IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

vs.

No. 28,700

ALICIA VICTORIA GONZALES,

Defendant-Appellant.

CRIMINAL APPEAL FROM THE DISTRICT COURT
BENALILLO COUNTY
THE HONORABLE NEIL C. CANDELARIA, DISTRICT JUDGE

STATE OF NEW MEXICO'S ANSWER BRIEF

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NOTE ON RECORD ON APPEAL

The official transcript contains 9 volumes, referred to in this brief by volume number and page number as, e.g., "Tr. 6, 37."

STATEMENT OF COMPLIANCE

The body of the attached brief exceeds the 35 page limit set forth in Rule 12-213(F)(2) NMRA 2009, but does not exceed the 11,000 word limit. I certify that this brief is proportionally spaced using Times New Roman type face at 14 point and contains 10,443 words. The word count was obtained by using Microsoft Office Word 2003.

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SUMMARY OF FACTS AND PROCEEDINGS

Defendant's BAC was 0.21. (State's Exhibit 16) She was speeding along I-25, in the middle of Albuquerque on a clear, dry day with normal traffic, at 9:00 p.m. (Tr. 5, 45-46) Other motorists testified that Defendant was going "at high speeds," and "a lot faster" than the speed limit. (Tr. 5, 78, 96, 102) In another car, seven-year-old Manuel and five-year-old D'Andre were sitting in the back seat, with their mothers in the front seat; both children were wearing seatbelts. (Tr. 5, 43-49)

The district court described Defendant's conduct as follows, in the judgment and sentence: "Specifically, the Court found that the defendant's blood alcohol content was .21, that the defendant's vehicle was described by witnesses as weaving in and out of traffic, that the defendant's vehicle initially struck one vehicle and did not stop, that the defendant's vehicle struck the victim's vehicle with such force that the trunk and back passenger seat were virtually eliminated, that one witness described the crash as an explosion, that the defendant's vehicle when striking the victim's vehicle continued as if it was pushing the victim's car out of the way and there was no indication that the defendant had made any attempt to avoid the accident." (RP 316 (determining that 2 counts of negligent child abuse were serious violent offenses))

Defendant killed seven-year-old Manuel and injured five-year-old D'Andre.

Defendant was convicted of: Negligent child abuse resulting in the death of Manuel; Negligent child abuse resulting in injury to D'Andre; Aggravated DWI (BAC of 0.21); and Leaving the scene of an accident. (RP 314) Defendant argues that she cannot be punished for negligent or intentional child abuse or vehicular homicide. Defendant does not challenge her convictions for Aggravated DWI and Leaving the scene of an accident.

ARGUMENT

I. The child abuse statute does not include an element of knowledge that there was a child in the victims' car.

Defendant argues that New Mexico's child abuse statute requires the State to prove that Defendant knew that there were children in the victims' car when she crashed into it. (BIC 8-29) NMSA 1978, § 30-6-1 (2004) (subsequently amended). Defendant argues: "Our legislature intended to punish as child abuse only the kind of highly reprehensible conduct . . . which are commonly recognized as child abuse." (BIC 8 (emphasis added)) The State responds that speeding on I-25 in the middle of Albuquerque, in a big SUV, while highly intoxicated (0.21), is "highly reprehensible conduct." Defendant showed reckless disregard for the safety of all others on the road—including adults and children. When Defendant killed one child and injured another child, it is fully consistent with the legislative intent to provide heightened protection for children that she be punished more severely than if her "highly reprehensible conduct" had killed and injured adults

instead of children. See State v. Guilez, 2000-NMSC-020, ¶ 17, 129 N.M. 240, 4 P.3d 1231 (Legislature intended to provide heightened protection for children).

Defendant correctly recognizes that the language of Section 30-6-1 is broad. (BIC 10) Defendant asks the Court to limit the statute by reading in language which is not there. Neither the language of the statute nor the language of the UJIs requires proof that Defendant knew there were children in the car she crashed into. Defendant asks the Court to hold that the jury instructions must be modified to add an element: that the defendant knew that there were children in the other car. This would be a new rule. Defendant then asks the Court to hold that the State has lost its chance to prosecute Defendant for killing one child and injuring another because the State did not prove this new element. To impose a new requirement and simultaneously hold that the State gets no chance to comply with that new requirement is neither reasonable nor in accordance with standard appellate principles.

The jury instructions given followed the UJIs. (RP 251-255) See UJI 14-602 NMRA 2009; UJI 14-604 NMRA 2009. The jury was required to find:

> 1. Alicia Gonzales caused Manuel Delfino to be placed in a situation which endangered the life or health of Manuel Delfino;

2. The defendant acted with reckless disregard and without justification. To find that Alicia Gonzales acted with reckless disregard, you must find that Alicia Gonzales knew or should have known the defendant's conduct created a substantial and foreseeable risk, the defendant disregarded that risk and the defendant was wholly indifferent to the consequences of the conduct and to the welfare and safety of Manuel Delfino;

3. Alicia Gonzales's actions or failure to act resulted in the death of Manuel Delfino;

4. Manuel Delfino was under the age of 18.

(RP 253) A similar jury instruction was given regarding the injury to D'Andre. (RP 255)

Defendant argues that these jury instructions should have been modified. Defendant proffered a number of modified jury instructions in district court, adding an element that Defendant intended to cause harm to Manuel or D'Andre or that Defendant had knowledge of the presence of the children in the other car. (RP 228-243) The district court, however, modifies at its peril the UJIs approved by the Supreme Court; if a modification is incorrect, the district court will be reversed. State v. Acosta, 1997-NMCA-035, ¶ 13, 123 N.M. 273, 939 P.2d 1081. The district court refused Defendant's requests to give unapproved instructions, and instead carefully followed the UJIs approved by the Supreme Court. "[T]he New Mexico Supreme Court has recognized the irony of reversing a conviction because a trial court used UJIs that the higher court itself had approved." Id. (citing State v. Parish, 118 N.M. 39, 47, 878 P.2d 988, 996 (1994)).

A statute should be interpreted in light of the purpose for which it was enacted. State v. Howard, 108 N.M. 560, 562, 775 P.2d 762, 764 (Ct. App. 1989). "Ultimately, the best indicator of legislative intent is the plain language of a statute." Erica, Inc. v. New Mexico Regulation & Licensing Dep't, 2008-NMCA-065, ¶ 17, 144 N.M. 132, 184 P.3d 444. The Court "will not read into a statute . . . language which is not there, particularly if it makes sense as written." Id. (internal quotation omitted).

Defendant, however, asks the Court to read into the child abuse statute a requirement that the defendant have knowledge that there are children in another vehicle—so that Defendant would not be guilty of child abuse. Defendant argues that the heightened penalties for child abuse show that the Legislature did not intend to cover Defendant's conduct under Section 30-6-1. (BIC 24) But these heightened penalties are fully consistent with the Legislature's intent to provide heightened protection for children. The heightened penalties are fully consistent with the heightened culpability of an adult who injures a child. "'When an adult, without justification, endangers a child's safety, the adult is more culpable than when the safety of another adult is jeopardized.'" State v. Santillanes, 2001-NMSC-018, ¶ 24, 130 N.M. 464, 27 P.3d 456 (quoting Guilez, 2000-NMSC-020, ¶ 17).

Despite the broad, plain language of Section 30-6-1, Defendant argues that

the Legislature intended to punish under this statute only conduct which is "commonly recognized as child abuse." (BIC 8) This assertion is refuted by a number of New Mexico cases involving situations not "commonly recognized as child abuse," as Defendant concedes. (BIC 20-21 (citing State v. Ungarten, 115 N.M. 607, 856 P.2d 569 (Ct. App. 1992) (child was not target of attack, but was nearby); State v. McGruder, 1997-NMSC-023, 123 N.M. 302, 940 P.2d 150 (child was not target of attack, but was standing nearby)) Other cases applying the plain language of Section 30-6-1—and not limiting the statute's application to conduct "commonly recognized as child abuse"—are Santillanes and Guilez. These cases hold that one who, while intoxicated, drives a car containing children is properly punished under Section 30-6-1. State v. Santillanes, 2001-NMSC-018, 130 N.M. 464, 27 P.3d 456; State v. Guilez, 2000-NMSC-20, 129 N.M. 240, 4 P.3d 1231; see State v. Castenada, 2001-NMCA-052, 130 N.M. 679, 30 P.3d 368. Defendant asserts that all of these cases "fit within the community understanding of what constitutes child abuse." (BIC 22) The State disagrees. "Although the statute is entitled "child abuse," prosecution under Section 30-6-1 has been upheld in these cases because the defendant's conduct met the statutory plain language, under the UJIs adopted by the Supreme Court. These cases refute Defendant's argument that only what is "commonly recognized as child abuse" is properly prosecuted under Section 30-6-1. Instead, conduct which meets the plain language of the statute—as

set forth in the UJIs—is properly prosecuted under Section 30-6-1. Although the statute is entitled "child abuse," the UJIs do not use this term; the UJIs do not require the jury to find that the defendant was guilty of what is "commonly recognized as child abuse." Defendant puts too much emphasis on the title of Section 30-6-1; Defendant gives too little consideration to the plain language of the statute itself. The UJIs properly follow the plain language of the statute. The community understanding of what is child abuse does not constitute a limitation on Section 30-6-1.

Defendant's conduct, as instructed in the UJIs, meets the plain language of the child abuse statute. The Legislature has the power to punish Defendant's conduct, and has done so under Section 30-6-1. The Legislature could have added a requirement about the defendant's knowledge—but chose not to do so. The Court should not read in a requirement that the Legislature left out. The level of culpability to attach to Defendant's conduct was a legislative decision. As Defendant points out, Section 30-6-1 does punish what is "commonly recognized as child abuse"—but this is only a subset of the conduct punished under the statute. The State argues that Section 30-6-1 also punishes additional conduct falling within the plain language of the statute—like Defendant's. Whether Defendant's conduct was equally culpable as other conduct punished under Section 30-6-1 was a legislative decision. The Legislature decided that it was.

Colorado takes its protection of children seriously. Colorado's Supreme Court has interpreted Colorado's statute to apply to circumstances like Defendant's. When a defendant drove drunk and hit and killed people in another car, the Colorado Court upheld life sentences for child abuse even though there was no evidence that the defendant knew that his conduct would result in injury or death to a child, rather than to an adult.

In Deskins, the Colorado Supreme Court en banc held that Colorado's child abuse statute did not require proof that the defendant knew there were children in the other car. People v. Deskins, 927 P.2d 368 (Colo. 1996) (en banc). The defendant was driving while under the influence of alcohol when he crashed into a car occupied by a woman and four children, killing three of the children and injuring the woman and the fourth child. Id. at 369. The issue was "whether the defendant can be convicted of reckless child abuse when there was no evidence that he knew that his conduct could result in injury to a child rather than to an adult." Id. at 371. Colorado's child abuse statute states that a person is guilty of child abuse if he or she "'causes an injury to a child's life or health or permits a child to be unreasonably placed in a situation which poses a threat of injury to the child's life or health." Id. at 371 (quoting § 18-6-401(1), 8B C.R.S. (1996 Supp.)). When the defendant acts "knowingly or recklessly" and the child abuse results in death, it is a class 2 felony; if the child abuse results in serious bodily injury, it is a

class 3 felony.

According to Colorado statute, a person acts recklessly "when he consciously disregards a substantial and unjustifiable risk that a result will occur or that a circumstance exists." Id. at 371 n.8. "The culpable mental states applicable to a crime of child abuse relate not to a particular result, but rather to the nature of the offender's conduct in relation to the child or to the circumstances under which the act or omission occurred." Id. at 371(emphasis added). The Colorado Court relied on the plain language of the statute, concluding that if the defendant acted recklessly and if that conduct killed or injured a child, criminal liability attaches. Id. at 371-72.

The Deskins Court rejected the defendant's argument that the statute required "that the jury find that he was aware that children were in the car that his vehicle struck in order for him to be found guilty of reckless child abuse." Id. at 372. Deskins held that "the awareness required for reckless child abuse is simply the *risk* that one's conduct could result in an injury to a child's life or health." Id. at 373. "Therefore, the risk in this case was not that children might be in the actual car that Deskins' vehicle hit that night. On the contrary, what Deskins consciously disregarded when he drove while drunk was the risk that children would be passengers *in any of the cars on the road that night.*" Id. at 373 (emphasis in original). "In our view, the record was sufficient for the jury to conclude that

Deskins disregarded this risk and that the risk was substantial and unjustifiable." Id. at 373. The Colorado Court upheld life sentences for the deaths of the children.

The Deskins Court rejected the defendant's argument that he was not guilty of child abuse because he was not "aware" of the age of his victims. Id. at 373. The Colorado Legislature had not made knowledge of the victim's age, or lack of knowledge, a defense; the statute required proof that the defendant disregarded a substantial and unjustifiable risk that his conduct may cause death or injury to a child, and the statute required proof that the victim was in fact a child (under the age of 16). Id. The legislature had not included a defense of mistake as to the victim's age; "the standard for reckless child abuse does not require the actor's awareness that the victim was a child." Id.

The Deskins Court recognized that the legislature could provide more severe penalties for some crimes, as long as the classification reflected substantial differences in the proscribed conduct which have a reasonable relationship to the public purpose. Id. at 372. Heightened penalties were justified because the Colorado Legislature could reasonably provide additional protection to children. Id. The defendant in Deskins received life sentences for each child killed. Id. at 369.

Defendant observes that there were dissents in Deskins. One justice agreed that the defendant could be found guilty of child abuse—but not of the enhanced

sentences. Id. at 373-76. Two other justices agreed with the majority in rejecting the defendant's argument that he must actually know that his conduct could result in injury to a child rather than to an adult; these justices, however, would have required a showing that the defendant's conduct "be oriented in some discernable fashion toward children as opposed to the population at large." Id. at 380. These two justices required a closer connection between the conduct and the identity of the victim as a child—for instance, driving while intoxicated through a school zone, or on Halloween night, when there was a greater likelihood that a child would be the victim. Id. [1]

Defendant asserts that Colorado's definition of child abuse is "quite different" from New Mexico's. (BIC 28) The State disagrees. The Colorado statute applicable in Deskins provided:

> (1)(a) A person commits child abuse if such person causes an injury to a child's life or health, or permits a child to be unreasonably placed in a situation that poses a threat of injury to the child's life or health, or engages in a continued pattern of conduct that results in malnourishment, lack of proper medical care, cruel punishment, mistreatment, or an accumulation of injuries that ultimately results in the death of a child or serious bodily injury to a child.
> . . . .
>
> (7)(a) Where death or injury results, the following shall apply:

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[1] On federal habeas review, the district court upheld in an unpublished opinion the Deskins defendant's five consecutive life sentences for reckless child abuse without proof of knowledge that he knew there were children in the other car. Deskins v. Zenon, 2007 AL 1701717, * 36-38 (D. Colo. 2007).

(I) When a person acts knowingly or recklessly and the child abuse results in death to the child, it is a class 2 felony except as provided in paragraph (c) of this subsection (7).

(II) When a person acts with criminal negligence and the child abuse results in death to the child, it is a class 3 felony.

Colo. Rev. Stat. § 18-6-401 (1996) (subsequently amended) (emphasis added).

New Mexico's child abuse statute, Section 30-6-1, provides:

D. Abuse of a child consists of a person knowingly, intentionally or negligently, and without justifiable cause, causing or permitting a child to be:

(1) placed in a situation that may endanger the child's life or health;

(2) tortured, cruelly confined or cruelly punished; or

(3) exposed to the inclemency of the weather.

E. A person who commits abuse of a child that does not result in the child's death or great bodily harm is, for a first offense, guilty of a third degree felony and for second and subsequent offenses is guilty of a second degree felony. If the abuse results in great bodily harm to the child, the person is guilty of a first degree felony.

§ 30-6-1 (emphasis added). The plain language of both Colorado's and New Mexico's statutes focuses on resultant injury to a child. Like the plain language of Colorado's statute, the plain language of New Mexico's statute does not require knowledge that the defendant's conduct affects a child. Like the Colorado Legislature, the New Mexico Legislature intended to provide heightened protection for children.

New Mexico should follow the same approach as the Colorado Supreme Court in Deskins. Because the New Mexico legislature intended to provide heightened protection for children, the Court should hold that conviction under Section 30-6-1 did not require proof that Defendant knew there were children in the car she crashed into. Defendant knew that her conduct was prohibited: speeding, swerving around other traffic, with a BAC of 0.21. Defendant knew or should have known that speeding, while highly intoxicated, "created a substantial and foreseeable risk," Defendant disregarded that risk, and Defendant "was wholly indifferent to the consequences of the conduct and to the welfare and safety" of anyone else on I-25. (RP 253 (jury instruction)) In determining whether the risk created by the defendant's conduct is substantial and foreseeable, the factfinder may consider the gravity of the threatened harm. State v. Chavez, 2009-NMSC-035, ¶ 23, ___ N.M. ___, 211 P.3d 891; State v. Schoonmaker, 2008-NMSC-010, ¶ 43, 143 N.M. 373, 176 P.3d 1105 ("What distinguishes civil negligence from criminal negligence is not whether the person is subjectively aware of a risk of harm; rather, it is the magnitude of the risk itself.").

What Defendant did not know is whether she would in fact crash into another vehicle. Nor did Defendant know, if she crashed into another vehicle, whether she would kill or injure another person—or cause no injury at all. Defendant did not know what penalty she was facing until the results were seen.

The penalty could be for injuring an adult; the penalty would be higher if she killed an adult. The penalty could be for injuring a child; the penalty would be higher if she killed a child. See § 30-6-1 (3 or 18 years). Until the results of her reckless driving were known, the penalty Defendant faced was not known. Not knowing whether she would end up injuring no one, injuring a child, killing a child, injuring an adult, or killing an adult—with the penalty dependent upon the result—does not demonstrate any infirmity in the child abuse statute, when it does not require an additional element of knowledge of the potential victim's age.

Defendant's argument alternatively amounts to an assertion that she was entitled to a mistake-of-fact defense. Although she obviously knew there were other people in the other cars she hit that night, she argues that she had to know that she was endangering the lives and safety of children—not just adults. But a mistake-of-fact defense is generally not available for offenses against children. The Colorado Supreme Court held that the Colorado Legislature did not intend to allow a mistake-of-fact defense; "the General Assembly had the prerogative to determine if a mistake of age defense was appropriate and did not do so." Deskins, 927 P.2d at 373. Similarly, in New Mexico, a mistake-of-age defense is generally not available in offenses against children.

In Perez, the New Mexico Supreme Court held that "knowledge of a child's age is not an essential element of the crime" of criminal sexual penetration. State

v. Perez, 111 N.M. 160, 161, 803 P.2d 249, 250 (1990). The Perez Court did hold, however, that a mistake-of-fact on the victim's age is a defense when the victim is thirteen to sixteen. Id. at 162, 803 P.3d at 251. The Perez Court stated that there is no such defense when the victim is under the age of thirteen; such victims require "the protection of strict liability." Id.

Perez is unusual in allowing a mistake-of-fact defense, even for older victims. "Even in jurisdictions where statutes are written so that courts must decide whether legislatures intended to make knowledge of the minor's age an element of the offense, decisions on the point have gone overwhelmingly against defendants." Feliciano v. State, 937 So. 2d 818, 819 (Fla. Dist. Ct. App. 2006) (statutory rape law does not require proof that defendant knew victim was 16 or 17). The New Mexico Court of Appeals has characterized Perez as "limited to the facts of that case" and "based in part upon the policy consideration that some of the potential victims [those ages 13 to 16] within the purview of the statute do not require the protection of strict liability." State v. Torres, 2003-NMCA-101, ¶ 12, 134 N.M. 194, 75 P.3d 410 (rejecting a mistake-of-fact defense regarding the offense of carrying a firearm into a liquor establishment).

As in similar cases, the New Mexico Legislature did not provide that the age of the victim is an element of child abuse, and did not explicitly allow a mistake-of-fact defense. In accordance with the Legislature's intent to provide heightened

protection for children, this Court should hold that Defendant's conduct is judged by the result; when Defendant killed one child and injured another child, the penalty is greater than if adults were hurt because the Legislature intended to provide that acts injuring or killing a child are more culpable. Defendant recklessly took a "substantial and foreseeable" risk that she would injure or kill someone that night; it would be contrary to public policy to show leniency to Defendant because she was not sure that her victims would be children.

The rule of lenity applies if there is "insurmountable ambiguity" about the intended scope of a statute. State v. Davis, 2003-NMSC-022, ¶ 14, 134 N.M. 172, 74 P.3d 1064; State v. Kent, 2006-NMCA-134, ¶ 16, 140 N.M. 606, 145 P.3d 86. "However, lenity is reserved 'for those situations in which a reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute.'" Davis, 2003-NMSC-022, ¶ 14 (emphasis added) (quoting State v. Ogden, 118 N.M. 234, 242, 880 P.2d 845, 853 (1994)). The plain language of Section 30-6-1 does not require Defendant's knowledge that there were children in the victims' car. Legislative history shows that the Legislature intended to provide heightened protection for children, and has continually expanded such protection over the years. Guilez, 2000-NMSC-020, ¶¶ 17-18. Thus the Court should conclude that the rule of lenity does not apply since no ambiguity, much less "insurmountable ambiguity," exists

after the Court considers the plain language, legislative history, and motivating policies of Section 30-6-1. See Davis, 2003-NMSC-022, ¶ 14. All of these aids to statutory interpretation lead to the same conclusion; the Legislature meant what it said in the plain language of Section 30-6-1: a defendant's knowledge of children in the victims' car is not required by the statute. This conclusion is consistent with the statute's "obvious spirit or reason," and the rule of lenity does not support reading language into the statute. See State v. Willie, 2009-NMSC-037, ¶ 13, 2009 WL 2170445 [S. Ct. No. 30,909, slip op. issued June 24, 2009].

Defendant argues that this Court should protect the one charged with crimes, Defendant, and that it would be unreasonable to provide the innocent children on the road with the high degree of protection afforded by Colorado when that course would give less "protection" to Defendant. The State argues that a person who gets herself so drunk that her BAC is 0.21, then drives a big vehicle at an excessive rate of speed, then nearly hits two cars but continues the same reckless driving, then hits the side of a vehicle, and finally smashes the back of the victims' car—after barely touching her brakes—is in no position to demand protection because her reckless behavior caused the death of a child instead of an adult. Defendant is in no position to claim that she lacked notice that her behavior was criminal—she just did not know for sure whether it would be an adult she endangered or killed, or a child.

Although Defendant does not make the argument, the State anticipates that this Court may think about whether the peace-officer cases are relevant. In Nozie, the Supreme Court held that knowledge of the victim's identity as a peace officer was an essential element of aggravated battery, and that the defendant was entitled to a mistake-of-fact instruction. State v. Nozie, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119; see Reese v. State, 106 N.M. 498, 745 P.2d 1146 (1987). The Nozie Court determined the question of knowledge on the basis of legislative intent, and concluded that there was no clear legislative intent to omit a mens rea element with respect to the victim's identity. Nozie, 2009-NMSC-018, ¶¶ 26, 29. The critical distinction between Nozie and Defendant's case is that the Legislature has explicitly provided heightened protection to children, in statutes prescribing increased penalties when the result of the offense is that a child is injured. The Legislature has not provided the same degree of heightened protection to peace officers.

The State thus believes that the UJIs as written set forth the elements of child abuse, and that there is no requirement at all that the defendant either know or take the risk that there are children in other cars. If, however, the Court disagrees and believes that some element must be added to the child abuse statute, the State argues that, with regard to the negligent child abuse at issue in Defendant's appeal, the Court should require the same level of intent as criminal

negligence. Instead of knowledge, the State argues, reckless disregard of whether there were children in other cars should be sufficient. See Nozie, 2009-NMSC-018, ¶ 29 (different mental state can be required for different elements). (Tr.(11-20-07), 41 (prosecutor argued in district court that the standard was whether there was a "foreseeable risk" that children could be harmed—not a "conscious disregard," because criminal negligence was the standard)

If this Court holds that knowledge of the children's presence in the victims' car and knowledge of the children's ages are required, Defendant appears to take the position that her convictions would be reversed for insufficient evidence, which would then bar retrial under double jeopardy principles. The State disagrees, as argued in Section VI infra.

Defendant's brief in chief characterizes this prosecution as a "test case." (BIC 5) The record does not show that the district attorney's office intended to bring a "test case." Rather, when asked why vehicular homicide was not charged, the prosecutor said she was not involved in the charging decision and her supervisor did not know, either, why only child abuse was charged. (Tr. 3, 40)

II. There was, however, sufficient evidence to show that Defendant was aware that there were children in the victims' car, if such knowledge were required.

Defendant argues that, if the State was required to prove that Defendant was aware of the children's presence as an element of child abuse, there was insufficient evidence. (BIC 29) Defendant uses the term "awareness" to describe

the mental state required on this point. "Awareness" appears to be equivalent to a requirement of "knowledge."

The State argues that there was sufficient evidence to support a jury finding of Defendant's knowledge, or reckless disregard, of whether there were children in the other car—if this were required as an unstated element of child abuse. The evidence would have supported the jury in finding, as a fact, that Defendant could see the children and the car seat.

In determining whether there was sufficient evidence, this Court must "'view the evidence in the light most favorable to the state, resolving all conflicts therein and indulging all permissible inferences therefrom in favor of the verdict.'" State v. Graham, 2005-NMSC-004, ¶ 6, 137 N.M. 197, 109 P.3d 285 (quoting State v. Sutphin, 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988)). The question then is whether "*any* rational trier of fact" could find each element established beyond a reasonable doubt. Graham, 2005-NMSC-004, ¶ 6.

Robert Tafoya testified that he was driving south on I-25 when he noticed the victims' car. When the victims' car was in the lane to his left, right beside him, he looked over and saw two women in the front seat and a little boy in the back seat. (Tr. 5, 127, 140) Then "there was an explosion." (Tr. 5, 127) Even though Tafoya's car was next to the victims' car, while Defendant's SUV was behind the victims' car, this evidence would have supported a jury finding that Defendant

could also see the children in the car. Defendant was up high in her SUV, and her headlights would have been shining through the rear window, allowing her to see the little heads and the car seat in the back seat of the victims' car. See State v. Romero, 1998-NMCA-057, ¶ 26, 125 N.M. 161, 958 P.2d 119 (jurors are entitled to rely on their common knowledge and experience).

In addition, as Defendant recognizes, the exhibits admitted at trial show a car seat in the back seat of the victims' car. (State's Exhibit 8; Defendant's Exhibit H; Tr. 5, 209-10 (witness identifying as the car seat the "navy blue with the gray trim" in the right rear seat)) Both photographs show that the car seat is quite high. Even though these photographs, with the car smashed up, do not show the view from the back—before Defendant smashed into the car—the photographs would have allowed the jury to find that the top of the car seat would have been visible from behind, especially from the high vantage point of Defendant in her SUV, with her headlights shining through the rear window. Jurors are entitled to rely on their common knowledge and experience. Romero, 1998-NMCA-057, ¶ 26. Based on these photographs, together with their common knowledge and experience about the height of car seats and how much one can see if one's headlights are shining directly into a car immediately in front of one, rational jurors could find that Defendant was able to see the car seat in the victims' car. See Graham, 2005-NMSC-004, ¶ 13 (appellate court must view evidence as a whole). It is, of course,

irrelevant that there was in fact no baby yet in that car seat—because Gina had not yet picked up her baby.

Even if the rear window of the victims' car were tinted, Defendant was high up in her SUV—that was the reason the crash was so bad, and crushed the victims' back seat: Defendant's SUV (and its bumper) were up higher than the small car Defendant smashed into. The jury could have found that Defendant's headlights enabled Defendant to see through the rear window, even if it was tinted, and to see either the little heads in the back seat or the car seat or both. See Romero, 1998-NMCA-057, ¶ 26 (jurors may rely on common knowledge and experience). The jurors could also rely on their common knowledge and experience that children would be in some of the cars on the highway; people commonly drive both school children and babies around in the evening, including at 9:00 p.m. See id.

The State thus believes that there was sufficient evidence to support a jury finding that Defendant was "aware" that there were children in the victims' car—if the Court were to conclude that this mental state was required on this point. If the Court so concludes, the Court should remand for retrial under a modified jury instruction requiring the jury to find that Defendant knew there were children. Since the statute and the UJIs, approved by the Supreme Court, do not require a specific finding by the jury that Defendant knew there were children in the car, this is not a case in which double jeopardy would bar retrial on the ground that the

evidence was insufficient. The jury was never asked to determine Defendant's awareness of children, because the statute and the approved UJIs do not require a specific finding of this knowledge; the State did provide sufficient evidence on the elements specified in the current UJIs. If the Court were to add a requirement to the statute and the UJI, retrial would be allowed under a newly modified jury instruction. (See § VI, infra)

The State's argument, however, is that for negligent child abuse, the Court should require—at most—the same mental state of reckless disregard on this point, rather than "awareness" or knowledge. There was sufficient evidence to allow a reasonable jury to find that Defendant acted with reckless disregard about whether there were children in the victims' car.

Defendant also argues that the risk of danger to children was insufficient, citing McGruder. (BIC 32) The State does not believe that the Supreme Court has determined that there must be a reasonable probability or possibility that a child—as opposed to an adult—will be harmed. In McGruder, the Supreme Court upheld a child abuse conviction when the child was only an incidental victim and not the focus of the defendant's conduct. State v. McGruder, 1997-NMSC-023, ¶¶ 5-6, 37-38, 123 N.M. 302, 940 P.2d 150 (defendant aimed gun at mother and threatened to kill mother, while daughter was standing behind her but not "right behind her"). The State believes that the focus is on "the magnitude of the risk" rather than on

the defendant's level of awareness of who, specifically, might be harmed by the defendant's unlawful behavior. State v. Schoonmaker, 2008-NMSC-010, ¶ 43, 143 N.M. 373, 176 P.3d 1105 ("magnitude of risk" is what is critical; defendant need not be subjectively aware of a risk of harm for criminal negligence).

III. The child abuse statute is not void-for-vagueness if interpreted not to require proof of knowledge that children were in the victims' car.

Defendant argues that the child abuse statute would be void-for-vagueness unless it is interpreted to require knowledge that a child is in the car that one crashes into while intoxicated and speeding.

There is a strong presumption that a statute is constitutional. State v. Duran, 1998-NMCA-153, ¶ 31, 126 N.M. 60, 966 P.2d 768; State v. Luckie, 120 N.M. 274, 277, 905 P.2d 205, 208 (Ct. App. 1995). "Every presumption is to be indulged in favor of the validity and regularity of legislation, and it will not be declared unconstitutional, unless the court is satisfied beyond all reasonable doubt that the Legislature went outside the Constitution in enacting it." State v. Coe, 92 N.M. 320, 321, 587 P.2d 973, 974 (Ct. App. 1978) (internal quotation omitted). This Court in Coe upheld the child abuse statute against a general claim that the statute was void for vagueness. The burden of showing that the statute is unconstitutionally vague is on Defendant. State v. Andrews, 1997-NMCA-017, ¶ 10, 123 N.M. 95, 934 P.2d 289. Defendant's particular situation must be considered in determining the constitutionality of Section 30-6-1, and not the

constitutionality as it might apply to other situations. See id. ¶ 11 (distinguishing vagueness on face versus vagueness as applied); Luckie, 120 N.M. at 276, 901 P.2d at 207.

The question is whether Section 30-6-1 defines the criminal offense with sufficient definiteness that a person of ordinary intelligence can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. See Andrews, 1997-NMCA-017, ¶ 10; State v. Brecheisen, 101 N.M. 38, 42, 677 P.2d 1074, 1078 (Ct. App. 1984). The reviewing Court construes a statute "in a manner so as to uphold it against a claim of unconstitutionality if a reasonable and practical construction can be given to the language in question." Luckie, 120 N.M. at 277, 901 P.2d at 208; see Brecheisen, 101 N.M. at 42, 677 P.2d at 1078. The Court should consider the statute as a whole in ascertaining legislative intent, and should also consider other relevant statutory provisions or case law. See Luckie, 120 N.M. at 277, 901 P.2d at 208; Brecheisen, 101 N.M. at 42, 677 P.2d at 1078.

The mere fact that Section 30-6-1, as charged in the UJIs, does not include an explicit requirement that the defendant know, or be aware, that there may be children in another vehicle does not make the statute vague; rather, the test is whether the statute gives a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited. See Luckie, 120 N.M. at 277-79, 901 P.2d at

208-10 (custodial interference statute held constitutional, despite lack of definition of "without good cause" and "for a protracted time"); Brecheisen, 101 N.M. at 41-42, 677 P.2d at 1077-78 (criminal sexual penetration statutes upheld, despite lack of definition of spouses "living apart"). Defendant had reasonable notice that her conduct was prohibited: driving while very intoxicated (0.21), well over the speed limit, and swerving in and out of traffic.

The Legislature can constitutionally give heightened protection to children, even forgoing the requirement of proof on some point. When the public-safety interest is compelling, and the potential harm is great, the Legislature can enact strict liability offenses. State v. Torres, 2003-NMCA-101, ¶ 11, 134 N.M. 194, 75 P.3d 410 (carrying firearm into liquor establishment); State v. Lake, 1996-NMCA-055, ¶ 10, 121 N.M. 794, 918 P.2d 380 (same). New Mexico has a serious DWI problem, causing "grave concern" to society. City of Albuquerque v. One (1) 1984 White Chevy Ut., 2002-NMSC-014, ¶ 18, 132 N.M. 187, 46 P.3d 94; State ex rel. Schwartz v. Kennedy, 120 N.M. 619, 624, 904 P.2d 1044, 1049 (1995). A vehicle in the control of a drunk driver presents an enormous risk of harm to the public, including children. State v. Johnson, 2001-NMSC-001, ¶ 17, 130 N.M. 6, 15 P.3d 1233. The public interest in deterring people from driving while intoxicated is "so compelling that the offense of DWI is a strict liability crime." Id. When the public interest is so compelling because the potential for harm is so great, public interests

override individual interests; this is the principal reason for establishing strict liability crimes. See State v. Rios, 1999-NMCA-069, ¶ 5, 127 N.M. 334, 980 P.2d 1068; State v. Harrison, 115 N.M. 73, 77, 846 P.2d 1082, 1086 (Ct. App. 1993).

"The child abuse statute was designed to give greater protection to children than adults." Guilez, 2000-NMSC-020, ¶ 17. The legislature recognized that "adults owe a greater responsibility to minors." Id. "When an adult, without justification, endangers a child's safety, the adult is more culpable than when the safety of another adult is jeopardized." Id. The child abuse statute therefore provides greater penalties when a child is the victim; child abuse resulting in great bodily harm is a first-degree felony, while aggravated battery resulting in great bodily harm is a third-degree felony. Id. The history of the child abuse statute shows that the legislature has expanded protection for children. Id. ¶ 18.

In Defendant's case, we have a combination of DWI and risk to children, a group meriting heightened protection. When a highly intoxicated driver, speeding and weaving, crashes into another car, the driver does not know whether she will kill or injure adults or children or both; the driver does not know the exact penalties she will face, until the result is known. If the victims are adults, who are injured, one penalty applies; if the victims are adults who are killed, a greater penalty applies. If the victims are children, who are injured, one penalty applies; if the victims are children who are killed, a greater penalty applies. This does not

make any statute void-for-vagueness, just because the penalty depends on the result; Defendant certainly had clear notice that driving drunk and speeding were prohibited. Just because Defendant did not know in advance whether she would face the penalties for injuring or killing a child or an adult does not make the statute unconstitutional.

IV. The district court did not abuse its wide discretion in admitting into evidence Defendant's reaction to being told that she had injured a small boy; Defendant's statement "he was probably a little shit, anyway" was relevant to prove Defendant's reckless disregard for the safety of anyone else on the road.

Officer Kelly Enyart testified that she was sitting in Defendant's hospital room and Defendant asked the officer questions about what had happened. (Tr. 6, 36) Officer Enyart testified that Defendant said that an accident "wasn't a big deal" and that "nobody got hurt":

> Officer Enyart: She [Defendant] asked me—well, she said that it wasn't a big deal that she had been in the accident. That it wasn't a big deal. Nobody got hurt. I told her actually a little boy got hurt. And her response to me was, "Well, he was probably a little shit, anyway."

(Tr. 6, 37) Defendant argues that the district court abused its discretion in allowing the testimony that Defendant's reaction to having hurt a little boy was: "Well, he was probably a little shit, anyway."

When Defendant raised this issue before trial, the State argued that the statement was relevant to show Defendant's state of mind. (Tr. 5, 19) The district court determined that the statement was relevant for that purpose—to show

Defendant's indifference to the safety of others as Defendant was driving. (Tr. 5, 20) The district court acknowledged that the statement was prejudicial, but determined that its probative value outweighed the prejudicial effect. (Tr. 5, 20) In closing argument, the prosecutor used the statement as evidence of Defendant's reckless disregard for others. (Tr. 7, 131)

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to ther determination of the action more probable or less probable than it would be without the evidence." Rule 11-401 NMRA 2009 (emphasis added). "All relevant evidence is generally admissible unless otherwise provided by law." State v. Stampley, 1999-NMSC-027, ¶ 38, 127 N.M. 426, 982 P.2d 477; Rule 11-402 NMRA 2009. "[A]ny doubt should be resolved in favor of admissibility." Stampley, 1999-NMSC-027, ¶ 38. The appellate court allows the trial court "wide discretion" in evidentiary rulings. State v. Jordan, 116 N.M. 76, 81, 860 P.2d 206, 211 (Ct. App. 1993).

Defendant's statement was relevant to the counts of negligent child abuse. To prove negligent child abuse, the State was required to prove that Defendant acted "with reckless disregard" and was "wholly indifferent to the consequences" of her conduct. (RP 253, 255) See UJI 14-602 NMRA 2009; UJI 14-604 NMRA 2009. The State had to prove that Defendant was "wholly indifferent . . . to the welfare and safety of" the children in the car she smashed into. (RP 253, 255) See

UJI 14-602; UJI 14-604. The district court was well within its wide discretion in ruling that the statement was relevant to prove this. It was for the jury to decide whether such a comment revealed a persistent or transitory attitude. Although Defendant argues that her state of mind hours after the accident is not relevant to her state of mind earlier, the jury could reasonably view a comment like Defendant's as indicative of Defendant's established and stable views toward children—not a spur-of-the-moment attitude that changed by the hour. Most people would probably never make such a statement.

Defendant's statement, showing utter indifference to the welfare of a child, was also relevant to the counts of intentional child abuse. (RP 251, 254) Defendant's statement supported an argument that Defendant acted intentionally to place in danger anyone on the road, when Defendant drank so much that her BAC was 0.21, when Defendant was speeding so much that she had to weave in and out to get by other traffic, when Defendant failed to slow down or stop after she nearly hit two cars and then did hit Rachel Jinzo's truck, and then "struck the victim's vehicle with such force that the trunk and back passenger seat were virtually elminated." (RP 316 (description of Defendant's conduct in J & S); Tr. 5, 77-78, 96-106; State's Exhibit 16) As the prosecutor argued in closing, Defendant did not swerve and did not make any significant attempt to brake; a witness testified to seeing brake lights flash on for only about two seconds. (Tr. 7, 127; Tr. 5, 102-

106) The jury could even have found that Defendant intended to crash into other cars; such an intentional act is, unfortunately, not inconceivable. Cf. State v. Neely, 112 N.M. 702, 819 P.2d 249 (1991) (defendant charged with intentional crimes of murder and attempted murder for driving her car into a family).

The reviewing court must also defer to the district court's "wide discretion" in making a ruling under Rule 11-403 NMRA 2009. Jordan, 117 N.M. at 81, 860 P.2d at 211. The question is whether the probative value of the evidence is "substantially outweighed by the danger of unfair prejudice." Rule 11-403 (emphasis added). Exclusion of evidence is only required when the danger of "unfair" prejudice substantially outweighs "the legitimate prejudice that is otherwise known as probative value." State v. Ruiz, 119 N.M. 515, 519, 892 P.2d 962, 966 (Ct. App. 1995). Evidence of guilt is prejudicial; that is why it is evidence of guilt. State v. Lopez, 105 N.M. 538, 544, 734 P.2d 778, 784 (Ct. App. 1986). As the Supreme Court has recognized:

> The purpose of SCRA 11-403 is not to guard against the danger of any prejudice whatsoever, but only against the danger of *unfair* prejudice. A statement is not unfairly prejudicial simply because it inculpates the defendant. 1 Kenneth S. Broun et al., McCormick on Evidence § 185, at 780 (John W. Strong ed., 4th ed. 1992) ("[P]rejudice does not simply mean damage to the opponent's cause.").

State v. Woodward, 121 N.M. 1, 6, 908 P.2d 231, 236 (1995). "[P]rejudice is unfair when the tendered evidence goes only to character or propensity; [h]owever,

when the tendered evidence serves a legitimate purpose other than character or propensity, then that legitimate purpose should be balanced against the jury's tendency to use the evidence illegitimately." Ruiz, 119 N.M. at 519, 892 P.2d at 966. And if "reasonable minds can differ" on whether evidence of prior bad acts is more prejudicial than probative, the appellate court should defer to the trial court's assessment and affirm. Jordan, 116 N.M. at 81, 860 P.2d at 211.

The probative value of Defendant's statement was great—to prove that Defendant was "wholly indifferent . . . to the welfare and safety of" the children in the car she smashed into, and acted with reckless disregard. The district court was well within its wide discretion in determining that the probative value of this evidence was not "substantially outweighed by the danger of unfair evidence" under Rule 11-403.

V. The Court should not address the non-final declaration of mistrial on intentional child abuse.

Defendant recognizes the general rule that only final judgments and decisions are appealable, and Defendant concedes that the order declaring a mistrial does not meet this standard. (BIC 43) See NMSA 1978, § 39-3-3(A)(1) (1972); State v. Griego, 2004-NMCA-107, ¶ 7, 136 N.M. 272, 96 P.3d 1192; Kelly Inn No. 102 v. Kapnison, 113 N.M. 231, 234-40, 824 P.2d 1033, 1036-42 (1992). Ordinarily a final order is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." High Ridge Hinkle Joint

Venture v. City of Albuquerque, 119 N.M. 29, 33, 888 P.2d 475, 479 (Ct. App. 1994). Defendant did not file for appeal of the mistrial order. Absent an exception to the rule of finality, Defendant could not have appealed at this point because there has been no final judgment on the intentional child abuse charges. "Not to limit the doctrine of practical finality would allow the exception to fast swallow the rule." Griego, 2004-NMCA-107, ¶ 17 (internal quotation omitted); cf. State v. Apodaca, 1997-NMCA-051, ¶¶ 7-17, 123 N.M. 372, 940 P.2d 478.

There was a separate written order declaring the mistrial. (RP 272) Defendant's notice of appeal limits her appeal to "the jury verdict of January 18, 2008, and Judgment, Sentence and Commitment filed" on April 28, 2008. (RP 322) The Judgment and Sentence does not even refer to the mistrial. Defendant could have filed an application for interlocutory appeal on the declaration of mistrial; since she did not do so, this Court has no jurisdiction to review on this basis. See § 39-3-3(A)(3); Griego, 2004-NMCA-107, ¶ 6.

If the jury had convicted Defendant of intentional child abuse, and Defendant had appealed on that issue, then the Court could review the issue for sufficiency of evidence. But the jury did not convict Defendant of intentional child abuse. Defendant did not appeal on this issue. The Court therefore cannot review a conviction on intentional child abuse. For the Court to review this issue would be the same as considering whether to dismiss a count, before trial, for insufficient

evidence; this is not allowed. See Rule 5-601(B) NMRA 2009 ("Any defense, objection or request which is capable of determination without a trial on the merits may be raised before trial by motion." (emphasis added)). Compare State v. Hughey, 2007-NMSC-036, ¶ 13, 142 N.M. 83, 163 P.3d 470 ("in criminal cases, unlike civil cases, trial courts are not ordinarily authorized to rule on the sufficiency of the prosecution's evidence of guilt before the State has had the chance to present its evidence at trial"); State v. Gomez, 2003-NMSC-012, ¶ 7, 133 N.M. 763, 70 P.3d 753 (pretrial dismissal on ground prosecution will not be able to present sufficient evidence is inappropriate if the State could reasonably assert the availability of additional evidence) with State v. Foulenfont, 119 N.M. 788, 895 P.2d 1329 (1995) (trial court had authority to dismiss burglary charges, prior to trial, on a "purely legal issue" of statutory construction—whether a fence constituted a "structure" under the burglary statute—because that question was not part of a jury's factfinding function). The State proceeded on the proper assumption that the child abuse statute, and the UJIs approved by the Supreme Court, set forth all elements which must be proved; Defendant's knowledge that there were children in the victims' car is not listed as an element which must be proved. If this Court adds an element to the statute, and adds that element to the UJI, then the State should have the opportunity to prove that element at retrial on the intentional child abuse counts. The State has not conceded that it has no

additional evidence to offer, if "knowledge" is required as an element. See Gomez, 2003-NMSC-012, ¶ 7 (pretrial dismissal not allowed unless State conceded that it would have no additional evidence to present).

All the State needs to proceed to retrial, in the procedural posture of this case, is probable cause on the intentional child abuse counts. It would be premature for this Court to address issues involving the mistrial order.

Defendant suggests that it would be "patently unfair" to retry her on the intentional child abuse counts, because the same reason making the negligent child abuse statute inapplicable makes the intentional child abuse statute inapplicable. (BIC 43) But if the appellate court opinion shows that Defendant could not be convicted of intentional child abuse, as Defendant argues, this Court can trust the district court and the prosecutor not to retry her on intentional child abuse, unless the prosecutor has additional evidence to present on "knowledge" (or reckless disregard). It would be premature—and also an intrusion into the province of the district court and the district attorney's office—for this Court to assume that there will be a problem and to assume that they will not handle it responsibly and fairly.

Defendant's suggestion that retrial would constitute double jeopardy is erroneous; Defendant's citation to a prosecutorial misconduct case is inapplicable. (BIC 43 (citing State v. McClaugherty, 2008-NMSC-044, 144 N.M. 483, 188 P.3d 1234 (prosecutorial misconduct issue under Breit))) It is well established that

retrial after a mistrial for a hung jury is a continuation of jeopardy—not a double jeopardy violation. State v. O'Kelley, 113 N.M. 25, 27-28, 822 P.2d 122, 124-25 (Ct. App. 1991). Defendant has not been acquitted on the intentional child abuse counts.

The State respectfully requests this Court to remand for retrial on the intentional child abuse counts.

VI. Retrial of Defendant would not violate the Double Jeopardy Clause, because the issue concerns not sufficiency of evidence but whether the State proceeded under an inapplicable statute.

Defendant argues that her convictions of negligent child abuse should be reversed based on insufficiency of evidence. Defendant assumes that, if the Court holds that the child abuse statute does require a jury determination that Defendant knew that there were children in the victims' car, or holds that the child abuse statute is void-for-vagueness if it does not include this requirement, the Double Jeopardy Clause bars retrial. The State disagrees. Even if the Court accepts either argument, the issue is not one of insufficient evidence. Instead, such a holding would mean merely that the State proceeded under an inapplicable statute; retrial is allowed under these circumstances. A new interpretation of the reach of a statute, adding an element, cannot be applied to bar retrial; the State presented sufficient evidence on each of the elements previously recognized in the statute and the UJIs.

The United States Supreme Court has held that a defendant who obtains

reversal on appeal, on the argument that the statute under which he was convicted was inapplicable, has obtained reversal on grounds "unrelated to guilt or innocence." Montana v. Hall, 481 U.S. 400, 403 (1987) (per curiam). The Double Jeopardy Clause therefore does not prevent retrial. Id.

Hall had been convicted of incest for a sexual assault against his stepdaughter. Id. at 401. The incest statute in effect at the time, however, did not apply when the victim was a stepchild. Id. The Montana Supreme Court therefore reversed Hall's incest conviction and also held that double jeopardy barred retrial under Montana's statute proscribing sexual assault (which Hall's conduct did violate). Id. at 401, 404. The United States Supreme Court reversed the Montana Supreme Court, observing that Hall's conduct was criminal at the time he engaged in it, and that "the State simply relied on the wrong statute." Id. at 404. "It is a 'venerable principle[e] of double jeopardy jurisprudence' that 'the successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict, poses no bar to further prosecution on the same charge." Id. at 402 (quoting United States v. Scott, 437 U.S. 82, 90-91 (1978), and Burks v. United States, 437 U.S. 1 (1978)). Hall's case fell "squarely within" this rule. Id. at 404. At trial, Montana had proved that Hall committed sexual assault against his stepdaughter, but had not proved that she was within the class of victims covered by the incest statute; the incest conviction was reversed because

the incest statute did not cover stepchildren. This does not constitute reversal for insufficient evidence. As the United States Supreme Court said: "There is no suggestion that the evidence introduced at trial was insufficient to convict respondent." Id. at 403. And: "In these circumstances, trial of respondent for sexual assault, after reversal of respondent's incest conviction on grounds unrelated to guilt or innocence, does not offend the Double Jeopardy Clause." Id. (emphasis added).

Other cases approve the same analysis as Hall. See, e.g., United States v. Lanzotti, 90 F.3d 1217, 1222-24 (7th Cir. 1996) (retrial permitted when prosecution relied on the wrong theory of liability to establish predicate state violation element for conviction of participation in illegal gambling business); United States v. Todd, 964 F.2d 925, 929-30 (9th Cir. 1992) (per curiam) (retrial permitted for sexual contact even if evidence in first trial were insufficient to prove sexual intercourse); United States v. Weems, 49 F.3d 528, 530-31 (9th Cir. 1995) (retrial for structuring financial transactions permitted following reversal of conviction because of recent opinion interpreting statute to require additional proof); see also 5 Wayne R. La Fave et al., Criminal Procedure § 25.4(b), text at fns. 16-18 (3d. ed. 2009).

The United States Supreme Court in Hall reached its conclusion in a short per curiam opinion, finding the distinction between insufficiency of evidence and prosecution under an inapplicable statute neither subtle nor difficult. To the extent

that some New Mexico cases may be read to suggest a different analysis, they employ incorrect analysis.

In Stein, the Court considered the statute proscribing battery against a household member. State v. Stein, 1999-NMCA-065, 127 N.M. 362, 981 P.2d 295. The Court recognized that the plain language of the statute covered a child of the accused. Id. ¶ 11. But the Stein Court did not accept the plain language; instead, the Court read into the statute a provision that a minor child is not a "family member" or "relative." The Stein Court then held that the defendant's thirteen-year-old daughter was not a "family member" or "relative." See id. ¶¶ 3, 19. Stein did not explicitly hold or carefully consider whether double jeopardy barred retrial, but the Court appeared to make the assumption that retrial would be barred on the ground of insufficient evidence. Id. ¶¶ 7, 9. But the reversal was not for insufficient evidence. The reversal was instead on the ground that—after the Stein Court decided to limit the plain language of the statute—the conviction was under the wrong statute; Section 30-3-15 was no longer applicable, after the Stein opinion, and the defendant should instead have been tried under Section 30-3-4. Consideration of Hall shows that the Stein Court failed to recognize the difference between insufficient evidence and an inapplicable statute. See also In re Gabriel M., 2002-NMCA-047, ¶¶ 8-9, 27, 132 N.M. 124, 45 P.3d 64 (similarly failing to recognize that, when arson statute did not cover damage to personal property,

retrial for criminal damage to property would not have been barred by double jeopardy).

Just as in Hall, Defendant argues that her conviction must be reversed because the statute under which she was convicted is inapplicable. Just as in Stein, the plain language of the statute and the UJI appear to cover Defendant's conduct. The plain language of the child abuse statute does not require Defendant's knowledge that there were children in the victims' car. The UJIs approved by the Supreme Court do not require, as an element, that the State prove awareness, or knowledge, or reckless disregard for whether there were children in the victims' car. If this Court reads into Section 30-6-1 one of these as an additional element, then the State simply proceeded under the wrong statute (if the State has no additional evidence to present to show Defendant's knowledge). As the statute and UJIs are currently written and interpreted, the State could proceed under Section 30-6-1—and did so—without any requirement of proof of Defendant's knowledge of the children. If Defendant obtains reversal on appeal on the ground that an additional element is required now, that reversal would not be on grounds of insufficient evidence, but would merely constitute a declaration that the State proceeded under the wrong statute. As in Hall, the reversal would be on a ground "unrelated to guilt or innocence." Hall, 481 U.S. at 403. There would be no double-jeopardy bar to retrial under the vehicular homicide statute. See Hall.

Alternatively, reversal by this Court may mean that the State simply chose the wrong statute under the general/specific rule. In Santillanes, the New Mexico Supreme Court concluded that the general/specific statute rule did not apply to require the State to prosecute under the vehicular homicide statute instead of under the child abuse statute. State v. Santillanes, 2001-NMSC-018, ¶ 27, 130 N.M. 464, 27 P.3d 456. The prosecutor "retained the discretion to charge [the defendant] with either vehicular homicide or child abuse resulting in death, or both." Id. In Santillanes, the defendant-driver had a BAC of 0.15 when he collided with a truck, killing four children—who were in the defendant's car. Id. ¶ 2. In the case before this Court, agreement with Defendant's argument may mean that—when the children are in another vehicle, not the defendant's—the prosecutor is required to proceed under the vehicular homicide statute under the general/specific statute rule, distinguishing Santillanes. Again, as in Hall, the reversal would be on a ground "unrelated to guilt or innocence" and there would be no double-jeopardy bar to retrial under the specific statute (vehicular homicide). Hall, 481 U.S. at 403.

If this Court agrees with Defendant and reverses, that reversal would not be for insufficient evidence and would not be barred by double jeopardy. Instead, reversal would merely mean that the State either proceeded under an inapplicable statute, or under a general statute when the State was required to proceed under a specific statute. The State respectfully requests that, if the Court agrees with

Defendant that the child abuse statute required proof of Defendant's knowledge or recklessness that children were in the other car, the Court remand for retrial; the prosecutor could then choose to retry for child abuse with a jury instruction modified in accordance with this Court's opinion, or to retry under the vehicular homicide statute.

CONCLUSION

For the foregoing reasons, the State respectfully requests the Court to affirm Defendant's judgment and sentence, and to remand for retrial on the intentional child abuse counts.

Respectfully submitted,

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