Official Publication of the State Bar of New Mexico

Bar Bulletin

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Kyoto Crossing, by Brandon McIntyre

Inside This Issue

State Bar of New Mexico
Est. 1886

The *Bar Bulletin* (ISSN 1062-6611) is distributed twice a month by the State Bar of New Mexico, 5121 Masthead St. NE, Albuquerque, NM 87109-4367. The first issue of each month is published and distributed in print and electronically. The second issue of each month is distributed electronically. Periodicals postage paid at Albuquerque, NM. Postmaster: Send address changes to *Bar Bulletin,* PO Box 92860, Albuquerque, NM 87199-2860.

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www.sbnm.org

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Cannabis Law	12	9	9 a.m., Zoom
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Notices

Please email notices desired for publication to notices@sbnm.org.

Professionalism Tip

With respect to my clients:

I will counsel my client that initiating or engaging in settlement discussions is consistent with zealous and effective representation.

Court News

New Mexico Supreme Court

Rule-Making Activity

To view recent Supreme Court rule-making activity, visit the Court's website at https://supremecourt.nmcourts.gov. To view all New Mexico Rules Annotated, visit New Mexico OneSource at https://nmonesource.com/nmos/en/nav.do.

Supreme Court Law Library

The Supreme Court Law Library is open to the legal community and public at large. The Library has an extensive legal research collection of print and online resources. The Law Library is located in the Supreme Court Building at 237 Don Gaspar in Santa Fe. Building hours: Monday-Friday 8 a.m.-5 p.m. (MT). Library Hours: Monday-Friday 8 a.m.-noon and 1-5 p.m. (MT). For more information call: 505-827-4850, email: libref@nmcourts.gov or visit https://lawlibrary.nmcourts.gov.

N.M. Administrative Office of the Courts

Learn About Access to Justice in New Mexico in the "Justice for All" Newsletter

Learn what's happening in New Mexico's world of access to justice and how you can participate by reading "Justice for All," the New Mexico Commission on Access to Justice's monthly newsletter! Email atj@nmcourts.gov to receive "Justice for All" via email or view a copy at https://accesstojustice.nmcourts.gov.

State Bar News

Save the Date for the State Bar of New Mexico's 2024 Annual Meeting on Oct. 25

The Annual Meeting looks a little different this year! Save the Date for the State Bar of New Mexico's 2024 Annual Meeting on Oct. 25. "Be Inspired" during one full day of legal education, networking with your colleagues, inspirational speakers and activities, entertainment and much more. Join us either in-person at the State Bar Center or virtually and earn all 12 of your CLE credits for the year! Sponsorship opportunitites are now available. More information and registration can be viewed soon at https://www.sbnm.org/AnnualMeeting2024.

Alternative Dispute Resolution Committee

Notice of Quarterly Meetings

The State Bar of New Mexico's Alternative Dispute Resolution Committee that covers all topics related to ADR meets each quarter for general meetings. The Committee's next meeting is July 18, where the ADR Committee will discuss topics for their Annual Institute and have a presentation by Tonya Covington on "Restorative Justice and How It Fits Into Alternative Dispute Resolution." For more information, contact either Tamara Couture by email at tamara@couturelaw.com or by phone at 505-266-0125, or contact Rachel Donovan by email at abqmediation@gmail.com or by phone at 505-328-4792.

Communications Advisory Committee

Join the New Committee!

The Communications Advisory Committee, which the Board of Bar Commissioners established earlier this year, is a committee that sources and reviews content for the Bar Bulletin. There are currently 10 open seats on the Committee, which will begin work in 2025. To apply for the Committee, please submit a letter of interest and your experience in this area. Send your email application by email to notices@sbnm.org by Aug. 31 for consideration.

Elder Law Section

Invitation to Monthly Medicaid Lunch and Learns

The New Mexico legal community is invited to attend an all-new monthly series of "Medicaid In Small Bites" lunch and learns. Presented by Lori L. Millet, Esq. and co-hosted by the State Bar of New Mexico's Elder Law Section Board, these lunch and learns will provide attendees the opportunity to both better understand the complexities of Medicaid in a legal capacity and avoid the potential pitfalls accompanying misunderstandings of Medicaid. These sessions will be held through Zoom on July 18, Aug. 15, Sept. 19, Oct. 17, Nov. 21 and Dec. 19, from noon to 12:30 p.m. (MT). To join, visit https://us02web.zoom.us/j/83846688863?pwd=RJsHBnM7tbQdTBfU6aLfVzQF2Y5T0b.1. For any quesions about joining the lunch and learn, please contact jbrannen@brannenlawllc.com.

New Mexico Lawyer Assistance Program

NM LAP Committee Meetings

The NM LAP Committee will meet at 4 p.m. (MT) on July 11 and Oct. 11. The NM LAP Committee was originally developed to assist lawyers who experienced addiction and substance abuse problems that interfered with their personal lives or their ability to serve professionally in the legal field. The NM LAP Committee has expanded their scope to include issues of depression, anxiety, and other mental and emotional disorders for members of the legal community. This committee continues to be of service to the New Mexico Lawyer Assistance Program and is a network of more than 30 New Mexico judges, attorneys and law students.

New Mexico Well-Being Committee Meetings

The N.M. Well-Being Committee was established in 2020 by the State Bar of New Mexico's Board of Bar Commissioners. The N.M. Well-Being Committee is a standing committee of key stakeholders that encompass different areas of the legal community and cover state-wide locations. All members have a well-being focus and concern with respect to the N.M. legal community. It is this committee's goal to examine and create initiatives centered on wellness. The Well-Being Committee will meet the following dates at 3 p.m. (MT): July 30, Sept. 24 and Nov 26. Email Tenessa Eakins at Tenessa.Eakins@sbnm.org.

New Mexico State Bar Foundation

New Mexico State Bar Foundation Golf Classic - Register to Play!

You're invited to the New Mexico State Bar Foundation Golf Classic on Sept. 30 at 9 a.m. (MT) at the Tanoan Country Club in Albuquerque! Register to play form.jotform.com/sbnm/GolfClassic. All proceeds benefit the New Mexico State Bar

Supreme Court of New Mexico Sitting in Terms

At its February 2024 administrative conference, the Supreme Court of New Mexico approved sitting in terms with updates to the Court's oral argument calendar.

Notably, the Supreme Court of New Mexico will hear oral arguments in the months of September, November, December, and March. Dispositions for all cases submitted during the Court's 2024-2025 term will be filed on or before July 15, 2025. At this time, no amendments to the Rules of Appellate Procedure are necessary to implement the Court's new calendar. The Court will continue to set expedited appeals in accordance with Supreme Court Order No. 238500-016, In the Matter of the Modification of the Policy Expediting the Process for Specific Categories of Case upon the Issuance of Writ of Certiorari. For the current Supreme Court oral argument schedule, please visit the Court's website at https://supremecourt.nmcourts.gov/about-this-court/court-calendar-and-oral-argument-livestream/.

Foundation. Sponsorship opportunities are also available. Visit www.sbnm.org/NMSBFGolfClassic2024 for more information.

UNM School of Law

The Law Art Reception

The UNM School of Law is celebrating creative works by our alumni and community members displayed in the School of Law Art Gallery at the Law Art Reception. The event will be held on July 17 from 4 to 6 p.m. (MT) at the UNM School of Law. To RSVP, visit forms.unm.edu/forms/lawartgallery.

Law Library Hours

The Law Library is happy to assist attorneys via chat, email, or in person by appointment from 8 a.m.-8 p.m. (MT) Monday through Thursday and 8 a.m.-6 p.m. (MT) on Fridays. Though the Library no longer has community computers for visitors to use, if you bring your own device when you visit, you will be able to access many of our online resources. For more information, please see lawlibrary.unm.edu.

Other News

N.M. Legislative Counsel Service

Legislative Research Library Hours

The Legislative Research Library at the Legislative Council Service is open to state agency staff, the legal community, and the general public. We can assist you with locating documents related to the introduction and passage of legislation as well as reports to the legislature. Hours of operation are Monday through Friday, 8 a.m. to 5 p.m. (MT), with extended hours during legislative sessions. For more information and how to contact library staff, please visit https://www.nmlegis.gov/Legislative_Library.

New Mexico Workers' Compensation Administration

Notice of Judicial Vacancy

The New Mexico Workers' Compensation Administration announces a vacant judge position in Albuquerque. The position is exempt, with an initial one-year term, and a possible reappointment to a subsequent five-year term. Interested applicants must be licensed by and in good standing with the New Mexico Supreme Court to practice law in New Mexico, with five years of experience as a practicing attorney. A background check will be performed prior to hiring.

Attorneys interested in applying for the judge vacancy must complete a judicial application and submit to the WCA along with a resume and legal writing sample by close of business on Aug. 5 to the attention of WCA Director Robert E. Doucette, Jr. Completed application packets should be labeled "WCA Judge Vacancy," and mailed to the Workers' Compensation Administration, Attn: Director's Office, PO Box 27198, Albuquerque, NM, 87125-7198; or transmitted via email to Nicole.Bazzano@wca.nm.gov. For more information, and to obtain the judicial application, visit the WCA's website, https://workerscomp.nm.gov/WCA-Jobs.

BE ON THE LOOKOUT FOR THE NEXT DIGITAL-ONLY ISSUE OF THE BAR BULLETIN!

The Bar Bulletin is published twice a month. The first issue of the month is printed and distributed electronically. The second issue of the month is only distributed electronically. All printed and digital issues of the Bar Bulletin can be read at https://www.sbnm.org/News-Publications/Bar-Bulletin/Current-Issue

Legal Education Calendar

July

1-31 **Self-Study - Tools for Creative Lawyering: An Introduction to Expanding Your Skill Set with Eric Sotkin**
1.0 G, 2.0 EP
Online On-Demand
The Ubuntuworks Project
www.ubuntuworksschool.org

11 **A Comprehensive Look at the US Sentencing Guidelines: Calculating Guidelines in Drug Cases**
1.0 G
Webcast
Administrative Office
of the U.S. Courts
www.uscourts.gov

11 **REPLAY: 2024 Updates to the New Mexico Child Support Guidelines**
1.0 G
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

12 **Elimination of Bias-Combating Age Bias in the Legal Field**
1.0 EIJ
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

12 **Percentage Rent Leases in Commercial Real Estate**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

16 **Cybercrime Prosecutions Training**
24.0 G
Live Program
New Mexico Department of Justice
www.nmdoj.gov

17 **REPLAY: 2024 Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204**
1.0 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

17 **Why Women Attorneys Get Paid Less: What's Gender Bias Got to Do With It**
1.0 EIJ
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

17 **2024 Family and Medical Leave Update**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

18 **Ethics, Juror Misconduct, and Jury Tampering: The Murdaugh Motion For New Trial**
2.0 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

18 **REPLAY: Don't Get Caught: Deep-Dive into the Corporate Transparency Act**
1.0 G
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

19 **Drafting Supply Agreements**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

24 **REPLAY: Pronouns, Salutations and Gender-Neutral Language in the Legal System**
1.7 EIJ
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

24 **Secured Transactions Practice: Security Agreements to Foreclosures Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

25 **Secured Transactions Practice: Security Agreements to Foreclosures Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

25 **REPLAY: 2024 Health Law Legislative Roundup**
1.5 G
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

31 **Due Diligence in Commercial Real Estate Transactions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

Listings in the *Bar Bulletin* Legal Education Calendar are derived from course provider submissions and from New Mexico Minimum Continuing Legal Education. All MCLE approved continuing legal education courses can be listed free of charge. Send submissions to notices@sbnm.org. Include course title, credits, location/course type, course provider and registration instructions. For a full list of MCLE-approved courses, visit https://www.sbnm.org/Search-For-Courses.

Opportunities for Pro Bono Service CALENDAR

July

12 **Legal Fair**
In-Person
New Mexico Legal Aid
bit.ly/NMLALegalFairSignUp
Location: Taos

19 **Legal Fair**
In-Person
Eighth Judicial District Court Pro Bono Committee w/New Mexico Legal Aid
bit.ly/NMLALegalFairSignUp
Locations: Taos, Colfax, Union Counties

25 **Asylum Initial Application and Work Permit Pro Se Clinic**
In-Person
New Mexico Immigrant Law Center
www.nmilc.org/asylum
Location: Announced prior to clinic

26 **Legal Fair**
In-Person
New Mexico Legal Aid
bit.ly/NMLALegalFairSignUp
Location: Santa Fe

If you would like to volunteer for pro bono service at one of the above events, please contact the hosting agency.

Resources for the Public CALENDAR

July

10 **Divorce Options Workshop**
Virtual
State Bar of New Mexico
Call 505-797-6022 to register
Location: Virtual

12 **Legal Fair**
In-Person
New Mexico Legal Aid
bit.ly/NMLALegalFairSignUp
Location: Taos

16 **Legal Resources for the Elderly Workshop**
Virtual
State Bar of New Mexico
Call 505-797-6005
or 1-800-876-6657 to register
Location: Virtual

19 **Legal Fair**
In-Person
Eighth Judicial District Court Pro Bono Committee w/New Mexico Legal Aid
bit.ly/NMLALegalFairSignUp
Locations: Taos, Colfax, Union Counties

24 **Consumer Debt/Bankruptcy Workshop**
Virtual
State Bar of New Mexico
Call 505-797-6094 to register
Location: Virtual

25 **Asylum Initial Application and Work Permit Pro Se Clinic**
In-Person
New Mexico Immigrant Law Center
www.nmilc.org/asylum
Location: Announced prior to clinic

Listings in the *Bar Bulletin* Pro Bono & Volunteer Opportunities Calendar are gathered from civil legal service organization submissions and from information pertaining to the New Mexico State Bar Foundation's upcoming events. All pro bono and volunteer opportunities conducted by civil legal service organizations can be listed free of charge. Send submissions to probono@sbnm.org. Include the opportunity's title, location/format, date, provider and registration instructions.

Order Dismissing Citation and Order to Show Cause

From the New Mexico Supreme Court

June 20, 2024

No. S-1-SC-00015

IN THE MATTER OF THE SUSPENSION OF ACTIVE MEMBERS OF THE STATE BAR OF NEW MEXICO FOR NONCOMPLIANCE WITH 2024 ANNUAL LICENSE RENEWAL REQUIREMENTS PURSUANT TO RULE 24-102 NMRA

ORDER DISMISSING CITATION AND ORDER TO SHOW CAUSE

WHEREAS, this matter came on for consideration by the Court, upon notification from the State Bar of New Mexico of attorney compliance with the 2024 licensing requirements, and it appearing that on May 17, 2024, pursuant to order of the Court, a Citation and Order to Show Cause why the cited delinquent members of the State Bar of New Mexico should not be suspended from the practice of law for noncompliance with MCLE requirements for licensing year 2024 either due to failure to complete the required credits, failure to pay assessed sanctions, or both, was issued; and

WHEREAS, having been notified by the State Bar of New Mexico that as of June 18, 2024, the following attorneys have either satisfied all licensing requirements under Rule 24-102 NMRA for the year 2024, have timely applied for inactive status, or have confirmed the expiration of their limited license, and the Court having considered the foregoing and being sufficiently advised, Chief Justice David K. Thomson, Justice Michael E. Vigil, Justice C. Shannon Bacon, Justice Julie J. Vargas, and Justice Briana H. Zamora concurring;

NOW, THEREFORE, IT IS ORDERED that the Citation and Order to Show Cause hereby is DISMISSED for the following attorneys in compliance with Rule 24-102 NMRA: and

Jeffrey Lynn Allen
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Sweetwater, TX 79556-0078

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108 Wellesley Dr SE
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Order Dismissing Citation and Order to Show Cause

From the New Mexico Supreme Court

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Order Dismissing Citation and Order to Show Cause

From the New Mexico Supreme Court

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Thomas Gordon Wood
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Albuquerque, NM 87102-2064

IT IS FURTHER ORDERED that the Citation and Order to Show Cause hereby is DISMISSED as to the following attorneys who have timely applied for inactive status:

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IT IS FURTHER ORDERED that the Citation and Order to Show Cause is hereby DISMISSED as to the following attorney whose limited license has been confirmed as expired prior to the deadline for compliance:

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51 Jemez Canyon Dam Rd
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87004-5986

Order of Suspension

From the New Mexico Supreme Court

June 20, 2024

No. S-1-SC-2023-00015

IN THE MATTER OFTHE SUSPENSION OF ACTIVE MEMBERS OF THE STATE BAR OF NEW MEXICO FOR NONCOMPLIANCE WITH 2024 ANNUAL LICENSE RENEWAL REQUIREMENTS PURSUANT TO RULE 24-102 NMRA

ORDER OF SUSPENSION

WHEREAS, this matter came on for consideration by the Court upon certificate filed by the Board of Commissioners of the State Bar of New Mexico attesting that certain members of the State Bar of New Mexico are delinquent for failure to comply with the 2024 annual license renewal requirements under Rule 24-102 NMRA;

WHEREAS, the Clerk of this Court, on May 17, 2024, issued and served via Odyssey File & Serve and by first-class regular mail to the last known address shown on the Official Roll of Attorneys a Citation and Order to Show Cause to each delinquent attorney;

WHEREAS, the time within which to comply or respond to said Citation and Order to Show Cause having elapsed, and the delinquent attorneys listed below having remained in noncompliance with the 2024 annual license renewal requirements under Rule 24-102 NMRA, and the Court having considered the foregoing and being sufficiently advised, Chief Justice David K. Thomson, Justice Michael E. Vigil, Justice C. Shannon Bacon, Justice Julie J. Vargas, and Justice Briana H. Zamora concurring;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the named attorneys listed below **ARE SUSPENDED FROM THE PRACTICE OF LAW** in the courts of this State by reason of noncompliance with Rule 24-102 NMRA for licensing year 2024;

IT IS FURTHER ORDERED that the Clerk of this Court shall change the Official Roll of Attorneys to indicate the status of suspension for the attorneys listed below, and that notice thereof be given to each judge in the state of New Mexico and published in the *Bar Bulletin*: and

Claire L. Addison
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Order of Suspension

From the New Mexico Supreme Court

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IT IS FURTHER ORDERED that an order addressing the status of the following non-compliant attorneys holding a limited license shall separately issue:

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Call for Pro Bono Articles & Content

The State Bar of New Mexico is soliciting articles and brief comments regarding what you find most rewarding about doing pro bono work in New Mexico. Please send submissions to Brandon McIntyre at **Brandon.McIntyre@sbnm.org** for possible inclusion in a future *Bar Bulletin*.

State Bar of New Mexico
Est. 1886

The deadline for submissions is Aug. 30.
We look forward to your submissions!

State Bar of New Mexico
Est. 1886

ANNUAL MEETING 2024

What Inspires You?

We want to hear from you!

To highlight the **2024 Annual Meeting's "Be Inspired"** theme, we would love to know: **What inspires you?** Please submit short video at a max of 20 seconds or written text about how you stay inspired to **notices@sbnm.org**, and you will be featured during the Annual Meeting as well as in the *Bar Bulletin* and on the State Bar's social media!

We look forward to your submissions!
Please contact notices@sbnm.org if you have any questions.

be inspired.

When filming the short video, please ensure centered orientation and clear resolution. Please provide your name and contact information when submitting. Submissions will be screened for relevancy and approved by the State Bar of New Mexico.

From the New Mexico Supreme Court

Opinion Number: 2024-NMSC-010
No: S-1-SC-38300 (filed March 4, 2024)

STATE OF NEW MEXICO,
Plaintiff-Petitioner,
v.
DAVID RAEL,
Defendant-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Mary L. Marlowe Sommer, District Judge

Hector H. Balderas, Attorney General
Marko David Hananel,
Assistant Attorney General
Santa Fe, NM

for Petitioner

Bennett J. Baur, Chief Public Defender
Caitlin C.M. Smith, Assistant Appellate Defender
Santa Fe, NM

for Appellee

OPINION

VIGIL, Justice.

{1} This appeal arises from a prosecution under the Sexual Exploitation of Children Act (the Act), NMSA 1978, §§ 30-6A-1 to -4 (1984, as amended through 2016), legislation that this Court previously forecast would create its fair share of interpretative issues. *See State v. Myers*, 2011-NMSC-028, ¶¶ 1, 19, 150 N.M. 1, 256 P.3d 13 (stating that determining "the meaning of certain elements of the Act and applying the elements to differing fact situations" would prove "challeng[ing to] our courts"). We first discuss the relevant statutory provisions, as this sets the stage for our analysis and conclusions.

{2} Pornography is defined as a *prohibited sexual act*[1] which is depicted on a *visual or print medium*[2] and is *obscene*.[3] *Black's Law Dictionary* (11th ed. 2019) 1405 (defining *pornography*). When a child under eighteen years of age is depicted, it is child pornography. *See id.* Consistent with the purpose of the Act to protect children from "the harm to the child that flows from trespasses against the child's dignity when treated as a sexual object," *State v. Myers*, 2009-NMSC-016, ¶ 17, 146 N.M. 128, 207 P.3d 1105 (internal quotation marks and citation omitted), Section 30-6A-3 makes it a crime to possess, distribute, or manufacture child pornography.[4]

{3} Section 30-6A-3(A) criminalizes the possession of child pornography, as a fourth-degree felony, and Section 30-6A-3(C) criminalizes the distribution of child pornography, as a third-degree felony. In identical language, these two subsections make it a crime to "intentionally possess" or "intentionally distribute" pornography

> if that person *knows or has reason to know* that the obscene medium depicts any prohibited sexual act or simulation of such act and if that person *knows or has reason to know* that one or more of the participants in that act is a child under eighteen years of age.

Section 30-6A-3(A), (C) (emphases added).

{4} The most serious of the child pornography crimes is found in Section 30-6A-3(E), which provides that it is a second-degree felony to manufacture child pornography. Section 30-6A-3(E) provides, in pertinent part,

> It is unlawful for a person to intentionally manufacture any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if one or more of the participants in that act is a child under eighteen years of age.

---

[1] Section 30-6A-2(A) ("[P]rohibited sexual act means:
(1) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex;
(2) bestiality;
(3) masturbation;
(4) sadomasochistic abuse for the purpose of sexual stimulation; or
(5) lewd and sexually explicit exhibition with a focus on the genitals or pubic area of any person for the purpose of sexual stimulation.")

[2] Section 30-6A-2(B) ("[V]isual or print medium means:
(1) any film, photograph, negative, slide, computer diskette, videotape, videodisc or any computer or electronically generated imagery; or
(2) any book, magazine or other form of publication or photographic reproduction containing or incorporating any film, photograph, negative, slide, computer diskette, videotape, videodisc or any computer generated or electronically generated imagery.")

[3] Section 30-6A-2(E). ("[O]bscene means any material, when the content if taken as a whole:
(1) appeals to a prurient interest in sex, as determined by the average person applying contemporary community standards;
(2) portrays a prohibited sexual act in a patently offensive way; and
(3) lacks serious literary, artistic, political or scientific value.")

[4] Section 30-6A-3 was amended following the pertinent events of this case. See 2016 N.M. Laws, ch. 2, § 1. The 2016 amendments, including those adding a subsection and relettering others, do not affect our substantive analysis. For clarity and ease of reference, we refer to the current version of the statute throughout this opinion. For simplicity's sake, we will use the term "child pornography" in describing crimes of sexual exploitation of children defined in Section 30-6A-3.

The Act elsewhere broadly defines the term "manufacture" to mean "the production, processing, copying by any means, printing, packaging or repackaging of any [prohibited] visual or print medium." Section 30-6A-2(D).

{5} The statutory element "knows or has reason to know," which is required for possession and distribution, is not an element of manufacturing. The absence of this element makes for the core issue in this case: under the Act, what is the statutory mental state or mens rea requirement for manufacturing? The Court of Appeals engrafted the "knows or has reason to know" element onto the crime of manufacturing child pornography. *State v. Rael*, 2021-NMCA-040, ¶ 32, 495 P.3d 598. We reject this construction of Section 30-6A-3(E) and hold that the mens rea for manufacturing child pornography consists of "intentionally" manufacturing pornography that "intentionally" depicts a child under eighteen years of age and that in fact depicts a child that is under eighteen years of age. *See* § 30-6A-3(E).

{6} The Court of Appeals also held that the State presented insufficient evidence of Defendant's mens rea to support Defendant's convictions. *Rael*, 2021-NMCA-040, ¶¶ 41-51. We disagree with this conclusion as well.

{7} Accordingly, we reverse the Court of Appeals and reinstate Defendant's convictions.

I. BACKGROUND

A. Factual Background and District Court

{8} Defendant was initially charged in a criminal information filed in the district court with four counts of manufacturing child pornography, one count of distributing child pornography, and one count of possession of child pornography. One count of manufacturing child pornography was dismissed at the start of the trial, and the trial went to the district court in a bench trial without a jury. After the bench trial the district court filed findings of fact and conclusions of law, concluding that the "State proved beyond a reasonable doubt Defendant's guilt" of all remaining charges. Defendant was sentenced to a total of thirty-one and one-half years, with all counts to run concurrently, resulting in an actual sentence of nine years in the Department of Corrections.

{9} The evidence presented was as follows. The New Mexico Attorney General's Office operates the New Mexico Internet Crimes Against Children Task Force (the Task Force). Special Agent Owen Peña works for the Task Force and testified that the Task Force conducts undercover online investigations of peer-to-peer, file-sharing networks. He was qualified by the court as an expert witness in peer-to-peer investigations and testified as follows.

{10} Peer-to-peer, file-sharing networks allow people to share files with others on the same network, with each computer in the network serving as both a terminal to download materials and as a server for other computers to download materials. Such networks are popular and legal except when they are used for the illegal distribution of materials such as child pornography. To use a file-sharing network, the user must download the file-sharing software—relevant here is DownloadHQ—and then share files to continue accessing the network.[5] When accessing files, DownloadHQ has a preview window that allows users to view, or watch, a portion of the video file before selecting which files to download.

{11} When conducting investigations, the Task Force uses specialized software to search the file-sharing networks and locate individuals sharing child pornography. This is accomplished by using common search terms to locate suspected child pornography files and then comparing a suspected file's "hash values" to those of known child pornography files in a database. *See State v. Knight*, 2019-NMCA-060, ¶ 4, 450 P.3d 462 ("[H]ash values . . . are alphanumeric values assigned to every unique file."). Once confirmed that a suspected file contains hash values matching known child pornography, the software then selects the user sharing the content and determines the Internet Protocol (IP) address and general geographic location.

{12} Special Agent Peña testified that while he was conducting an investigation, the software identified an IP address in New Mexico sharing files with hash values matching potential child pornography. The IP address belonged to Defendant. Special Agent Peña detailed how he made a direct connection to Defendant's computer, browsed the files listed in Defendant's shared files folder, and downloaded one of the files. The downloaded file was named "(pthc)black gay man fucking a 13 year old boy (hot!!)" ("thirteen-year-old-boy" video). According to Special Agent Peña, the acronym "pthc" in the file name stands for "pre-teen hardcore." Special Agent Peña reviewed the downloaded file and confirmed it was child pornography. Defendant later stipulated at trial that the "thirteen-year-old-boy" video contains "prohibited sexual acts as defined in Section 30-6A-2(A)(1)" and is "obscene as that term is defined in Section 30-6A-2(E)."

{13} Special Agent Peña obtained a grand jury subpoena allowing him to get subscriber information for the IP address. He forwarded that information to Sergeant (now Commander) Oliver Morris of the Los Alamos Police Department who determined that Defendant's physical address was associated with the IP address. Commander Morris then obtained a search warrant which he executed with Special Agent Peña. During the search, a Gateway computer and a Toshiba external hard drive were seized from Defendant's bedroom.

{14} Special Agent Peña testified that during the execution of the search warrant, the Gateway computer had DownloadHQ running, and searches for "teen sex" and "extreme sex" were active. Special Agent Peña further testified that the username for the DownloadHQ account on the computer was the same username Defendant previously used to download the "thirteen-year-old-boy" video. He explained that when Defendant downloaded files, they were directed to the C.drive "downloads" folder in the Gateway computer instead of the default DownloadHQ folder. Defendant therefore knew where the downloaded files were stored since he changed where the downloads were automatically directed. Special Agent Peña added that Defendant modified the software settings so that, using the software, he could make five uploads and fifteen downloads at once. Finally, Special Agent Peña testified that when OS Triage—a program that allows law enforcement to do an onsite preview of the data on a computer—was run on the Gateway computer, it showed several child pornography related searches in the browser history and that the search-term keyword "young" had been used.

{15} After the search warrant was executed, Defendant agreed to an interview with Commander Morris and Special Agent Peña at the Los Alamos Police Department. Before the interview, Defendant stated he understood his *Miranda* rights and signed a *Miranda* waiver form. The interview was video-recorded, and it took place before the Gateway computer and Toshiba external hard drive were forensically examined. At trial, the seventy-eight-minute video-recorded interview was admitted into evidence without objection.

{16} Throughout that interview, Defendant made several admissions. Defendant said he was the owner of the Gateway computer and the Toshiba external hard drive. Defendant admitted he was generally the exclusive user of the Gateway computer, he was "pretty much" responsible for its contents, his roommates did not know the password to the computer, his internet was secured by a username and password,

[5] DownloadHQ is a version of the file-sharing program Ares. Witnesses and trial counsel referred to DownloadHQ and Ares interchangeably. For consistency, we use DownloadHQ throughout this opinion.

and he used CCleaner—an antiforensic program—daily. Defendant described how he was somewhat familiar with computers and that he would help friends who were having computer issues. Defendant also stated that he was familiar with DownloadHQ which he had been using for about two and one-half years. He understood it was a program used to share files in that he would select files to download from other users and that other users would initiate uploads of files from his computer. He knew child pornography was illegal.

{17} In general, Defendant claimed that if the file name of a video suggested it contained child pornography, he would not download it. When questioned about the child pornography files on his computer, Defendant admitted to having opened and viewed files containing child pornography; however, he claimed that he deleted the files after determining their content. Special Agent Peña asked Defendant why he would download the files in the first place, and Defendant responded that the files must have been under a different file name. Special Agent Peña then read off the file names for some of the files found in Defendant's shared file folder. These included "2 brothers fucking 14 year old sister," "2 girls 2 14 15 yo fucking hardcore" and "maverick men two fucking bitching boy in bathroom." Special Agent Peña asked Defendant, "Don't you think you would've got rid of those ones?" and Defendant responded, "I thought I did." Special Agent Peña informed Defendant that all told, there were thirty-seven suspected child pornography files linked to his DownloadHQ account. Defendant again responded that they must have been under different file names. Later in the interview, Defendant claimed that if child pornography files were still on his computer, it was because at times he would get drunk, "pass out," and forget to delete them.

{18} With regard to his search history, Defendant admitted to using certain search terms, which included "teen," and stated that "there's probably search stuff in there but I don't typically look at child [pornography]." Defendant nevertheless admitted that he had, at various times, inadvertently downloaded child pornography, but upon watching them and learning they depicted children, he turned them off before any sex acts occurred and deleted them.

{19} Defendant offered two examples of videos he claimed to have deleted immediately upon learning children were involved: a video showing three naked thirteen-year-old girls dancing and a video of a naked girl in a bathtub. These two videos that Defendant described matched the videos we refer to herein as the "Alicia" video, and the "lingerie" video. Finally, Defendant admitted that he recognized the file name "KitKatClub," but maintained that he recalled the video as being adult pornography and not child pornography.

{20} After the interview, Defendant's Gateway computer and Toshiba external hard drive were taken to the Regional Computer Forensics Laboratory for forensic analysis. Detective Christopher Brown of the New Mexico Regional Computer Forensics Laboratory conducted the forensic analysis. He was qualified by the court as an expert in computer forensics and testified as to the results. His testimony related to the "Alicia" video and the "lingerie" video, which Defendant admitted he watched, and a third video referred to at trial as the "Kimmy" video. Detective Brown testified that all three videos contain child pornography. These videos are the basis for Defendant's three convictions for manufacturing child pornography. As pertains to the file names, Detective Brown testified that three terms are particularly indicative of child pornography: "pthc" and "ls" and "lolita."

{21} The "Alicia" video is named "!fuckingdaughteralicia(3)(2)256.mpg." Detective Brown testified that the video is in two folders on the Toshiba external hard drive and that it was downloaded on two separate dates: March 15, 2013, and April 5, 2013. Detective Brown confirmed that the "Alicia" video depicts "a young prepubescent female starting out in a tub, and it eventually transitions to her being naked and, I believe, performing an act of oral sex" on an adult male.

{22} The "lingerie" video is named "(ls-magazine-ls-models lsm-07-01-02-bonus-red lingerie 11y 12y 13y-video.avi." Detective Brown testified that this video is on the Toshiba external hard drive and that artifacts from the video were found on the Gateway computer. Forensic evaluation indicated the video was viewed on the Gateway computer and stored on the internal hard drive. The video begins with three naked girls dancing and touching each other's genitals. Special Agent Peña testified that two of the girls are prepubescent and one of the girls is pubescent but still very young. Early in the video, the camera focuses on the genital area of a prepubescent girl.

{23} The "Kimmy" video is named "(pthc lolifuck) kimmy-superbig cock fucking little girl.avi." Detective Brown said this video is in two folders on the Toshiba external hard drive: part of the path to one folder included "davidhome," and part of the path to the other included "porn." The video also had two different download dates: May 22, 2013, and May 29, 2013. Detective Brown testified that this video depicts a female child being vaginally penetrated by an adult male.

{24} Next, Detective Brown testified about the video Defendant recalled during his interview with Special Agent Peña and Commander Morris—the "KitKatClub" video. The video served as the basis for Defendant's charge of possession of child pornography. The "KitKatClub" video, named "xxx - kitkat club avantgarde extreme 8.mpg," depicts a "small child, and there is a male rubbing her genital area." Detective Brown testified that forensic evidence indicated it was downloaded by Defendant on June 15, 2013, using DownloadHQ and stored on the Gateway computer hard drive.

{25} Detective Brown also testified about the "thirteen-year-old-boy" video investigated by Special Agent Peña, which was the basis for the charge of distributing child pornography. Although he could not locate the video on any of Defendant's devices, Detective Brown testified that other forensic evidence revealed that the video was downloaded using DownloadHQ onto the Gateway computer at some point. Detective Brown explained that the DownloadHQ application kept an encrypted log of files downloaded and shared, and that the log included the "thirteen-year-old-boy" video file name, "(pthc)black gay man fucking a 13 year old boy (hot!!) 314.avi." When asked how the "thirteen-year-old-boy" video could have been downloaded but not found on any of Defendant's devices, Detective Brown clarified that the video may have been deleted and overwritten or deleted and antiforensic programs may have been run to remove traces of it.

{26} Detective Brown testified that he was able to recover and decrypt from Defendant's DownloadHQ application a partial list of names of the files downloaded to Defendant's Gateway computer, together with a partial list of names of the files Defendant made available to others through the DownloadHQ application. Detective Brown read the following names of the downloaded files recovered: (1) "Virgin sex after school 13," (2) "pthc black gay man fucking a 13 year old boy hot!!314" (consistent with the file named in Defendant's conviction for distributing child pornography), (3) "pthc 11 year whores to 15 year 2 mpeg3GP," (4) "2 brothers fucking 14 year old sister!", (5) "kitkat club avant-garde extreme 8" (consistent with the file named in Defendant's conviction for possession of child pornography), and (6) "2 girl 2 15 and 14 years fucking hardcore." Detective Brown also read recovered names of files that were shared: (1) "pthc 2010 15 year fucking my sister excellent," (2) "fucking my cute 15 year old sister porn sex xxx fuck suck anal 2," (3) "maria teen young preteen fuck Lolita sex full version," and (4) "young student girl fucked Lolita teen porn rape sex nude queen william edward 1."

{27} Detective Brown concluded his testimony with an explanation of the CCleaner program, an "anti-forensic program" that is generally used by people who do not want their information seen or recovered. It is an antiforensic program that is "directed to go and delete files in a way that they should not be able to be recovered." He testified CCleaner was on the Gateway computer and that it "had been run recently" and previously "thousands of times." Defendant said in his interview that he used the cleaner "every day." Detective Brown also testified that CCleaner included advanced settings for deleting certain data and that Defendant's CCleaner was configured to target certain DownloadHQ search terms. The few search terms that he recovered included "xxx," "young cheerleaders," and "teen sex."

{28} The defense then called its only witness, Steven Gary Burgess, who was qualified by the court as an expert in computer forensics. Mr. Burgess testified that he located "several hundred" videos on the hard drive of the Gateway computer and the Toshiba external hard drive of which three or four were "illicit videos."

{29} Of the files that contained "illicit videos," Mr. Burgess testified there was no indication that those files had been viewed. Granted, this was based off the media players on the Gateway computer itself, not the media player within DownloadHQ. Mr. Burgess also testified that he recovered eleven thousand DownloadHQ search terms from the Gateway computer and examined them for five search terms that were indicative of child pornography. Mr. Burgess testified that none of the common child pornography search terms appeared in the search history. Mr. Burgess concluded that the search terms used were not indicative of searching for child pornography but instead "would be used for any kind of pornography."

{30} Mr. Burgess also testified about the programs found on the Gateway computer. He testified that although he had only used DownloadHQ a few times, it is generally possible for a user to download a multitude of files at once, making it possible for a person to download a file without knowing its contents. Mr. Burgess stated that he believed a program called Backup Now was being used on the Gateway computer and that it allows users to back up or copy an entire volume of files without having to individually select each file. Finally, Mr. Burgess testified that he did not "find any evidence proving that CCleaner had been used."

{31} The district court convicted Defendant of one count of possession of child pornography (the "KitKatClub" video), one count of distribution of child pornography (the "thirteen-year-old-boy" video), and three counts of manufacturing child pornography by copying (the "Alicia" video, the "lingerie" video, and the "Kimmy" video). All three of the manufacturing counts were based on Defendant copying the videos from the Gateway computer to the Toshiba external hard drive.

{32} Defendant appealed, requesting that the Court of Appeals clarify the necessary elements for each of his convictions and challenging the sufficiency of the evidence to support his convictions. *Rael*, 2021-NMCA-040, ¶ 1.

B. Court of Appeals

{33} The Court of Appeals noted that the "knows or has reason to know" element contained in Section 30-6A-3(A) and (C) for the crimes for possession and distribution of child pornography is absent from the statute for the crime of the manufacture of child pornography, § 30-6A-3(E). *Rael*, 2021-NMCA-040, ¶ 27. This distinction, the Court of Appeals said, could be an indication that the Legislature did not intend manufacturing child pornography to have any mens rea requirement because "the plain language [prohibiting the manufacture of child pornography] does not provide *any* scienter requirement." *Id.* Concluding that a legislative intent was not expressed in "unambiguous 'language negating a mental state,'" the Court of Appeals determined to look to other indicia of the Legislature's intent. *Id.* ¶¶ 27-28 (quoting *State v. Nozie*, 2009-NMSC-018, ¶¶ 26, 30, 146 N.M. 142, 207 P.3d 1119 (stating that the Court must determine whether "there is [a] clear intent on the part of the Legislature to omit a mens rea element" from a crime because it is presumed that criminal intent is an essential element of a crime)).

{34} The "other indicia of legislative intent" which the Court of Appeals looked to were the severity of the punishment and whether reading Section 30-6A-3(E) (manufacturing) without the "knows or has reason to know" mens rea requirements of Section 30-6A-3(A) and (C) (possession and distribution) would lead to an absurd and unreasonable result. *Rael*, 2021-NMCA-040, ¶¶ 29-30. In addition, the Court of Appeals invoked the objective of avoiding challenges of unconstitutionality in its interpretation of Section 30-6A-3(E). *Id.* ¶ 31. The result was that the Court of Appeals inserted the "knows or has reason to know" element of the crimes of possession and distribution of child pornography into the elements of the crime of manufacturing child pornography. *Id.* ¶¶ 22, 28-32. The Court of Appeals therefore determined that in addition to the other elements of manufacturing child pornography, the State is required to prove "[t]he defendant knew or had reason to know that [the] medium depicts [pornography]" and that "[t]he defendant knew or had reason to know that one or more of the participants in that act is a child under eighteen years of age." *Id.* ¶ 32.

{35} Turning its attention to the sufficiency of the evidence, the Court of Appeals determined that the State presented insufficient evidence that Defendant knew or had reason to know the videos contained child pornography. *Id.* ¶¶ 39, 43-44, 49-50. In other words, the Court concluded there was insufficient evidence to prove that Defendant acted with the mens rea required to convict him of possession, distribution, or the manufacture of child pornography. *Id.* ¶ 39. The Court of Appeals therefore reversed all of Defendant's convictions.

{36} We granted the State's petition for writ of certiorari which raises two questions: (1) what is the mens rea requirement for manufacturing child pornography, and (2) did the State present sufficient evidence of Defendant's mens rea to support Defendant's convictions.

II. DISCUSSION

{37} We are first called upon to determine whether Section 30-6A-3(E), which prohibits the manufacture of child pornography, has a mens rea requirement, and if so, what that mental state is. Finally, we determine whether the evidence is sufficient to support the convictions.

A. Standard of Review and Rules of Statutory Interpretation

{38} "Interpretation of a statute is a matter of law," as is the "determination of whether the language of a statute is ambiguous." *State v. Rivera*, 2004-NMSC-001, ¶ 9, 134 N.M. 768, 82 P.3d 939 (internal quotation marks and citations omitted). Our review is therefore de novo. *Id.*

{39} Legislative intent is this Court's touchstone when interpreting a statute. *See State* v. *Padilla*, 2008-NMSC-006, ¶ 10, 143 N.M. 310, 176 P.3d 299. "The starting point in every case involving the construction of a statute is an examination of the language utilized by the Legislature in drafting the pertinent statutory provisions." *Rivera*, 2004-NMSC-001, ¶ 10 (brackets, internal quotation marks, and citation omitted); *see also* 2A Norman J. Singer & J.D. Shambie Singer, *Statutes & Statutory Construction* § 46:3 at 178 (7th ed. 2014) ("[C]ourts consider statutory text to be the best evidence of legislative intent or will.").

{40} As a "cardinal canon" of statutory interpretation, we presume "that a legislature says in a statute what it means and means in a statute what it says." *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). This and other linguistic canons serve as "aids for analyzing [a statute's] text and context [and providing] 'guides to solving the puzzle of textual meaning.'" *Kisor v. McDonough*, 995 F.3d 1347, 1349

& n.3 (Fed. Cir. 2021) (Prost, C.J., concurring) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 59 (Thomson West 2012). The consideration of linguistic canons is not a step beyond a plain-meaning analysis but is part and parcel of such an analysis. *See, e.g.*, *Thomas v. Reeves*, 961 F.3d 800, 823 (5th Cir. 2020) (mem.) (en banc) (per curiam) (Willett, J., concurring in the judgment) (determining the statutory meaning to be clear based on the application of linguistic canons).

{41} Further, where "a statute contains language which is [determined to be] unambiguous, we must give effect to that language and refrain from further statutory interpretation," *Rivera*, 2004-NMSC-001, ¶ 10 (internal quotation marks and citation omitted), at least where our plain-meaning interpretation does not "lead to injustice, absurdity, or contradiction." *Padilla*, 2008-NMSC-006, ¶ 7 (internal quotation marks and citation omitted). In such circumstances, the first and foremost interpretative canon identified in *Germain*—that a legislature is presumed to say what it means and mean what it says—"is also the last: judicial inquiry is complete." 503 U.S. at 253-54 (internal quotation marks and citations omitted); *accord United States v. Browne*, 505 F.3d 1229, 1250 (11th Cir. 2007) (allowing that when "construing a criminal statute, we begin with the plain language" and go no further absent ambiguous language).

B. The Mens Rea for Manufacturing Child Pornography

{42} "Typically, criminal liability is premised upon a defendant's culpable conduct, the *actus reus*, coupled with a defendant's culpable mental state, the *mens rea*." *Padilla*, 2008-NMSC-006, ¶ 12. In order to determine what mens rea, if any, is required for manufacturing child pornography, we begin with the words of the statute. In pertinent part, Section 30-6A-3(E) states:

> It is unlawful for a person to intentionally manufacture any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if one or more of the participants in that act is a child under eighteen years of age.

The object of the statute is not to prohibit manufacturing pornography per se but to prohibit manufacturing pornography "if one or more of the participants . . . is a child under eighteen years of age." *Id.* In other words, the object of the statute is to prohibit manufacturing child pornography. Nonetheless, the statute is ambiguous as to the mens rea required to commit the crime of manufacturing child pornography. One reading of the statute is that it prohibits the act of "intentionally" manufacturing pornography (i.e., "any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act") but that such prohibited manufacturing does not require "intentionally" depicting a child under eighteen years of age. Under this reading, if the pornography depicts a child under eighteen years of age, the crime is complete, regardless of the defendant's intent. This reading makes manufacturing child pornography a strict liability offense.

{43} Strict liability crimes are crimes "for which liability is imposed irrespective of the defendant's knowledge or intentions, that is, crimes without a mens rea requirement." Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 Cornell L. Rev. 401, 417 (1993); *see State v. Harrison*, 1992-NMCA-139, ¶ 18, 115 N.M. 73, 846 P.2d 1082 ("A strict liability crime is one which imposes a criminal sanction for an unlawful act without requiring a showing of criminal intent."). Strict liability crimes generally arise from the legislative exercise of police powers to achieve some societal good, with relatively slight penalties. *Santillanes v. State*, 1993-NMSC-012, ¶¶ 26-27, 115 N.M. 215, 849 P.2d 358. On the other hand, crimes which require mens rea are those that punish conduct which warrants "moral condemnation and social opprobrium." *Id.* ¶ 27; *see Nozie*, 2009-NMSC-018, ¶ 26 (stating "moral condemnation and social opprobrium" typically do not attach to strict liability crimes (internal quotation marks and citation omitted)). We reject reading manufacturing child pornography as a strict liability crime for two reasons.

{44} First, we do not assume that the Legislature intended to create a strict liability crime even if a criminal statute does not expressly set forth a mens rea requirement. *Santillanes*, 1993-NMSC-012, ¶ 11. Rather, we follow the well-established rule that we presume mens rea is a necessary element of the crime unless the statute clearly shows that the Legislature wanted to dispense with it. *Id.* This has been our rule in New Mexico since at least 1917. *State v. Gonzalez*, 2005-NMCA-031, ¶ 12, 137 N.M. 107, 107 P.3d 547 ("Since at least 1917, we have followed the common law that where an act is prohibited and punishable as a crime, it is construed as also requiring the existence of a criminal intent."). *See also Ruan v. United States*, 142 S. Ct. 2370, 2377 (2022) ("[W]hen we interpret criminal statutes, we normally start from a longstanding presumption, traceable to the common law, that [the legislature] intends to require a defendant to possess a culpable mental state." (internal quotation marks and citation omitted)). Our courts have construed a criminal statute to require criminal intent—knowledge—where none was expressed in the statute. *See, e.g.*, *State v. Ramos*, 2013-NMSC-031, ¶¶ 21, 24-25, 305 P.3d 921 (holding that although not expressed in the statute, violating an order of protection requires proof that a defendant knows of the order of protection and of the protected person's presence within the protected zone); *Nozie*, 2009-NMSC-018, ¶ 30 (holding that although it is not expressed in the statute, knowledge that the victim is a police officer is an essential element of the crime of aggravated battery on a police officer); *State v. Valino*, 2012-NMCA-105, ¶¶ 15, 17, 287 P.3d 372 (holding that notwithstanding the absence of statutory language requiring it, knowledge that the victim is a health care worker is an essential element of the crime of battery on a health care worker); *State v. Gonzalez*, 2005-NMCA-031 ¶¶ 1, 18 (holding that despite no statutory expression requiring knowledge of contraband, a person entering a jail must knowingly possess contraband as an essential element of bringing contraband into a jail).

{45} We end this portion of our discussion by noting that the text of Section 30-6A-3(E) does not clearly express a legislative intent to dispense with a mens rea requirement for the crime of manufacturing child pornography☐leaving as ambiguous the *extent* of the required mens rea. We nevertheless presume criminal intent is a necessary element of the crime.

{46} Second, a statute that prohibits manufacturing child pornography is unconstitutional if it is construed as a strict liability criminal offense. Where a statute is capable of being interpreted in two ways, one that is constitutional and one unconstitutional, we adopt the version that is constitutional. *State ex rel. State Engineer v. Romero*, 2022-NMSC-022, ¶ 16, 521 P.3d 56. Although child pornography is not protected by the First Amendment of the United States Constitution, *see United States v. Williams*, 553 U.S. 285, 288 (2008), the power to criminalize child pornography does have limitations, *see id.* at 289. One limitation is that if a strict liability crime chills the exercise of free expression, it is unconstitutional. *Smith v. California*, 361 U.S. 147, 151-52 (1959). The *Smith* Court, anticipating that a bookseller facing strict criminal liability would be restricted in distributing constitutionally protected material, concluded that a bookseller without some "knowledge of the contents" of the allegedly obscene material could not be punished. *Id.* at 153. Similarly, in *New York v. Ferber*, 458 U.S. 747, 765 (1982), the Court explicitly ruled that while criminal statutes may constitutionally ban the sexually explicit depictions of minors, "criminal responsibility may not be imposed without some element of scienter on the part of the defendant." *Id.* However, the Court did not specify what level of mens rea is required.

{47} The statute in this case could be construed in two different ways. On the one hand, we might conclude that the statute prohibits *intentionally* producing pornography but does not require the producer to have *intentionally* depicted minors under eighteen years of age. That construction would be both unconstitutional and at odds with legislative intent. Our obligation is "to follow the well-established principle of statutory construction that statutes should be construed, if possible, to avoid constitutional questions." *Romero*, 2022-NMSC-022, ¶ 16 (internal quotation marks and citation omitted).

{48} We therefore consider whether the crime of manufacturing child pornography requires both "intentionally" manufacturing pornography and "intentionally" depicting a child under eighteen years of age. We discern no grammatical or other obstacle to including "intentionally" in the depiction of a minor under eighteen years of age for the prohibited manufacture of child pornography. Textually, Section 30-6A-3(E) prohibits intentionally manufacturing pornography "if one or more of the participants in [the prohibited sexual] act is a child under eighteen years of age." The specific deterrent purpose of the statute is to prohibit manufacturing child pornography, and requiring an offender to have "knowingly" used the depiction of a child under the age of eighteen years of age for the manufactured pornography falls squarely within its specific deterrent purpose. *See Nozie*, 2009-NMSC-018, ¶ 30 (requiring knowledge that the victim is a police officer furthers the specific deterrent purpose expressed by the statute criminalizing battery on a police officer). Further, by presuming a legislative intent to require an offender's intent to depict a child under eighteen years of age, we avoid a construction rendering the statute unconstitutional.

{49} We therefore apply the expressed mens rea requirement of intent to both statutory elements: the intentional mental state attaches not only in the manufacturing but *also* in the depiction of a child under eighteen years of age. That is to say, the crime consists of the *actus reus* of intentionally manufacturing pornography coupled with the *mens rea* of intentionally depicting a child under eighteen years of age. Because manufacturing child pornography under Section 30-6A-3(E) requires "some element of scienter on the part of the defendant," *Ferber*, 458 U.S. at 765, Section 30-6A-3(E) complies with the First Amendment and is constitutional.

{50} Our construction of New Mexico's statute criminalizing the manufacture of child pornography is consistent with the United States Supreme Court's interpretation of the Protection of Children Against Sexual Exploitation Act of 1977, as amended, 18 U.S.C. § 2252. In *U.S. v. X-Citement Video, Inc.*, 513 U.S. 64, 66-67 (1994), the defendant challenged the constitutionality of 18 U.S.C. §§ 2252(a)(1)-(2), which prohibits "knowingly" transporting, shipping, receiving, distributing, or reproducing a visual depiction if it "involves the use of a minor engaging in sexually explicit conduct." The Court summarized the statute's legislative history as "persuasively indicat[ing] that Congress intended that the term 'knowingly' apply to the requirement that the depiction be of sexually explicit conduct" while it was "a good deal less clear . . . that Congress intended that the requirement extend also to the age of the performers." *X-Citement*, 513 U.S. at 77. The Court warned that statutes "completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts." *Id.* at 78. Therefore, it was "incumbent upon [the *X-Citement* Court] to read the statute to eliminate those doubts so long as such a reading is not plainly contrary to the intent of Congress." *Id.* The Court relied upon the plain language of the statute and canons of statutory construction and concluded that the "knowingly" element applied to the conduct involved, the depiction of sexual content, and the age of the performers. *Id.* at 77-78; *see also Williams,* 553 U.S. at 294 (concluding that "knowingly" at the beginning of the federal pandering child pornography statute applied to all parts of the statute). "[A] scienter requirement as to the age of the performers" delineates the boundary between constitutionally protected speech and unprotected speech. *X-Citement*, 513 U.S. at 78.

{51} We hold that the mens rea required to violate Section 30-6A-3(E) is (1) to intentionally manufacture pornography that (2) intentionally depicts a child under eighteen years of age. In addition, the pornography must, in fact, depict a child that is under eighteen years of age. Further, the mens rea requirements apply to all the methods for *manufacturing* as defined in Section 30-6A-2(D) (defining *manufacture* as "the production, processing, copying by any means, printing, packaging or repackaging of any visual or print medium depicting any [pornography] or simulation of [pornography] if one or more of the participants in that act is a child under eighteen years of age"). We now evaluate the sufficiency of the evidence supporting Defendant's convictions for the possession, distribution, and manufacture of child pornography under Section 30-6A-3(A), (C) and (E).

C. Sufficiency of the Evidence

{52} In evaluating the sufficiency of the evidence supporting Defendant's convictions, we must determine whether the evidence supports a finding that Defendant had the requisite mens rea to be convicted of possessing, distributing, and manufacturing child pornography. We conclude the evidence supports a finding that Defendant actually knew all the videos contained child pornography. Any discussion of whether he should have known is not necessary.

{53} The Court of Appeals concluded Defendant's possession conviction was not supported by sufficient evidence that Defendant knew or had reason to know the "KitKatClub" video contained child pornography when he possessed it. *Rael*, 2021-NMCA-040, ¶ 42. The Court of Appeals reasoned that because the video's file name had no terms specific to child pornography, and although Defendant admitted to knowing that a particular search *can* result in the return of child pornography, this was different from "knowing a search *will* return [child pornography]." *Id.* ¶¶ 41-42.

{54} The Court of Appeals also concluded that there was insufficient evidence to support Defendant's distribution conviction because there was a lack of evidence suggesting he knew or had reason to know that the "thirteen-year-old-boy" video contained child pornography. *Id.* ¶ 44. This was because the file name of the video contained neither "the search terms that Defendant admitted using nor the terms that were actively being searched when law enforcement executed the search warrant." *Id.* The Court of Appeals elaborated, "While the full title to the ["thirteen-year-old-boy"] video suggests that it depicts an underage person as a participant in a prohibited sexual act, the State did not present any evidence that Defendant was familiar with the video's full title or content when he distributed it." *Id.*

{55} Last, applying its "knows or has reason to know" mens rea requirements of Section 30-6A-3(A) to Defendant's convictions for manufacturing child pornography under Section 30-6A-3(E), the Court of Appeals concluded that there was insufficient evidence that Defendant knew or had reason to know that the "Alicia" video, the "lingerie" video, or the "Kimmy" video contained child pornography when each copy was made. *Rael*, 2021-NMCA-040, ¶¶ 45, 50. The Court of Appeals again reasoned that this was because the three digital video file names did not contain "any of the search terms Defendant admitted to using" and because "the State did not present any evidence that Defendant was familiar with the title[s] or content" of the files. *Id.* ¶¶ 48-50.

{56} Seeking affirmance of the Court of Appeals, Defendant argues that no rational factfinder could have found the evidence sufficient to prove beyond a reasonable

doubt that he intentionally possessed, distributed, or manufactured the child pornography videos found on his computing devices or that he knew or had reason to know of the videos' contents. Defendant maintains that the presence of the unlawful videos on his digital devices and his conduct in downloading, sharing, and copying the videos were the products of mere "inadverten[ce]" and "happenstance" and thus were beyond the scope of Section 30-6A-3. However, as will be shown, Defendant's assertions of "accidental conduct" ring hollow in light of the persuasive circumstantial evidence presented at trial.

1. Standard of review

{57} In assessing the sufficiency of the evidence presented in a bench trial, the appellate court's role is well settled.

> First it reviews the evidence [resolving all conflicts and indulging all permissible inferences] with deference to the findings of the trial court; then it determines whether the evidence, viewed in this manner, could justify a finding by any rational trier of fact that each element of the crime charged has been established beyond a reasonable doubt.

Myers, 2009-NMSC-016, ¶ 13 (alteration in original) (citation omitted). Regardless of the type of trial involved—bench or jury trial—appellate review remains highly deferential because the reviewing court "resolve[s] all disputed facts in favor of the State, indulge[s] all reasonable inferences in support of the verdict, and disregard[s] all evidence and inferences to the contrary." *State v. Largo*, 2012-NMSC-015, ¶ 30, 278 P.3d 532 (internal quotation marks and citation omitted); *see also State v. Garcia*, 2011-NMSC-003, ¶ 5, 149 N.M. 185, 246 P.3d 1057 (cautioning an appellate court to refrain from "second-guess[ing] the [factfinder's] decision concerning the credibility of witnesses, reweigh[ing] the evidence, or substitut[ing] its judgment for that of the [factfinder]" (alterations 1, 3, and 4 in original) (internal quotation marks and citation omitted)). So long as a rational factfinder "*could* have found beyond a reasonable doubt the essential facts required for a conviction, we will not upset [the factfinder's] conclusions." *Id.* (internal quotation marks and citation omitted).

2. Defendant's mens rea was proven by sufficient evidence

{58} "Evidence is sufficient to sustain a conviction when there exists substantial evidence of a direct or circumstantial nature to support a verdict beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Smith*, 2016-NMSC-007, ¶ 19, 367 P.3d 420 (internal quotation marks and citation omitted). "Substantial evidence," in turn, "is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Largo*, 2012-NMSC-015, ¶ 30 (internal quotation marks and citation omitted).

{59} It is also settled that the "determination of the weight and effect of the evidence, including all reasonable inferences to be drawn from both the direct and circumstantial evidence, is a matter reserved for the determination of the trier of facts." *State v. Bloom*, 1977-NMSC-016, ¶ 5, 90 N.M. 192, 561 P.2d 465. In cases where a defendant's intent is at issue, but there is no admissible expression of intent by the defendant, the factfinder is required to draw reasonable inferences from all the evidence and surrounding circumstances to determine whether that defendant acted with a criminal intent. *See State v. Green*, 1993-NMSC-056, ¶ 21, 116 N.M. 273, 861 P.2d 954 (stating that intent "can seldom be proven by direct evidence"); *Holguin v. Sally Beauty Supply Inc.*, 2011-NMCA-100, ¶ 22, 150 N.M. 636, 264 P.3d 732 (stating that intent "must ordinarily be proved circumstantially by inferences from the facts and circumstances of each case" in the absence of a voluntary statement of the requisite intent by a mentally competent defendant). This is another way of saying, "A material fact may be proven by inference." *State v. Brown*, 1984-NMSC-014, ¶ 12, 100 N.M. 726, 676 P.2d 253.

{60} Evaluated under the foregoing principles and our standard of review, the evidence is overwhelming that Defendant intended his possession, distribution, and manufacture and knew that all five of the videos he was convicted of possessing, distributing, or manufacturing depicted child pornography.

{61} Defendant admitted he was the owner and exclusive user of the Gateway computer and the Toshiba external hard drive. He was familiar with DownloadHQ, which he had been using for two and one-half years to share files. He would select files to download from other users, and other users would initiate uploads of files from his computer. In order to obtain files, Defendant would enter search terms, and a responsive list was produced. The OS Triage program, which allows law enforcement to do an onsite preview of data on a computer, showed several child-pornography-related searches in the browser history of Defendant's Gateway computer. From the list produced by the search terms, Defendant would determine which files to download to his Gateway computer. DownloadHQ has a preview window that allows users to view a portion of the video prior to selecting which files to download. Defendant redirected his downloads from the default DownloadHQ folder to the C drive "downloads" folder in the Gateway computer. All told, there were thirty-seven suspected child pornography files linked to Defendant's DownloadHQ account. Forensic analysis of Defendant's DownloadHQ application also retrieved a partial list of file names downloaded to the Gateway computer and a partial list of files Defendant made available to others through the DownloadHQ application. Each of the file names of these downloads and uploads had terms descriptive of child pornography. In the foregoing context, we now turn to the specific videos at issue.

{62} Defendant was convicted for possessing the "KitKatClub" video which, without dispute, depicts child pornography. It is one of the videos Defendant admitted in his interview that he watched and downloaded but claimed it contained adult pornography. Defendant also claimed he deleted the video when he learned that children were involved. However, forensic evidence indicated that the "KitKatClub" video was stored on the Gateway computer hard drive. Defendant's viewing the video, choosing to download the video, and redirecting where the video was to be stored in the Gateway computer are all circumstances from which a factfinder could reasonably conclude that Defendant intentionally possessed the "KitKatClub" video, knowing it contained child pornography. *See State v. Flick*, 790 N.W.2d 295, 305-06 (Mich. 2010) (contrasting the accidental conduct of one who views an "unsolicited depiction" of child pornography on a computer screen and immediately "undert[akes] efforts to remove the depiction" from the intentional conduct of one who takes "many . . . affirmative steps . . . to gain actual physical control" of child pornography and knowingly possesses it). The fact that the file name of the video has no terms specific to child pornography, which the Court of Appeals said was determinative, *Rael*, 2021-NMCA-040, ¶¶ 41-42, does not negate these facts.

{63} Defendant's conviction for distributing child pornography arises from Special Agent Peña's discovery during his investigation that the DownloadHQ application in Defendant's computer was distributing the "thirteen-year-old-boy" video. The Court of Appeals reversed this conviction because it concluded there was no evidence that Defendant was familiar with the video's file name or content when it was distributed. *Id.* ¶ 44. We disagree. Again, there is no dispute that the video depicts child pornography. Although the video was not located on Defendant's computer or hard drive, forensic evidence revealed that the video was downloaded to Defendant's Gateway computer using the DownloadHQ application. Forensic evidence also revealed an encrypted log of files downloaded and shared, and the

log included the "thirteen-year-old-boy" video file name. The evidence therefore shows that as a result of Defendant entering search terms, DownloadHQ produced a list of files, and from that list, Defendant chose to download the "thirteen-year-old-boy" video to his computer. There is no dispute that the file name contains terms specific to child pornography, and a fair inference is that Defendant knew what the file name was when he downloaded it. Defendant also knew that the DownloadHQ application would then share that file with other users of the DownloadHQ application. From this evidence, and reasonable inferences from that evidence, a factfinder could reasonably conclude that Defendant intentionally distributed the "thirteen-year-old-boy" video knowing it contained child pornography.

{64} We now turn to Defendant's convictions for manufacturing child pornography by copying three videos of child pornography from his Gateway computer to his Toshiba external hard drive. These are the "Alicia" video, the "lingerie" video, and the "Kimmy" video. The Court of Appeals reversed these convictions, concluding that there was no evidence that Defendant was familiar with the file names or content of the videos. *Rael*, 2021-NMCA-040, ¶¶ 48-50. Again, we disagree. The "Alicia" video is the second video Defendant admitted in his interview that he downloaded but claimed he deleted upon seeing it depicted children. There is no dispute that it depicts child pornography. Further, the file name of the "Alicia" video has terms specific to child pornography, and the evidence is that it was copied on two separate dates from Defendant's Gateway computer to Defendant's Toshiba external hard drive. The "lingerie" video also depicts child pornography. Forensic evidence showed it was viewed from the Windows Media Player on Defendant's Gateway computer, kept on the internal hard drive, and copied to Defendant's Toshiba external hard drive. The "Kimmy" video depicts child pornography, and its file name contains terms specific to child pornography. It was copied from Defendant's Gateway computer to Defendant's Toshiba external hard drive on two different dates. This evidence, and reasonable inferences from the evidence are sufficient for a factfinder to reasonably conclude that Defendant intentionally copied these videos with the intent to copy child pornography because he knew they depicted child pornography.

{65} Two additional factors are supportive of our conclusion that Defendant knew all five videos contained child pornography.

{66} First, Defendant said he used CCleaner daily, and Detective Brown confirmed it "had been run recently" and previously "thousands of times." Detective Brown explained it is "used by a lot of people that generally do not want their information being recovered or seen" as it is an antiforensic program that is "directed to go and delete files in a way that they should not be able to be recovered." He further explained that Defendant's CCleaner was configured to target certain DownloadHQ search terms. In fact, when asked how the "thirteen-year-old-boy" video may have been downloaded but not found on any of Defendant's devices, Detective Brown explained that the video may have been deleted and overwritten or deleted and antiforensic programs may have been run to remove traces of it. In addition, Detective Brown testified that he was able to recover and decrypt a partial list of file names downloaded to Defendant's Gateway computer and shared from Defendant's Gateway computer using Defendant's DownloadHQ application and that the names of all those files contained terms specific to child pornography. Defendant knows child pornography is illegal. Defendant's daily use of CCleaner, his downloads of videos named for and containing child pornography, and his use of search terms specific to child pornography is a combination fatal to Defendant's argument that he did not know the videos he was convicted of possessing, distributing, and copying depicted child pornography. *See United States v. Clark*, 24 F.4th 565, 576-77 (6th Cir. 2022) (relying, in part, on the defendant's use of "two evidence destruction programs" on his computer in concluding that the defendant "knowingly distributed illegal images and videos . . . on a peer-to-peer network"); *State v. Schuller*, 843 N.W.2d 626, 637 (Neb. 2014) ("It seems reasonable to infer that [the defendant] deleted the files to hide evidence of his earlier knowing possession [of child pornography].").

{67} Second, Defendant's credibility was tested and contradicted in several material respects. Defendant claimed that if the file name of a video suggested it contained child pornography, he would not download it. But, when confronted with the fact that the shared folder in his computer had files with names clearly stating they contained child pornography, Defendant claimed he thought he had deleted them. Defendant then claimed that files might not have been deleted because sometimes he got drunk, passed out, and forgot to delete them. He also admitted he downloaded child pornography files but claimed he deleted those files after determining their content. Another time he claimed that upon learning videos depicted children, he turned them off before any sex acts occurred and deleted them. The district court as the factfinder was not required to give any credibility to Defendant's explanations. *State v. Jason L.*, 2000-NMSC-018, ¶ 10, 129 N.M. 119, 2 P.3d 856 ("Conflicts in the evidence, even within the testimony of a witness, are to be resolved by the fact finder at trial."). The fact that the district court convicted Defendant establishes that it rejected Defendant's explanations and excuses, and on appeal we are not free to reweigh the evidence and come to a contrary conclusion by accepting those explanations and excuses as true. *State v. Garcia*, 2011-NMSC-003, ¶ 5.

{68} For the foregoing reasons, we conclude that the evidence supports findings that Defendant (1) intentionally possessed the "KitKatClub" video, knowing that it depicts pornography and knowing that one of the participants is a small child, under eighteen years of age; (2) intentionally distributed the "thirteen-year-old-boy" video, knowing that it depicts pornography and knowing that one of the participants it depicts is a young boy under eighteen years of age; and (3) intentionally manufactured child pornography by copying the "Alicia" video, the "lingerie" video, and the "Kimmy" video, intending for all the copies to depict a child or children under eighteen years of age. We therefore affirm Defendant's convictions.

III. CONCLUSION

{69} The opinion of the Court of Appeals is reversed. The case is remanded to the district court for enforcement of the judgment and sentence it imposed.

{70} IT IS SO ORDERED.

MICHAEL E. VIGIL, Justice

WE CONCUR:

C. SHANNON BACON, Chief Justice

DAVID K. THOMSON, Justice

BRIANA H. ZAMORA, Justice

BRETT R. LOVELESS, Judge

Sitting by designation

From the New Mexico Supreme Court

Opinion Number: 2024-NMSC-011
No: S-1-SC-38818 (filed March 14, 2024)

STATE OF NEW MEXICO,
Plaintiff-Respondent,
v.
SANDI TAYLOR and MARY TAYLOR,
Defendants-Petitioners.

ORIGINAL PROCEEDING ON CERTIORARI
Donna Mowrer, District Judge

Harmon, Barnett & Morris, P.C.
Tye C. Harmon
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OPINION

VIGIL, Justice.

{1} This appeal calls on us to once again consider the propriety of jury instructions in a reckless child abuse case, a recurrent theme in our jurisprudence. Most recently, *State v. Consaul* and *State v. Montoya* identified and examined several pervasive problems with then-existing uniform jury instructions on child abuse as defined in NMSA 1978, Section 30-6-1 (2009). *See Consaul*, 2014-NMSC-030, ¶¶ 27-40, 332 P.3d 850 (concluding that the uniform jury instructions for child abuse did not "adequately capture[] the true nature of the crime and the legislative intent behind the statute"); *Montoya*, 2015-NMSC-010, ¶¶ 16-34, 345 P.3d 1056, (noting "[t]he confusion caused by the dissonance between our case law and our jury instructions for child abuse"). This Court addressed these problems by implementing in 2015 the substantial revisions to our reckless child abuse jury instructions in effect today. *See* UJI 14-612, 615, 621, and 622 NMRA.

{2} The problem with the jury instructions used at Defendants' joint trial arises from confusion and misdirection due to the unfortunate use of an inappropriate conjunctive term in the complex, essential-elements instructions that set out the course of conduct the jury was required to find in order to return guilty verdicts. The confusion and misdirection stem from the use of a single *and/or* connector to separate and join no fewer than four distinct propositions for the jury's consideration. The term *and/or* has proved singularly unsuited to formulating clear and effective jury instructions, to the degree that our trial courts would be well-served to avoid its use in jury instructions altogether. The underlying jury instructions' use—or, more accurately, misuse—of the *and/or* connector requires this Court to reverse Defendants' reckless child abuse convictions.

{3} Our determination to reverse Defendants' convictions and remand for a new trial based on this instructional error makes it unnecessary for us to address Defendants' remaining arguments concerning the jury instructions, a double jeopardy merger claim, and evidentiary arguments. *State v. Mascarenas*, 2000-NMSC-017, ¶ 1, 129 N.M. 230, 4 P.3d 1221 (declining to reach other issues brought before the Court when the first issue supports reversal and remand).

I. BACKGROUND

{4} The facts underlying this appeal are undeniably tragic. Defendants Mary Taylor and Sandi Taylor, mother and daughter, operated a licensed daycare out of their home in Portales, New Mexico. In July 2017, Defendants used two SUVs to drive the twelve children under their care to a nearby park for lunch and playtime. Of the six children who were passengers in Sandi's SUV, two of them, M.J. and A.L. (the Victims), were less than two years old, each riding in a car seat in the middle row of the SUV.

{5} Driving from the playground in separate vehicles, Defendants and all twelve children returned to the daycare shortly before 1:00 p.m., when the outdoor temperature was 91 degrees. Upon arrival, all four of the older children who were riding with Sandi and all six of the children who were riding with Mary exited their respective vehicles and went inside the daycare. Without noticing that the Victims were still seated in Sandi's vehicle, both Defendants entered the daycare as well. Defendants remained there until Sandi, for reasons unrelated to the whereabouts of the Victims, returned to her vehicle over two-and-a-half hours later and found M.J. blue in color and unresponsive and A.L. limp and slouched over. Defendants immediately called the police and made diligent efforts to attend to the Victims, but their efforts were futile. Due to the Victims' prolonged heat exposure, M.J. died, and A.L. suffered severe neurological injuries.

{6} The State charged each Defendant with reckless child abuse by endangerment resulting in M.J.'s death and reckless child abuse by endangerment resulting in great bodily harm to A.L., both of which are first-degree felonies under Section 30-6-1(D)(1), (E)-(F). The evidence at trial was undisputed in several respects. The State stipulated that Defendants did not intend to leave the Victims in Sandi's vehicle, and responding police officers agreed that there were no signs that Defendants were aware that the Victims remained in the vehicle until Sandi returned to the vehicle. On this score, Sandi told police officers at the scene that both she and her mother believed the other had removed the Victims from the vehicle and brought them inside the daycare upon returning from the park.

{7} A videotape of Sandi's police interview containing candid admissions was played for the jury in its entirety. During the interview, Sandi acknowledged both that she "forgot" the Victims in the vehicle and that Defendants did not follow their usual

practice to do a headcount of the children at any time after returning to the daycare.

{8} The jury convicted each Defendant of reckless child abuse resulting in death and reckless child abuse resulting in great bodily harm. Each Defendant was sentenced to eighteen years for each count, totaling thirty-six years each. The Court of Appeals affirmed in a precedential opinion. *See State v. Taylor*, 2021-NMCA-033, ¶ 1, 493 P.3d 463. On certiorari review, we reverse the Court of Appeals, holding that the essential conduct elements of the jury instructions *as given* constitute reversible error because they would have confused or misdirected a reasonable juror.

II. DISCUSSION

A. The Jury's Elements Instructions

{9} Defendants contend reversible error resulted when the district court failed to properly identify the conduct or course of conduct alleged to be child abuse in the elements instruction. Specifically, Defendants argue that the instruction's listing of the elements of essential conduct with an *and/or* conjunction provided for alternative ways for the jury to find that Defendants committed child abuse without requiring the jury to unanimously agree on any of those alternatives. Applying a de novo standard of review, we agree with Defendants.

{10} "The propriety of jury instructions given or denied is a mixed question of law and fact" which we review de novo. *State v. Salazar*, 1997-NMSC-044, ¶ 49, 123 N.M. 778, 945 P.2d 996. As Defendants preserved each of the instructional issues now raised, "we review the instructions for reversible error," *State v. Benally*, 2001-NMSC-033, ¶ 12, 131 N.M. 258, 34 P.3d 1134, a process which requires us to consider the "instructions as a whole, not singly, and . . . look to see whether a reasonable juror would have been confused or misdirected by the . . . instructions," *State v. Munoz*, 2006-NMSC-005, ¶ 20, 139 N.M. 106, 129 P.3d 142 (internal quotation marks and citation omitted). "[J]uror confusion or misdirection may stem not only from instructions that are facially contradictory or ambiguous, but from instructions which, through omission or misstatement, fail to provide the juror with an accurate rendition of the relevant law." *Benally*, 2001-NMSC-033, ¶ 12.

{11} The indictments are identical in how they allege Defendants committed child abuse. Pertinent here, Count 1 alleges each Defendant "left the child unattended in a heated vehicle, which resulted in the death of M.J.", and Count 2 alleges each Defendant "left the child unattended in a heated vehicle, which resulted in great bodily harm to A.L." At trial, the parties disagreed on how to describe the conduct required for the jury to find Defendants guilty of reckless child abuse. *See* UJI 14-615, -622 (requiring the court to "describe [the] conduct or course of conduct alleged to have been child abuse"). Defendants requested that the jury be required to find that Defendants left the Victims "unattended in a vehicle, exposed to unsafe temperatures, for a time period exceeding two hours." The State's requested instruction, adopted fully by the district court, identified four different acts. The district court instructed the jury that to find Defendants guilty of reckless child abuse, it had to find that

> [Defendants] did not follow the proper rules and procedures mandated by CYFD in conducting the care of [the Victims], *including* failing to do headcounts, driving [the Victims] without CYFD permission, failing to have [a] proper care giver to child ratio when [the Victims were] in [Defendants'] care, *and/or* failing to remove [the Victims] from a vehicle which resulted in [the Victims] being left unattended in that vehicle and exposed to unsafe temperatures for a time period of approximately two hours and 40 minutes.

(Emphases added.)

{12} As we explain next, the presence of *and/or* in the all-important conduct element of the essential-elements instructions confused and misdirected the jury and allowed it to make a finding of guilt on a legally inadequate basis.[1]

{13} More than seventy-five years ago, this Court criticized the use of *and/or* in the context of jury instructions:

> [T]he highly objectionable phrase "and/or" . . . has no place in pleadings, findings of fact, conclusions of law, judgments or decrees, and least of all in instructions to a jury. Instructions are intended to assist jurors in applying the law to the facts, and trial judges should put them in as simple language as possible, and not confuse them with this linguistic abomination.

State v. Smith, 1947-NMSC-048, ¶¶ 7-8, 51 N.M. 328, 184 P.2d 301 (involving the misuse of *and/or* in jury instructions that defined the essential elements of second-degree murder), quoted approvingly in Bryan A. Garner, *Garner's Dictionary of Legal Usage*, 57 (3d ed. 2011). And over the years other courts have joined this criticism. *See, e.g.*, *Garzon v. State*, 980 So. 2d 1038, 1043-45 (Fla. 2008) ("condemn[ing]" the unobjected-to use of the *and/or* conjunction between names of codefendants in jury instructions that set out the elements to be proven, but holding that the error was not fundamental); *State v. Gonzalez*, 130 A.3d 1250, 1255 (N.J. Super. Ct. App. Div. 2016) (concluding that the trial court's repeated use of the imprecise term *and/or* in its jury instructions was "so confusing and misleading as to engender great doubt about whether the jury was unanimous with respect to some part or all aspects of its verdict or whether the jury may have convicted the defendant by finding the presence of less than all the elements the prosecution was required to prove"); *Commonwealth v. Johnson*, 700 N.E.2d 270, 272-73 (Mass. App. Ct. 1998) (setting aside a verdict convicting the defendant of violating a domestic protective order based on an erroneous jury instruction that permitted a conviction upon a finding "that the defendant violated the order by abusing [the victim], '. . . *and/or [by] contacting [her]*,'" where contact was not "a restraint" prohibited by the order (alterations and omission in original)).

{14} Commentators, too, have weighed in on the subject, including the aforementioned Bryan A. Garner, whose unvarnished view is that "the only safe rule to follow is not to use the expression [*and/or*] in any legal writing, document or proceeding, under any circumstances." Garner, *supra*, at 57 (internal quotation marks and citation omitted). But other commentators, including Professor Ira P. Robbins, espouse a more measured approach which recognizes that while the "proper use of *and/or* creates neither ambiguity nor confusion" in most areas of the law, the term "should not be used in jury instructions," especially "[i]n cases that involve more than one person, victim, or element of a crime or civil cause of action, [because] jury instructions that use

[1] Although the point is not raised by Defendants, we note the potential problems inherent in the use of the word including in these jury instructions. When used in this setting, the word including—"usually a term of enlargement, and not of limitation, that . . . connotes . . . an illustrative application," United States v. Cline, 986 F.3d 873, 876 (5th Cir. 2021) (internal quotation marks and citation omitted)—can allow a jury "to roam freely through the evidence and choose any facts which suit[] its fancy or its perception of logic to impose liability," Scanwell Freight Express STL, Inc. v. Chan, 162 S.W.3d 477, 482 (Mo. 2005) (en banc) (internal quotation marks and citation omitted). Without addressing this unraised issue head-on, we simply acknowledge there are additional concerns presented by the use of the word including alongside the already ambiguous term and/or in the conduct element of the jury instructions in this case.

the term [in that context] carry the risk of jurors making decisions they are not allowed to make." Ira P. Robbins, *"And/or" and the Proper Use of Legal Language*, 77 Md. L. Rev. 311, 315, 320 (2018).

{15} Regardless of the circumstances or context of its legal usage, the intended meaning of the term *and/or* is rendered all the more confusing where, as here, it is used to both separate and join more than two propositions in a single statement. Professor Robbins explains the added complexities of this linguistic dilemma:

> Using *and/or* to separate two terms, such as "A and/or B," invites the reader to choose only A, only B, or both A and B. Thus, a reader is presented with only three options when *and/or* is used to separate two terms.
>
> . . .
>
> [However, as] opposed to "A and/or B," adding an additional proposition, C, can leave a reader guessing whether *and/or* is intended to be placed between all propositions or only some of the propositions. On the one hand, "A, B and/or C" could provide a choice among A, B, C, or any combination thereof, equal to 'A and/or B and/or C.' On the other hand, the placement of *and/or* between B and C might suggest that *and/or* is intended to provide a choice between only B and C, with A remaining a constant. In this scenario, the possible choices for the reader end up being A and B, A and C, or all three propositions.

Robbins, *supra*, at 316, 335 (footnotes omitted).[2] We agree with Professor Robbins that a trial court should not ask a lay jury to unravel such a complex syntactical problem. This fraught endeavor can serve only, and needlessly, to sidetrack a jury from its critical fact-finding role.

{16} The jury was required to parse the complexities created by the presence of multiple alternative propositions framed by a single *and/or* connector in determining whether the course of conduct allegedly engaged in by Defendants in the hours leading up to the tragic incident constituted reckless child abuse. The jury was left to pick and choose between what the court presented as no fewer than four alternative species of conduct attributed to Defendants and to assess the nature and severity of the risks each presented—both individually and in combination—with no guidance to aid its inquiry. This violated our teaching in *Consaul*, 2014-NMSC-030, ¶ 23, that "[w]hen two or more different or inconsistent acts or courses of conduct are advanced by the State as alternative theories as to how a child's injuries occurred, then the jury must make an informed and unanimous decision, guided by separate instructions, as to the culpable act the defendant committed and for which he is being punished."

{17} An additional problem with the conduct element of the essential-elements instructions goes beyond the convoluted form of the instructions and compounds juror confusion and misdirection. We refer to the fact that the multiple propositions set out in the instructions involve acts or omissions that fit into two separate and distinct categories of conduct. The first category is Defendants' alleged violations of one—or more—of the policies put into place by CYFD to promote the safe operation of daycare facilities in New Mexico. The second category is the exclusive focus on Defendants' ultimate conduct, as described in the underlying indictments, of having left the Victims "unattended in a heated vehicle."

{18} The record of the jury instruction conference reveals that the references in the instructions to Defendants' alleged CYFD lapses were intended, from the State's perspective, to satisfy the recklessness requirement of the charged child abuse offenses by shedding light on the "the totality of circumstances" surrounding the incident and on all "the risks that [Defendants] disregarded." In contrast, the jury instructions' reference to Defendants' ultimate act of neglecting to remove the Victims from the vehicle intended to relate to the conduct or *actus reus* component of the child abuse charges. But the divergent purposes and relative import of these two categories of conduct were never explained to the jury. In combining these two distinct categories of elements, the district court gave the jury confusing and misleading instructions that failed to "provide members of the jury with a clear and correct understanding of what it is they are to decide." *State v. Bovee*, 394 P.3d 760, 772 (Haw. 2017) (internal quotation marks and citation omitted); *id.* (finding reversible error in a jury instruction which "conflated the 'conduct' and 'attendant circumstances' elements of the offense" charged); *see also State v. Traeger*, 2001-NMSC-022, ¶ 22, 130 N.M. 618, 29 P.3d 518 (concluding that the combining of two independent elements of a crime in a single jury instruction made for "awkward phraseology" and an unduly "complicated" instruction).

{19} It is thus clear that a reasonable juror, at least one untrained as a linguist, "would have been confused or misdirected by the jury instruction[]." *Munoz*, 2006-NMSC-005, ¶ 20 (internal quotation marks and citation omitted). This conclusion is buttressed by empirical studies that confirm the substantial conceptual challenges jurors face in properly understanding the interplay between criminal "intent and act requirements." Avani Mehta Sood, *What's So Special About General Verdicts? Questioning the Preferred Verdict Format in American Criminal Jury Trials*, 22 Theoretical Inquiries L. 55, 65-66 (2021) (noting that mock jurors who participated in experiments conducted by the author reported "that they misperceived the act element of the offense as an alternative to the intent element, or they treated proof of intent as sufficient for conviction regardless of whether the requisite act had been proven"). The essential-elements instructions here only added to jury confusion and misdirection instead of lessening these problems.

{20} In the final analysis, the conduct element instructions, with their complex structure and prominent use of the term *and/or*, on their face, allowed the jury to make a "decision[] they [were] not allowed to make," Robbins, *supra*, at 320. That is to say, the jury was allowed to return guilty verdicts *solely* based on one or more of Defendants' alleged CYFD violations. For our analysis, this Court need not dispositively address the legal efficacy of each of the several conviction choices available to the jury under the essential-elements instructions as framed. Instead, it is enough to point out that the jury, as instructed, could have convicted Defendants on the charged felony child abuse crimes for merely failing to obtain agency permission to transport the children to and from a nearby park. This technical violation of the agency's policies could not support a stand-alone finding that Defendants placed the Victims in any "direct line of danger." *State v. Garcia*, 2014-NMCA-006, ¶ 10, 315 P.3d 331 (recognizing that "[t]he risk [associated with child endangerment] cannot be merely hypothetical, as the child must be

[2] It stands to reason that the number and complexity of choices that a jury need make necessarily increases in circumstances where, as in this case, four propositions are presented with but a single and/or conjunction. In this regard, the use of and/or serves to compound the comprehensibility problems already created by a jury instruction's "string[ing] of [multiple] items or attributes [in] lists." Robert P. Charrow & Veda R. Charrow, Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions, 79 Colum. L. Rev. 1306, 1329 (1979).

physically close to an inherently dangerous situation of the defendant's creation" (emphasis, internal quotation marks, and citation omitted)).

{21} In rejecting Defendants' arguments under this point, the Court of Appeals relied on *State v. Godoy*, 2012-NMCA-084, ¶ 6, 284 P.3d 410, reiterating that "where alternative theories of guilt are put forth under a single charge, jury unanimity is required only as to the verdict, not to any particular theory of guilt" and that a "jury's general verdict will not be disturbed in such a case where substantial evidence exists in the record supporting at least one of the theories of the crime presented to the jury." *Taylor*, 2021-NMCA-033, ¶¶ 22-23 (internal quotation marks omitted). For two reasons, the Court of Appeals inappropriately relied on *Godoy*. First, because the issue argued in *Godoy* was not preserved, the *Godoy* Court initially addressed whether there was a fundamental error in the instructions, *Godoy*, 2012-NMCA-084, ¶ 4, whereas the issue in this case was preserved. Second, and decisively, *Godoy* has no applicability to cases, such as this case, in which one of the alternatives on which the jury is allowed to return a guilty verdict is legally inadequate. *State v. Sena*, 2020-NMSC-011, ¶ 47, 470 P.3d 227; *see also Johnson*, 700 N.E.2d at 273 (concluding that when a verdict is supported on one ground but not another, and it is impossible to tell on which ground the jury relied, the verdict is invalid); *see generally State v. Dowling*, 2011-NMSC-016, ¶ 17, 150 N.M. 110, 257 P.3d 930 (stating that "if an instruction is facially erroneous it presents an incurable problem and mandates reversal" (internal quotation marks and citation omitted)). Defendants' convictions are reversed due to the confusing, misleading, and incorrect elements instructions given to the jury.

B. Sufficiency of the Evidence

{22} Having determined that the improper use of *and/or* in the elements instructions mandates reversal, we next consider Defendants' sufficiency of the evidence claim to determine whether the prohibition against double jeopardy prevents a retrial. *See State v. Garcia*, 2021-NMSC-019, 488 P.3d 585, ¶ 22 (stating that under well-settled precedent, if the evidence presented at trial was insufficient to support the conviction, double jeopardy entitles a defendant to dismissal of the charges on remand).

{23} In seeking an outright dismissal of the underlying reckless child abuse charges instead of a new trial, Defendants point to both the parties' trial stipulation that Defendants did not intend to leave the Victims inside the vehicle and the police testimony confirming that Defendants were initially unaware that the Victims had remained in the vehicle upon Defendants' returning to the daycare. From this, Defendants maintain that their failure to remove the Victims from the vehicle "was the result of accidental, inadvertent, or unknowing conduct" beyond the reach of New Mexico's reckless child abuse statute. As Defendants frame the argument, for a caregiver to commit reckless child abuse by leaving a child in a hot car, "the [caregiver] must know [that] the child has been left in the hot car." There being no evidence presented that Defendants actually knew the Victims were left in the vehicle when Defendants returned to the daycare, they assert they are entitled to a dismissal of the charges. The Court of Appeals rejected Defendants' argument. *State v. Taylor*, 2021-NMCA-033, ¶¶ 7-9. For the following reasons, we also reject Defendants' argument.

{24} We have already rejected the premise that a prerequisite to the imposition of criminal liability for reckless child abuse is a defendant's subjective knowledge that a substantial and unjustifiable risk of harm actually exists. Instead, the reckless element of child abuse in New Mexico is properly evaluated under an objective test.

{25} In *Consaul*, we recognized that our existing uniform jury instructions on negligent child abuse were confusing. 2014-NMSC-030, ¶ 28. They combined concepts of civil negligence using "knew or should have known" with criminal negligence and "reckless disregard." *Id.* (internal quotation marks and citation omitted). To avoid any further confusion, we determined that what had previously been called "'criminally negligent child abuse'" would thereafter be called "'reckless child abuse'" without any reference to negligence, as being consistent with the Legislature's intent "to punish acts done with a reckless state of mind" for a violation of Section 30-6-1. *Id.* ¶¶ 36-38. We also determined that our uniform jury instructions would be changed to reflect that to find a defendant guilty of reckless child abuse, a jury must find that the defendant acted with reckless disregard. *Id.* ¶ 40. In 2015, we adopted UJI 14-622 to set forth the essential elements a jury must find on a charge of child abuse resulting in death and UJI 14-615 to set forth the essential elements a jury must find on a charge of child abuse resulting in great bodily harm. Both require the jury to find that a defendant acted with "reckless disregard." UJI 14-615, -622. Those instructions were given in this case. In order to find that Defendants committed child abuse resulting in death and child abuse resulting in great bodily harm, the jury was required to find that each Defendant

> showed a reckless disregard for the safety or health of [the Victims]. To find that [Defendant] showed a reckless disregard, you must find [Defendant's] conduct was more than merely negligent or careless. Rather, you must find that [Defendant] caused or permitted a substantial and unjustifiable risk of serious harm to the safety or health of [the Victims]. A substantial and unjustifiable risk is one that any law-abiding person would recognize under similar circumstances and that would cause any law-abiding person to behave differently than [Defendant] out of concern for the safety or health of [the Victims].

Under our instructions, the standard for the jury to determine whether "a substantial and unjustifiable risk" exists is objective: it is what "any law-abiding person" would recognize under the circumstances and which would cause "any law-abiding person" to act differently. UJI 14-615, -622. Subjective, actual knowledge of the risk is not an element of reckless child abuse under the UJIs.

{26} Nor is subjective knowledge required under *Consaul*. *See* 2014-NMSC-030, ¶¶ 37, 40 (adopting reckless disregard as the standard for negligent child abuse and resolving to address whether "knew or should have known" should remain in the child abuse instructions); *see also, e.g.*, UJI 14-622 (setting forth an objective standard for "reckless disregard" without reference to *knew or should have known*).

{27} We are not alone in requiring a jury to decide whether a defendant caused or permitted a substantial unjustifiable risk of serious harm to the safety or health of a child to be determined against an objective standard. For example, in *People v. Valdez*, 42 P.3d 511 (Cal. 2002), a prosecution was brought under a statute which provides that anyone who "'willfully causes or permits [a] child to be placed in a situation where his or her person or health is endangered'" is guilty of felony child abuse. *Id.* at 514 & n.3 (citation omitted). The jury convicted the defendant for having entrusted her infant daughter to a caregiver—the defendant's live-in fiancé—who had a history of mistreating the infant and who ultimately beat and shook the infant to death. *Id.* at 513. As recounted by the California Supreme Court, the Court of Appeal of California held that the statute required proof that the accused "know or be aware of the danger." *Id.*

{28} The California Supreme Court granted the attorney general's petition for review and reversed. *Id.* at 513-14. In support of the Court of Appeal's holding, the

defendant argued to the *Valdez* Court that to satisfy the felony endangerment prong of the statute, a defendant "must have a subjective awareness of the risk" involved. *Id.* at 519. The *Valdez* Court squarely rejected that premise as unsupported by the statutory language and as "inconsistent with the purpose of [the statute], which is to protect vulnerable members of society from a wide range of dangerous situations." *Id.* The *Valdez* Court explained that the "defendant's interpretation would harm children and the elderly by protecting their abusers from prosecution through the erection of an unjustified, and difficult to establish, evidentiary hurdle of subjective awareness of the risk." *Id.* (internal quotation marks omitted).

{29} An example, the *Valdez* Court pointed out, was *Walker v. Superior Court*, 763 P.2d 852 (Cal. 1988), in which "the mother's concern for her daughter and good faith belief [that] prayer would cure her, would negate such subjective intent despite the fact the mother intentionally withheld medical treatment from the four-year-old daughter resulting in her suffering and death." *Valdez*, 42 P.3d at 519. Pertinent to the case before us, the *Valdez* Court noted that infant hyperthermia deaths resulting from parents or caretakers leaving infants in cars fell in the same category, because the parents or caretakers "could claim they had no idea the car temperature would rapidly rise to a fatal level." *Id.* The court concluded that imposing a subjective awareness of the risk "would contravene the legislative intent to impose criminal liability on persons who flagrantly disregard the health and safety of children in their custody or care." *Id.*

{30} Whitfield v. Commonwealth, 702 S.E.2d 590 (Va. Ct. App. 2010), also supports our reasoning and conclusion. On a summer morning, the defendant in *Whitfield*, a van driver whose job was to pick up and deliver children to daycare, placed a thirteen-month-old infant, already strapped into his car seat, in the first-row bench seat directly behind the driver's seat. *Id.* at 592, 594-95. Upon arriving at the daycare, the defendant unloaded all of the children except the infant. *Id.* Although the defendant "understood it was his responsibility," he failed to follow several safety protocols to ensure no children remained in the van. *Id.* at 592. Several of these lapses in protocol led to the infant's death from environmental heat exposure, including the defendant's failure "to look for [the infant] after unloading the other children from the van—despite having personally secured him . . . in the first passenger row of the van earlier that morning," *id.* at 593-95; failure to "double check" to make sure the van was empty, both after dropping the other children off at the daycare and driving the van back to his home, "unaware [the infant] was still in the car seat directly behind him," *id.* at 592, 595; and failure to make use of either of two logbooks—one kept inside the van and the other kept inside the daycare—that the defendant's employer trained him to use "to help him keep track of [and confirm] the children he . . . dropped off at the daycare," with the defendant choosing instead "to rely solely on his memory," *id.* at 592.

{31} On these facts, the Court of Appeals of Virginia affirmed the defendant's conviction for involuntary manslaughter and felony child neglect, the latter crime characterized as a criminal negligence offense that applied a "reckless disregard standard." *Id.* at 594 (internal quotation marks and citation omitted). The following substantial portions of the *Whitfield* Court's supporting analysis ring true here.

> In cases involving children, [the] reckless disregard standard can be shown by conduct that subjects a child to a substantial risk of serious injury, as well as to a risk of death, because exposure to either type of risk can endanger the child's life. It is not only the nature of the act or omission that matters. The vulnerability of the victim plays an equally important role in the culpability calculus. A course of conduct that satisfies the ordinary care standard when directed toward an adult might be gross, and even criminal, negligence toward children of tender years. It necessarily follows that greater precaution must be taken when a course of conduct puts a young child at risk of harm.
>
> When determining a defendant's culpability, we apply an objective standard . . . [, under which the prosecution] need not prove that an accused actually knew or intended that [his] conduct would likely cause injury or death, but rather that the accused [was on notice that his] acts created a substantial risk of harm. . . . .
>
> Governed by these principles, we hold [the defendant's] actions cannot be dismissed as simply a momentary, inadvertent act of ordinary negligence[, having instead] displayed an inexcusable pattern of reckless [behavior].

Id. (third alteration in original) (footnote, internal quotation marks, and citations omitted). We note that like the statute in *Whitfield*, our child abuse statute sets forth a criminal negligence offense that requires a "reckless disregard." *See* § 30-6-1(A)(3) (defining "negligently" to include acting with "reckless disregard"); *see also Consaul*, 2014-NMSC-030, ¶¶ 40, 43 (holding that the crime of negligent child abuse requires a showing of "reckless disregard").

{32} Courts in other jurisdictions have reached similar conclusions as the *Whitfield* Court on like reasoning. *See, e.g.*, *State v. Morton*, 741 N.E.2d 202, 203-05 (Ohio Ct. App. 2000) (affirming the child-endangering conviction of a foster mother who left a three-week-old infant in a closed van parked at a shopping center on a hot day for thirty to forty minutes, having mistakenly assumed that the other adult—or one of seven older children—in the vehicle had taken the infant into the store, and without "check[ing] the van herself to ensure that all of the children were properly supervised"); *State v. Every*, No. W2005-00547-CCA-R3-CD (Tenn. Crim. App. June 28, 2007) (unpublished) (upholding the reckless endangerment conviction of the assistant director of a daycare facility whose "admitted" failure "to personally inspect" the interior of a daycare van for the presence of children despite a directive to do so constituted "a conscious disregard of a substantial risk which resulted in the [two-year-old] victim's abandonment and ultimate death").

{33} The appeal now before us has much in common with the preceding cases. Like the defendants in *Whitfield* and *Every*, Defendants here admit that they failed to undertake known and reliable safety precautions—conducting a headcount or a complete visual inspection of Sandi's SUV upon the children's return to the daycare—in a situation admittedly known to be of high risk. Likewise, each of our Defendants, like the defendant in *Morton,* baselessly assumed that the other had removed the imperiled children from the vehicle.

{34} Given these *objective* indicia of culpability, while Defendants were not *subjectively* aware that they left the Victims stranded inside the vehicle, Defendants were well aware of the significant danger to life and safety created by leaving children in a closed vehicle on a hot day. Additionally, Defendants failed, without explanation or justification, to take routine and familiar precautionary measures to ensure that they avoided such a dangerous occurrence. Under the jury instructions given, a reasonable jury could find that Defendants' inactions showed a reckless disregard for a substantial and unjustifiable risk of serious harm to the safety or health of the Victims. The evidence thus was sufficient to permit retrial without violating Defendants' right to be free from double jeopardy.

III. CONCLUSION

{35} Based on the significant risk of

jury confusion and misdirection created by the use of the ambiguous term *and/or* in identifying Defendants' underlying course of conduct in the jury instructions as framed, we reverse Defendants' reckless child abuse convictions and remand for a new trial consistent with this opinion.

{36} IT IS SO ORDERED.
MICHAEL E. VIGIL, Justice
WE CONCUR:
C. SHANNON BACON, Chief Justice
DAVID K. THOMSON, Justice
RODERICK T. KENNEDY, Judge, retired
Sitting by designation
JAMES T. MARTIN, Judge
Sitting by designation, dissenting

Martin, Judge (dissenting).

{37} I am unable to agree with the majority's conclusion that Defendants' convictions must be reversed because of a flawed essential elements instruction the jury received in this case. Taken as a whole, the instruction at issue correctly sets forth the law applicable to Defendants' underlying course of conduct, which in turn supports the jury's unanimous guilty verdicts. While the language of the instruction at issue may to some degree suffer, as the majority concludes, insofar as there is indeed a difference in meaning between the words "and" and "or," I cannot agree that use of both terms alternatively "would have confused or misdirected a reasonable juror." *Maj. op.* ¶ 8. A reasonable juror can understand that the "and/or" structure of the elements instruction simply provided alternative ways for the jury to unanimously agree on any event or events that resulted in the failure of Defendants to remove the Victims from the vehicle that exposed them to fatally high temperatures. And, as highlighted by the Court of Appeals now being reversed, Defendants flag nothing in the record that suggests the jury was confused as to the course of conduct alleged to be reckless child abuse or whether that conduct met the requirements for conviction. *See State v. Gardner*, 2003-NMCA-107, ¶ 30, 134 N.M. 294, 76 P.3d 47 (concluding that there was no error in a tendered elements instruction when the defendant pointed to nothing "in the record suggesting that the verdicts were not unanimous"). Accordingly, I respectfully dissent.

I. DISCUSSION

{38} To begin, the majority primarily cites secondary sources, i.e., law reviews, to support their condemnation of the use of the term "and/or" in the district court's jury instructions.[3] However, in one of the law reviews cited, *"AND/OR" and the Proper Use of Legal Language*, 77 Md. L. Rev. 311 (2018), the author, Ira P. Robbins, acknowledges,

> While grammarians, scholars, and judges typically despise *and/or*, the problems associated with it are often wrongly attributed to the term itself. Many criticisms that *and/or* is imprecise or ambiguous ignore that the term has a definite meaning: it is "a formula denoting the items joined by it can be taken either together or as alternatives"☐i.e., "*A or B, or both*." Critics urge those wanting to use *and/or* to simply write out its meaning for the sake of clarity. Given the term's definite meaning, however, proper use of *and/or* creates neither ambiguity nor confusion. Of course, *and/or* critics seem to overlook that any term can be ambiguous when used incorrectly. In short, the term's potential for confusion has been severely overstated☐ drafters should seek to incorporate it where appropriate.

Id. at 315 (citations omitted). As discussed hereinafter, the term "and/or" was used correctly in this matter and thus did not contribute to jury confusion or misdirection.[4]

{39} I further take issue with the majority's determination, *see maj. op.* ¶ 21, that the Court of Appeals inappropriately relied upon *State v. Godoy*, 2012-NMCA-084, 284 P.3d 410. First, the majority maintains *Godoy* addressed only whether there was fundamental error in the instructions given in that case because the issue argued was not preserved, whereas here the issue was preserved. Such does not, in my view, eliminate the usability of *Godoy*. Rather, as this Court stated in *State v. Benally*, 2001-NMSC-033, 131 N.M. 258, 34 P.3d 1134,

> The standard of review we apply to jury instructions depends on whether the issue has been preserved. If the error has been preserved we review the instructions for reversible error. If not, we review for fundamental error. Under both standards we seek to determine "whether a reasonable juror would have been confused or misdirected by the jury instruction."

Id. ¶ 12 (citations omitted). Thus, whether the standard of review is for fundamental or reversible error, we must answer "whether a reasonable juror would have been confused or misdirected by [a] jury instruction." Second, in determining *Godoy* to be inapplicable here, the majority concludes that one or some of the alternatives on which the jury herein was given permitted it to return a guilty verdict that was legally inadequate. *See maj. op.* ¶ 21. It is this issue that goes to the heart of whether reversal is warranted, and on which my disagreement with the majority rests.

{40} Here, the majority construes the jury instruction to have permitted the jury to "return guilty verdicts *solely* based on one or more of Defendants' alleged CYFD violations," including "failing to obtain agency permission to transport the children to and from a nearby park. This technical violation of the agency's policies could not support a stand-alone finding that Defendants placed the Victims in any 'direct line of danger.'" *Maj. op.* ¶ 20 (citation omitted). My view, however, is

[3] The majority also cites three out-of-state cases in support of the rejection of the use of the term "and/or." However, those cases are readily distinguishable from the facts and jury instructions at issue in this appeal. In Garzon v. State, 980 So. 2d 1038 (Fla. 2008), the jury instructions at issue placed the "and/or" conjunction as between two codefendants' criminal liability. Furthermore, dicta from that case lists a long string of Florida cases in which "and/or" was criticized but did not constitute reversible error. In State v. Gonzalez, 130 A.3d 1250 (N.J. Super. Ct. App. Div. 2016), the "and/or" connector was used repeatedly throughout the trial court's jury instructions to connect both codefendants' criminal liability as well as to connect two different crimes (robbery and/or assault). Finally, in Commonwealth v. Johnson, 700 N.E.2d 270 (Mass. App. Ct. 1998), the appellate court's opinion was neither supportive nor critical of the "and/or" connector but rather reversed the conviction because one of the factual alternatives was outside of the proscribed criminal conduct prohibited by the domestic violence restraining order. In that case, the parties to the domestic violence restraining order had stipulated to some contact but only prohibited "threatening" communications. However, the trial court instructed the jury that it could convict the Defendant for threatening the victim "and/or" by contacting her.

[4] I note as well that the majority supplements its underestimation of the jury's capacity to understand the same instruction by criticizing use of the word "including" within it. In this regard, the majority states that "[w]ithout addressing this unraised issue head-on, we simply acknowledge there are additional concerns presented by the use of the word including alongside the already ambiguous term and/or in the conduct element of the jury instructions in this case." Maj. op. ¶ 12 n.1. Such was neither raised by Defendants nor, in my view, should factor into today's decision.

that but for these actions by Defendants, the children would never have been in the "'direct line of danger,'" *maj. op.* ¶ 20 (citation omitted), as revealed by the evidence at trial. The record amply supports that Defendants failed to follow the proper rules and procedures mandated by the Children, Youth & Families Department (CYFD) in caring for the Victims, by each of the following alleged actions: (1) failing to do headcounts to ensure that all children in Defendants' care were present and accounted for when changing locations; (2) driving the Victims to the park on the day in question without CYFD permission leading to the eventual result of the Victims being left in the vehicle; (3) failing to have a proper care giver to child ratio to ensure proper attention and care was given to the children. These actions led to the tragic events of the day and to Defendants' failure to remove the children from the vehicle, thus exposing the Victims to the unsafe temperatures for an extended period of time. These actions are the "'direct line of danger,'" *maj. op.* ¶ 20 (citation omitted), which supports the convictions. Each of these failures and the ensuing calamity are all clearly established by evidence presented by the State in the trial record. Unlike the majority, I believe that a review of each of these factors is necessary in this analysis and that such a review demonstrates that all of these "conviction choices," *maj. op* ¶ 20, placed the children in the "'direct line of danger,'" *maj. op.* ¶ 20 (citation omitted), resulting in the serious bodily injury of one of the Victims and the tragic death of the other. In focusing on what it perceives to be a technical violation of CYFD policy, the majority overlooks how all of these factors demonstrate reckless disregard for the safety and health of the Victims. The majority itself acknowledges that "[u]nder the jury instructions given, a reasonable jury could find that Defendants' inactions showed a reckless disregard for a substantial and unjustifiable risk of serious harm to the safety or health of the Victims." *Maj. op.* ¶ 34.

{41} The majority also cites *Benally*, which states that "juror confusion or misdirection may stem not only from instructions that are facially contradictory or ambiguous, but from instructions which, through omission or misstatement, fail to provide the juror with an accurate rendition of the relevant law." *Benally*, 2001-NMSC-033, ¶ 12. As the Court of Appeals concluded in this matter, the district court was required to and did instruct the jury regarding the conduct or course of conduct alleged to be child abuse. The Court of Appeals acknowledged that the district court instructed the jury on both UJI 14-622 NMRA, entitled *Child Abuse Resulting in Death; Reckless Disregard; Child Under 12; Essential Elements*, and UJI 14-615 NMRA, entitled *Child Abuse Resulting in Great Bodily Harm; Essential Elements*. *See State v. Taylor*, 2021-NMCA-033, ¶ 25, 493 P.3d 463. As the Court of Appeals held, in accordance with UJI 14-622, the district court properly instructed the jury on the elements necessary to find Defendants guilty of reckless child abuse. *Taylor*, 2021-NMCA-033, ¶ 21. Specifically, the district court instructed the jury that it must find Defendants recklessly disregarded a "substantial and unjustifiable risk of serious harm" by failing to follow CYFD procedures in caring for the Victims and/or failing to remove the Victims from the vehicle. In so doing, the district court instructed the jury on two theories, specifically, failing to comply with CYFD requirements and/or failing to remove the Victims from their car seats.

{42} It is clear from the record that substantial evidence supported Defendants' convictions for reckless child abuse, and there was substantial evidence supporting both theories. As outlined by the Court of Appeals and presented at trial, the State showed that Defendants disregarded CYFD safety policies designed to prevent harm to children and in which Defendants had been trained. *See id.* ¶ 13. As noted by the Court of Appeals, Defendants were aware that they needed permission from CYFD to drive the children in their personal vehicles and did not have permission to do so. *See id.* Moreover, the Court of Appeals also asserted that the record demonstrates that Defendants were trained on CYFD policies requiring caregivers to perform headcounts to account for all children under their supervision when moving from one location to another and that Defendants failed to do so. *See id.* Additionally, as the Court of Appeals states, the State demonstrated at trial that Defendants failed to follow CYFD policies on the day in question despite having been reprimanded for violating CYFD policies in the past. *See id.* ¶ 14. These failures to comply with CYFD policy amounted to reckless disregard for the safety and health of the Victims. As the Court of Appeals also stated, the State's theory at trial was that Defendants' conduct on July 25, 2017, demonstrated a reckless disregard for the safety and health of the Victims, which resulted in death and severe injuries. *See id.* ¶ 4. The Court of Appeals noted as well that to demonstrate the harm allegedly caused by Defendants' conduct, the State presented testimony from CYFD and compliance reports showing Defendants were in violation of numerous CYFD safety policies on the day in question. *See id.*

{43} "[A] conviction under a general verdict must be reversed when it is based on more than one legal theory and at least one of those theories is legally, as opposed to factually, invalid." *State v. Mailman*, 2010-NMSC-036, ¶ 12, 148 N.M. 702, 242 P.3d 269. This Court emphasized in *Montoya*, 2015-NMSC-010, ¶ 31, 345 P.3d 1056, that "the overriding concern . . . is that the jury's verdict must be clear about the crime of which the defendant was convicted." *See also* Rule 5-611(A) NMRA ("The verdict shall be unanimous and signed by the foreman."). "The [judicial] rules and [uniform jury] instructions either refer generally to a requirement of jury unanimity or require only that the jury agree on a verdict." *See State v. Salazar*, 1997-NMSC-044, ¶ 34, 123 N.M. 778, 945 P.2d 996 (discussing whether unanimity is required on two underlying theories of first-degree murder).

{44} Thus, the State in this case advanced many different factual theories of guilt to support the legal theory of reckless child abuse. The first element of the jury instructions allowed the jurors to rely on different acts or combinations of actions to conclude that Defendants engaged in two theories of reckless child abuse proposed by the State in the second element: endangering the children or exposing them to the inclemency of the weather. The second element of the jury instruction states, "By engaging in the conduct described in [the first element], [Defendants] caused or permitted [the Victims] to be placed in a situation that endangered the life or health of [the Victims] or to be exposed to inclement weather."

{45} A review of the jury instructions demonstrates that they were sufficiently clear regarding the theories advanced by the State despite the "and/or" inclusion. The jurors did not need to be unanimous regarding the factual basis of Defendants' charges but did need to agree on the legal theory of recklessness. As demonstrated by the record in this case, the jurors did agree, and the convictions were unanimous. Despite the majority's artificial limitations on *Godoy*'s holding, my view is that *Godoy* is instructive in this matter, and I agree with the Court of Appeals in its decision to cite *Godoy*, which states, "[W]here alternative theories of guilt are put forth under a single charge, jury unanimity is required only as to the verdict, not to any particular theory of guilt." *Godoy*, 2012-NMCA-084, ¶ 6. "[A] jury's general verdict will not be disturbed in such a case where substantial evidence exists in the record supporting at least one of the theories of the crime presented to the jury." *Id.* (internal quotation marks and citation omitted). As the Court of Appeals further observed, *Godoy* states that "[w]e have never suggested that in returning general verdicts in such cases the jurors should be required to agree upon a single means of commission, because dif-

ferent jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line." *Id.* ¶ 7 (alteration in original) (internal quotation marks and citation omitted). Therefore, under established law there is no basis on which to declare that the jury instructions, as written, constitute reversible error.

{46} As this Court held in *State v. Parish*, 1994-NMSC-073, ¶ 4, 118 N.M. 39, 878 P.2d 988,

> A jury instruction standing by itself may appear defective. However, when considered in the context of the other instructions given to the jury it may "fairly and accurately state the applicable law." From the early case *State v. Crosby*, [1920-NMSC-037,]26 N.M. 318, 191 P. 1079 (1920), we can glean two principles to guide our determination of whether the defective jury instructions gave rise to reversible error: (1) "an erroneous instruction cannot be cured by a subsequent correct one," and (2) "instructions must be considered as a whole, and not singly." These principles address three situations: erroneous instructions, vague instructions, and contradictory instructions. . . . As *Crosby* states, if an instruction is facially erroneous, it presents an incurable problem and mandates reversal. On the other hand, if a jury instruction is capable of more than one interpretation, then the court must next evaluate whether another part of the jury instructions satisfactorily cures the ambiguity. Finally, if the jury is given two contradictory instructions, each of which is complete and unambiguous, reversible error occurs because it is impossible to tell if the error is cured by the correct instruction; furthermore, there is no way to determine whether the jury followed the correct or incorrect instruction. The standard against which the court makes its determination is that of the reasonable juror. . . . Reversible error arises if, under the principles just described, a reasonable juror would have been confused or misdirected.

Parish, 1994-NMSC-073, ¶ 4 (citations omitted). In *State v. Trossman*, 2009-NMSC-034, ¶ 8, 146 N.M. 462, 212 P.3d 350, this Court emphasized that "[w]hatever the case, the ultimate concern of the reviewing court must be whether 'a reasonable juror would have been confused or misdirected.'" *Id.* (citation omitted). "Juror confusion or misdirection may stem from instructions which, through omission or misstatement, fail to provide the juror with an accurate rendition of the relevant law." *State v. Luna*, 2018-NMCA-025, ¶ 19, 458 P.3d 457 (internal quotation marks and citation omitted). Overall, the jury instructions were sufficiently clear regarding the theories advanced by the State despite the "and/or" inclusion. In addition, the jury instructions accurately instructed the jury on the applicable law. *See Montoya*, 2015-NMSC-010, ¶ 25 (quoting *State v. Cabezuela*, 2011-NMSC-041, ¶ 21, 150 N.M. 654, 265 P.3d 705 ("[Jury instructions] are to be read and considered as a whole and when so considered they are proper if they fairly and accurately state the applicable law." (alteration in original))). The jurors did not need to be unanimous regarding the factual basis of Defendants' charges but did need to agree on the legal theory of recklessness. As demonstrated by the record in this case, the jurors did agree, and the convictions were unanimous.

II. CONCLUSION

{47} Like the Court of Appeals, I too believe that the province of the jury should not be invaded, nor should jurors' capacity to understand instructions given them be underestimated, particularly given the jury unanimously agreed upon a verdict. *See State v. Sutphin*, 1988-NMSC-031, ¶ 21, 107 N.M. 126, 753 P.2d 1314 ("This court does not weigh the evidence and may not substitute its judgment for that of the fact finder so long as there is sufficient evidence to support the verdict.") As this Court held in *Morga v. FedEx Ground Package System, Inc.*, 2022-NMSC-013, 512 P.3d 774, "Taking the respective roles of the judge and jury into consideration, this Court will not disturb a jury's verdict except 'in extreme cases.'" *Id.* ¶ 19 (citation omitted).

{48} The district court did not err by tendering the elements instruction to the jury. Defendants have failed to point to any portion of the record to support the majority's position that there was a "significant risk of jury confusion and misdirection" created by the use of the term *and/or* in identifying Defendants' underlying course of conduct in the jury instructions as framed, which would require a reversal of Defendants' reckless child abuse convictions and necessitate a new trial. *Maj. op.* ¶ 35. Accordingly, with respect, I am compelled to dissent.

James T. Martin, Judge
Sitting by designation

FORMAL OPINION

Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.

Filing Date: 5/20/2024

No. A-1-CA-40362

JESUS MORENO,
Plaintiff-Appellant,
v.
RANGER ENERGY SERVICES, LLC and WILDCAT OIL TOOLS, LLC,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Kathleen McGarry Ellenwood, District Court Judge

Durham, Pittard & Spalding LLP
Caren I. Friedman
Justin R. Kaufman
Rosalind B. Bienvenu
Santa Fe, NM

Arnold & Itkin LLP
Andrew Gould
Noah M. Wexler
Trenton "Trent" Shelton
Houston, TX

for Appellant

Rodey, Dickason, Sloan, Akin & Robb, P.A.
Stephanie K. Demers
Albuquerque, NM

for Appellee Ranger Energy Services, LLC

Priest & Miller, LLP
Ada B. Priest
Brian L. Shoemaker
Albuquerque, NM

for Appellee Wildcat Oil Tools, LLC

▶ Introduction of Opinion

Plaintiff Jesus Moreno appeals the district court's determination that the personal injury complaint against Ranger Energy Services, LLC and Wildcat Oil Tools, LLC (collectively, Defendants) was untimely filed. Plaintiff maintains that the district court improperly dismissed the case, because the savings statute, NMSA 1978, § 37-1-14 (1880), applied to deem the present case a continuation of a first-filed, but dismissed, Texas case. We conclude, however, that under the circumstances of the present case, the Texas case was untimely as a matter of law on the face of the pleadings and the motion responses, and as a result, the subsequent case filed in New Mexico cannot be "deemed a continuation of the first," expired case. *Id*. We therefore affirm.

Katherine A. Wray, Judge
WE CONCUR:
Shammara H. Henderson, Judge
Michael D. Bustamante, Judge, retired,
Sitting by designation

To read the entire opinion, please visit the following link: **https://bit.ly/A-1-CA-40362**

MEMORANDUM OPINION

This decision of the New Mexico Court of Appeals was not selected for publication in the New Mexico Appellate Reports. Refer to Rule 12-405 NMRA for restrictions on the citation of unpublished decisions. Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.

Filing Date: 5/15/2024

No. A-1-CA-40535

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
STEFAN VARELA,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF COLFAX COUNTY
Melissa A. Kennelly, District Court Judge

Raúl Torrez, Attorney General
Santa Fe, NM
Charles J. Gutierrez, Assistant Attorney General
Albuquerque, NM

for Appellant
Bennett J. Baur, Chief Public Defender
Kathleen T. Baldridge, Assistant Appellate Defender
Santa Fe, NM

for Appellee

▶ Introduction of Opinion

The district court excluded evidence as a sanction for the State's discovery violations during the prosecution of Defendant Stefan Varela. The State appeals, contending that the district court abused its discretion because it improperly determined that some of the State's conduct amounted to discovery violations and because several of the district court's findings lacked support in the record. We affirm.

Zachary A. Ives, Judge
WE CONCUR:
Jacqueline R. Medina, Judge
Jane B. Yohalem, Judge

To read the entire opinion, please visit the following link: **https://bit.ly/A-1-CA-40535**

MEMORANDUM OPINION

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Filing Date: 5/15/2024

No. A-1-CA-40667

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
DAVID CLARENCE SARVER,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Stan Whitaker, District Court Judge

Raúl Torrez, Attorney General
Laurie Blevins, Assistant Attorney General
Santa Fe, NM

for Appellee

Bennett J. Baur, Chief Public Defender
Tania Shahani, Assistant Appellate Defender
Santa Fe, NM

for Appellant

▶ Introduction of Opinion

Defendant David Sarver appeals his convictions for two counts of criminal sexual penetration (CSP) in the first degree, in violation of NMSA 1978, Section 30-9-11(D)(1) (2009); and one count of kidnapping in the first degree, in violation of NMSA 1978, Section 30-4-1(A)(4) (2003). He further appeals the district court's decision to enhance his sentences for CSP under NMSA 1978, Section 31-18-15.1 (2009). On appeal, Defendant argues that the district court (1) improperly enhanced his sentences for CSP and failed to state its reason for doing so on the record; (2) erred in denying his request for an in camera review of A.E.'s (Victim) psychological records; and (3) abused its discretion when it allowed the State to elicit testimony from the State's expert and Victim about certain uncharged sexual acts committed by Defendant. Because the district court erred by admitting evidence of uncharged acts, we reverse and remand.

Kristina Bogardus, Judge
WE CONCUR:
Jennifer L. Attrep, Chief Judge
Jane B. Yohalem, Judge

To read the entire opinion, please visit the following link: **https://bit.ly/A-1-CA-40667**

MEMORANDUM OPINION

This decision of the New Mexico Court of Appeals was not selected for publication in the New Mexico Appellate Reports. Refer to Rule 12-405 NMRA for restrictions on the citation of unpublished decisions. Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.

Filing Date: 5/16/2024

No. A-1-CA-40432

KAREN ANNE KOCH, Et al.,
Plaintiffs-Appellees,
v.
THE DAVID FAMILY OIL AND GAS INTERESTS PARTNERSHIP, Et al.,
Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY
Jane Shuler Gray, District Court Judge

Gallegos Law Firm
J.E. Gallegos
Santa Fe, NM

for Appellees Karen Anne Koch, Robert Avery Koch, and Kathleen Koch Callender

Holloman Law, LLC
Scotty Holloman
Hobbs, NM

for Appellees Karen L. Cook, Robert Cook Deegan, and Gregory B. Ryan

Modrall, Sperling, Roehl, Harris & Sisk, P.A.
Chris H. Killion
Spencer L. Edelman, Et al.
Albuquerque, NM

for Appellant David Family Oil and Gas Interests Partnership

▶ Introduction of Opinion

This case involves competing claims of ownership to an overriding royalty interest in a federal oil and gas lease located in Eddy County in southern New Mexico. The district court granted summary judgment in favor of Plaintiffs Karen Koch, Karen Cook, Robert Cook Deegan, Robert Avery Koch, and Kathleen Koch Callender, Gregory Ryan, Energy Investments, Inc., and Wendi Chamberlain against Defendants the David Family Oil and Gas Interests Partnership, Barbara Blume, Kristen L. Blume, Bayswater Fund III-A, LLC, Bayswater Fund III-B, LLC, Bayswater Fund IV-B, LLC, Bayswater Resources, LLC, Blue-Chip Resources, LLC, Ditto Land Company, LLC, Robbins Family Minerals, LP, Fall Land & Cattle, LLC, and Colburn Oil, LP. We conclude that there are questions of material fact precluding summary judgment against parties in the David chain of title. We also conclude that the district court misapplied New Mexico's law with regard to "void" versus "voidable" conveyances of real property in the circumstances of this case. We affirm in part, reverse in part, and remand for further proceedings in accordance with this opinion.

Michael D. Bustamante, Judge, retired,
Sitting by designation.
WE CONCUR:
J. Miles Hanisee, Judge
Jacqueline R. Medina, Judge

To read the entire opinion, please visit the following link: **https://bit.ly/A-1-CA-40432**

MEMORANDUM OPINION

This decision of the New Mexico Court of Appeals was not selected for publication in the New Mexico Appellate Reports. Refer to Rule 12-405 NMRA for restrictions on the citation of unpublished decisions. Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.

Filing Date: 5/16/2024

No. A-1-CA-40777

DANETTE L. MARTINEZ,
Plaintiff/Counterdefendant-Appellee,
v.
MICHAEL MARTINEZ,
Defendant/Counterplaintiff-Appellant.

APPEAL FROM THE DISTRICT COURT OF RIO ARRIBA COUNTY
Jason Lidyard, District Court Judge

Christopher M. Grimmer Attorney at Law, LLC
Christopher M. Grimmer
Santa Fe, NM

for Appellee

Ben A. Ortega
Albuquerque, NM

for Appellant

▶ Introduction of Opinion

Defendant Michael Martinez appeals the district court's final judgment granting declaratory relief and a permanent injunction for Plaintiff Danette Martinez establishing an easement on Defendant's property. Defendant claims the district court's finding that the easement measured twenty-six-feet in width was not supported by substantial evidence. We hold that the district court's finding that the easement measured twenty-six feet wide during the ten-year prescriptive period is supported by substantial evidence and affirm.

Jacqueline R. Medina, Judge
WE CONCUR:
Zachary A. Ives, Judge
Katherine A. Wray, Judge

To read the entire opinion, please visit the following link: **https://bit.ly/A-1-CA-40777**

DISPOSITIONAL ORDER

This decision of the New Mexico Court of Appeals was not selected for publication in the New Mexico Appellate Reports. Refer to Rule 12-405 NMRA for restrictions on the citation of unpublished decisions. Electronic decisions may contain computer-generated errors or other deviations from the official version filed by the Court of Appeals.

Filing Date: 5/20/2024

No. A-1-CA-41113

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
ERNEST CLAH,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF MCKINLEY COUNTY
R. David Pederson, District Court Judge

Raúl Torrez, Attorney General
Benjamin Lammons, Assistant Attorney General
Santa Fe, NM

for Appellant

Bennett J. Baur, Chief Public Defender
Melanie C. McNett, Assistant Appellate Defender
Santa Fe, NM

for Appellee

▶ Dispositional Order

The State appeals from the district court's order dismissing a charge of child abuse by endangerment, contrary to NMSA 1978, Section 30-6-1(D) (2009), against Defendant and amending the criminal information to charge Defendant with driving while intoxicated with a minor in the vehicle, contrary to NMSA 1978, Section 66-8-102.5 (2019) (DWI with a minor).

Read the full Dispositional Order at the link below.

Shammara H. Henderson, Judge
WE CONCUR:
J. Miles Hanisee, Judge
Jacqueline R. Medina, Judge

To read the entire dispositional order, please visit the following link: **https://bit.ly/A-1-CA-41113**

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Positions

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Attorney

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Mid- size downtown Defense litigation firm looking for associate with 3-5 years to do litigation including depositions and trials. Pay range varies with experience $70,000. To $120,000. Congenial and easy-going firm. Please contact Karen Arrants at Stiff, Garcia & Associates, karrants@stifflaw.com

Civil Litigation Defense Firm Seeking Associate Attorney

Ray Peña McChristian, PC seeks new attorneys to join its Albuquerque office. RPM is an AV rated, regional civil defense firm with offices in Texas and New Mexico handling predominantly defense matters for businesses, insurers and government agencies. We have opportunities for associates who want to hit the ground running with interesting cases and strong mentors. The ideal candidate will have strong legal research and writing skills and will be comfortable working in a fast-paced environment. The successful candidate will be responsible for providing legal advice to clients, preparing legal documents, and representing clients in court proceedings, including trial. This is an excellent opportunity for a motivated individual to join a highly respected AV-rated law firm and gain valuable experience in the legal field. Salary for this role is competitive with a full benefits package, straightforward partner/shareholder track and a casual work environment in Uptown ABQ. If you join us, you will be well supported with the infrastructure of a multi-state firm and a group of professionals that want you to succeed. Apply by emailing your resume and a letter of interest to cray@raylaw.com.

Assistant General Counsel

The New Mexico Workers' Compensation Administration is accepting applications to fill its vacant Assistant General Counsel position. Minimum qualifications Juris Doctorate degree from an accredited school of law. Must be licensed as an attorney by the Supreme Court of New Mexico or qualified to apply for limited practice license (Rules 15-301.1 and 15-301.2 NMRA). The selected candidate reports to General Counsel of the agency. Principal duties of the position include: (1) attending hearings held by the Director for purposes of determining a proper recipient of benefits for an incapacitated worker or minor children of a deceased worker; (2) responding to subpoenas for WCA records and Inspection of Public Records Act requests; (3) assist with the WCA's legislative and rulemaking initiatives, including preparing fiscal impact reports during legislative session and drafting of rules; (4) respond to constituent inquires received from the Governor's Office, legislators and/or the general public; and (5) provide general legal support in legal representation of the Director and the agency on various legal subject encountered by the Office of General Counsel in team collaboration with two paralegals and General Counsel. Salary range: $77,354 - $139,238. To apply, visit the State Personnel website at www.spo.state.nm.us.

Chief Judge
Jicarilla Apache Nation
Dulce, New Mexico

The Jicarilla Apache Nation is seeking a Chief Judge for the Nation's Court. Salary commensurate with qualifications and experience. Applicants should be graduates of an accredited Law School. Applicants should have significant knowledge and experience in Native American Culture and Traditions, as well as be well versed in Native American Legal Issues. Please submit resumes and letters of interest to Paul Hoffman, General Counsel, Jicarilla Apache Nation at phoffman @jan legal.com, with a copy to Sonja Newton, Vice-President Jicarilla Apache Nation, in care of Ouida Notsinneh, Secretary to the Vice-President at onotsinneh@janadmin.com. Excellent Benefit package including but not limited to full Medical, Prescription, Pension, 401(k), Dental, Life Insurance, vacation and sick leave. Prior Judicial Experience is required. Please submit Letters of Interest and Curriculum Vitae not later than 5:00 pm on August 12, 2024.

Associate Attorney – Civil Litigation

Sutin, Thayer & Browne APC is looking to hire a full-time Associate Attorney with at least 4-5 years of relevant experience for our Litigation practice. Interest in commercial and governmental law is a plus. All candidates should visit our website and view our Practice Areas webpage, as well as our Careers webpage for instructions on how to apply. Visit sutinfirm.com.

Associate Attorney

Atkinson, Baker & Rodriguez, P.C. is a successful and established Albuquerque-based complex civil commercial and tort litigation firm seeking motivated and talented associate attorney candidates with great academic credentials. Join our small but growing focused Firm and participate in litigating cases from beginning to end with the support of our nationally recognized, experienced attorneys! Come work for a team that fosters development and growth to become a stand-out civil litigator. Highly competitive compensation and benefits. Send resumes, references, writing samples, and law school transcripts to Atkinson, Baker & Rodriguez, P.C., 201 Third Street NW, Suite 1850, Albuquerque, NM 87102 or e_info@abrfirm.com. Please reference Attorney Recruiting.

Senior Trial Attorneys, Trial Attorneys, and Assistant Trial Attorneys

The Eleventh Judicial District Attorney's Office, Div. II, in Gallup, New Mexico, McKinley County is seeking applicants for Assistant Trial Attorneys, Trial Attorneys and Senior Trial Attorneys. You will enjoy working in a community with rich culture and history while gaining invaluable experience and making a difference. The McKinley County District Attorney's Office provides regular courtroom practice, supportive and collegial work environment. You are a short distance away from Albuquerque, Southern parts of Colorado, Farmington, and Arizona. We offer an extremely competitive salary and benefit package. Salary commensurate with experience. These positions are open to all licensed attorneys who are in good standing with the bar within or without the State of New Mexico. Please Submit resume to District Attorney Bernadine Martin, 201 West Hill, Suite 100, Gallup, NM 87301, or e-mail letter to Bmartin@da.state.nm.us. Position to commence immediately and will remain open until filled.

Judge

Pueblo of Laguna, NM – Great employer and benefits, competitive pay DOE! Seeking full-time Judge for the Pueblo Court with at least 5 years of legal experience to adjudicate criminal and civil cases. Leisurely commute from Albuquerque metro, Los Lunas, or Grants. Apply by July 12 for best consideration. Application instructions and position details at: https://www.lagunapueblo-nsn.gov/elected-officials/secretarys-office/human-resources/employment/

Experienced Family Law Attorney

Cordell & Cordell, P.C., a domestic litigation firm with over 100 offices across 35 states, is currently seeking an experienced family law attorney for an immediate opening in its office in Albuquerque, NM. The candidate must be licensed to practice law in the state of New Mexico, have minimum of 3 years of litigation experience with 1st chair family law preferred. The position offers 100% employer paid premiums including medical, dental, short-term disability, long-term disability, and life insurance, as well as 401K and wellness plan. This is a wonderful opportunity to be part of a growing firm with offices throughout the United States. To be considered for this opportunity please email your resume to Hamilton Hinton at hhinton@cordelllaw.com

New Mexico Legal Aid – Current Job Opportunities

New Mexico Legal Aid (NMLA) provides civil legal services to low income New Mexicans for a variety of legal issues including domestic violence/family law, consumer protection, housing, tax issues and benefits. NMLA has locations throughout the state including Albuquerque, Santa Fe, Las Cruces, Gallup, Roswell, Silver City, Clovis, Hobbs, Las Vegas, Taos, and Santa Ana. Managing Attorney: Multiple positions; Staff Attorney Positions: Multiple positions; Paralegal: Multiple positions. Please visit our website for all current openings, NMLA benefits, Salary Scales and instructions on how to apply - https://newmexicolegalaid.isolvedhire.com/jobs/

Contract Prosecutor

The Eleventh Judicial District Attorney's Office, Div. II, in Gallup, New Mexico, McKinley County is seeking applicants for a Contract Prosecutor to assist in the prosecution of criminal misdemeanor cases, felony cases and conflict of interest cases. The Contract Prosecutor position requires substantial knowledge and experience in criminal prosecution, rules of evidence and rules of criminal procedure; trial skills; the ability to draft legal documents and to research/analyze information and situations and the ability to work effectively with other criminal justice agencies and Law Enforcement. This position is open to all attorneys who have knowledge in criminal law and who are in good standing with the New Mexico Bar. Limited License is okay. Salary will result in a contractual agreement between the contract prosecutor and the District Attorney. Submit letter of interest and resume to District Attorney Bernadine Martin, 201 West Hill, Suite 100, Gallup, NM 87301, or e-mail letter to bmartin@da.state.nm.us.

Public Defender

Pueblo of Laguna, NM – Great employer and benefits, competitive pay DOE! Seeking full-time attorney to represent adult criminal defendants and juveniles in delinquency cases in Laguna Pueblo Court. No murder cases or hard felonies – largely low-level misdemeanors and DUIs. Office has assistant and significant behavioral resources are available as alternatives to incarceration. Active but manageable case-load. Leisurely commute from Albuquerque metro, Los Lunas, or Grants, with remote work available up to 2 days per week. Salary DOE. Apply now, will fill quickly. Application instructions and position details at: https://www.lagunapueblo-nsn.gov/elected-officials/secretarys-office/human-resources/employment/

New Mexico Medical Board Job Announcement

Prosecutor Position

DESCRIPTION: The New Mexico Medical Board (Board) is the state agency responsible for the regulation over 10,000 licensees including medical doctors (physicians), physician assistants, anesthesiologist assistants, genetic counselors, polysomnographic technologists, naturopaths and naprapaths. The New Mexico Medical Board is accepting applications to fill the position of Prosecutor. This is an exempt, full-time position based in Santa Fe, NM. This position is responsible for prosecuting physicians and other licensees primarily for violation of the Medical Practices Act specific to unprofessional or dishonorable conduct and/or the Impaired Healthcare Provider Act. The Prosecutor will review most complaints with Board Investigators, will issue recommendations for settlement and will handle adjudications as well as some appeals. Most hearings are held in Santa Fe although they can be held anywhere in the State. The successful candidate will have a strong knowledge of regulatory processes, to include the licensing, disciplining and ensuring compliance of medical professional rules and regulations; and must have a strong knowledge of the state and federal laws/regulations applicable to the medical profession. In addition, the successful candidate must have the ability to provide strong and ethical prosecutorial representation for the Board; possess strong communication, interpersonal and legal skills; exercise sound judgment; and appropriately advise the Board's staff on matters related to the disciplinary processes as it related to the regulation of the medical profession in New Mexico. QUALIFICATIONS: Educational requirements: NM Juris Doctorate. Experience Requirements: 5 or more years of litigation experience. Special emphasis on knowledge of the medical regulation, medical standard of care cases, and/or other professional licensure subject to the ULA is preferred but not mandatory. APPLICATION PROCESS: In order to be considered for this position, qualified candidates should send a resume, CV and cover letter to: Amanda Quintana, Interim Executive Director, New Mexico Medical Board, 2055 S. Pacheco Street, Building 400, Santa Fe, NM 87505; Phone: (505) 476-7220; Email: AmandaL.Quintana@nmmb.nm.gov

Various Assistant City Attorney Positions

The City of Albuquerque Legal Department is hiring for various Assistant City Attorney positions. Hybrid in person/remote work schedule available. The Legal Department's attorneys provide a broad range of legal services to the City and represent it in legal proceedings in court and before state, federal and administrative bodies. Current open positions include: Employment/Labor: The City is seeking an attorney to represent it in litigation related to employment and labor law in New Mexico State and Federal Courts, before the City of Albuquerque Personnel Board, and before the City of Albuquerque Labor Board; Litigation Division: The City is seeking attorneys to join its in house Litigation Division, which defends claims brought against the City; Health, Housing and Homelessness and Youth and Family Services General Counsel: The City is seeking an attorney to serve as general counsel to the Department of Health, Housing and Homelessness and the Department of Youth and Family Services for contract review, and a broad range of general legal issues, including federal grant compliance, procurement, rulemaking and interpretation, and other duties as assigned; Aviation: The City is seeking an attorney who will focus on representation of the City's interests with respect to Aviation Department legal issues and regulatory compliance. The position will be responsible for interaction with Aviation Department administration, the Albuquerque Police Department, various other City departments, boards, commissions, and agencies, and various state and federal agencies, including the Federal Aviation Administration and the Transportation Security Administration; Municipal Affairs: The City is seeking an attorney to provide a broad range of general counsel legal services to the Mayor's Office, City Council, various City departments, boards, commissions, and agencies. The legal services provided by the division includes, but are not limited to, drafting legal opinions, reviewing and drafting ordinances and executive/administrative instructions, reviewing and drafting contracts, and providing general advice and counsel on day-to-day operations; Department of Municipal Development and General Services Department: The City is seeking an attorney to provide legal services to the City's Department of Municipal Development ("DMD") and General Services Department ("GSD") for contract review, and a broad range of general legal issues, including public works construction law and Capital Implementation projects, facilities, procurement, rulemaking, and interpretation, and other duties as assigned. Attention to detail and strong writing and interpersonal skills are essential. Preferences include: experience with litigation, contract drafting and review, government agencies, government compliance, and policy writing. Salary based upon experience. For more information or to apply please send a resume and writing sample to Angela Aragon at amaragon@cabq.gov.

Associate Attorney

Quiñones Law Firm LLC is a well-established defense firm in Santa Fe, NM in search of a full-time associate attorney with minimum 5 years of legal experience and willing to work minimum of 30 hours per week. Generous compensation and health benefits. Please send resume to quinoneslaw@cybermesa.com

Paralegal

Paralegal position in established commercial civil litigation firm. Prior experience preferred. Requires knowledge of State and Federal District Court rules and filing procedures; factual and legal online research; trial preparation; case management and processing of documents including acquisition, review, summarizing, indexing, distribution and organization of same; drafting discovery and related pleadings; maintaining and monitoring docketing calendars; oral and written communications with clients, counsel, and other case contacts; proficient in MS Office Suite, AdobePro, Powerpoint and adept at learning and use of electronic databases and legal software technology. Must be organized and detail-oriented professional with excellent computer skills. All inquiries confidential. Salary DOE. Competitive benefits. Email resumes to e_info@abrfirm.com or Fax to 505-764-8374.

Part-time Legal Assistant/Paralegal

Quinones Law Firm LLC is a well-established defense firm in Santa Fe, NM in search of a part-time legal assistant/paralegal with minimum 5 years of Legal Assistant/Paralegal experience. Please send resume to quinoneslaw@cybermesa.com

Receptionist/ Administrative Assistant
Law Firm seeking a Receptionist/ Administrative Assistant for litigation practice. The position requires someone who can communicate with potential and existing clients, manage case files, calendar, assist with billing, has strong computer skills, can perform other administrative tasks and proficient in Office 365. Benefits package, paid time off, and sick leave available. Full-time. Salary dependent on experience and background. Previous law firm experience strongly encouraged. Send resume and cover letter to admin@peiferlaw.com.

Experienced Legal Assistant
Stiff, Garcia & Associates, LLC, a successful downtown insurance defense firm, seeks experienced Legal Assistant. Must be detail-oriented, organized, and have excellent communication skills. Bilingual in Spanish a plus. Competitive salary. Please e-mail your resume to karrants@stifflaw.com

Paralegal
The City of Albuquerque Legal Department is seeking a Paralegal to assist an assigned attorney or attorneys in performing substantive administrative legal work from time of inception through resolution and perform a variety of paralegal duties, including, but not limited to, performing legal research, managing legal documents, assisting in the preparation of matters for hearing or trial, preparing discovery, drafting pleadings, setting up and maintaining a calendar with deadlines, and other matters as assigned. Excellent organization skills and the ability to multitask are necessary. Must be a team player with the willingness and ability to share responsibilities or work independently. Starting salary is $25.54 per hour during an initial, proscribed probationary period. Upon successful completion of the proscribed probationary period, the salary will increase to $26.80 per hour. Competitive benefits provided and available on first day of employment. Please apply at https://www.governmentjobs.com/careers/cabq.

Services

Contract Paralegal
27 years civil litigation experience offering top quality full-service litigation support. Specializing in legal writing and medical records analysis and chronology. Reliable and exceptional work product. You will not be disappointed. Well-versed in legal and medical terminology. Send inquiries to ppslegalpro@gmail.com.

Office Space

820 Second Street NW
820 Second Street NW, office for rent, two blocks from courthouses, all amenities including copier, fax, telephone system, conference room, high-speed internet, phone service, receptionist, call Ramona at 243-7170

2024 *Bar Bulletin* Publishing and Submission Schedule

The *Bar Bulletin* publishes twice a month on the second and fourth Wednesday. Advertising submission deadlines are also on Wednesdays, three weeks prior to publishing by 4 pm.

Advertising will be accepted for publication in the Bar Bulletin in accordance with standards and ad rates set by publisher and subject to the availability of space. No guarantees can be given as to advertising publication dates or placement although every effort will be made to comply with publication request. The publisher reserves the right to review and edit ads, to request that an ad be revised prior to publication or to reject any ad. **Cancellations must be received by 10 a.m. on Thursday, three weeks prior to publication.**

For more advertising information, contact: Marcia C. Ulibarri at 505-797-6058 or email marcia.ulibarri@sbnm.org

The publication schedule can be found at **www.sbnm.org.**

The State Bar of New Mexico's Annual Meeting looks a little **different** this year.

be inspired.

Save the Date!

October 25, 2024

Attend In-Person at the State Bar Center in Albuquerque or Virtually

Earn all 12 of your CLE credits for the year at a discounted rate!

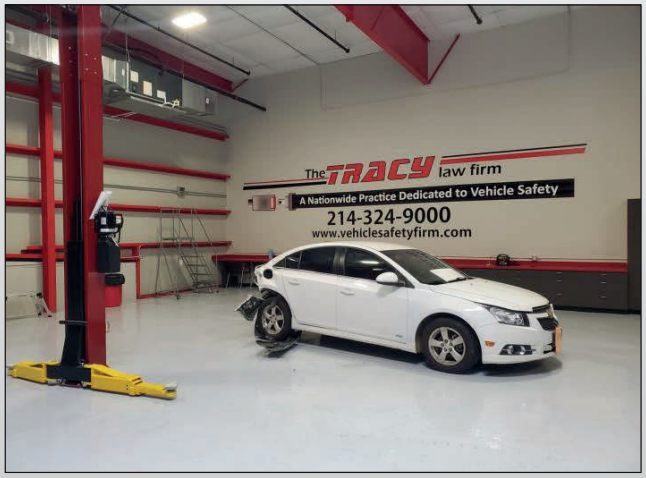
Earn a portion of your CLE credits by attending the live (in-person or virtual) Annual Meeting event and complete the remaining credits with access to our CLE On-Demand courses. More information coming soon!

Reach thousands of members of the New Mexico legal community!
Annual Meeting sponsorships are available!
Contact Marcia Ulibarri at 505-797-6058 or marketing@sbnm.org for more information.

www.sbnm.org/AnnualMeeting2024

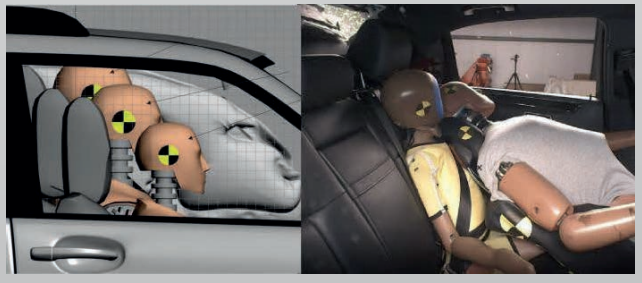
IS YOUR CASE AT A RECOVERY DEAD-END?

Maybe not because you may have a CRASHWORTHINESS case.

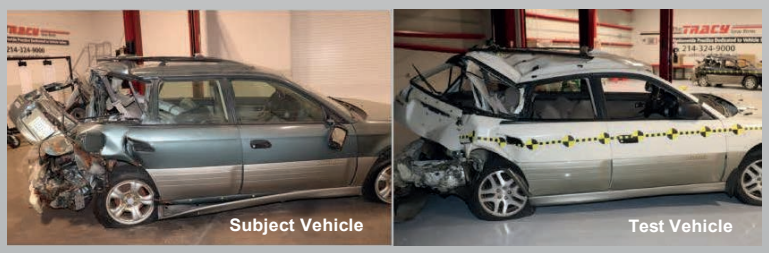


Crashworthiness

focuses on how the vehicle's safety systems performed, not who caused the accident. At my firm's Crash Lab, we continually study vehicle safety through engineering, biomechanics, physics, testing and innovation.



If you have any questions about a potential case, please call Todd Tracy. Vehicle safety system defects may have caused your client's injury or death.



The TRACY law firm

A Nationwide Practice Dedicated to Vehicle Safety

4701 Bengal Street, Dallas, Texas 75235

214-324-9000

www.vehiclesafetyfirm.com