

STATE V. PLOWMAN

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**STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JOSHUA PLOWMAN,
Defendant-Appellant.**

No. A-1-CA-36084

COURT OF APPEALS OF NEW MEXICO

December 11, 2017

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

COUNSEL

Hector H. Balderas, Attorney General, Santa Fe, NM, John J. Woykovsky, Assistant Attorney General, Albuquerque, NM, for Appellee

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JUDGES

J. MILES HANISEE, Judge. WE CONCUR: M. MONICA ZAMORA, Judge, HENRY M. BOHNHOFF, Judge

AUTHOR: J. MILES HANISEE

MEMORANDUM OPINION

HANISEE, Judge.

{1} Defendant has appealed from a conviction for battery on a health care worker. We issued a second notice of proposed summary disposition in which we proposed to

reverse and remand for a new trial. The State has filed a memorandum in opposition. After due consideration, we remain unpersuaded.

{2} To very briefly reiterate the pertinent background information, in this case the jury instructions omitted an essential element, that Defendant “acted in a rude, insolent, or angry manner.” [RP 199; St. MIO 8] See UJI 14-365 NMRA (outlining the essential elements of the offense of battery on a health care worker, *inter alia*). Although this issue was not preserved, [Def. MIO 9, 11] insofar as the element was disputed we proposed to hold that the omission constituted fundamental error. [2nd CN 3-4] See, e.g., *State v. Valino*, 2012-NMCA-105, ¶ 13, 287 P.3d 372 (similarly reversing a conviction for battery on a health care worker and remanding for a new trial after concluding that failure to instruct the jury on an essential element was fundamental error).

{3} In its memorandum in opposition the State argues that the jury implicitly found that Defendant acted in a rude, angry, or insolent manner, notwithstanding the omission of this element, because the only conflicting evidence concerned the question whether Defendant struck the victim intentionally or accidentally. [St. MIO 10-12] Insofar as the jury was instructed that intentional conduct was essential, the State contends that the guilty verdict reflects that the jury rejected Defendant’s version of the events as accidental. [St. MIO 10-11] However, this does not fully address our concerns.

{4} As we observed in the second notice of proposed summary disposition, [2nd CN 3-4] in addition to the suggestion of accidental contact, evidence was also presented to the effect that Defendant collided with the victim as Defendant was leaving the hospital, and he acted out of fear because he was receiving inadequate treatment for his seizures and the hospital staff had threatened to keep him against his will. [Def. MIO 6-8; St. MIO 11] To the extent that Defendant’s collision with the victim was precipitated by fear, the jury might have concluded that his conduct should not be characterized as rude, angry, or insolent.

{5} In closing, we continue to acknowledge that the evidence was amply sufficient to support a conviction, [CN 2-6; 2nd CN 3] and that the jury could reasonably reject Defendant’s “self-serving” testimony about his state of mind and course of conduct. [St. MIO 11-12] However, insofar as the evidence was capable of supporting conflicting inferences, we must reverse and remand for a new trial. See generally *State v. Lopez*, 1996-NMSC-036, ¶ 13, 122 N.M. 63, 920 P.2d 1017 (“We will only affirm a case in which the trial court failed to instruct the jury on an essential element when, under the facts adduced at trial, that omitted element was undisputed and indisputable, and no rational jury could have concluded otherwise.” (internal quotation marks and citation omitted)); *State v. Benavidez*, 1999-NMCA-053, ¶ 28, 127 N.M. 189, 979 P.2d 234 (concluding that to speculate on how a properly instructed jury would have decided a case “would jeopardize Defendant’s right to have his conviction rest on an actual finding of guilt, beyond a reasonable doubt, as to each essential element of the crime charged, as our case law requires”), *vacated on other grounds*, 1999-NMSC-041, 128 N.M. 261, 992 P.2d 274.

{6} Accordingly, for the reasons stated above and in the notice of proposed summary disposition, we reverse and remand for a new trial.

{7} IT IS SO ORDERED.

J. MILES HANISEE, Judge

WE CONCUR:

M. MONICA ZAMORA, Judge

HENRY M. BOHNHOFF, Judge