

The slip opinion is the first version of an opinion released by the Clerk of the Court of Appeals. Once an opinion is selected for publication by the Court, it is assigned a vendor-neutral citation by the Clerk of the Court for compliance with Rule 23-112 NMRA, authenticated and formally published. The slip opinion may contain deviations from the formal authenticated opinion.

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: _____

Filing Date: March 3, 2025

No. A-1-CA-39883 and No. 40163
(consolidated for purpose of opinion)

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

MATTHEW CLAY MEDEMA,

Defendant-Appellant.

APPEALS FROM THE DISTRICT COURT OF DOÑA ANA COUNTY

Conrad F. Perea, District Court Judge

Raúl Torrez, Attorney General

Santa Fe, NM

Meryl E. Francolini, Assistant Solicitor General

Alexander W. Tucker, Assistant Solicitor General

Albuquerque, NM

for Appellee

Wadsworth Law, LLC

Mathew R. Wadsworth

Rio Rancho, NM

The Law Office of Ryan J. Villa

Richelle Anderson

Albuquerque, NM

for Appellant

OPINION

YOHALEM, Judge.

{1} In this consolidated opinion,¹ Defendant Matthew Clay Medema appeals from his convictions for criminal sexual penetration (CSP) (use of force or coercion), contrary to NMSA 1978, Section 30-9-11(F) (2009); aggravated battery on a household member, contrary to NMSA 1978, Section 30-3-16 (2018); and false imprisonment, contrary to NMSA 1978, Section 30-4-3 (1963). Defendant raises five claims on appeal, as well as claiming cumulative error: (1) the district court erred in failing to strike a juror for cause; (2) the district court erred in excluding Victim's out-of-court statements allegedly relevant to her consent to sexual intercourse; (3) Defendant's conviction for aggravated battery on a household member either is not supported by the evidence or must be reversed because of misconduct by the prosecution in closing argument; (4) Defendant's conviction of both CSP by force or coercion and false imprisonment violated Defendant's right to be free from double jeopardy; and (5) the destruction of jury questionnaires pursuant to Rule 5-606 NMRA violated Defendant's constitutional rights and requires reversal. We agree with Defendant that the prosecution's remarks in closing

¹For reasons we explain, this opinion consolidates two appeals: Case Nos. A-1-CA-39883 and A-1-CA-40163. Because these cases stem from the same underlying trial court proceeding involving the same Defendant and request the same relief, we consolidate the cases for decision. *See* Rule 12-317(B) NMRA.

1 argument on facts not in evidence were prosecutorial misconduct that likely
2 impacted the jury's conviction of Defendant for aggravated battery of a household
3 member, and we therefore reverse and remand for retrial on that count. We also
4 conclude that Defendant's conviction of false imprisonment and CSP, under the
5 circumstances of this case as presented by the State, subjects Defendant to double
6 jeopardy. We therefore reverse his conviction for false imprisonment. We otherwise
7 affirm.

8 **BACKGROUND**

9 {2} Defendant and Victim lived together in the past and had a child together.
10 Defendant and Victim stayed in contact after they broke up, and Defendant visited
11 Victim about twice a week to spend time with their child. During some of these
12 visits, Defendant and Victim would engage in consensual sexual intercourse.

13 {3} On September 22, 2018, Defendant visited Victim and their child. After
14 putting their child down for a nap, Victim went to her bedroom and Defendant went
15 to the bathroom. Victim testified that when Defendant left the bathroom, she was
16 sitting on her bed. Defendant came over to her and hugged her, tightening his grip
17 as she struggled to free her arms and escape. For three to five minutes, Victim tried
18 to get Defendant to release her, without success, while repeatedly rejecting his
19 attempts to engage in sexual intercourse. Victim and Defendant fell off the bed
20 during this struggle and ended up on the floor with Defendant on top of Victim.

1 Victim managed to crawl to the other side of the room, while still struggling to
2 escape Defendant's grasp. According to Victim, Defendant straddled her and "[a]t
3 some point, he started to choke [her], and [she] had a hard time breathing."
4 Defendant then turned Victim on her stomach and penetrated her by force as she
5 resisted.

6 {4} Defendant left Victim's residence after the encounter and Victim went to
7 dinner with her family. Later that night she went to the hospital for a sexual assault
8 examination. Some small bruises on Victim's chest and upper arm were
9 photographed and admitted into evidence. Victim did not testify to any other injuries.
10 There were no visible injuries to Victim's neck.

11 {5} Defendant testified that the sex they had that day was consensual, and that
12 they often playfully wrestled before having sex. Defendant described what happened
13 on September 22, 2020, as consistent with other times he and Victim had consensual
14 sex. Victim agreed in response to a juror's question that she and Defendant "had
15 rough sex before where he would choke [her] a little," and "it was always consensual
16 before."

17 {6} Defendant was charged with CSP by force or coercion; false imprisonment,
18 defined in the jury instructions as restraining or confining Victim against her will,
19 with knowledge that the restraint was unauthorized; and aggravated battery of a
20 household member, requiring the jury to find, in relevant part, that "[D]efendant

1 touched or applied force to [Victim] by pushing his hand against her neck”; and that
2 “[D]efendant acted in a way that would likely result in death or great bodily harm to
3 [Victim].” The jury was also instructed that “[g]reat bodily harm means an injury to
4 a person which creates a high probability of death.” The jury convicted Defendant
5 on all three counts.

6 **DISCUSSION**

7 **I. The District Court Did Not Abuse Its Discretion in Refusing to Strike** 8 **Juror 134 for Cause**

9 {7} Defendant contends the district court abused its discretion in failing to strike
10 for cause a juror who disclosed during voir dire that she and her daughter were both
11 victims of sexual assault. Defendant argues that Juror 134’s answers to questions
12 during voir dire established actual bias—that the juror could not be fair and
13 impartial—and the district court’s failure to excuse her, therefore, violated
14 Defendant’s right to a fair and impartial jury.

15 **A. Preservation and Harm**

16 {8} We first note that Defendant preserved this issue for appellate review by
17 moving to strike Juror 134 for cause during voir dire. *See* Rule 12-321(A) NMRA.
18 When the district court refused to excuse Juror 134 for cause, Defendant used a
19 peremptory challenge to remove the juror. Because Defendant used all of his
20 peremptory challenges before the jury was seated, he has made a sufficient showing
21 of harm to require remand for a new trial if the district court’s denial of excusal for

1 cause was an abuse of discretion. *See Fuson v. State*, 1987-NMSC-034, ¶ 9, 105
2 N.M. 632, 735 P.2d 1138. We, therefore, proceed to review Defendant’s claim on
3 the merits.

4 **B. Standard of Review**

5 {9} Our standard of review of the district court’s refusal to excuse a juror for cause
6 is for abuse of discretion. *See State v. Johnson*, 2010-NMSC-016, ¶ 31, 148 N.M. 50,
7 229 P.3d 523 (“We review the [district] court’s rulings regarding the selection of
8 jurors for an abuse of discretion.” (text only) (citation omitted)). We will find an
9 abuse of discretion in failing to excuse a juror only when the district court acts in an
10 obviously erroneous, arbitrary or unwarranted manner by failing to excuse a juror
11 who could not be impartial. *Id.*

12 **C. Juror 134’s Statements**

13 {10} Responding to a prosecutor’s question during voir dire about what kind of
14 evidence they would expect the State to produce to prove the case, Juror 134 stated,
15 “I’ve been through [sexual assault] myself.” The prosecutor asked Juror 134 if she
16 would be able to set her experiences aside and be fair and impartial. Juror 134
17 responded, “I don’t know what to say. It’s kind of hard for me to say anything.” The
18 prosecutor asked Juror 134 if she would be willing to speak with the parties privately,
19 and she agreed that she would. In chambers, the following colloquy ensued:

1 State: And I know I kind of asked would you be able to set your
2 experiences aside, listen to the evidence in the case and be
3 fair and impartial?

4 Juror 134: Yes, I would.

5
6 Defense: Do you think you'd believe the State more because of the
fact this happened to you?

7 Juror 134: Yes.

8 Defense: So you really can't be fair in this situation, can you?

9 Juror 134: Well, I don't know what—I don't know what the situation
10 is.

11 Defense: Would you believe the State more because this happened
12 to you?

13 Juror 134: I don't know what to believe yet. I have to hear more
14 proof, I think.

15 Defense: Do you think you'll be thinking about what happened to
16 you previously, or just what's happened in this case?

17 Juror 134: I will try not to think about what happened to me. Because
18 I stay positive every day and just go forward. I try and
19 leave that in the past. It's mostly my daughter. She's
20 already older now, but it happened to her when she was
21 nine. So I did put that person in prison for it.

22 Defense: So do you think that impacts you here today?

23 Juror 134: Yeah.

24

1 State: Even knowing that you've gone through this and loved
2 ones have gone through this, would you be able to focus
3 on the trial as you're sitting there listening?

4 Juror 134: Yeah, because I've been through it already. No child
5 should be going through this at all. Anybody, I mean adult.
6 It's not fun. It's terrible.

7 State: Would you still give both parties a fair shake, defense and
8 the State?

9 Juror 134: Yes, I think so. To find out what the truth is.

10

11 Defense: Do you think what happened to your daughter might
12 impact your thinking as to believing the State or [the]
13 defense?

14 Juror 134: I try not to think about that, what happened to my
15 daughter. It's kind of hard—

16 Defense: But do you think it would have an impact on you?

17 Juror 134: Yeah.

18 **D. Discussion**

19 {11} Defendant subsequently moved to strike Juror 134 for cause. The district court
20 denied that motion stating that the court would leave it to the parties to decide
21 whether to exercise a peremptory challenge.

22 {12} Defendant argues on appeal that the district court abused its discretion in
23 failing to excuse Juror 134 for cause because Juror 134 (1) failed to “unequivocally
24 state that she could be fair and impartial,” (2) acknowledged that her own experience

1 and her daughter's experience "impacts her here today," and (3) "acknowledged that
2 her own experiences made her more likely to believe the State's witnesses."

3 {13} Defendant claims that Juror 134 needed to "unequivocally state" that she
4 would be able to put her experience aside and be fair and impartial. Defendant's
5 argument is based on a misunderstanding of this Court's opinion in *State v. Holtsoi*,
6 2024-NMCA-042, ¶ 9, 547 P.3d 770. This Court found in *Holtsoi* that a potential
7 juror strongly stated his belief that he could *not* be fair and impartial. *See id.* ("Juror
8 23's statements combine to express his belief that he could not faithfully serve as an
9 impartial juror and strongly support such an inference."). Given this strong statement
10 by the juror that he could not be impartial, we concluded in *Holtsoi* that the district
11 court judge's failure to excuse that juror for cause was an abuse of discretion. *Id.*
12 ¶ 10. Our decision turned on the juror's unequivocal insistence that he could not be
13 fair and impartial. *Id.* This approach is consistent with the principle that a juror, who
14 unequivocally expresses actual bias, stating that they cannot be impartial, *must* be
15 excused for cause. *See State v. Romero*, 2023-NMSC-014, ¶ 10, 533 P.3d 735.
16 Where, however, a juror expresses potential bias, but does not unequivocally state
17 that they cannot be fair and impartial, the defendant must establish with facts
18 developed in voir dire "that the bias would actually affect the juror's vote." *Id.* ¶ 9;
19 *see Holtsoi*, 2024-NMCA-042, ¶ 11 ("[A]ll potential jurors are presumed capable of

1 impartial and fair consideration of the law and the facts of each case unless they
2 indicate otherwise during voir dire.”).

3 {14} In this case, Juror 134 admitted that she had experiences in her life that had
4 an impact on her and would impact her assessment of the evidence at trial. We have
5 recognized, however, that requiring a juror to “purge [their] mind of all experiences
6 and opinions” is “psychologically impossible.” *State v. Fransua*, 1973-NMCA-071,
7 ¶ 7, 85 N.M. 173, 510 P.2d 106. Each juror may weigh the evidence in light of their
8 own experiences, and the verdict is the product of the collective experience of all
9 twelve jurors. *Id.*; see *Romero*, 2023-NMSC-014, ¶ 7 (“We presume ‘that a jury
10 selected from a fair cross section of the community is impartial, regardless of the
11 mix of individual viewpoints actually represented on the jury.’” (quoting *Lockhart*
12 *v. McCree*, 476 U.S. 162, 184 (1986))). The presumption is that each prospective
13 juror can be fair and impartial, despite experiences in their past.

14 {15} The question here is whether Juror 134’s answers to the questions from the
15 prosecution and Defendant revealed “actual bias,” like that revealed in *Holtsoi*,
16 where the juror “repeatedly and unequivocally indicated that he could not separate
17 his bias regarding drug use from the facts of the case.” 2024-NMCA-042, ¶ 7. We
18 do not agree with Defendant that Juror 134’s comments were comparable to the clear
19 statement of an inability to be fair and impartial made by the potential juror in
20 *Holtsoi*. In contrast to the juror in *Holtsoi*, Juror 134’s answers to questions during

1 voir dire revealed an ability and a willingness to listen to the evidence and make a
2 decision based on that evidence.

3 {16} Although Juror 134 admitted that her experiences with sexual assault would
4 impact her during trial, this is not an admission that she has a bias, which would
5 prevent her from making an impartial decision based on the law and the evidence.
6 As stated in *Fransua*, 1973-NMCA-071, ¶ 7, all jurors have experiences that
7 influence their view of the evidence, and these experiences are not inherently
8 disqualifying. *See Johnson*, 2010-NMSC-016, ¶ 32 (holding, in a murder trial, that
9 the district court properly denied motions to strike two jurors who had loved ones
10 murdered and admitted that the trial would bring back those memories, but asserted
11 impartiality).

12 {17} Although Juror 134 initially answered “yes” to defense counsel’s question if
13 she would believe the State more than Defendant, upon further questioning by the
14 defense, Juror 134 stated that she did not know “what the situation [was],” did not
15 know “what to believe yet,” and needed to “hear more proof.” When asked by the
16 prosecution if she would give both parties a fair shake, she responded, “Yes, I think
17 so. To find out what the truth is.”

18 {18} Given these answers, it was not arbitrary or unreasonable for the district court
19 to conclude that Juror 134’s experiences in the past would not prevent her from

1 serving as an impartial juror. We therefore find no error in the trial court's exercise
2 of its discretion to deny Defendant's motion to strike Juror 134 for cause.

3 **II. Defendant's Claim That the District Court Erred in Excluding Victim's**
4 **Out-of-Court Statements Was Not Preserved**

5 {19} Defendant argues that the district court erroneously sustained two hearsay
6 objections made by the State to Defendant's attempt to testify to two out-of-court
7 statements made by Victim. Because Defendant did not raise the issues he now
8 asserts in the district court, Defendant's arguments were not preserved and we will
9 not consider them on appeal.

10 {20} Defendant first attempted to testify that Victim had stated earlier in the day of
11 the incident at issue that she wanted to have sex with him that day. When the State
12 objected to the admission of this statement on the grounds that it was hearsay,
13 defense counsel argued that the statement was admissible nonhearsay because it was
14 a statement by a party-opponent. *See* Rule 11-801(D)(2) NMRA. Defendant does
15 not renew this argument on appeal, claiming instead that the district court erred in
16 sustaining the objection because the statement fell within the then-existing state of
17 mind exceptions to the rule against hearsay. *See* Rule 11-803(3) NMRA.

18 {21} Later in his testimony, Defendant was asked about Victim's answer to his
19 allegedly asking her if she wanted to move from the bed to the floor. The State
20 objected to this statement's admission, claiming it was hearsay. Defendant offered
21 no response to this objection, simply saying, "Okay" when the district court

1 sustained it. He argues on appeal that the statement was not hearsay to begin with
2 and, if it was, it was admissible as a present-sense impression.

3 {22} Although we “do not apply the preservation requirement in an unduly
4 technical manner,” *In re Est. of Baca*, 1999-NMCA-082, ¶ 15, 127 N.M. 535,
5 984 P.2d 782 (internal quotation marks and citation omitted), it is necessary for the
6 issue advanced on appeal to have been raised before the district court with enough
7 specificity to “apprise[] the [district] court of the nature of the claimed error and
8 invoke[] an intelligent ruling thereon,” *State v. Montoya*, 2015-NMSC-010, ¶ 45,
9 345 P.3d 1056 (internal quotation marks and citation omitted). *See* Rule 12-321(A);
10 *State v. Ortiz*, 2009-NMCA-092, ¶ 32, 146 N.M. 873, 215 P.3d 811 (“To preserve
11 an issue for review on appeal, it must appear that appellant fairly invoked a ruling
12 of the [district] court on the same grounds argued in the appellate court.” (internal
13 quotation marks and citation omitted)); *see also State v. Lucero*, 1986-NMCA-085,
14 ¶¶ 9-11, 104 N.M. 587, 725 P.2d 266 (holding that the defendant’s general hearsay
15 objection did not preserve the argument on appeal that testimony did not fall within
16 a specific hearsay exception). Defense counsel had an obligation to alert the district
17 court to a permissible use of evidence in response to an objection to the admission
18 of evidence by the opposing party. Absent a response to an objection from the State
19 on the same ground now raised on appeal, the alleged error in admitting the evidence

1 is not preserved and cannot be argued on appeal. *See State v. Arguello*, 2024-NMCA-
2 074, ¶¶ 12-13, 557 P.3d 1018, *cert. denied*, 2024-NMCERT-009, 557 P.3d 995.

3 {23} Because Defendant’s claims of error were not preserved and Defendant has
4 not argued that any exceptions to the preservation rule apply here, we give these
5 claims of error no further consideration. *See State v. Druktenis*, 2004-NMCA-032,
6 ¶ 122, 135 N.M. 223, 86 P.3d 1050 (“[G]enerally, . . . we [will not] address issues
7 not preserved below and raised for the first time on appeal.”); *State v. Gutierrez*,
8 2003-NMCA-077, ¶ 9, 133 N.M. 797, 70 P.3d 787 (stating that courts normally do
9 not review for fundamental or plain error when not requested by the appellant).

10 **III. The Prosecutor’s Remarks, Without Support in the Record, Advising the**
11 **Jury of the Amount of Pressure That Can Cause Unconsciousness,**
12 **Constitutes Misconduct That Amounts to Fundamental Error**

13 {24} Defendant argues that the prosecution’s conduct in closing statements
14 amounted to fundamental error. Defendant focuses on two alleged errors: (1) the
15 prosecutor improperly communicated to the jury the State’s view that the Defendant
16 was not testifying truthfully; and (2) the prosecutor improperly testified in rebuttal
17 closing by both mischaracterizing Victim’s testimony and explaining to the jury,
18 without supporting evidence in the record, that serious bodily harm can be caused
19 by as little as four pounds of pressure applied to the neck. We are not persuaded that
20 the prosecution’s statements about the believability of Defendant’s story were
21 misconduct, but we do find fundamental error requiring reversal of Defendant’s

1 conviction for aggravated battery on a household member based on the prosecution's
2 introducing evidence in closing from outside the record on a disputed element of the
3 crime of aggravated battery—whether Defendant's pressure on Victim's neck was
4 likely to result in death or serious bodily harm.

5 {25} Because Defendant made no objection in the district court to any part of the
6 State's closing argument, we review for fundamental error. “The first step in
7 reviewing for fundamental error is to determine whether an error occurred. If that
8 question is answered affirmatively, we then consider whether the error was
9 fundamental.” *State v. Cabezuela*, 2011-NMSC-041, ¶ 49, 150 N.M. 654, 265 P.3d
10 705 (quoting *State v. Silva*, 2008-NMSC-051, ¶ 11, 144 N.M. 815, 192 P.3d 1192).

11 {26} Looking first to the prosecution's comments on the veracity of Defendant's
12 story, we are not persuaded that these remarks were error, given that this case was a
13 contest between two conflicting stories—Victim's and Defendant's. Where a case
14 essentially revolves around “which of two conflicting stories is true, a party may
15 reasonably infer, and thus argue, that the other side is lying.” *State v. Aguilar*, 1994-
16 NMSC-046, ¶ 23, 117 N.M. 501, 873 P.2d 247. And where the defendant has
17 testified, as in this case, “[t]he prosecutor may comment on the credibility of defense
18 witnesses,” including the defendant. *State v. Rojo*, 1999-NMSC-001, ¶ 56, 126 N.M.
19 438, 971 P.2d 829 (internal quotation marks and citation omitted)); see *State v.*

1 *Dominguez*, 2014-NMCA-064, ¶ 25, 327 P.3d 1092. Having found no error, we need
2 not consider the second prong of the fundamental error analysis.

3 {27} We next consider Defendant’s argument that the prosecutor’s remarks in
4 rebuttal closing—without supporting evidence in the record and without Defendant
5 having an opportunity to respond—that four pounds of pressure on a person’s neck
6 will cause someone to become unconscious, constitute fundamental error. We turn
7 first to whether the prosecutor’s comments were error.

8 {28} In the initial closing argument, the prosecutor summarized Victim’s
9 testimony, stating that Defendant “pressed hard” on her neck and that “[Victim]
10 couldn’t breathe.” We agree with the State that this statement appropriately
11 summarized Victim’s testimony that when Defendant had his hands on her neck, she
12 “was having a hard time . . . breath[ing].” The prosecutor told the jury that “[w]e all
13 know what happens if you cut off the blood flow to the brain for very long,”
14 reminding them it would cause death. Because that is common knowledge that
15 strangulation for a long time can lead to death, and the jury can take that knowledge
16 into account, these remarks were not error.

17 {29} In rebuttal closing, however, the prosecutor stated, “[I]t only takes four
18 pounds—four pounds of pressure to cut off someone’s blood supply to make them
19 lose consciousness—[t]hat’s all it takes, four pounds.” The prosecutor’s final
20 comment to the jury was “[r]emember, four pounds of pressure . . . [is] all it takes.”

1 There is no testimony in the record about the amount of pressure that will result in
2 loss of consciousness and, it is undisputed that Victim did not lose consciousness.
3 There also was no testimony in the record about the amount of pressure Defendant
4 applied.

5 {30} Although both parties are permitted wide latitude during closing arguments,
6 the prosecutor's remarks must be based upon the evidence. "It is beyond the bounds
7 of valid argumentation to recite prejudicial 'facts' that are entirely outside the
8 evidence presented at trial. It is misconduct for a prosecutor to make prejudicial
9 statements not supported by evidence." *State v. Duffy*, 1998-NMSC-014, ¶ 56, 126
10 N.M. 132, 967 P.2d 807 (citation omitted), *overruled on other grounds by State v.*
11 *Tollardo*, 2012-NMSC-008, ¶ 37 n.6, 275 P.3d 110.

12 {31} The State admits that the challenged remarks have no support in the evidence,
13 but claims that Defendant opened the door to these comments by arguing that Victim
14 had not in fact suffered serious harm. If a prosecutor's comment is invited by a
15 defense argument, it does not constitute reversible error, even if the comment is
16 improper. *State v. Taylor*, 1986-NMCA-011, ¶ 25, 104 N.M. 88, 717 P.2d 64. We
17 do not agree, however, that Defendant's closing argument—suggesting that the jury
18 should consider whether severe harm or death had actually occurred in order to find
19 "a likelihood of serious harm or death"—invited the prosecution to present evidence
20 not in the record on the likelihood of harm. What was invited was a response pointing

1 the jury to the instructions, stating that the jury must find Defendant “acted in a way
2 that would likely result in death or great bodily harm to [Victim].” Instead, the State
3 provided an additional, unsubstantiated fact to establish that Defendant’s act met the
4 likelihood of serious harm element of the offense. We therefore conclude that a
5 remark introducing what could only have been presented as expert testimony during
6 the trial, directly relevant to an element of the crime charged, not offered by the
7 State, constitutes misconduct by the prosecution.

8 {32} Having found error, we now turn to consider whether the error was
9 fundamental. Fundamental error occurs when prosecutorial misconduct in closing
10 statements compromises a defendant’s right to a fair trial. *See Rojo*, 1999-NMSC-
11 001, ¶ 55. To find fundamental error, we must be convinced that there is “a
12 reasonable probability that the error was a significant factor in the jury’s
13 deliberations in relation to the rest of the evidence before them.” *State v. DeGraff*,
14 2006-NMSC-011, ¶ 21, 139 N.M. 211, 131 P.3d 61 (internal quotation marks and
15 citation omitted). We will upset a jury verdict only (1) when guilt is so doubtful as
16 to shock the conscience, or (2) when there has been an error in the process
17 implicating the fundamental integrity of the judicial process. *State v. Barber*, 2004-
18 NMSC-019, ¶¶ 14, 16, 135 N.M. 621, 92 P.3d 633.

19 {33} The jury was instructed that, to find Defendant guilty of aggravated battery
20 with great bodily harm, they were required to find, in relevant part, “[D]efendant

1 acted in a way that would likely result in death or great bodily harm to [Victim].”

2 The jury was also instructed that “[g]reat bodily harm means an injury to a person
3 which creates a high probability of death.”

4 {34} We briefly review the evidence in the record concerning Defendant’s choking
5 of Victim. According to Victim, Defendant straddled her and “[a]t some point, he
6 started to choke [her], and [she] had a hard time breathing.” Victim described
7 Defendant as choking her with one hand for what felt like a few minutes, while
8 ripping her clothes off with the other hand. When asked what she was thinking while
9 Defendant was choking her, she stated, “I just wanted him to get off.” There was
10 also testimony from Nurse Sofia Osello and Detective Jeffrey Kuepfer that
11 strangulation can occur without bruising.

12 {35} The evidence in the record left the jury with an extremely difficult question to
13 answer about whether the prosecution had established, beyond a reasonable doubt,
14 that Defendant had acted in a way that would likely result in death or a high
15 probability of death when he “touched or applied force to [Victim]” by pushing one
16 hand against her neck while ripping her clothes off with the other hand. Victim
17 testified she had difficulty breathing, but never stated that she passed out or even
18 almost passed out. Given these jury instructions and this equivocal evidence, the
19 prosecutor’s remarks that very little pressure can be deadly, quantified at four
20 pounds of pressure, repeated as the last words the jury heard before beginning

1 deliberations, could have tipped the balance and led to a guilty verdict. Although the
2 evidence is sufficient to uphold a conviction arrived at by a jury based on the
3 evidence in the record, there is a “reasonable probability that the error was a
4 significant factor in the jury’s deliberations in relation to the rest of the evidence
5 before them.” *DeGraff*, 2006-NMSC-011, ¶ 21. We therefore reverse and remand
6 for a new trial on the aggravated battery of a household member count.

7 **IV. Double Jeopardy Prohibits Multiple Punishments for CSP and False** 8 **Imprisonment in This Case**

9 {36} Defendant next argues that his convictions of CSP and false imprisonment
10 violate his right to be free from double jeopardy. We agree.

11 **A. Standard of Review**

12 {37} We apply a de novo standard of review to a double jeopardy claim. *See State*
13 *v. Cummings*, 2018-NMCA-055, ¶ 6, 425 P.3d 745. The Double Jeopardy Clause of
14 the Fifth Amendment of the United States Constitution, made applicable to the states
15 by the Fourteenth Amendment, protects against “multiple punishments for the same
16 offense.” *State v. Sena*, 2020-NMSC-011, ¶ 44, 470 P.3d 227 (internal quotation
17 marks and citation omitted).

18 **B. Defendant’s Double Description Claim**

19 {38} Defendant raises what is known as a double description claim. A double
20 description violation occurs when an individual is convicted of more than one
21 offense under different statutes for a single act or course of conduct. *State v. Vigil*,

1 2021-NMCA-024, ¶ 17, 489 P.3d 974. Defendant argues that he was convicted of
2 both CSP by force or coercion and false imprisonment based on a single course of
3 conduct—using the same force to restrain Victim and to force her to engage in sexual
4 intercourse.

5 {39} Double description claims are subject to the two-part test adopted by our
6 Supreme Court in *Swafford v. State*, 1991-NMSC-043, ¶ 25, 112 N.M. 3, 810 P.2d
7 1223. “The first part [of the test] focuses on the conduct and asks whether the
8 conduct underlying the offenses is unitary, i.e., whether the same conduct violates
9 multiple statutes.” *Sena*, 2020-NMSC-011, ¶ 45 (alteration, internal quotation
10 marks, and citation omitted). The second part of the test examines “whether the
11 [L]egislature intended to create separately punishable offenses” based on the same
12 conduct. *Id.* ¶ 45 (internal quotation marks and citation omitted). We reach the
13 second part of the test only if we find Defendant’s conduct to be unitary. *See*
14 *Swafford*, 1991-NMSC-043, ¶ 38 (not reaching the second part of the test because
15 the conduct was not unitary).

16 **C. Defendant’s Conduct Was Unitary**

17 {40} In determining whether Defendant’s conduct is unitary, the first prong of the
18 double jeopardy test, we must determine whether the two offenses the jury found
19 Defendant committed were separated by “sufficient indicia of distinctness.” *Id.* ¶ 26.

1 {41} Our Supreme Court recently held that in determining whether the conduct
2 forming the basis of each conviction in a double description case is sufficiently
3 distinct to avoid a double jeopardy violation, our courts should rely on the six factors
4 identified in *Herron v. State*, 1991-NMSC-012, ¶ 15, 111 N.M. 357, 805 P.2d 624.
5 *See State v. Phillips*, 2024-NMSC-009, ¶ 38, 548 P.3d 51 (holding that New Mexico
6 applies the six *Herron* factors to determine whether there is distinct conduct in
7 double description cases). The factors considered in *Herron* include: “(1) temporal
8 proximity of the acts, (2) location of the victim during each act, (3) the existence of
9 intervening events, (4) the sequencing of the acts, (5) the defendant’s intent as
10 evidenced by his conduct and utterances, and (6) the number of victims.” *Phillips*,
11 2024-NMSC-009, ¶ 12. Distinct conduct is supported by evidence in the record that
12 “one crime is completed before another is committed,” or “the force used to commit
13 a crime is separate from the force used to commit another crime.” *Id.* ¶ 38 (internal
14 quotation marks and citation omitted).

15 {42} In determining whether two charged crimes are proved by conduct separated
16 by “sufficient indicia of distinctness,” we are directed by our Supreme Court to look
17 to “the elements of the charged offenses, the facts presented at trial, and the
18 instructions given to the jury.” *See State v. Lorenzo*, 2024-NMSC-003, ¶ 6, 545 P.3d
19 1156 (text only) (citation omitted). This test has not changed significantly from
20 earlier precedent that provides that “[t]he conduct question depends to a large degree

1 on the elements of the charged offenses and the facts presented at trial,” *see*
2 *Swafford*, 1991-NMSC-043, ¶ 27, and directs this Court to examine the factual
3 record. *See State v. Franco*, 2005-NMSC-013, ¶ 7, 137 N.M. 447, 112 P.3d 1104;
4 *see also State v. Begaye*, 2023-NMSC-015, ¶ 14, 533 P.3d 1057 (noting that the
5 application of the unitary conduct portion of the test “is largely consistent” with
6 longstanding precedent). Like *Begaye*, *Lorenzo* adopts *Franco*’s description of the
7 “proper analytical framework,” stating, in relevant part, that “[t]he proper analytical
8 framework is whether the facts presented at trial establish that the jury reasonably
9 could have inferred independent factual bases for the charged offenses.” *Lorenzo*,
10 2024-NMSC-003, ¶ 8 (quoting *Franco*, 2005-NMSC-013, ¶ 7).

11 {43} *Lorenzo* applies the six *Herron* factors to the evidence in that record, noting
12 that the two crimes at issue in that case occurred closely in both time and space; that,
13 at no point had the armed robbery, the first crime, been completed before the
14 aggravated battery occurred. *Id.* ¶ 10. The *Lorenzo* Court also found that the
15 defendant’s intent throughout the entire course of conduct was consistent, another
16 *Herron* factor. *Id.* ¶ 12.

17 {44} In addition to analyzing the evidence as to the six *Herron* factors, the Court
18 in *Lorenzo* also relies on the fact that “the [s]tate’s presentation on appeal does not
19 match its presentation at trial,” noting that “had the [s]tate opted for a different
20 presentation at trial, it is possible that the jury could have decided that different uses

1 of force satisfied the elements of each crime,” and concluding that “[t]he [s]tate may
2 not now argue in the abstract about what it could have asked the jury to decide.”
3 *Lorenzo*, 2024-NMSC-003, ¶ 11. We understand this discussion in *Lorenzo* to direct
4 that, in considering whether a defendant’s conduct is unitary applying the six *Herron*
5 factors, we should consider the State’s presentation of the evidence to the jury at trial
6 when the argument the State makes on appeal differs markedly from the State’s
7 presentation to the jury.

8 {45} We now turn to the application of these principles to the facts presented to the
9 jury by the State in this case. We begin with the jury instructions. As to the offense
10 of CSP, the jury instructions directed the jury to convict if it found that Defendant
11 unlawfully “caused [Victim] to engage in sexual intercourse through the use of
12 physical force or physical violence.” The jury instruction for false imprisonment
13 directed the jury to convict if it determined that, knowing Defendant had no
14 authority, Defendant “restrained or confined [Victim] against her will.”

15 {46} The State argues on appeal that Defendant’s conduct was nonunitary because
16 Defendant first restrained Victim against her will while she was on the bed, where
17 the evidence described Defendant as “hugging” Victim tightly as she struggled to
18 escape his grip, completing the crime of false imprisonment, before continuing to
19 use what the State alleges on appeal was different force to accomplish sexual
20 penetration. According to the State’s brief on appeal, “the CSP did not occur until

1 several minutes later after a prolonged struggle that included several other types of
2 restraint.” The State claims that the Defendant’s act of “bear hugging [Victim] on
3 the bed” “created a distinct restraint from the [continued] restraint Defendant then
4 used to commit CSP.”

5 {47} As was the case in *Lorenzo*, the State’s presentation on appeal does not match
6 its presentation to the jury at trial. The State’s legal theory in closing argument was
7 that there was a single, continuous struggle between Defendant and Victim, during
8 which Defendant’s intent was consistently to force Victim to engage in sexual
9 intercourse. The State described Victim, while restrained on the bed, as
10 “continu[ally]” telling him “no,” and trying to get away, without success. The State
11 argued in closing, again pointing to the struggle on the bed that “[Victim] did not
12 want to have sex and could not get away, and [Defendant] was forcing it upon her.”
13 The State described the CSP occurring as “[Victim] was trying to get away;
14 [Defendant] was holding on and would [not] let her get away,” describing
15 Defendant’s restraint of Victim as continuous and intended from the outset to force
16 Victim to have intercourse.

17 {48} As in *Lorenzo*, it is possible, had the State presented the theory it now raises
18 on appeal, that the jury would have relied on the distinction between the force on the
19 bed used to restrain Victim and the force during the struggle on the floor and at the
20 time of penetration, deciding that distinct conduct satisfied the elements of each

1 crime. Because, however, the State did not make this argument to the jury or present
2 the evidence this way, we will not review the evidence in the abstract. *See Lorenzo*,
3 2024-NMSC-003, ¶ 11.

4 {49} Viewing the evidence as the jury was instructed to view it, rather than how
5 the State argues on appeal, Defendant’s conduct was unitary. Victim was restrained
6 from the outset with the consistent intent by Defendant to force Victim to engage in
7 sexual intercourse. The same force was employed to restrain Victim for purposes of
8 false imprisonment as was employed to accomplish penetration without Victim’s
9 consent. The jury, directed by the State’s closing to consider the encounter as a
10 continuous restraint of Victim by Defendant, ending in CSP, would not have
11 reasonably found the distinctions the State now argues on appeal. Therefore,
12 Defendant’s conduct was unitary.

13 **D. The Legislature Did Not Intend to Permit Multiple Punishments Under**
14 **These Two Statutes for the Same Conduct**

15 {50} Having determined that the conduct relied on to convict Defendant of the two
16 offenses was unitary, we proceed to the second *Swafford* prong: “whether the
17 Legislature intended to create separately punishable offenses.” *State v. Reed*, 2022-
18 NMCA-025, ¶ 8, 510 P.3d 1261 (text only) (citation omitted). Because the CSP and
19 false imprisonment statutes do not expressly permit multiple convictions, *see*
20 § 30-9-11(F); § 30-4-3, we consider whether the Legislature intended multiple

1 punishments under the circumstances in this case. *See Begaye*, 2023-NMSC-015,
2 ¶ 21.

3 {51} We first determine whether the modified *Blockburger* test or the strict-
4 elements *Blockburger* test applies. *See Blockburger v. United States*, 284 U.S. 299
5 (1932); *see also Begaye*, 2023-NMSC-015, ¶ 23 (providing that the reviewing court
6 must “examine the statutes at issue to discern whether the modified or strict-elements
7 *Blockburger* test applies,” and “should then apply either the modified or the strict-
8 elements test—but not both”). We have little difficulty concluding that both statutes
9 require the application of the modified *Blockburger* test. The CSP statute allows
10 sexual penetration to be accomplished either by violence or by coercion, and the
11 false imprisonment statute allows false imprisonment to be accomplished by
12 restraint or confinement, each of which can be achieved in multiple ways.
13 Accordingly, we must apply the modified *Blockburger* test.

14 {52} In applying the modified *Blockburger* test, we examine each offense, looking
15 to the State’s theory of each offense, rather than the statutory elements in the
16 abstract. *See State v. Branch*, 2018-NMCA-031, ¶ 25, 417 P.3d 1141. If under the
17 State’s theory of the case as presented to the jury all elements of one offense are
18 “subsumed within the other, then the analysis ends and the statutes are considered
19 the same for double jeopardy purposes.” *See State v. Silvas*, 2015-NMSC-006, ¶ 12,
20 343 P.3d 616; *see also Begaye*, 2023-NMSC-015, ¶ 24 (“We examine each offense

1 keeping in mind that determining whether one offense subsumes the other *depends*
2 *entirely on the [s]tate's theory of the case.*" (emphasis added) (alteration, internal
3 quotation marks, and citation omitted)).

4 {53} As previously discussed, the jury was instructed, and the State argued, that to
5 convict Defendant of false imprisonment of Victim the jury needed to find that
6 Defendant had restrained or confined Victim against her will and that Defendant
7 knew this restraint or confinement was unauthorized. The theory for false
8 imprisonment pursued by the State in this case was that Defendant continuously
9 restrained Victim with the aim of penetrating her, while she struggled to escape and
10 repeatedly begged Defendant to let her go. Under the State's theory of the case,
11 Defendant's conduct in restraining or confining Victim was the same conduct that
12 was described as the force required to convict Defendant of CSP, and Victim's
13 struggle and expressed wish to escape, communicated to Defendant, was the proof
14 of both Defendant's understanding that his conduct was not authorized, as well as
15 proof of the unlawfulness and lack of consent elements of CSP. There is, therefore,
16 no element of proof required to convict of false imprisonment, as that crime was
17 presented to the jury by the State, that was not also required to convict Defendant of
18 CSP. One crime—false imprisonment—was fully subsumed with the other.
19 Defendant's right to be free from double jeopardy was, therefore, violated and "the
20 inquiry is over." *See id.* ¶ 35 (internal quotation marks and citation omitted).

V. Defendant Fails to Point to Any Error Cognizable on Appeal Related to the Destruction of Jury Questionnaires

{54} Approximately five months after filing his first appeal, Defendant filed a second notice of appeal in the same cause of action. The second appeal arose from the district court’s denial of Defendant’s motion to retain juror questionnaires, a collateral question that Defendant pursued after the verdict and after the filing of his appeal from his conviction. Defendant’s second appeal does not seek review of the district court’s denial of Defendant’s request to retain the questionnaires. It instead seeks reversal of his convictions, the same remedy sought by the original appeal, arguing that reversal is required because “the mandatory destruction rule is unconstitutional and unenforceable.”

{55} The State argues that the district court did not have jurisdiction to rule on the juror questionnaire motion, and even if there was jurisdiction, no procedure exists to permit Defendant to take a second appeal. Because Defendant’s post-judgment motion sought only collateral relief in the district court, we disagree and determine that we have jurisdiction.

{56} After a notice of appeal has been filed, a district court has jurisdiction to address “collateral matters not involved in the appeal.” *Kelly Inn No. 102, Inc. v. Kapnison*, 1992-NMSC-005, ¶ 39, 113 N.M. 231, 824 P.2d 1033 (internal quotation marks and citation omitted). A post-judgment request for collateral relief is “separate from the decision on the merits” and does not “destroy the finality of the decision.”

1 *Id.* ¶ 21 (internal quotation marks and citation omitted). The district court, therefore,
2 had authority to enter a collateral order, and that order is subject to appeal. *See id.*
3 ¶ 28 (approving of process wherein two appeals are taken in a case, one from the
4 merits and one from a subsequent collateral order, and allowing for the two cases to
5 be consolidated on appeal). We, therefore, have consolidated Defendant’s two
6 appeals, both of which seek reversal of Defendant’s June 30, 2021 judgment, and
7 sentence.

8 {57} Defendant raises a single issue in his second appeal: Defendant argues that his
9 convictions must be reversed because the district court denied his motion to preserve
10 the jury questionnaires beyond the 120 days after the final disposition of the case
11 provided by Rule 5-606, and the destruction of the questionnaires violates
12 Defendant’s constitutional rights. In the district court, the sole reason stated by
13 Defendant for preservation of the questionnaires was that “Defendant has asked that
14 a third party review . . . the entire trial proceeding.”

15 {58} Defendant concedes he knows of no error in the selection of the jury venire,
16 in the voir dire, or the selection of the jurors sworn for his trial (with the exception
17 of the claim of juror bias addressed earlier in this opinion). Nonetheless, he argues
18 that the destruction of jury questionnaires to protect the privacy of the jurors, even
19 when no issue is raised on appeal requiring review of those questionnaires, violates

1 his constitutional rights to due process, equal protection, and his right to appeal, and
2 requires reversal of the judgment against him. We are not persuaded.

3 {59} Defendant’s argument on appeal, as best we are able to discern, is that he is
4 entitled to reversal of his convictions because jury questionnaires have not been
5 preserved for a future hunt for any sort of error not previously identified, in the hope
6 that he may be able to bring a collateral challenge to the judgment if error is found.
7 Defendant has cited no authority, which would support the remedy of reversal of his
8 conviction on direct appeal when trial counsel, who reviewed the questionnaires,
9 was present in the district court for this portion of the case, filed the motion to retain
10 the questionnaires, and has made no claim of error that requires review of these
11 questionnaires.

12 {60} Reversal of a conviction on appeal requires a defendant establish that the
13 district court erred. *See Hall v. City of Carlsbad*, 2023-NMCA-042, ¶ 5, 531 P.3d
14 642 (“[I]t is the appellant’s burden to persuade us that the district court erred.”). “On
15 appeal, there is a presumption of correctness in the rulings and decisions of the
16 district court, and the party claiming error must clearly show error.” *Id.* (internal
17 quotation marks and citation omitted). Moreover, generally, Defendant must have
18 brought that error to the district court’s attention, preserving it for review on appeal
19 by timely alerting the district court and the State to the claimed error, thereby giving
20 the State an opportunity to respond, and the district court an opportunity to correct

1 the error. *See* Rule 12-321; *see also* *Barreras v. N.M. Corr. Dep’t*, 1992-NMSC-
2 059, ¶ 22, 114 N.M. 366, 838 P.2d 983 (“We will not consider a matter not properly
3 brought before the trial court for the first time on appeal.”). Even the exception to
4 preservation for fundamental error places the burden on the Defendant to identify
5 and establish that an error occurred. *See State v. Ocon*, 2021-NMCA-032, ¶ 7, 493
6 P.3d 448 (“Our review involves two basic steps. The first is to determine whether
7 error occurred. In other words, our analysis begins at the same place as the analysis
8 for reversible error.” (text only) (citation omitted)).

9 {61} Defendant having failed to identify any error that requires the jury
10 questionnaires for review, we apply our presumption of correctness and do not
11 consider Defendant’s unpreserved argument further. Our ruling does not prevent
12 Defendant from pursuing relief by way of a petition for writ of habeas corpus. *See*
13 *Campos v. Bravo*, 2007-NMSC-021, ¶ 5, 141 N.M. 801, 161 P.3d 846.

14 **VI. Cumulative Error**

15 {62} We are not persuaded by Defendant’s claim that there was pervasive error at
16 trial in this case. We see no error requiring reversal of Defendant’s conviction for
17 CSP by force or coercion.

1 **CONCLUSION**

2 {63} We vacate Defendant's conviction of aggravated battery on a household
3 member and remand for retrial on that count. We also vacate Defendant's conviction
4 of false imprisonment on double jeopardy grounds. We otherwise affirm.

5 {64} **IT IS SO ORDERED.**

6
7

JANE B. YOHALEM, Judge

8 **WE CONCUR:**

9
10

GERALD E. BACA, Judge

11
12

KATHERINE A. WRAY, Judge