IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: _____

Court of Appeals of New Mexico
Filed 12/6/2022 10:40 AM
Mark Reynolds

Filing Date: December 6, 2022

No. A-1-CA-39786

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

JERRY GILBERT ESPINOZA,

Defendant-Appellant.

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

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OPINION

WRAY, Judge.

{1} Defendant Jerry Espinoza appeals the jury's conviction on one count of criminal sexual penetration of a minor (CSPM) in the first degree, contrary to NMSA 1978, Section 30-9-11(D) (2007, amended 2009), and one count of incest in the third degree, contrary to NMSA 1978, Section 30-10-3 (1963). Defendant contends the district court improperly admitted DNA evidence and other expert testimony. We affirm.

BACKGROUND

{2} Defendant was charged with the sexual abuse of his granddaughter (Victim), and a warrant to collect Defendant's DNA was executed in order to conduct a paternity test regarding Victim's child (Child). Before trial, Defendant moved to suppress any testimony regarding paternity testing.

{3} At the suppression hearing, the analyst from the New Mexico Department of Public Safety Forensic Laboratories (NM Lab), Samantha Rynas, who tested the samples in the present case, distinguished between forensic testing of DNA samples and the statistical analysis of the results of the forensic testing. Rynas explained that forensic testing involves manipulating a DNA sample to generate a profile. In the present case, Rynas generated three profiles from three samples: Defendant, Victim, and Child. Rynas compared Victim's profile to Child's and isolated the genetic

attributes that were contributed by someone other than Child's mother, attributes comprising the paternal contribution. Next, Rynas compared the paternal contribution in Child's profile to Defendant's profile to determine whether Defendant could be eliminated as a genetic contributor to Child. From this profile comparison—the forensic testing—Rynas concluded that Defendant "couldn't be eliminated" as Child's father.

{4} Next, Rynas engaged in a statistical analysis, to generate a likelihood ratio. Generally, the likelihood ratio computation is "the probability that a man with the phenotypes of the alleged father and a woman with the mother's types would produce an offspring with the child's types." 1 Robert P. Mosteller et. al., McCormick on Evidence § 211.1 (8th ed. 2022). Rynas described the likelihood ratio as "how often are these little bits of DNA being in the population and how likely is it to find—for these set of circumstances to happen, in this situation, than if I just pulled somebody off the street and tested their DNA." Rynas explained the likelihood ratio as follows: "It is essentially calculating out something very similar to, if I rolled a big set of dice and it came up in a set order of 5-6-2-4-6, what are the chances that I roll that dice again and get that exact set up again?" The statistical analysis is important because if a person's profile cannot be eliminated as a genetic contributor, "we have to give a weight to that evidence and essentially say how likely it is to find" the occurrence of this DNA profile in a population. To conduct the

statistical calculations, the NM Lab uses software that is provided and maintained by the Federal Bureau of Investigation (FBI), called "Popstats." Based on the statistical calculation performed by Popstats, Rynas testified that it was "260 billion times more likely" that Defendant "was the father than if an untested, unrelated man was the father."

{5} Defendant called his own DNA expert, Dr. Karl Reich, to testify at the suppression hearing. Dr. Reich testified to the accreditations held by his commercial DNA testing lab, including its accreditation with the Association for the Advancement of Blood and Biotherapies (AABB). According to Dr. Reich, AABB is the only accrediting body for familial relationship testing and labs with AABB accreditation are required to log samples in a particular manner, to use particular language in drafting reports, to calculate statistical conclusions using particular frequency tables, and to annually verify the statistical conclusions by hand. Dr. Reich testified that while the NM Lab is accredited to conduct the *forensic* testing to produce DNA profiles, the NM Lab would not qualify for AABB accreditation for statistical calculations. Dr. Reich agreed that the failure to log samples according to AABB standards was "minor," but that AABB does not recognize Popstats as validated software; and no documentation suggested that the NM Lab conducts an annual manual validation of Popstats calculations as AABB would require. At the conclusion of the hearing, the district court ruled that (1) Rynas was qualified as an

expert in forensic DNA analysis; (2) the evidence showed that the protocols that Rynas used were "widely, scientifically accepted" and "used in almost every government/state lab," according to Dr. Reich's testimony; (3) the issue in dispute—the reliability of Popstats—went to the weight of the evidence and was for the jury to consider; and (4) Rynas' testimony regarding the methods for statistical calculation was sufficiently reliable for trial.

{6} At trial, Rynas explained that the statistical calculations compare a subject's profile to an "unrelated man" in order to determine the likelihood that the subject or an unrelated man is the father. The statistics Rynas used "are based off of a population group where essentially [the] data was gathered to look at how frequent[ly] DNA markers appear in [a] population." These statistics would be "skew[ed]," however, if the subject's DNA was tested against a related individual—for example, a brother. Rynas confirmed that the Popstats software is programed to "do the math for us and that is what we use to report our statistics." Rynas again testified that it was "260 billion times more likely" that Defendant was the father rather "than an untested, unrelated man," and "the probability of paternity [was] 99.99 percent." The NM Lab report prepared by Rynas mirrored her testimony and was admitted into evidence as State's Exhibit 11. The district court also admitted the NM Lab accreditation documents as State's Exhibit 12a. Exhibit 12a includes a performance certification of the Popstats software for the period during which the

DNA tests and calculations were performed in the present case. Dr. Reich also testified and informed the jury that the NM Lab was not accredited to interpret the results of the forensic testing and it did not verify the method used to analyze the DNA profile.

{7} After trial began, Defendant argued that the district court should limit the testimony of the State's forensic interviewer, Julie Kay Vigil-Romero. Defendant additionally objected that Vigil-Romero was only qualified to testify as a forensic interviewer and not about disclosure of sexual assault, grooming, and promiscuity resulting from sexual abuse. In this regard, the State argued that it would lay the foundation for Vigil-Romero to qualify as an expert in the areas of (1) observed behavioral manifestations of the impacts of sexual abuse on children and adolescents, and (2) family dynamics in abusive homes. The district court ruled that "as long as the foundation is laid to the jury," Vigil-Romero would be admitted as an expert in those areas identified by the State. The district court cautioned the State "to stay away from [eliciting testimony from Vigil-Romero regarding] any conclusions as to whether she thinks the abuse occurred or whether [V]ictim is credible or truthful." During the trial, Vigil-Romero testified that after reviewing the case materials, she concluded that had she been the forensic interviewer, she would have made referrals for a sexual assault nurse exam (SANE), a rape kit, counseling, a mental health assessment, and mental health services.

{8} The jury convicted Defendant for one count of CSPM and incest and acquitted Defendant of an additional CSPM count. This appeal followed.

DISCUSSION

{9} Defendant argues that the district court improperly admitted both the DNA evidence and Vigil-Romero's expert opinion. The admission of scientific evidence and expert testimony is "within the sound discretion of the [district] court and will not be reversed absent a showing of abuse of that discretion." *State v. Alberico*, 1993-NMSC-047, ¶ 58, 116 N.M. 156, 861 P.2d 192. A district court abuses its discretion if its decision is manifestly erroneous, arbitrary, unwarranted, or is "clearly against the logic and effect of the facts and circumstances before the court." *Id*. ¶¶ 58, 63; *see also State v. Yepez*, 2021-NMSC-010, ¶ 18, 483 P.3d 576 (explaining that the role of the appellate court is to ascertain whether a meaningful analysis of the admission of scientific testimony was conducted by the district court in accordance with the Rules of Evidence).

I. The Admission of the DNA Evidence

{10} The admission of expert testimony is largely governed by Rule 11-702 NMRA, which has been interpreted to require the proponent of expert testimony to satisfy three prerequisites: (1) the expert is qualified; (2) the testimony proffered will assist the trier of fact; and (3) the testimony concerns scientific, technical, or other

specialized knowledge with a reliable basis.[1] *Yepez*, 2021-NMSC-010, ¶ 19; *Lee v. Martinez*, 2004-NMSC-027, ¶ 17, 136 N.M. 166, 96 P.3d 291. Defendant argues that the district court abused its discretion in admitting the following evidence: (1) the 260-billion-to-one likelihood ratio; and (2) the 99.99 percent probability that Defendant was Child's father. We refer to this evidence together as the "Probability Conclusions."

{11} Defendant specifically argues that the Probability Conclusions were unreliable and misleading. Generally, courts determine reliability based on the following factors:

> (1) whether a theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error in using a particular scientific technique and the existence and maintenance of standards controlling the technique's operation; and (4) whether the theory or technique has been generally accepted in the particular scientific field.

Yepez, 2021-NMSC-010, ¶ 22 (internal quotation marks and citation omitted); *see State v. Fuentes*, 2010-NMCA-027, ¶ 24, 147 N.M. 761, 228 P.3d 1181 (same). A district court also "should determine whether the scientific technique is capable of supporting opinions based upon reasonable probability rather than conjecture."

[1]We observe that the admission of expert testimony, like all evidence, is additionally subject to Rule 11-401 NMRA (governing relevance) and Rule 11-403 NMRA (excluding relevant evidence that is substantially more prejudicial than probative). *Yepez*, 2021-NMSC-010, ¶ 19. The parties make no arguments pertaining to these rules, and we therefore do not address them.

Yepez, 2021-NMSC-010, ¶ 22 (omission, internal quotation marks, and citation omitted). Defendant does not evaluate the statistical calculations performed by Popstats, or the resulting Probability Conclusions, according to these four nonexclusive factors.

{12} Instead, Defendant maintains that because the Popstats software performed the statistical calculations that resulted in the probability conclusions and Rynas did not testify to how those calculations were performed, the Probability Conclusions were inadmissible on various legal grounds. In order to consider each of Defendant's arguments, we must first distinguish between (1) the evidence the State ultimately sought to be admitted—the result of the scientific test, and (2) the evidence "used to determine whether the test result is admitted in the first place—the foundational requirements." *State v. Martinez*, 2007-NMSC-025, ¶ 13, 141 N.M. 713, 160 P.3d 894 (noting that "[t]he distinction is critical"). In the context of the present case we separate the evidence to be admitted, the Probability Conclusions, from the foundational testimony that justifies its admission, the statistical calculations performed by Popstats. *See id.* The Probability Conclusions are the evidence to be admitted because that evidence is relevant to an element of proof for both charges. To establish both CSPM and incest, the State was required to prove that Defendant engaged in sexual intercourse with Victim. *See* UJI 14-958 NMRA; § 30-10-3. The Probability Conclusions offer the jury evidence from which to infer that sexual

intercourse, resulting in Child's conception, occurred. The statistical calculations, however, provide the foundational support for the admission of the Probability Conclusions and are therefore "merely [a] foundational requirement[] that the [s]tate must meet before the critical piece of evidence—the test result—is admitted into evidence." *Martinez*, 2007-NMSC-025, ¶ 14.

{13} Having identified the type of evidence at issue—foundational evidence—we next evaluate whether the foundational evidence offered was sufficient, by a preponderance of the evidence, to support the admission of the Probability Conclusions. *See id.* ¶ 19 ("[T]he trial court need only be satisfied by a preponderance of the evidence that the foundational requirement [is] met."). We find *Martinez* to be helpful in this respect. In *Martinez*, our Supreme Court considered whether testimony from a police officer about a certification sticker on a breathalyzer machine used to administer a breath test sufficiently established the foundation to admit the breath test results generated by the machine. *Id.* ¶¶ 1, 6. The Court first concluded that the foundational requirements for admitting the breath test would be met by proof that the machine was certified by a state laboratory at the time the test was administered. *Id.* ¶ 12. The sticker was sufficient because it demonstrated compliance with regulations that existed to ensure the accuracy of the breathalyzer machine. *Id.* ¶¶ 11-12. The defendant had argued that to lay a sufficient foundation, the officer who conducted the test must have personal knowledge of the

certification process. *Id.* ¶ 22. The *Martinez* Court disagreed and explained that "[w]hether the officer understands the underlying process that led to the document's content does not matter for foundational purposes—what matters is simply the content of the document." *Id.*

{14} In the present case, we observe that the parties point us to no accuracy-ensuring regulations that would demonstrate the reliability of the statistical calculations, like those the *Martinez* Court determined to be sufficient for the breathalyzer. Nevertheless, we agree with the district court that Rynas' testimony provided a sufficient foundation for the Probability Conclusions by a preponderance of the evidence. Rynas' testimony about the "underlying process," the statistical calculations, demonstrated the NM Lab's in-house quality assurance controls and accuracy-ensuring policies and procedures. At both the suppression hearing and at trial[2] Rynas testified that the NM Lab had its own conditions, procedures, and policies for quality control and that as a CODIS-FBI affiliated lab, must adhere to quality assurance standards. Rynas testified that all of these quality assurances were in place and adhered to in the testing and analysis involved in this case. Specifically related to Popstats, Rynas explained at trial that the NM Lab uses the software for

[2]In considering the foundational evidence, we look to the evidence presented at both the suppression hearing and at trial. *Cf. State v. Martinez*, 1980-NMSC-066, ¶ 16, 94 N.M. 436, 612 P.2d 228 (broadening the scope of appellate review to include assessment of the entire record to determine whether probable cause existed for a warrantless arrest).

statistical analyses and that the FBI provides software updates. Before a Popstats software update is "deployed out [by the FBI] to any of the [affiliated] agencies," the FBI performs its own verifications of the updated software, called performance checks. Then, when the NM Lab receives the software update, it conducts an in-house performance check to ensure accuracy of results between versions.

{15} The district court admitted State's Exhibit 12a, which includes a document titled "NM-DPS Forensic Laboratory—Biology Unit CODIS 8.0 Popstats Software Performance Check." The document states:

> On August 30, 2018, the FBI CODIS Software programs were upgraded to version 8.0 from version 7.0. The Popstats statistical analysis program was part of this upgrade, and as such, required a performance check of the statistical databases to ensure concordant results were obtained for casework applications. Three forensic single-source samples were evaluated using Random Match Probability (RMP), three forensic mixtures were evaluated using Probability of Inclusion (PI), and two sets of parentage samples were evaluated for Parentage Trio. The statistical analysis of these samples demonstrated concordant results with previously analyzed data.

This document is dated September 4, 2018, and the next upgrade, from version 8.0 to version 9.0, was September 25, 2020. Because the testing in this case occurred between September 9, 2019 and September 13, 2019, the 2018 update and validation was in place at the time of Defendant's testing. Based on this collective evidence, we reject Defendant's assertion that Popstats was not validated,[3] and as a result, we

[3]At the suppression hearing, Defendant's expert, Dr. Reich, testified that he could not evaluate the statistical calculations performed by the NM Lab, because he

cannot say that admitting the Probability Conclusions based on the statistical calculations performed by Popstats was "clearly contrary to logic and the facts and circumstances of the case." *Martinez*, 2007-NMSC-025, ¶ 23 (internal quotation marks and citation omitted).

A. Defendant's Challenge to the Reliability of the DNA Evidence

{16} This conclusion, however, does not end our analysis. It is well established that "once the [district] court determines that the [s]tate has met the foundational requirements for the admission [of evidence], a defendant may successfully challenge the reliability of the [evidence]." *Id*. ¶ 24. Defendant makes several arguments in this regard: (1) the NM Lab was not accredited for paternity testing; (2) Rynas simply plugged numbers into the Popstats software without understanding the statistical calculations and parroted the software's conclusions; (3) the Popstats testimony violated Defendant's right to confrontation; and (4) the district court shifted the burden to Defendant to undermine the foundational evidence for Popstats. We briefly dispose of Defendant's final argument. Defendant points to the district court's observation that Dr. Reich did not testify or present literature demonstrating that Popstats was unreliable and argues that this finding suggests that Defendant had

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did not "have access to Popstats." Dr. Reich conceded, however, that Popstats is used exclusively by government laboratories—and further that he did not know of a single government laboratory accredited by AABB—and that the NM Lab's conclusions could be independently verified using different software.

the burden to *disprove* the foundation for the Probability Conclusions. We agree that once the State met the foundational requirements for admission of the evidence, a defendant may "critically challenge" the State's foundation for scientific testimony. *See id*. Contrary to Defendant's position, however, at this point, the burden to challenge the reliability of the testimony shifts to the opponent of admissibility. *See id*. The district court did not impermissibly shift the burden, but instead determined that Dr. Reich's testimony failed to mount a successful challenge to the State's foundational evidence. We see no abuse of discretion in that ruling. *Cf. Martinez*, 2007-NMSC-025, ¶ 24 (noting no abuse of discretion where the defendant failed to mount any challenge to the foundational testimony). Having addressed this argument, we turn to Defendant's remaining contentions.

1. The Accreditation Argument

{17} Defendant argues the NM Lab's lack of accreditation for "paternity" testing "contributed to the [NM L]ab's DNA results being inadmissible." Defendant acknowledges that the accreditation issue is not dispositive but contends that AABB accreditation would have ensured the tests were properly conducted. If the NM Lab were AABB accredited, Defendant argues, "then it probably would not have committed the scientific errors that lead to an inaccurate and unjustified report being provided to the jury." As we have noted, Dr. Reich testified that the AABB standards would have imposed additional requirements and processes on the NM Lab.

Defendant, however, points to no authority that a particular accreditation or satisfaction of other standards was required in order for paternal DNA testing conclusions to be admissible. As discussed at length above, we are further unpersuaded that the State failed to establish the reliability of the results in the absence of AABB accreditation. We therefore agree with the district court that the differences in accreditation requirements went to the weight of the evidence and not to its admissibility. *See State v. Anderson*, 1994-NMSC-089, ¶¶ 47, 50, 118 N.M. 284, 881 P.2d 29 (concluding that doubts about a single aspect of the scientific evidence reliability evaluation and disputes about "the accuracy of the probability results . . . goes to the weight of the evidence, not its admissibility" (internal quotation marks and citation omitted)).

{18} Defendant maintains that because NMSA 1978, Section 40-11A-503 (2009) of the New Mexico Uniform Parentage Act (NMUPA) establishes standards for paternity testing and requires AABB accreditation of a testing laboratory, the Legislature has recognized "the different nature of paternity testing" and accreditation would safeguard against unreliable results. *See id*. The State responds that the NMUPA permits paternity testing to be performed by a lab accredited by AABB *or* "an accrediting body designated by the federal secretary of health and human services." Section 40-11A-503(A)(1), (3). The NM Lab was accredited by an organization called A2LA. *See* American Association for Laboratory Accreditation

(A2LA), 83 Fed. Reg. 12,799, 12,800 (Mar. 23, 2018) (to be codified at 42 C.F.R. pt. 493). As the State points out, A2LA accreditation satisfies Section 40-11A-503(A)(3). The NM Lab therefore was accredited under the NMUPA. While Dr. Reich did not dispute that the NM Lab was accredited by A2LA, he dismissed the A2LA accreditation because it related to *forensic* testing and not the statistical calculations. The NMUPA, however, does not distinguish between accreditation for forensic testing and statistical calculations—the statute simply refers to "[g]enetic testing." *See* § 40-11A-503(A). We thus conclude that the NMUPA provides little support for Defendant's argument that the State failed to establish a sufficient foundation for the admissibility of the evidence.

2. The "Parroting" Argument

{19} We understand Defendant's next argument as follows. Because it is Defendant's position that Rynas simply plugged the DNA profile into Popstats, which Defendant maintains was not validated, and Rynas did not know how Popstats calculated the statistics, Rynas' testimony about the resulting conclusions was inadmissible, improper "parroting" of the Popstats calculations.[4] Parroting is one

[4]To the extent that Defendant's argument could be viewed as a challenge to Rynas' qualifications to testify about the statistical calculations and the Probability Conclusions, we agree with the State that Defendant did not challenge Rynas' qualifications in the district court. In reply, Defendant clarifies his position that Rynas was "not an expert in paternity testing" but does not point us to any place in the record where the qualifications argument was preserved. Accordingly, we do not consider it. *See State v. Clements*, 2009-NMCA-085, ¶ 19, 146 N.M. 745, 215 P.3d

witness conveying "another individual's testimonial hearsay, rather than conveying her independent judgment that only incidentally discloses testimonial hearsay to assist the jury in evaluating her opinion." *State v. Gonzales*, 2012-NMCA-034, ¶ 8, 274 P.3d 151 (internal quotation marks and citation omitted). Nothing in the record suggests that Rynas "parroted" Popstats. Rynas explained the purposes and relevance of the statistical calculations. According to *Martinez*, if other evidence established the reliability of the Probability Conclusions, whether Rynas understood the underlying calculations performed by Popstats "does not matter for foundational purposes." 2007-NMSC-025, ¶ 22. Nevertheless, Defendant cites *Gonzales* to argue that the "parroting" impacted the admissibility of the testimony. The *Gonzales* Court considered the substitute testimony of an expert who did not perform the initial procedure and whether that testimony violated the Confrontation Clause of the Sixth Amendment to the United States Constitution and the New Mexico Rules of Evidence. 2012-NMCA-034, ¶ 1. To the extent that "parroting" concerns apply to this evidentiary argument—as opposed to a Confrontation Clause argument—the present case does not involve a substitute analyst. *Id.* ¶ 16 (explaining that "the degree to which a substitute analyst parrots the hearsay testimony of another" controls the analysis under the Confrontation Clause). Rynas described the purpose

54 ("This Court will not search the record to find whether an issue was preserved where [the d]efendant does not refer this Court to appropriate transcript references.").

of using Popstats, the calculations Popstats performed, and the meaning of the results. Rynas testified to her own work and results and did not relay the testimonial hearsay of another person. *See id*. (distinguishing "parroting" from an expert expressing their own opinion). For these reasons, we reject Defendant's "parroting" argument.

3. The Confrontation Clause

{20} For many of the same reasons, the admission of the DNA evidence did not violate Defendant's right to Confrontation, which would have been violated if he was "unable to confront testimony offered against [him]." *State v. Imperial*, 2017-NMCA-040, ¶ 15, 392 P.3d 658. The right to confrontation extends to testimonial statements made by a declarant "who did not appear at trial unless [the declarant] was unavailable to testify, and the defendant had [a] prior opportunity for cross-examination." *Id*. ¶ 38 (internal quotation marks and citation omitted). The parties agree that Defendant did not preserve a Confrontation Clause challenge and that our review is for fundamental error. *See State v. Silva*, 2008-NMSC-051, ¶¶ 11, 13, 144 N.M. 815, 192 P.3d 1192 (reviewing an unpreserved Confrontation Clause claim first for error and then to determine whether the error was fundamental, reversing the conviction only "if the defendant's guilt is so questionable that upholding a conviction would shock the conscience, or where, notwithstanding the apparent

culpability of the defendant, substantial justice has not been served" (internal quotation marks and citation omitted)).

{21} Defendant argues that the district court "created a [C]onfrontation [C]lause violation by permitting" Rynas to testify about the statistical calculations and Probability Conclusions. Defendant characterizes the statistical calculations as a "computer accusation" and "basis evidence." Defendant casts Rynas as an "alternative expert witness" whose testimony parroted the computer's accusation because she did not know how the statistics were calculated and could not verify the calculations. In response, the State argues that Defendant failed to identify a witness whom he was unable to cross-examine for the purposes of the Confrontation Clause. We conclude that the statistical calculations performed by Popstats—as opposed to the Probability Conclusions reached as a result of the calculations—was neither testimonial nor basis evidence, and Defendant had the opportunity to confront the individual who performed the analysis.

{22} "[N]ot all foundational evidence implicates the Confrontation Clause." *State v. Anaya*, 2012-NMCA-094, ¶ 21, 287 P.3d 956. The "testimonial nature of a statement and its use against the defendant . . . triggers Confrontation Clause protection." *Id.* Again, the distinction between foundational evidence and evidence to prove an element of the charge is critical. *See id.* ¶ 19. "[I]ssues that are preliminary and foundational in nature are non-testimonial," because those issues

bear "an attenuated relationship to conviction." *Id*. ¶ 22. In *Anaya*, this Court considered whether the foundational evidence required to admit breath test results, regarding the reliability of the breathalyzer, was testimonial. *Id*. ¶ 25. "Because the underlying science and functionality of the [breathalyzer] bears only on the measurement to be used in conducting an analytical, scientific process, the scientific aspects of the breathalyzer machine are non-testimonial and the Confrontation Clause does not apply." *Id*. As a result, "the officer's testimony regarding [the d]efendant's act of blowing his breath into the machine . . . constitutes the testimonial evidence that requires the officer who administered the breathalyzer test to be present at trial and subject to cross-examination." *Id*. ¶ 26. This Court discerned no Confrontation Clause violation because the officer who administered the breath test was a witness at trial. *Id*. In the present case, Defendant challenges his ability to confront the "computer accusation," or the Popstats statistical calculations. The statistical calculations, however, like the "science and functionality" of the breathalyzer, bear only on the mathematical process that produces the Probability Conclusions and are therefore not testimonial. *See id*. ¶ 25. Rynas' testimony regarding the forensic testing of the DNA samples and the Probability Conclusions constitutes the testimonial evidence that requires the analyst to be present at trial and subject to cross-examination. Like the *Anaya* Court, we see no Confrontation Clause

violation, because Rynas, who conducted the testing, input the data into Popstats, and provided the associated testimonial evidence, testified at trial.

{23} We further disagree with Defendant that "[t]he computer output [could] also be considered basis evidence." Defendant offers the definition for "basis evidence," derived from *State v. Jimenez*, 2017-NMCA-039, 392 P.3d 668, but does not analyze or explain why the "computer output" qualifies as basis evidence. The *Jimenez* Court described the improper admission of "basis evidence" as circumstances in which an individual who collected evidence and created a report was not available at trial, but a different testifying expert based an opinion on the unavailable witness's evidence and report. *Id.* ¶ 15. Defendant's argument suggests that the Popstats software is the necessary (and missing) evidence-collecting witness but expressly maintains that "[t]he argument is not that the computer itself should be carried into the courtroom for cross-examination." Thus, Defendant has identified no missing witness who should have testified about the statistical calculations. Rynas did not base her opinion setting forth the Probability Conclusions on statistical calculations gathered by a missing witness. As a result, *Jimenez* does not apply.

{24} We also reject Defendant's claim that Rynas was an "alternative" expert to Popstats, which was the "de facto expert." Defendant cites *Gonzales*, 2012-NMCA-034, ¶ 16, to suggest that Rynas improperly parroted the outcome of the statistical calculations performed by Popstats. In *Gonzales*, however, the district court

excluded the testimony of an "alternative witness," because the witness had not conducted the autopsy in question. *Id.* ¶ 6. As Defendant notes, in a case involving an alternative expert witness, the controlling question, "is whether the analyst's testimony was an expression of his own opinion or whether he was merely parroting or merely repeating the contents of the report or the opinion of the analyst who is unavailable for cross-examination." *Id.* ¶ 16 (alteration, internal quotation marks, and citation omitted). Defendant offers no authority to support a conclusion that a computer program is the equivalent of another, unavailable analyst. As discussed above, Rynas conducted the forensic testing, inputted the results into Popstats, and provided an explanation for the resulting Probability Conclusions to the jury. The present case does not involve parroting by Rynas, nor does it involve the opinion of any other analyst, and *Gonzales* therefore does not apply.

{25} Defendant last argues that the ubiquity of computers in modern society has muddied previously "clear legal distinctions, such as that between human witnesses and computers." Our courts, however, have continually applied the confrontation analysis to account for developing technologies in order to ensure that Constitutional protections are honored. *See, e.g.*, *Anaya*, 2012-NMCA-094, ¶¶ 14-27 (applying the confrontation analysis to the breathalyzer); *see also Imperial*, 2017-NMCA-040, ¶¶ 37-40 (applying the confrontation analysis to the admission of surveillance videos). Having applied that analysis to the facts of the present case, we hold that

the evidence did not violate Defendant's right to confrontation and therefore no fundamental error occurred.

II. The Testimony of the State's Behavioral Expert

{26} Defendant argues that (1) the district court should not have qualified Vigil-Romero as an expert in "the dynamics of child sexual abuse within the family and in observed behavioral manifestations of the impacts of sex abuse on children and adolescents"; and (2) Vigil-Romero's testimony improperly bolstered Victim's credibility. We first address Vigil-Romero's qualifications and second consider the bolstering argument.

A. Expert Qualifications

{27} Whether an expert has the necessary qualifications to testify on any given proposition is within the "wide discretion" of the district court and any ruling will not be disturbed on appeal unless that discretion has been abused. *Am. Nat'l Prop. & Cas. Co. v. Cleveland*, 2013-NMCA-013, ¶ 26, 293 P.3d 954. This Court "should be wary of substituting its judgment for that of the [district] court" in considering a witness's qualifications. *Alberico*, 1993-NMSC-047, ¶ 63. An expert is qualified to testify under Rule 11-702 by "knowledge, skill, experience, training, or education." *Yepez*, 2021-NMSC-010, ¶ 19. The State proffered Vigil-Romero's testimony, based on her training and experience, to provide an opinion about whether Victim's behaviors (including promiscuity, mental health issues, and outward expressions of

coping difficulties) were common traits in a person who has been sexually abused. We consider whether this proffered testimony fell within Vigil-Romero's training and experience.

{28} Vigil-Romero testified to her education and background in early childhood development, her multiple certifications, and her memberships in various groups that advocate for children. Before she became a forensic interviewer, Vigil-Romero worked as a liaison with the Children, Youth, and Families Department and made referrals to interviewees and their families for services after domestic violence or sexual abuse allegations. As a forensic interviewer, Vigil-Romero received referrals to conduct investigations in order to obtain information about abuse allegations. As part of her associate's degree in early childhood development, Vigil-Romero explained that her studies ranged from and included children's development, growth, disabilities, demeanor, and learning. Vigil-Romero had nearly completed a family-studies bachelor's degree, which involves the study of family units and behaviors that can occur in family units. Vigil-Romero calculated that throughout her career, she had received 1,039.20 hours of particularized training in child sexual abuse and incest, including "the signs and symptoms that children display when they are being abused—so, some of the behaviors, some of the things you might pick up on as an individual when there is a child being sexually abused." Throughout her career, Vigil-Romero estimated that she had been involved with 1,600 cases involving child

sexual abuse, the majority occurring within a family unit. Vigil-Romero testified further why she could explain misconceptions about child abuse:

> I think that I can speak about child abuse because that is my job and that is what I have been working with and on for the past fifteen years. I've been working and providing forensic interviews to children who are victims, also to adults who are developmentally delayed who are abused, as well as learning new information. It's constantly evolving—there's always new research out there in regards to child abuse and forensic interviewing and I've dedicated fifteen years of my life to that.

Specifically, Vigil-Romero explained that lay people might not understand the "myths and facts about child abuse, . . . signs and symptoms, . . . the impact of child abuse on children, what happens to children when they have been abused, and how it affects them."

{29} Defendant contends that at most, Vigil-Romero was qualified as a "skilled witness" and not an expert, because she had not completed her bachelor's degree and many of her certifications were not applicable to the proffered testimony. Defendant acknowledges that New Mexico law does not distinguish between a "skilled" witness and an expert witness, but maintains that the failure to do so permits the State to bolster the witness's credibility with the jury. Defendant does not explain why qualifying a witness as "skilled" rather than as an "expert" would impact the jury differently. We are satisfied with the well-established standard for expert qualifications: "knowledge, skill, experience, training, or education." Rule 11-702. It is the role of the jury or the trier of fact to ascertain the weight of expert

opinion testimony, and the "judgments of experts or the inferences of skilled witnesses, even when unanimous and uncontroverted, are not necessarily conclusive on the jury, but may be disregarded by it." *Alberico*, 1993-NMSC-047, ¶ 36 (internal quotation marks and citation omitted); *see also State v. Duran*, 1994-NMSC-090, ¶ 9, 118 N.M. 303, 881 P.2d 48 (holding that the jury is free to believe or disbelieve, and weigh disputes between, experts regarding the calculation of the results of DNA typing evidence).

{30} We find no abuse of discretion in qualifying Vigil-Romero as an expert in the dynamics of child sexual abuse within the family and in the observed behavioral manifestations of the impacts of sexual abuse on children and adolescents.

B. Bolstering Testimony

{31} Defendant contends that Vigil-Romero improperly bolstered Victim's testimony when Vigil-Romero stated that had she been involved, she "would have made a referral for [a SANE] or a rape kit." Defendant acknowledges that this assertion of error is unpreserved, and seeks review for plain or fundamental error. *See State v. Barraza*, 1990-NMCA-026, ¶ 17, 110 N.M. 45, 791 P.2d 799. Both plain and fundamental error require that this Court "be convinced that admission of the testimony constituted an injustice that creates grave doubts concerning the validity of the verdict." *Id.* We consider "the alleged errors in the context of the testimony as a whole." *Id.* ¶ 18. First, however, we examine the different contexts in which New

Mexico courts have considered the balance between contextualizing an alleged victim's testimony and improperly bolstering that witness's credibility.

{32} The *Alberico* Court held that testimony about posttraumatic stress disorder (PTSD) "may be offered to show that [an alleged] victim suffers from symptoms that are consistent with sexual abuse." 1993-NMSC-047, ¶ 84. Admissibility, however, involves careful examination. The testimony "may not be offered to establish that [an] alleged victim is telling the truth," *id.*, but "[i]ncidental verification of [an alleged] victim's story or indirect bolstering of [their] credibility . . . is not by itself improper." *Id.* ¶ 89. In *Barraza*, this Court considered an expert's testimony that the symptoms described by the victim were consistent with rape trauma syndrome (RTS) based on scientific studies. 1990-NMCA-026, ¶ 10. The *Barraza* Court noted that "it might be improper for the jury to infer from such studies that one suffering those symptoms is actually a victim of rape." *Id.* But the expert did not testify that the victim had been raped—previous testimony referred to the "alleged rape"—and the risk that the jury would improperly conclude that someone with RTS symptoms in fact was a rape victim was not substantial enough to result in plain or fundamental error. *Id.* ¶18. The facts in *Barraza* were distinguished by our Supreme Court in *State v. Lucero*, 1993-NMSC-064, 116 N.M. 450, 863 P.2d 1071. In *Lucero*, the challenged expert testimony repeated the victim's statements regarding the alleged sexual abuse, and the expert directly and indirectly commented

on the victim's truthfulness. *Id.* ¶ 22. Because of this testimony, the *Lucero* Court had grave doubts concerning the validity of the verdict and the fairness of the trial and reversed and remanded under plain error review. *Id.*

{33} In the present case, after denying Defendant's motion to exclude Vigil-Romero's testimony, the district court cautioned the State that Vigil-Romero's testimony would not be unfairly prejudicial "as long as she does not get anywhere near concluding as to whether she thinks the abuse occurred or whether [V]ictim is credible." The challenged testimony arose during direct examination. The State asked Vigil-Romero whether, after she reviewed the case materials, she "would have made any recommendations for [Victim]." Vigil-Romero responded, "if I had been involved since the initiation [of the investigation] I would have made a referral for a [SANE] or a rape kit, and I would have made a referral for the child to get counseling, . . . a mental health assessment and mental health services."

{34} Defendant argues that this testimony went "far beyond the more typical question of whether an alleged victim's PTSD . . . is 'consistent with' being sexually abused" and therefore bolstered Victim's credibility. According to Defendant, Vigil-Romero "would only have made such a referral if she believed [Victim]'s account, and thus was vouching for her credibility." The State argues that even if the challenged testimony bolstered Victim's credibility it was not a direct comment—that it at most "inferentially suggested that [Vigil-Romero] believed [Victim's]

story"—and even if it did bolster, the error falls short of demonstrating plain or fundamental error.

{35} Evaluating the testimony as a whole, we discern no error. *See Barraza*, 1990-NMCA-026, ¶ 18 (explaining that alleged errors are considered in the context of the testimony as a whole to determine if there has been plain or fundamental error). Vigil-Romero's testimony is more like the *Barraza* testimony than the *Lucero* testimony. The *Lucero* expert "comment[ed] directly" on the victim's credibility, named the perpetrator, and testified that the victim's symptoms "were in fact caused by sexual abuse." 1993-NMSC-064, ¶¶ 15-17. Vigil-Romero's testimony had none of these characteristics. She did not testify as to the identity of the perpetrator, directly bolster Victim's credibility, or state that Victim's behaviors were caused by sexual abuse.

{36} Instead, Vigil-Romero's testimony, like the expert's testimony in *Barazza*, did not sufficiently raise the risk that the jury would draw an inappropriate conclusion. Vigil-Romero testified that had she been involved in the investigation, she would have recommended a SANE or a rape kit, and mental health services. Vigil-Romero testified that as a forensic interviewer, part of her job after the interview is to make counseling and medical referrals. The challenged testimony put Vigil-Romero's opinion in the context of her expertise as a forensic interviewer. Contrary to Defendant's argument, the testimony did not require an inference that Vigil-Romero

believed Victim, only that Vigil-Romero would have investigated the matter further. *See Alberico*, 1993-NMSC-047, ¶ 89 (noting that "indirect bolstering of [a victim's] credibility . . . is not by itself improper [because a]ll testimony in the prosecution's case will tend to corroborate and bolster the victim's story to some extent"); *see also Barraza*, 1990-NMCA-026, ¶ 18 (explaining that the risk that the jury would "improperly conclude that someone with the symptoms of RTS in fact is a rape victim" was not sufficiently substantial to demonstrate plain or fundamental error). Accordingly, the admission of Vigil-Romero's testimony was not plain or fundamental error.

CONCLUSION

{37} For these reasons, we affirm.

{38} **IT IS SO ORDERED.**

Katherine A. Wray

KATHERINE A. WRAY, Judge

WE CONCUR:

J. MILES HANISEE, Chief Judge

JANE B. YOHALEM, Judge