STATE V. ARIAS

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STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
REY ANTONIO ARIAS,
Defendant-Appellant.

NO. 34,440

COURT OF APPEALS OF NEW MEXICO

December 20, 2016

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY, James Waylon Counts, District Judge

COUNSEL

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JUDGES

LINDA M. VANZI, Judge. WE CONCUR: M. MONICA ZAMORA, Judge, J. MILES HANISEE, Judge

AUTHOR: LINDA M. VANZI

MEMORANDUM OPINION

VANZI, Judge.

{1} Defendant Rey Antonio Arias, a youthful offender who was found not amenable to treatment, appeals from jury verdicts finding him guilty of seven charges related to an

incident in which he and an acquaintance allegedly broke into Maria Diaz's (Victim) home and brutally attacked her. Defendant raises nine issues on appeal: (1) there was insufficient evidence for a jury to convict him of first degree kidnapping; (2) if kidnapping is reversed, there was insufficient evidence of false imprisonment; (3) Defendant's convictions for aggravated burglary and breaking and entering violate double jeopardy; (4) the jury instructions for aggravated burglary were improper because the jury was not required to find that a knife Defendant brought to Victim's home was a deadly weapon; (5) there was insufficient evidence that Defendant was armed with a deadly weapon, as required by the aggravated burglary statute; (6) it was fundamental error for the State to modify its theory of aggravated burglary in the jury instructions from its theory in the indictment; (7) Defendant's third degree tampering with evidence conviction should be reduced to a fourth degree felony because the jury instructions did not specify whether the tampering was related to a first or second degree felony; (8) there was insufficient evidence that a pipe found on Defendant during the search incident to arrest contained residue of a synthetic cannabinoid; and (9) the district court erred when it found Defendant not amenable to treatment. Unpersuaded, we affirm in all respects.

BACKGROUND

{2} On March 25, 2013, at around 2:00 a.m., Defendant, 17, and Justin Riley, 19, burglarized Victim's home. Defendant was charged as a youthful offender with nine counts relating to the burglary, including: (1) kidnapping, contrary to NMSA 1978, Section 30-4-1 (2003); (2) aggravated burglary, contrary to NMSA 1978, Section 30-16-4(C) (1963); (3) aggravated battery, contrary to NMSA 1978, Section 30-3-5(C) (1969); (4) breaking and entering, contrary to NMSA 1978, Section 30-14-8 (1981); (5) unlawful taking of a motor vehicle, contrary to NMSA 1978, Section 30-16D-1(A)(1) (2009); (6) conspiracy to commit breaking and entering, contrary to NMSA 1978, Section 30-28-2(A) (1979) and Section 30-14-8; (7) tampering with evidence, contrary to NMSA 1978, Section 30-22-5 (2003); (8) interference with communications, contrary to NMSA 1978, Section 30-12-1 (1979); and (9) possession of drug paraphernalia, contrary to NMSA 1978, Section 30-31-25.1(A) (2001). A jury acquitted Defendant of aggravated battery and interference with communications but convicted him of the remaining charges. The district court found that Defendant was not amenable to treatment and sentenced him to thirty-five years and six months of incarceration, less one day, but suspended twelve years of the sentence. The evidence at trial was as follows.

{3} Defendant testified that he was acquainted with Riley through Defendant's brother. Defendant testified that he had done yard work at Victim's house, and on one occasion, had brought Riley with him to help. Three weeks before the burglary, and a few days after assisting Defendant at Victim's house, Riley suggested that they rob Victim. On the night of the burglary, Defendant needed money and sought Riley's aid in stealing from Victim. The two then walked to Victim's house. Defendant took a knife with him, and Riley had a stick.

{4} Defendant testified that he entered Victim's house by prying open a rear bathroom window with his knife. After gaining entry, Defendant opened the front door to

let Riley in, and he observed Victim sleeping in her bedroom. Defendant testified that Riley was still in the living room when he went to Victim's computer room to steal her computer. Defendant testified that, as he was leaving with the computer, Riley handed him Victim's purse, which Defendant went through to steal cash. According to Defendant, while he was going through the purse, Riley discovered keys to Victim's truck and a bucket of coins. Defendant then kicked open the back door, put the computer in Victim's truck, and went back into the house. Defendant alleges that, once back inside the house, he remained in the living room and never went inside the bedroom. Defendant further claims that he heard Victim scream and the sound of things moving in the bedroom. Defendant and Riley eventually fled Victim's house in her truck.

{5} Victim also testified at the trial. According to Victim, at the time of the burglary, she was sleeping in her bedroom and was abruptly awakened by being hit multiple times on her head. She testified that it was dark and she did not know whether Defendant or Riley was her attacker. Victim bled onto her pillow and screamed during the attack. Victim testified that her attacker tied up her wrists and one foot with the cord of her cell phone charger. Victim testified that at that point in the incident, she heard only one voice but observed shadows and movement. Victim also testified that the attacker left her bedroom and went into the living room, at which point she heard two voices mumbling to each other. Her attacker then returned to her bedroom and told her "we are going to put you in the bathroom." Victim was placed in the bathroom and told not to move. The bathroom door was closed, and her bed, oxygen tank, and night stand were pushed against it. According to Victim, as she was being put in the bathroom, she saw a second person's shadow on the other side of her bed. Furthermore, Victim testified that she knew Defendant and was familiar with his voice because he had done yard work for her; nevertheless, she did not recognize his voice during the attack. Victim stayed in the bathroom until she heard her truck being driven away. She then pushed against the bathroom door with the left side of her body and was eventually able to escape after five to ten minutes of shouldering the door.

{6} After leaving Victim's house, Defendant went to his friend Fabian Romero's house, which was about five blocks from Victim's property. Upon realizing Victim's stolen truck had been tracked by police and seeing officers approaching him, Defendant left Romero's house. Defendant acknowledged that he removed the license plate from Victim's truck, crumbled it, and discarded it under Romero's house, and then hid the keys elsewhere on the property. Defendant next went to his girlfriend's home and subsequently learned Romero had been taken by police. Defendant then called 911 to turn himself in.

{7} Deputy Luis Herrera made contact with Defendant and interviewed him. Defendant maintained that he never hit Victim and did not intend to kidnap or restrain her, although he admitted to the burglary and theft. During the police investigation, Deputy Herrera discovered a stick in Victim's truck. Deputy Louis Santiago found Defendant's knife two blocks from Victim's property. Blood was found on the knife, and a forensic scientist who was qualified as an expert in DNA concluded that, "to a reasonable degree of scientific certainty," the blood came from Victim. The expert

additionally testified that she found a mixture of DNA on the handle of the knife and concluded that Defendant "cannot be eliminated as a possible source of the major DNA profile resolved from that mixture, and that [Victim] and [Riley] are eliminated as contributors to that mixture." Deputy Sam Montoya testified that Victim's blood was found in her bedroom and not anywhere else in her house. In addition, Deputy Herrera testified that he discovered a pipe that had drug residue on it after searching Defendant incident to his arrest.

DISCUSSION

Sufficient Evidence of Kidnapping

{8} Defendant first argues that there was not sufficient evidence to convict him for kidnapping. Specifically, Defendant claims that there was insufficient evidence to support a conviction for kidnapping under a principal theory because "he did not participate in the restraint or confinement" of Victim. Defendant further contends that there was insufficient evidence of kidnapping under an accessory liability theory because he did not share Riley's intent to kidnap Victim. Defendant also argues that there was insufficient evidence of a kidnapping by either Defendant or Riley. We are not persuaded.

{9} "The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Montoya*, 2015-NMSC-010, ¶ 52, 345 P.3d 1056 (internal quotation marks and citation omitted). The reviewing court "view[s] the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. We disregard all evidence and inferences that support a different result. *See State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829. In addition, "[t]o determine whether substantial evidence exists, we measure the evidence against the instructions submitted to the jury." *State v. Caldwell*, 2008-NMCA-049, ¶ 29, 143 N.M. 792, 182 P.3d 775.

{10} To support a conviction for kidnapping in any degree, the jury instructions required the State to prove beyond a reasonable doubt that Defendant (1) "took, restrained, confined or transported [Victim] by force[] or intimidation," (2) with the intent "to hold [Victim] against [her] will to inflict death, physical injury or a sexual offense on [her] or for the purpose of keeping [V]ictim from doing something[,]" and (3) that this happened on or about March 25, 2013, in New Mexico. *See* § 30-4-1(A); UJI 14-403 NMRA. To support a conviction of kidnapping in the first degree, the State was also required to prove beyond a reasonable doubt that Defendant did not voluntarily free Victim in a safe place and that Defendant inflicted physical injury on Victim. *See* § 30-4-1(B).

{11} We turn first to the question of whether Defendant restrained or confined Victim. We hold that there was sufficient evidence to convict Defendant of kidnapping under a principal theory. We note that Victim testified that after the initial attack, she heard two voices mumbling to each other. She also testified that her attacker told her "we are going to put you in the bathroom," and she saw a second shadow in her bedroom. Defendant concedes that Victim's testimony regarding the second shadow "arguably permits an inference of [Defendant's] presence in the room while [Victim] was [being] kidnapped." We also note that the jury was free to accept the evidence that Victim's bed required both Defendant and Riley to lift it in order to place it against the bathroom door. *See Montoya*, 2015-NMSC-010, ¶ 52. Victim testified that the bed was very heavy and that it generally could not be moved by one person. Deputy Montoya, who managed to move the bed a few feet with the help of another officer, testified that moving the bed by himself would have been "a difficult job."

{12} Importantly, we observe that evidence of Victim's DNA on Defendant's knife provides additional evidence whereby the jury could reasonably infer that Defendant confined or restrained Victim in her bedroom or the bathroom. That is, Defendant testified that he brought the knife to Victim's house and had it with him when he left, and the only place blood was discovered in the house was Victim's bedroom; therefore, a reasonable inference is that Defendant and his knife came in contact with Victim or her blood in Victim's bedroom, contrary to Defendant's testimony, and accordingly, Defendant participated in the confinement or restraint. Thus, in "view[ing] the evidence in the light most favorable to the guilty verdict," *Cunningham*, 2000-NMSC-009, ¶ 26, we conclude that there was sufficient evidence for the jury to convict Defendant of kidnapping under a theory that he was the principal actor.

{13} In addition, we acknowledge Defendant's assertion that the only evidence that connected him to the kidnapping was Victim's testimony that she saw a second shadow in her bedroom and circumstantial evidence that indicated the bed was too heavy to be moved by one person. We understand Defendant's contention to be that it was Riley, not Defendant, who restrained and confined Victim. However, the jury was free to reject Defendant's version of the facts and, therefore, we perceive no basis for reversal. *See State v. Nevarez*, 2010-NMCA-049, ¶ 32, 148 N.M. 820, 242 P.3d 387 ("Contrary evidence supporting acquittal does not provide a basis for reversal because the jury is free to reject [the d]efendant's version of the facts." (internal quotation marks and citation omitted)); *see generally State v. Salas*, 1999-NMCA-099, ¶ 13, 127 N.M. 686, 986 P.2d 482 (recognizing that it is for the fact finder to resolve any conflicts in the testimony and to determine where the weight and credibility lie).

{14} Because we hold that there was sufficient evidence to support Defendant's conviction for kidnapping under a principal theory, we need not address whether there was insufficient evidence under an accessory liability theory to convict Defendant of kidnapping. We will, however, briefly remark on Defendant's argument that there was insufficient evidence of his kidnapping intent because specific intent is required for the crime of kidnapping, *see* § 30-4-1(A), under either a principal or accessory liability theory. *See* NMSA 1978, § 30-1-13 (1972); *State v. Carrasco*, 1997-NMSC-047, ¶¶ 7,

18, 124 N.M. 64, 946 P.2d 1075 ("[A]n accessory must share the criminal intent of the principal."). Defendant argues that "the jury rejected [Defendant's] intent to injure [Victim] when it fully acquitted him of aggravated battery." Defendant specifically contends that the evidence necessary to convict him of aggravated battery with great bodily harm, which he was acquitted of, conflicts with the evidence necessary to uphold the kidnapping conviction.

{15} We note that the specific intent for kidnapping the jury was required to find was not the intent to inflict great bodily harm on Victim that was required by the aggravated battery charge. *Cf. State v. Nichols*, 2016-NMSC-001, ¶¶ 36-37, 363 P.3d 1187 (holding that where verdicts of "not guilty of causing medical neglect and guilty of permitting medical neglect [] hopelessly conflict[ed] . . . and preclud[ed] any determination of which culpable act was the actual basis for the jury's conviction of [the defendant,]" reversal was required). Rather, to find Defendant guilty of kidnapping, the jury had to find that Defendant "intended to hold [Victim] against [her] will to inflict death, physical injury *or* a sexual offense on [Victim] *or* for the purpose of keeping [V]ictim from doing something." (Emphases added.) As such, the jury instructions for kidnapping did not require the jury to find that Defendant intended to inflict great bodily harm on Victim. While the jury could have found that Defendant intended to physically injure Victim, it also could have found that Defendant intended to hold Victim against her will to keep her from doing something (held to service theory), such as calling the police, which would have been sufficient specific intent to convict Defendant of kidnapping.[1] *See* § 30-4-1(A)(3); UJI 14-403. Significantly, Defendant admits that this theory is factually supported.

{16} We also note that the evidence previously laid out—evidence of Defendant's knife having Victim's blood on it, Defendant being present in the bedroom with Riley, moving the bed with Riley to confine Victim in the bathroom, being the first to enter Victim's house and then letting Riley in, and being the one to suggest the idea of breaking into Victim's home the night of the incident—provides substantial evidence that supports an inference that Defendant had the requisite intent for kidnapping. *See Montoya*, 2015-NMSC-010, ¶ 52. Therefore, we hold that acquittal of the aggravated battery charge does not conflict with Defendant's conviction for kidnapping, and there is sufficient evidence of Defendant's kidnapping intent.

{17} Although we have explained in detail that there is sufficient evidence of Defendant's kidnapping intent, we will pause to briefly address Defendant's contention that there is "insufficient evidence of a kidnapping by any actor" in order to emphasize that a held to service theory is adequate for kidnapping. Defendant relies on *State v. Fish* for the notion that the intent to keep Victim from calling the police (held to service theory) is not sufficient specific intent for kidnapping. 1985-NMCA-036, ¶¶ 19-20, 102 N.M. 775, 701 P.2d 374. *Fish*, however, stands for the proposition that a jury should have been tendered instructions on false imprisonment because it may have found no intent to keep the victim from doing something, not that a held to service theory is insufficient by itself to convict for kidnapping. *See id.* Indeed, a held to service theory is adequate for a kidnapping conviction. *See State v. McGuire*, 1990-NMSC-067, ¶ 10, 110 N.M. 304, 795 P.2d 996 ("Once [the] defendant restrained the victim with the

requisite intent to hold her for service against her will, he had committed the crime of kidnapping[.]").

Double Jeopardy

{18} Defendant next argues that his convictions for breaking and entering and aggravated burglary violate double jeopardy because both offenses punish a single entry through the back window. We generally apply a de novo standard of review to the constitutional question of whether there has been a double jeopardy violation. *See State v. Andazola*, 2003-NMCA-146, ¶ 14, 134 N.M. 710, 82 P.3d 77.

{19} Defendant's argument implicates the Double Jeopardy Clause because one purpose of the constitutional protection is to prevent "multiple punishments for the same offense." *State v. Montoya*, 2013-NMSC-020, ¶ 23, 306 P.3d 426 (internal quotation marks and citation omitted). When a defendant is charged with violations of multiple statutes for the same conduct, we refer to the case as a "double-description" case. *See State v. DeGraff*, 2006-NMSC-011, ¶ 25, 139 N.M. 211, 131 P.3d 61. For double-description cases, we apply the two-part test set forth in *Swafford v. State*, 1991-NMSC-043, ¶ 25, 112 N.M. 3, 810 P.2d 1223: (1) whether the conduct is unitary, and (2) if so, whether the Legislature intended to punish the offenses separately. *State v. Silvas*, 2015-NMSC-006, ¶ 9, 343 P.3d 616. "Only if the first part of the test is answered in the affirmative, and the second in the negative, will the double jeopardy clause prohibit multiple punishment in the same trial." *Id.* (internal quotation marks and citation omitted).

{20} "When determining whether [a d]efendant's conduct was unitary, we consider whether [the d]efendant's acts are separated by sufficient indicia of distinctness." *DeGraff*, 2006-NMSC-011, ¶ 27 (internal quotation marks and citation omitted). Where unitary conduct forms the basis for multiple convictions, we then "inquire whether [the d]efendant has been punished twice for the same offense, and if so, whether the Legislature intended that result." *Silvas*, 2015-NMSC-006, ¶ 11. "In analyzing legislative intent, we first look to the language of the statute itself." *State v. Swick*, 2012-NMSC-018, ¶ 11, 279 P.3d 747. Under *Blockburger v. United States*, 284 U.S. 299, 304 (1932), we consider whether each statute requires proof of an element that the other does not. *Swick*, 2012-NMSC-018, ¶ 12. However, in *State v. Gutierrez*, 2011-NMSC-024, ¶ 58, 150 N.M. 232, 258 P.3d 1024, our Supreme Court modified the *Blockburger* test to avoid a mechanical application of the elements test in favor of a case-by-case approach that takes into account the state's legal theory of the particular case. *See Swick*, 2012-NMSC-018, ¶ 21. We now apply the modified *Blockburger* test when interpreting vague and unspecific or multipurpose criminal statutes, "which may in the abstract require proof of a fact the other does not[.]" *Silvas*, 2015-NMSC-006, ¶ 14 (alteration, internal quotation marks, and citation omitted). For these statutes, "our courts must evaluate legislative intent by considering the [s]tate's legal theory independent of the particular facts of the case[.]" *Swick*, 2012-NMSC-018, ¶ 21.

{21} The State concedes that the breaking and entering and aggravated burglary charges both required entry through the window and thus punished unitary conduct. We therefore turn immediately to the second part of the analysis—whether the Legislature intended to punish the offenses separately. *See Silvas*, 2015-NMSC-006, ¶ 9. First, in applying the *Blockburger* test, we discern that the breaking and entering and aggravated burglary statutes each require proof of an element that the other does not. *See Swick*, 2012-NMSC-018, ¶ 12. Section 30-14-8(A) prohibits breaking and entering and reads, in pertinent part, "[b]reaking and entering consists of the unauthorized entry of any . . . dwelling or other structure, movable or immovable, where entry is obtained by fraud or deception, or by the breaking or dismantling of any part of the . . . dwelling or other structure[.]" Meanwhile, the statute prohibiting aggravated burglary reads, in pertinent part, "[a]ggravated burglary consists of the unauthorized entry of any . . . dwelling or other structure, movable or immovable, with intent to commit any felony or theft therein and the person . . . is armed with a deadly weapon . . . [or] commits a battery upon any person while in such place[.]" Section 30-16-4(A), (C). Thus, while both offenses require an unauthorized entry into a dwelling, the breaking and entering statute requires the entry to be effectuated by a specified means, which the aggravated burglary statute does not. Further, the aggravated burglary charge requires the defendant to have a specific intent "to commit any felony or theft therein," and that the defendant, for instance, was "armed with a deadly weapon." Section 30-16-4(A). Therefore, under the *Blockburger* strict elements test, both offenses require proof of an element the other does not. *See State v. Hernandez*, 1999-NMCA-105, ¶ 29, 127 N.M. 769, 987 P.2d 1156 (holding that breaking and entering and aggravated burglary each required an element not included in the other, as burglary can be accomplished by any unauthorized entry with the intent to commit a theft, while breaking and entering requires that the unauthorized entry be by a specified means, such as breaking or dismantling).

{22} Because each statute requires proof of an element that the other does not, we can infer that the Legislature intended to authorize separate punishments under the breaking and entering and aggravated burglary statutes. *See Swafford*, 1991-NMSC-043, ¶ 12. But this is merely an inference that allows us to presume the two statutes punish different offenses. *Id.* ¶ 31. The presumption is not conclusive because the breaking and entering statute was written with various alternatives, *see* § 30-14-8(A) (entry may be by fraud, deception, breaking, or dismantling), so we now apply the modified *Blockburger* test to examine other indicia of legislative intent, *see Swafford*, 1991-NMSC-043, ¶ 31, and "the [s]tate's legal theory independent of the particular facts of the case." *Swick*, 2012-NMSC-018, ¶ 21; *see State v. Gutierrez*, 2012-NMCA-095, ¶ 14, 286 P.3d 608 (stating that we apply the modified *Blockburger* test when one of the statutes are written with various alternatives). Legislative intent may be ascertained by the "language, structure, history, and purpose of the statutes[,]" *State v. Franco*, 2005-NMSC-013, ¶ 12, 137 N.M. 447, 112 P.3d 1104, and the State's legal theory of the case may be determined "by examining the charging documents and the jury instructions given in the case." *Swick*, 2012-NMSC-018, ¶ 21.

{23} Although we recognize that the purpose of "New Mexico's breaking-and-entering statute is itself grounded in common law burglary[,]" *State v. Holt*, 2016-NMSC-011, ¶ 15, 368 P.3d 409 (internal quotation marks and citation omitted), we perceive distinct objectives of each statute that guide our analysis. As discussed, a specified means of entry, such as an actual "breaking" is required for the offense of breaking and entering. *See* § 30-14-8(A); *State v. Contreras*, 2007-NMCA-119, ¶ 17, 142 N.M. 518, 167 P.3d 966 (explaining that "entering by breaking the window" was an element in a breaking and entering case). In *State v. Sorrelhorse*, 2011-NMCA-095, ¶ 21, 150 N.M. 536, 263 P.3d 313, we held that the offense of criminal damage to property was a lesser included offense of breaking and entering because both offenses require actual property damage. Thus, the evident purpose of the breaking and entering statute, when entry is obtained by breaking or dismantling, is to punish unauthorized entry onto property that is accomplished by physical damage to that property.

{24} In comparison, while the burglary statute is likewise intended to safeguard possessory property interests, *State v. Rubio*, 1999-NMCA-018, ¶ 15, 126 N.M. 579, 973 P.2d 256, the evolution of common law burglary in New Mexico leads us to believe that the Legislature intended to authorize separate punishment under the two statutes. *See generally Sorrelhorse*, 2011-NMCA-095, ¶¶ 18-20 ("To be sure, the common law is the backdrop for the Legislature's enactments, and courts therefore can rely on the common law to construe unclear or ambiguous statutes."). At common law, "[b]urglary consisted of breaking and entering a dwelling of another in the night time with the intent to commit a felony." *Id.* ¶ 19. Initially, the crime required some element of force. *Id.* However, as the common law developed, the "breaking" component of common law burglary could be satisfied by a constructive breaking and did not necessarily require actual property damage. *Id.* Our Legislature, tracking the evolution of the common law crime of burglary, no longer requires a "breaking." *See id.* ("In construing the New Mexico burglary statute, this Court held that entry by fraud, deceit, or pretense was sufficient to constitute the 'unauthorized entry' requirement, which had been adopted by the New Mexico Legislature instead of the common law requirement of 'breaking.' "). Therefore, we conclude the purpose of the breaking and entering statute is sufficiently distinct from the purpose of the aggravated burglary statute. The crime of aggravated burglary punishes the broader criminal conduct of any unauthorized entry when there is specific criminal intent. *See* § 30-16-4; *Sorrelhorse*, 2011-NMCA-095, ¶ 20 ("The Legislature departed from the common law burglary concepts in enacting Section 30-14-8(A)."); *see also State v. Office of Pub. Def. ex rel. Muqqddin*, 2012-NMSC-029, ¶¶ 42-43, 285 P.3d 622, (discussing the broader privacy interests the burglary statute is aimed at protecting). For instance, the purpose of the aggravated burglary statute is to protect the right to exclude, *see Holt*, 2016-NMSC-011, ¶ 16, and the offense is thus necessarily "complete when entrance to a dwelling house . . . is made with the required criminal intent." *State v. Ross*, 1983-NMCA-065, ¶ 10, 100 N.M. 48, 665 P.2d 310.

{25} Further, the aggravated burglary statute has the added purpose of punishing conduct that increases the risk of danger to an innocent person. *See* § 30-16-4 (requiring that, in addition to unauthorized entry and criminal intent, the accused must either arm themselves with a deadly weapon before or after the unauthorized entrance

or commit a battery during the burglary). We thus recognize that aggravated burglary is not merely an offense against property, and accordingly, we conclude that the Legislature intended to authorize separate punishments for breaking and entering and aggravated burglary.

{26} We next turn to the State's theory of the case. A comparison of the instructions tendered to the jury for the two offenses establishes that the breaking and entering charge was not subsumed into the aggravated burglary charge. To convict Defendant of breaking and entering, contrary to Section 30-14-8(A), the jury was required to find, in pertinent part, that (1) Defendant entered Victim's dwelling without permission, and (2) "[t]he entry was obtained by breaking or dismantling a rear door or window[.]" *See* UJI 14-1410 NMRA. Meanwhile, a guilty verdict on the aggravated burglary charge, contrary to Section 30-16-4(A), required the jury to find, in pertinent part, that Defendant (1) "entered a dwelling without authorization[,]" (2) "with the intent to commit a theft or aggravated battery with great bodily harm," and (3) Defendant "was armed with a knife[.]" *See* UJI 14-1632 NMRA.

{27} The parties do not dispute that the unauthorized entrance through the window constituted unitary conduct. However, the State does not direct the jury to that unauthorized entrance as the sole basis for conviction of each crime. *Cf. Silvas*, 2015-NMSC-006, ¶¶ 18-21 (holding that, where a defendant was convicted of trafficking drugs with intent to distribute and possession with intent to distribute, the state's theory of the case was based on the unitary conduct of selling drugs and violated the defendant's right to be free from double jeopardy). Here, a crucial distinction in the two crimes is that the unauthorized entrance required by the aggravated burglary charge also included the specific intent "to commit a theft or aggravated battery with great bodily harm," and that Defendant "was armed with a knife[.]" Hence, the State's theory of the case for aggravated burglary required the jury to find something more than what was required for breaking and entering. Similarly, although entrance through the window was the common denominator to each charge, to convict Defendant of breaking and entering the jury had to find that the unauthorized entrance was effectuated by breaking or dismantling the rear door or window. That extraneous element prevents Defendant's conviction for breaking and entering from being subsumed within the aggravated burglary conviction. *See State v. Ramirez*, 2016-NMCA-072, ¶ 23, ___ P.3d ___ (explaining that, even where two offenses share a common element, the offenses are not necessarily subsumed within the other, particularly where the defendant can offend one of the offenses and not the other), *cert. denied*, 2016-NMCERT-007, ___ P.3d ___. As such, the State's theory of the case regarding the conduct differentiating the two charges was adequately distinguishable and not solely premised on the unitary conduct.

{28} The charging documents likewise show that the State's theory of the case did not rely on the mere abstract proof of a fact not required by each charge. *See Silvas*, 2015-NMSC-006, ¶ 14 (explaining that the modified *Blockburger* test is applied when interpreting vague and unspecific or multipurpose criminal statutes, "which may in the abstract require proof of a fact the other does not" (alteration, internal quotation marks, and citation omitted)). For example, the grand jury indictment, like the jury instructions,

specifically relied on the “breaking or dismantling” component of the breaking and entering statute. We thus conclude that Defendant’s convictions for breaking and entering and aggravated burglary did not offend his right to be free from double jeopardy.

The Jury Instructions Regarding the Knife

{29} Defendant argues that the jury instructions for aggravated burglary were improper in that they “supplanted the phrase ‘deadly weapon’ with ‘knife,’ removing that element from the jury’s consideration.” Defendant admits that this claim is not preserved and, therefore, we will review it for fundamental error. *See State v. Stevens*, 2014-NMSC-011, ¶ 42, 323 P.3d 901 (“We review an unpreserved challenge to a jury instruction for fundamental error.”).

{30} We conclude that Defendant’s claim has no merit because the knife at issue is a per se deadly weapon, and the jury therefore was not required to determine whether it was a deadly weapon. *See State v. Traeger*, 2001-NMSC-022, ¶ 12, 130 N.M. 618, 29 P.3d 518. The jury was instructed that to convict Defendant of aggravated burglary, it must find he was “armed with a knife.” The term “knife” in the jury instructions replaced the term “deadly weapon” that is in the statute. *See* § 30-16-4(A). Under NMSA 1978, Section 30-1-12(B) (1963) a “deadly weapon” is defined as including “any weapon which is capable of producing death or great bodily harm, including but not restricted to any types of daggers, brass knuckles, switchblade knives, bowie knives, poniards, butcher knives, dirk knives and all such weapons with which dangerous cuts can be given[.]” This definitional statute specifically lists certain items as being per se deadly weapons, *State v. Nick R.*, 2009-NMSC-050, ¶¶ 16-19, 147 N.M. 182, 218 P.3d 868, and the jury is not required to determine the deadly weapon element for these items because the Legislature has already determined that these weapons are inherently dangerous. *See Traeger*, 2001-NMSC-022, ¶¶ 12-13.

{31} The item at issue here is Defendant’s knife, which, based on the State’s exhibits admitted at trial, appears to be a butcher knife. Butcher knives are identified as per se deadly weapons in the Criminal Code. *See* § 30-1-12(B); *Traeger*, 2001-NMSC-022, ¶ 12. We do not perceive Defendant’s argument to be that the knife was not a butcher knife; rather, we understand Defendant’s contention to be that the jury instructions were in error because they did not qualify the knife as a butcher knife. We note that Defendant does not dispute that the knife was a butcher knife. Because a butcher knife is a per se deadly weapon, and there is no dispute as to whether the knife was a butcher knife, we conclude that it was not necessary for the jury to determine whether the knife was a deadly weapon. *See Traeger*, 2001-NMSC-022, ¶¶ 12-13. We further hold that fundamental error did not occur simply because the jury did not have an opportunity to determine whether the knife was a butcher knife. *See State v. Barber*, 2004-NMSC-019, ¶ 17, 135 N.M. 621, 92 P.3d 633 (providing that fundamental error only occurs in “cases with defendants who are indisputably innocent, and cases in which a mistake in the process makes a conviction fundamentally unfair notwithstanding the apparent guilt of the accused”). Additionally, Defendant does not point to any

authority that provides that, where there is no question as to whether an item is a per se deadly weapon, the jury must determine whether the item is indeed a per se deadly weapon. *See generally State v. Vigil-Giron*, 2014-NMCA-069, ¶ 60, 327 P.3d 1129. ("[A]ppellate courts will not consider an issue if no authority is cited in support of the issue and that, given no cited authority, we assume no such authority exists[.]"). As discussed more fully below, Defendant was on notice that the deadly weapon provision of the aggravated battery charge would be at issue in his trial, *see* § 30-3-5(C), and thus, could have disputed whether the knife was a butcher knife or deadly weapon under the statutory definition.

{32} We acknowledge Defendant's citation to UJI 14-1632 Use Note 3, which provides, "Insert the name of the weapon when the instrument is a deadly weapon as defined in Section 30-1-12(B)." We observe that, consistent with the use note, the jury instructions should have precisely referred to the item as a "butcher knife," however, for the foregoing reasons—specifically that this oversight did not make Defendant's conviction fundamentally unfair since he was on notice the knife would be an issue—we conclude that failure to include the term "butcher knife" in the jury instructions did not amount to fundamental error under the facts and circumstances of this case.

Sufficient Evidence That Defendant Was Armed With a Deadly Weapon

{33} Defendant additionally alleges that there was not sufficient evidence that he was armed with a deadly weapon, but for the reasons stated directly above, we disagree. Furthermore, contrary to Defendant's assertion that there was no evidence establishing that the knife was a deadly weapon or used as a deadly weapon, the State entered into evidence Exhibits 33 and 34, which indicate that the knife was a butcher knife, a per se deadly weapon. *See* § 30-1-12(B). That there was arguably no evidence that the knife was used as a weapon, or that Defendant intended to use it as a weapon is irrelevant. Defendant testified that he brought the knife with him to Victim's house, which is all that is required for the crime of aggravated burglary. *See State v. Anderson*, 2001-NMCA-027, ¶ 21, 130 N.M. 295, 24 P.3d 327 ("Some statutes aggravate a predicate crime when the perpetrator is *armed with a deadly weapon.* Under the aggravated burglary statute, the perpetrator can be convicted even when no use is intended." (citations omitted)).

The Amended Aggravated Burglary Charge

{34} Defendant next argues that the district court committed fundamental error by violating his due process right to notice by modifying the aggravated burglary jury instructions. Defendant alleges that he was prejudiced by the modified jury instructions because they included an element—that Defendant "was armed with a knife"—that was not in the indictment. Because Defendant neglected to raise this objection below, we review only for fundamental error. *See Barber*, 2004-NMSC-019, ¶ 8. An error is fundamental if it goes "to the foundation or basis of a defendant's rights or . . . to the foundation of the case or take from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive." *State v. Gallegos*,

2009-NMSC-017, ¶ 27, 146 N.M. 88, 206 P.3d 993 (internal quotation marks and citation omitted).

{35} "The Fourteenth Amendment to the United States Constitution requires the State to provide reasonable notice of charges against a person and a fair opportunity to defend." *State v. Dominguez*, 2008-NMCA-029, ¶ 5, 143 N.M. 549, 178 P.3d 834 (internal quotation marks and citation omitted). Thus, "[a] defendant in a criminal case is entitled to know what he is being charged with and to be tried solely on those charges." *State v. Johnson*, 1985-NMCA-074, ¶ 26, 103 N.M. 364, 707 P.2d 1174. But under Rule 5-204(A) NMRA, "[t]he court may at any time prior to a verdict cause the complaint, indictment or information to be amended . . . if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." With respect to variances, Rule 5-204(C) provides:

> No variance between those allegations of a complaint, indictment, information or any supplemental pleading which state the particulars of the offense, whether amended or not, and the evidence offered in support thereof shall be grounds for the acquittal of the defendant unless such variance prejudices substantial rights of the defendant.

In other words, the district court may make changes to the indictment in order to conform to the evidence presented at trial as long as there is no prejudice to the defendant. *See id.* "Prejudice exists when the defendant is unable to reasonably anticipate from the indictment the nature of the proof the state will produce at trial." *State v. Romero*, 2013-NMCA-101, ¶ 9, 311 P.3d 1205.

{36} Here, the grand jury indictment charged Defendant with aggravated burglary pursuant to Section 30-16-4(C), under a theory that Defendant committed a battery on Victim while inside her house or while entering or leaving. However, the district court permitted a variance of the charge when it instructed the jury that to find Defendant guilty of aggravated burglary it had to find that he was "armed with a knife." Defendant concedes, and we agree, that the State did not add a new charge by altering the theory of aggravated burglary. In *State v. Lucero*, 1998-NMSC-044, ¶¶ 23-25, 126 N.M. 552, 972 P.2d 1143, our Supreme Court held that, amending an indictment to add an alternative theory of a crime does not impermissibly add a different offense under Rule 5-204. Nevertheless, Defendant argues that he was prejudiced by the variance because he was "unprepared to defend against this factually distinct theory of the charge." We are not persuaded.

{37} The evidence presented at trial indicates that Defendant was not prejudiced by the alternative theory of aggravated burglary provided in the jury instructions. Defendant testified that he had a knife with him when he went to Victim's house. He also testified that he entered Victim's house through a bathroom window, which he pried open with the knife. In addition, he testified that he had the knife with him when he fled Victim's house. Victim's blood was discovered on the knife, and there was testimony that the only place Victim's blood was found, other than on the knife, was in her bedroom. The

foregoing evidence, therefore, could also support the State's initial theory of aggravated burglary—that Defendant committed a battery on Victim while inside her house, or while entering or leaving, pursuant to Section 30-16-4(C)—because such evidence would be probative of whether Defendant battered Victim. *See Ross*, 1983-NMCA-065, ¶ 13 (noting that a variance is not fatal unless the accused cannot reasonably anticipate from the indictment what the nature of the proof against him will be).

{38} Moreover, Defendant was on notice that the knife would be an issue at trial because he brought it with him to Victim's house and her blood was on it. Notably, in order to convict Defendant of aggravated battery, the jury was required to find, in pertinent part, that Defendant "touched or applied force to [Victim] by hitting her with a bat or *knife*[.]" (Emphasis added.) That is, contrary to Defendant's assertion, he had direct notice that he was to defend against a charge that contained an element involving a deadly weapon because the indictment charged Defendant with an aggravated battery under the deadly weapon provision of the relevant statute. *See* § 30-3-5(C) ("Whoever commits aggravated battery inflicting great bodily harm or does so with a deadly weapon or does so in any manner whereby great bodily harm or death can be inflicted is guilty of a third degree felony."); *see also Ross*, 1983-NMCA-065, ¶ 15 (holding that there was no prejudice where the defendant had an "opportunity to prepare and defend against [the] charge [convicted of and] was not impaired by the fact that such offense varied from the crime charged in the indictment"). Therefore, Defendant had reason to defend against the proposition that the knife was a deadly weapon. *Compare* § 30-16-4(A) (requiring as an element of aggravated burglary that the accused "is armed with a deadly weapon"), *with* § 30-3-5(C) (requiring as an element of aggravated battery that the accused inflicted great bodily harm or committed the battery "with a deadly weapon" or in a way that could inflict great bodily harm or death). We accordingly conclude that no substantial rights of Defendant were prejudiced, and the district court did not commit fundamental error by permitting the variance.

The Tampering With Evidence Conviction

{39} We next address Defendant's unpreserved claim that his conviction for third degree tampering with evidence violates his Sixth Amendment constitutional rights because, contrary to *State v. Alvarado*, 2012-NMCA-089, ¶¶ 9, 14, ___ P.3d ___, the jury instructions did not require the jury to find that the tampering was related to a capital, first, or second degree felony. Defendant thus contends that his tampering conviction should be reduced to a fourth degree felony as an indeterminate crime. The State acknowledges that the jury instructions for the tampering with evidence charge contained error but claims that it was not fundamental error requiring reversal. We agree with the State.

{40} In order to preserve an issue for appeal, the defendant must make a timely objection that specifically apprises the district court of the nature of the claimed error and invokes an intelligent ruling thereon. *State v. Varela*, 1999-NMSC-045, ¶ 25, 128 N.M. 454, 993 P.2d 1280. Both Defendant and the State agree that Defendant's claim was not preserved. Because Defendant failed to preserve any error with respect to the

tampering with evidence jury instructions, we review only for fundamental error. *See* Rule 12-216(B)(2) NMRA (giving appellate courts discretion to review issues involving fundamental rights or fundamental error, even when they have not been preserved below); *Stevens*, 2014-NMSC-011, ¶ 42 (“We review an unpreserved challenge to a jury instruction for fundamental error.”). “Fundamental error only applies in exceptional circumstances when guilt is so doubtful that it would shock the judicial conscience to allow the conviction to stand[,]” *Stevens*, 2014-NMSC-011, ¶ 42 (internal quotations and citation omitted), or when “a mistake in the process makes a conviction fundamentally unfair notwithstanding the apparent guilt of the accused.” *Barber*, 2004-NMSC-019, ¶ 17.

{41} We agree with both Defendant and the State that the jury instructions contained error. In *Alvarado*, we held that, “when the [s]tate seeks a conviction under Section 30-22-5(B)(1), tampering with evidence of a capital, first, or second degree felony, a determination that the defendant tampered with evidence related to a capital, first, or second degree felony must be made by the jury.” *Alvarado*, 2012-NMCA-089, ¶ 14. Without this finding, we said, the district court is restricted to sentencing the defendant to a fourth degree felony because the crime would then be “indeterminate.” *Id.*; *see* § 30-22-5(B)(4). We reasoned that absent this determination, a “third[]degree felony would violate the Sixth Amendment by exceeding the maximum sentence authorized by the facts as they were found by the jury[,]” contrary to *Apprendi v. New Jersey*, 530 U.S. 466, 482-83 (2000). *Alvarado*, 2012-NMCA-089, ¶¶ 11, 14, 16.

{42} Nonetheless, under two recent cases, we declined to extend our holding in *Alvarado*. In *State v. Herrera*, 2014-NMCA-007, ¶ 4, 315 P.3d 343, we held that, “although the jury instruction omitted an essential element of the crime, the error was not fundamental under the circumstances of this case.” In *Herrera*, the defendant was convicted of second degree murder for shooting his friend, and third degree tampering with evidence for placing the gun he used to shoot his friend under a crawlspace beneath a house. *Id.* ¶¶ 2-3. The jury instructions did not require the jury to find that the tampering was related to a capital, first, or second degree, felony. *Id.* ¶ 7. In holding that the failure to include an essential element of the crime in the instructions was not fundamental error, we concluded that, “[i]f it is clear that the missing element was established by the evidence at trial, the fact that the jury was not instructed on the element is not considered fundamental error.” *Id.* ¶ 17; *see id.* ¶ 18 (“As the only evidence at trial was that [the d]efendant’s act of hiding the gun was related to his act of shooting the victim and, as the jury concluded beyond a reasonable doubt that the shooting constituted a second[]degree felony, the facts at trial established that the tampering related to a second[]degree felony.”).

{43} In *State v. Sanchez*, 2015-NMCA-077, ¶¶ 23-25, 355 P.3d 51, *cert. denied*, 2015-NMCERT-006, 367 P.3d 852, we similarly held that there was no fundamental error when jury instructions for a tampering with evidence charge failed to specify whether the tampering was related to a capital, first, or second degree felony. In *Sanchez*, the defendant had fatally stabbed the victim and had thrown the knife out his car window as he fled the scene of the stabbing. *Id.* ¶¶ 2, 25. We concluded that,

because “the only evidence presented at trial that related to [the d]efendant’s discard of the knife was the act of stabbing [the v]ictim[,]” there was no fundamental error. *Id.* ¶ 25.

{44} Here, Defendant acknowledged that he removed the license plate from Victim’s stolen truck, crumbled it, and discarded it under Romero’s house and then hid the keys to the truck elsewhere on the property. Defendant was charged and convicted of tampering with evidence, contrary to Section 30-22-5, a third degree felony. The jury was required to find the following beyond a reasonable doubt in order to convict Defendant of tampering with evidence:

> 1. [Defendant] hid or placed [the] Chevy truck keys and license plate;
>
> 2. By doing so, [Defendant] intended to prevent the apprehension, prosecution, or conviction of himself or create the false impression that another had committed the crime;
>
> 3. This happened in New Mexico on or about the 25th day of March, 2013.

See UJI 14-2241 NMRA. Because the jury instructions did not require the jury to determine whether the tampering was related to a capital, first, or second degree, felony, the jury instructions were in error.[2] *See Alvarado*, 2012-NMCA-089, ¶ 14.

{45} Defendant was convicted of two offenses that the tampering with evidence conviction, as a third degree felony, could have related to: (1) kidnapping, and (2) aggravated burglary with intent to commit great bodily harm or theft. *See* § 30-22-5(B)(1). Defendant, however, maintains that the tampering with evidence conviction “was most directly associated with his fourth[]degree felony conviction” for unlawful taking of a motor vehicle. As is relevant here, the tampering with evidence statute provides:

> (1) if the highest crime for which tampering with evidence is committed is a capital or first degree felony or a second degree felony, the person committing tampering with evidence is guilty of a third degree felony;
>
> (2) if the highest crime for which tampering with evidence is committed is a third degree felony or a fourth degree felony, the person committing tampering with evidence is guilty of a fourth degree felony; [and]
>
> . . . .
>
> (4) if the highest crime for which tampering with evidence is committed is indeterminate, the person committing tampering with evidence is guilty of a fourth degree felony.

Section 30-22-5(B)(1), (2), (4). The kidnapping conviction was a first degree felony, pursuant to Section 30-4-1(B), the aggravated burglary conviction was a second degree felony, pursuant to Section 30-16-4, and the conviction for the unlawful taking of a motor vehicle was a fourth degree felony, contrary to Section 30-16D-1(A)(1). Thus, if the tampering with evidence conviction was related to either the kidnapping or aggravated burglary convictions, then Defendant was properly sentenced for a third degree felony. *See* § 30-22-5(B)(1). But if it was associated with the unlawful taking of Victim's truck, the conviction for tampering with evidence should be reduced to a fourth degree felony. *See* § 30-22-5(B)(2). And if it is not clear which crime the tampering with evidence conviction is related to, it should be reduced to a fourth degree felony under the "indeterminate" provision of the statute. *See* § 30-22-5(B)(4); *Alvarado*, 2012-NMCA-089, ¶ 14.

{46} Defendant's concealment of the license plate and truck's keys is evidence relating to all the crimes that resulted from Defendant's conduct on March 25, 2013, including the kidnapping and aggravated burglary, because it is probative of whether Defendant participated in the crimes, and specifically, whether he was at Victim's house at the relevant time and was trying to cover up his involvement in the incident. *See* Rule 11-401(A) NMRA (providing that relevant evidence includes a fact that has a tendency to make a material fact more or less probable). But we note that, unlike in *Herrera* and *Sanchez*, the license plate and keys that Defendant attempted to hide, were not the actual instrumentalities of the crime. *See Sanchez*, 2015-NMCA-077, ¶¶ 2, 25 (explaining that the tampering with evidence conviction related to the knife that was used to stab the victim); *Herrera*, 2014-NMCA-007, ¶¶ 17-18 (discussing that the tampering with evidence conviction related to the gun that was used to shoot the victim). Nonetheless, we conclude that there was no fundamental error under the facts and circumstances of this case.

{47} Although the general rule is that fundamental error occurs when the jury is not instructed on an essential element of a crime, "when there can be no dispute that the omitted element was established, fundamental error has not occurred and reversal of the conviction is not required." *State v. Sutphin*, 2007-NMSC-045, ¶ 16, 142 N.M. 191, 164 P.3d 72. In this case, the jury instructions only refer generically to "the crime." While we have already said that this was error, we hold that it was not fundamental error because the omitted element was established by Defendant's convictions for kidnapping and aggravated burglary, and a reasonable juror would have construed this instruction as relating to the entire range of criminal conduct that occurred at Victim's house, including the kidnapping and burglary. *See id.* ¶ 19 (stating that the fundamental error analysis consists of inquiring as to "whether a reasonable juror would have been confused or misdirected by the jury instruction" (internal quotation marks and citation omitted)). Stated another way, a reasonable juror would have interpreted Defendant's act of tampering with evidence as an attempt to prevent his identification as someone associated with the crimes against Victim and her property, and consequently, his apprehension for those crimes.

{48} In sum, the third degree felony conviction for tampering with evidence does not shock the conscience given the serious nature of the crimes Defendant was convicted of. *See Stevens*, 2014-NMSC-011, ¶ 42. Nor did the error in the jury instructions make Defendant's "conviction fundamentally unfair," *see Barber*, 2004-NMSC-019, ¶ 17, because evidence of the omitted element—that the highest crime was a first or second degree felony—was established by his convictions for kidnapping and aggravated burglary, *Sanchez*, 2015-NMCA-077, ¶¶ 24-25; *Herrera*, 2014-NMCA-007, ¶¶ 17-18, and a reasonable juror would have construed the instructions as being associated with all the crimes that took place at Victim's house. *See Sutphin*, 2007-NMSC-045, ¶ 16. Accordingly, the jury instructions did not contain fundamental error.

The Possession of Drug Paraphernalia Conviction

{49} Defendant next challenges his conviction for possession of drug paraphernalia based on possession of a pipe used to ingest "spice," arguing that there was insufficient evidence. During the search incident to arrest, police found a pipe that contained drug residue on Defendant, which was identified as a synthetic cannabinoid, or "spice." Defendant admitted he used the pipe to smoke spice but argues that simply identifying a substance as "spice" does not trigger criminal liability under the Controlled Substances Act (CSA). *See* NMSA 1978, § 30-31-6(C)(19) (2011). In particular, Defendant contends that the State did not test the specific sample of spice and, therefore, it cannot be concluded that a particular batch of spice falls within the CSA definition of a synthetic cannabinoid. We are not persuaded and conclude that the CSA does not preclude liability for substances not explicitly listed in the statute when the Legislature evinced an intent to include other substances.

{50} Although Defendant frames the issue as one of insufficient evidence, we perceive this to be a matter of statutory construction because Defendant's claim hinges on his interpretation of the CSA. Therefore, we review this question de novo. *See State v. Duhon*, 2005-NMCA-120, ¶ 10, 138 N.M. 466, 122 P.3d 50 ("Statutory interpretation is an issue of law, which we review de novo."). "Our primary goal when interpreting statutory language is to give effect to the intent of the [L]egislature." *State v. Torres*, 2006-NMCA-106, ¶ 8, 140 N.M. 230, 141 P.3d 1284. "We do this by giving effect to the plain meaning of the words of statute, unless this leads to an absurd or unreasonable result." *State v. Marshall*, 2004-NMCA-104, ¶ 7, 136 N.M. 240, 96 P.3d 801.

{51} The CSA criminalizes nonprescription possession of certain controlled substances, including synthetic cannabinoids. NMSA 1978, § 30-31-23 (2011). Under the CSA, possession of "synthetic cannabinoids, *including*" eleven specifically enumerated compounds with chemical designations is prohibited. Section 30-31-6(C)(19) (emphasis added). We have observed that "a statute which uses the word 'including' . . . is not limited in meaning to that included . . . [and] that the use of the word 'includes' to connect a general clause to a list of enumerated examples demonstrates a legislative intent to provide an incomplete list." *Wilcox v. N.M. Bd. of Acupuncture & Oriental Med.*, 2012-NMCA-106, ¶ 13, 288 P.3d 902 (alteration, internal quotation marks, and citations omitted). Thus, consistent with the plain meaning of the

term “including,” we hold that the eleven compounds identified as synthetic cannabinoids in the CSA are not exclusive, and the Legislature intended to punish possession of other substances identified as synthetic cannabinoids, or “spice.”

{52} We will next briefly address Defendant’s insufficient evidence argument. Defendant contends that there was not any evidence that the pipe had residue on it, and as such, there was insufficient evidence to convict him for possession of drug paraphernalia, as required by the jury instructions. We disagree.

{53} The jury was instructed that, in order to convict Defendant for possession of drug paraphernalia, it was required to find, in pertinent part, that he “did possess a metal pipe with residue.” *See generally Caldwell*, 2008-NMCA-049, ¶ 29 (“To determine whether substantial evidence exists, we measure the evidence against the instructions submitted to the jury.”). The jury was free to accept the evidence that there was residue on the pipe based on Defendant’s acknowledgment that he used the pipe to smoke spice and Deputy Herrera’s testimony that there was residue on it. *See Montoya*, 2015-NMSC-010, ¶ 52 (“The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction.” (internal quotation marks and citation omitted)). Therefore, we conclude that there was sufficient evidence that the pipe found on Defendant had residue on it.

The District Court’s Amenability Finding

{54} Defendant lastly challenges the district court’s finding that he was not amenable to treatment. Defendant argues that his confession to the property crimes and the fact that he took responsibility for his part in the plan to commit the burglary, as well as the evidence that Riley initiated and perpetrated the violence suggests that the district court should have found him amenable to treatment. We disagree. We note that while Defendant’s argument that the district court erred in finding that Defendant was not amenable to treatment was presented with a broad sweeping stroke and seemingly focused on but one factor of NMSA 1978, Section 32A-2-20(C) (2009), the proper review of whether a child is amenable to treatment or rehabilitation as a child requires the consideration of all eight factors set forth in this subsection of the statute.

{55} We review a district court’s findings regarding a youthful offender’s amenability to treatment for abuse of discretion or substantial evidence. *State v. Trujillo*, 2009-NMCA-128, ¶ 13, 147 N.M. 334, 222 P.3d 1040. “We do not reweigh the evidence or substitute our judgment for that of the district court.” *Id.* In viewing “the evidence in the light most favorable to the lower court’s decision, [we] resolve all conflicts and indulge all permissible inferences to uphold that decision, and disregard all evidence and inferences to the contrary.” *Id.*

{56} Section 32A-2-20(B) provides that the district court may give a youthful offender an adult sentence if it finds: “(1) the child is not amenable to treatment or rehabilitation as a child in available facilities; and (2) the child is not eligible for commitment to an

institution for children with developmental disabilities or mental disorders." In order to make these determinations, the district court is required, under Section 32A-2-20(C) to consider all eight factors:

(1) the seriousness of the alleged offense;

(2) whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;

(3) whether a firearm was used to commit the alleged offense;

(4) whether the alleged offense was against persons or against property, greater weight being given to offenses against persons, especially if personal injury resulted;

(5) the maturity of the child as determined by consideration of the child's home, environmental situation, social and emotional health, pattern of living, brain development, trauma history and disability;

(6) the record and previous history of the child;

(7) the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child by the use of procedures, services and facilities currently available; *and*

(8) any other relevant factor, provided that factor is stated on the record.

(Emphasis added.)

{57} After the amenability hearing, the district court made oral findings and issued a written order finding that Defendant was not amenable to treatment in the juvenile system based on the eight factors. The only factor Defendant appears to contest is his record and previous criminal history. *See State v. Chamberlain*, 1989-NMCA-082, ¶ 11, 109 N.M. 173, 783 P.2d 483 (stating that where an appellant fails "to provide us with a summary of all the facts material to consideration of [his or her] issue, as required by [Rule 12-208(D)(3) NMRA], we cannot grant relief"). We will not engage in any speculation as to how the district court might have erred regarding the remaining factors, and we will certainly not presume the district court erred.

{58} In finding that Defendant was not amenable to treatment, the district court specifically found that Defendant's offenses were serious, the crimes were premeditated and committed in an aggressive and violent manner, the crimes were against person and property and personal injury resulted, and "[t]here [was] no evidence of disabilities and [Defendant] has average maturity[.]" The district court then sentenced Defendant to a period of incarceration of thirty-five years and six months, less one day, with twelve

years of the sentence suspended. Because the district court's findings were supported by substantial evidence in the record, we hold that the district court did not abuse its discretion in finding Defendant was not amenable to treatment. Although Defendant argues that all the violent and premeditated crimes were committed by Riley and not Defendant, the jury disagreed and convicted Defendant of seven different offenses, including kidnapping and aggravated burglary, each serious felonies. The district court therefore did not err in finding Defendant had committed the crimes in an aggressive and violent manner. Viewing the evidence in the light most favorable to the district court's decision and disregarding contrary evidence and inferences, we hold that the district court did not abuse its discretion in holding Defendant was not amenable to treatment.

CONCLUSION

{59} For the foregoing reasons, we affirm the district court.

{60} IT IS SO ORDERED.

LINDA M. VANZI, Judge

WE CONCUR:

M. MONICA ZAMORA, Judge

J. MILES HANISEE, Judge

1We observe that the evidence at trial indicated that Victim had been barricaded in her bathroom and her phone had been destroyed, which is consistent with a theory that Defendant intended to keep her from calling for help.

2We note that, at the time of Defendant's jury trial, *Alvarado* had already been decided; however, UJI 14-6019 NMRA, which requires the jury to submit a special verdict form specifying the particular crime the tampering with evidence conviction was connected to, had not yet been adopted.