense of battery upon a peace officer was completed before the offense of abusing an officer, *see Phillips*, 2024-NMSC-009, ¶ 40, or that separate acts of battery and abuse could be discerned based on the underlying conduct involved multiple events separated by time, space, or other indicia of distinctness that could be assessed through an analysis of the *Herron* factors. *See Vigil*, 2021-NMCA-024, ¶ 21; *Neal*, ___-NMSC-___, ¶¶ 16, 31.

{17} As Defendant contends [RB 2-3], there was no evidence demonstrating that the two offenses were separated by either time or intervening circumstances, nor was there evidence demonstrating any other indicia of distinctness. Even if we do not

confine ourselves to "abuse" and consider resisting conduct, the altercation between Defendant and the officers was confined to a single location and occurred without any intervening events or sequencing that might allow for reasonable distinction between Defendant's act of abuse—grabbing Officer Ashburn's arm—and the acts of refusing to follow the officers' commands, refusing to bring his hands behind his back, tensing up and pulling away his arms, resisting the officers' efforts to place him in handcuffs, and wrestling with the officers after being tipped back in the chair. *See Phillips*, 2024-NMSC-009, ¶ 12. Additionally, it appears that Defendant's intent remained consistent throughout the encounter: to resist the officers' attempts to apprehend him. *See id.* Thus, four of the *Herron* factors weigh against distinctness. *See Phillips*, 2024-NMSC-009, ¶ 30 (weighing the *Herron* factors).

{18} The State argues that the remaining two *Herron* factors weigh in favor of distinctness and rebut the *Foster* presumption: the temporal proximity of the acts and the number of victims. [AB 7-10] As to the temporal proximity, the evidence does not make clear precisely how long the altercation lasted, and there is some conflict between Officer Ashburn's testimony that the elapsed time of the struggle was "extended" [5/16/24 CD 11:53:52-54:05], and the State's comment during closing argument that "the events happened really fast." [5/16/2024 CD 3:35:05-08] Given the ambiguous evidentiary record relevant to this factor, and without any indication that the underlying events were notably protracted or that Defendant's

intent changed during the incident, we are not persuaded by the State's assertion that the temporal proximity factor weighs in favor of distinctness in this case. *See State v. Garcia*, 2009-NMCA-107, ¶¶ 13, 16, 147 N.M. 150, 217 P.3d 1048 (concluding that the *Herron* factors weighed against distinctness where, although the record lacked some amount of detail, it appeared that the defendant's acts "occurred close in time and sequence" and the defendant had otherwise engaged in a "continuous course of conduct" that was "continually and sequentially progressing . . . without any apparent change in [the d]efendant's state of mind").

{19} As to the number of victims, the State argues that this factor weighs in favor of distinctness, asserting that the fact that there were two victims is pertinent to the issue of whether Defendant's conduct was unitary. [AB 7-10] The State further contends that the involvement of two victims "obviate[es] the applicability of a *Foster* presumption." [AB 10-11] We are unpersuaded by the State's contention that the involvement of two victims necessarily means that the underlying conduct was not unitary. Although the number of victims is one of the six factors this Court will examine in determining whether a defendant's conduct was unitary, *Phillips*, 2024-NMSC-009, ¶ 12, "the existence of multiple victims does not, itself, settle whether conduct is unitary or distinct." *State v. Bernal*, 2006-NMSC-050, ¶ 18, 140 N.M. 644, 146 P.3d 289. Indeed, numerous other cases have also involved resistance against multiple officers but have not treated that factor as dispositive of the analysis.

See State v. Jones, 2020-NMCA-029, ¶¶ 2, 13, 464 P.3d 1079 (recognizing that defendant placing herself between two officers and her son and grabbing wrist of one officer could give rise to double jeopardy for both resisting and battery charges); *see also State v. Mendez*, A-1-CA-40445, mem. op. ¶¶ 10-24 (N.M. Ct. App. Sep. 10, 2024) (nonprecedential) (involving three officers and finding assault and battering conduct directed towards two of them constituted double jeopardy with resisting and evading charges since it was based on unitary conduct but that the conduct related to the first officer was temporally and spatially distinct); *State v. Beard*, A-1-CA-35014, mem. op. ¶¶ 7-11 (N.M. Ct. App. Jan. 31, 2019) (nonprecedential) (involving one officer initially trying to apprehend defendant with a second officer joining to assist).

{20} We therefore conclude that, based on our analysis under both the *Foster* presumption and the *Herron* factors, *see Neal*, ___-NMSC-___, ¶ 16, Defendant's underlying conduct was unitary. As such, we further conclude that Defendant's convictions for battery upon a peace officer and resisting or abusing an officer violate double jeopardy. *See Jones*, 2020-NMCA-029, ¶ 13; *Ford*, 2007-NMCA-052, ¶¶ 18-23; *Diaz*, 1995-NMCA-137, ¶ 13. As the conviction carrying the shorter sentence, *see Phillips*, 2024-NMSC-009, ¶ 37, we reverse Defendant's conviction for resisting or abusing an officer and remand to the district court to vacate that conviction and resentence Defendant accordingly.

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

Katherine A. Wray

KATHERINE A. WRAY, Judge

WE CONCUR:

Jacqueline R. Medina

JACQUELINE R. MEDINA, Chief Judge

SHAMMARA H. HENDERSON, Judge