

Mark Reynolds

**IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

Opinion Number: \_\_\_\_\_

Filing Date: February 14, 2018

**NO. A-1-CA-34082**

**STATE OF NEW MEXICO,**

Plaintiff-Appellee,

v.

**JASON GWYNNE,**

Defendant-Appellant.

**APPEAL FROM THE DISTRICT COURT OF LEA COUNTY**

**Mark T. Sanchez, District Judge**

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for Appellant

1 **OPINION**

2 **HANISEE, Judge.**

3 {1} Defendant Jason Gwynne was convicted by a jury of two counts (Counts 2 and  
4 3) of manufacturing child pornography, a second degree felony, and one count (Count  
5 1) of possession of child pornography, a fourth degree felony. He was sentenced to  
6 nineteen-and-one-half years in prison—nine years for each of the manufacturing  
7 counts, and eighteen months for possession—less time served. Defendant raises  
8 numerous issues on appeal, which we summarize as follows: (1) his conviction for  
9 possession must be vacated to avoid violation of his right to be free from double  
10 jeopardy; (2) multiple evidentiary errors deprived him of a fair trial; (3) his  
11 convictions for manufacturing child pornography are unconstitutional because the  
12 Legislature lacks a rational basis for criminalizing his particular alleged conduct  
13 (recording a sex act with a consenting sixteen-year-old girl) where the same conduct  
14 with an eighteen-year-old would not be a crime; and (4) there was insufficient  
15 evidence to support his convictions. We disagree with Defendant and affirm his  
16 convictions and sentence.

17 **BACKGROUND**

18 {2} In January 2013 Defendant, at the time thirty-five years old, was living in a  
19 one-bedroom trailer with his then-sixteen-year-old stepdaughter (Stepdaughter),

1 whose mother had passed away in September 2012. Defendant allowed a sixteen-  
2 year-old friend (Friend) of Stepdaughter who had run away from home to stay with  
3 them. Stepdaughter slept on the pullout couch in the living room, while Defendant  
4 and Friend slept in the only bedroom. One night, Stepdaughter observed what she  
5 believed was Friend performing oral sex on Defendant in the trailer's bedroom and,  
6 after confronting Friend, reported the incident to an adult and later spoke with law  
7 enforcement. Stepdaughter reported to law enforcement that Friend and Defendant  
8 were "having a sexual affair" and that she had seen "naked pictures of unknown girls  
9 [of unknown age] on Defendant's cell phone."

10 {3} Law enforcement conducted a search of Defendant's residence, seized  
11 Defendant's phone, and downloaded three videos depicting Friend engaged in sexual  
12 acts. Defendant was initially charged with one count of sexual exploitation of  
13 children (possession) contrary to NMSA 1978, Section 30-6A-3(A) (2007, amended  
14 2016).<sup>1</sup> After law enforcement officers further investigated the matter and obtained  
15 evidence indicating that Defendant was the male participant in what the officers  
16 believed were self-recorded videos where Defendant was engaged in sexual acts with  
17 Friend, Defendant was additionally charged with two counts of sexual exploitation

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18 <sup>1</sup>For purposes of this opinion, the 2007 version of this statute will be  
19 referenced.

1 of children (manufacturing) in violation of Section 30-6A-3(D).<sup>2</sup> Defendant denied  
2 both having a sexual relationship with Friend and that he was the male participant in  
3 the video. At trial, the central issue to be decided was the identity of the male  
4 participant in the videos.

5 {4} The State's first witness was Stepdaughter, whose testimony primarily  
6 established (1) when and why Friend had come to live with Stepdaughter and  
7 Defendant, (2) where Friend slept in the trailer, and (3) what prompted Stepdaughter  
8 to make a report concerning Friend and Defendant to authorities. Additionally, after  
9 the district court denied Defendant's motion in limine to exclude testimony by  
10 Stepdaughter regarding her observation of a prior sexual encounter between  
11 Defendant and Friend, Stepdaughter was allowed to testify that she once observed  
12 Friend performing oral sex on Defendant in the bedroom of the trailer.

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13 <sup>2</sup>Defendant was not charged with any crime based on the underlying act of  
14 engaging in sexual intercourse with Friend because Friend was over sixteen years old,  
15 which is the age of consent in New Mexico. *See* NMSA 1978, § 30-9-11(G)(1) (2009)  
16 (providing that it is a fourth degree felony to sexually penetrate "a child thirteen to  
17 sixteen years of age when the perpetrator is at least eighteen years of age and is at  
18 least four years older than the child and not the spouse of that child" (emphasis  
19 added)); *State v. Samora*, 2016-NMSC-031, ¶ 30, 387 P.3d 230 (stating that "at age  
20 sixteen the alleged victim had passed the age of consent"). However, for purposes of  
21 the Sexual Exploitation of Children Act, NMSA 1978, §§ 30-6A-1 to -4 (1984, as  
22 amended through 2016), a "child" is considered to be anyone "under eighteen years  
23 of age." Section 30-6A-3.

1 {5} The State next called Friend, who testified that she was the female in the videos  
2 and that Defendant was the male. Friend admitted that she had previously stated that  
3 the male in the video was someone other than Defendant, but at trial she testified that  
4 her prior statement was a lie. Friend stated that she was aware that the video was  
5 being made and that Defendant was the person taking the video using his own cellular  
6 phone.

7 {6} Deputy Victor Hernandez of the Lea County Sheriff's Department described  
8 the investigation that followed Stepdaughter's report. He testified that when he went  
9 to Defendant's home to investigate and questioned Defendant, Defendant denied  
10 having sexual intercourse with Friend and told Deputy Hernandez that Friend slept  
11 on the couch. Deputy Hernandez's testimony also laid the foundation for the  
12 admission of State's Exhibit 1—the videos downloaded from Defendant's phone,  
13 which Deputy Hernandez seized during his investigation.

14 {7} Detective Mark Munro of the Hobbs, New Mexico Police Department testified  
15 regarding the videos themselves and how he came to suspect that Defendant was both  
16 the male participant in the videos and the person who manufactured the videos. He  
17 explained that “the angle and the manner [in] which [the video] was recorded was  
18 consistent with a participant recording the video.” He testified that while only the  
19 face of the female in the videos was “readily apparent,” the abdomen and genitals of

1 the male participant were visible and contained what Detective Munro described as  
2 “a consistent abnormality to the abdomen, . . . some sort of a scar or possibly a tattoo”  
3 in each of the videos. He then explained that as part of his investigation he reviewed  
4 photographs of Defendant’s unclothed torso that were taken by Deputy Hernandez  
5 and watched the videos again, comparing the images in the video of the male  
6 participant’s abdominal area to the photographs of Defendant. Because Friend, who  
7 initially told law enforcement that Defendant was the male in the videos, changed her  
8 story and identified another person as the male participant, Detective Munro also  
9 personally examined and photographed the torso of the other suspect in order to  
10 compare it to the videos. Detective Munro explained that he “freeze frame[d] and  
11 pull[ed] . . . screenshot[s]” from the videos in order to be able to compare the images  
12 in the videos with the photographs of Defendant and the other suspect. Based on his  
13 comparison of the videos—including the screenshot images—and the photographs,  
14 Detective Munro believed that the photograph of Defendant was “consistent” with the  
15 person that he saw in the video and that the other suspect was not the person in the  
16 video.

17 {8} The district court admitted, and the State published to the jury, the videos in  
18 their entirety, the photographs of Defendant’s and the other suspect’s respective  
19 torsos, and the screenshot images taken from the three videos showing the male

1 participant's abdominal area. The jury found Defendant guilty on all counts, and  
2 Defendant appealed.

### 3 **DISCUSSION**

#### 4 **I. Defendant's Convictions for Manufacturing and Possession of Child** 5 **Pornography Do Not Violate His Right to Be Free From Double Jeopardy** 6 **Under the Facts of This Case**

7 {9} "The constitutional prohibition against double jeopardy protects against both  
8 successive prosecutions and multiple punishments for the same offense." *State v.*  
9 *Contreras*, 2007-NMCA-045, ¶ 19, 141 N.M. 434, 156 P.3d 725 (internal quotation  
10 marks and citation omitted). There are two types of "multiple punishments" cases: (1)  
11 "double[]description" cases, in which the defendant is charged with violations of  
12 multiple statutes or statutory subsections that may or may not be deemed the same  
13 offense for double jeopardy purposes; and (2) "unit of prosecution" cases, in which  
14 a defendant is charged with multiple violations of the same statute based on a single  
15 course of conduct. *State v. DeGraff*, 2006-NMSC-011, ¶ 25, 139 N.M. 211, 131 P.3d  
16 61; *see State v. Franco*, 2005-NMSC-013, ¶ 14, 137 N.M. 447, 112 P.3d 1104  
17 (observing that the courts "treat statutes written in the alternative as separate statutes"  
18 for double jeopardy purposes). This is a "double description" case because Defendant  
19 challenges his convictions under two different subsections of Section 30-6A-3:

1 Subsection (A) (possession) and Subsection (D) (manufacturing).<sup>3</sup> See *Franco*, 2005-  
2 NMSC-013, ¶ 14.

3 {10} In “double description” cases, we apply the two-part test set forth in *Swafford*  
4 v. *State*, 1991-NMSC-043, ¶ 9, 112 N.M. 3, 810 P.2d 1223. We “first examine  
5 whether the defendant’s conduct was unitary, meaning that the same criminal conduct  
6 is the basis for both charges.” *Contreras*, 2007-NMCA-045, ¶ 20 (internal quotation  
7 marks and citation omitted). “If the conduct is not unitary, then the inquiry is at an  
8 end and there is no double jeopardy violation.” *Id.* (internal quotation marks and  
9 citation omitted). “If the conduct is unitary, however, then the second part of the  
10 analysis is to determine if the Legislature intended to punish the offenses separately.”  
11 *State v. Silvas*, 2015-NMSC-006, ¶ 9, 343 P.3d 616.

12 {11} Defendant argues that the conduct underlying the manufacturing and  
13 possession of child pornography charges “was clearly unitary[.]” The State argues it  
14 was not. We agree with the State.

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15 <sup>3</sup>While Defendant was convicted of two separate manufacturing counts under  
16 Section 30-6A-3(D)—one for each of two videos containing child pornography that  
17 the jury concluded Defendant manufactured—he does not challenge those convictions  
18 as violating the Double Jeopardy Clause under our “unit of prosecution” cases. He  
19 only challenges his conviction under Section 30-6A-3(A) for possession of child  
20 pornography as being duplicative of one of the two manufacturing counts.



1 {12} “In analyzing whether a defendant’s conduct is unitary, we look to whether  
2 [the] defendant’s acts have sufficient indicia of distinctness.” *Contreras*, 2007-  
3 NMCA-045, ¶ 21 (internal quotation marks and citation omitted). “In our  
4 consideration of whether conduct is unitary, we have looked for an identifiable point  
5 at which one of the charged crimes had been completed and the other not yet  
6 committed.” *DeGraff*, 2006-NMSC-011, ¶ 27. “[W]e will not find that a defendant’s  
7 conduct is unitary where the defendant completes one of the charged crimes before  
8 committing the other.” *Contreras*, 2007-NMCA-045, ¶ 21. We also “consider such  
9 factors as proximity in time and space, similarities, the sequencing of the acts,  
10 intervening events, and the defendant’s goals for and mental state during each act.”  
11 *State v. Vance*, 2009-NMCA-024, ¶ 13, 145 N.M. 706, 204 P.3d 31. Importantly, “the  
12 question of whether a defendant’s conduct is unitary is not limited by the [s]tate’s  
13 legal theory, but rather depends on the elements of the charged offenses and the facts  
14 presented at trial.” *Contreras*, 2007-NMCA-045, ¶ 21 (internal quotation marks and  
15 citation omitted). Thus, “[t]he proper analytical framework is whether the facts  
16 presented at trial establish that the jury reasonably could have inferred independent  
17 factual bases for the charged offenses.” *Franco*, 2005-NMSC-013, ¶ 7 (internal  
18 quotation marks and citation omitted). “We therefore first review the elements of the

1 charged offenses and then consider whether the [s]tate presented sufficient facts at  
2 trial in order to support the elements of both crimes.” *Vance*, 2009-NMCA-024, ¶ 13.

3 {13} Here, the jury was given three different jury instructions—one for each of the  
4 manufacturing charges, and one for the possession charge—containing the elements  
5 the State had to prove in order for Defendant to be convicted of Counts 1-3. On the  
6 first manufacturing charge (Count 2), the jury was instructed that the essential  
7 elements it had to find included that Defendant (1) manufactured (2) child  
8 pornography (3) *on or about January 26, 2013*. On the second manufacturing charge  
9 (Count 3), the jury was instructed that it had to find that Defendant (1) manufactured  
10 (2) child pornography (3) *on or about January 18, 2013*. And on the possession  
11 charge (Count 1), the jury was instructed that it had to find Defendant (1) had child  
12 pornography (2) in his possession (3) *on or about January 28, 2013*. On their faces,  
13 these instructions required the State to prove different elements—and thus different  
14 facts—based on the charges stemming from acts on three different dates:  
15 manufacturing on January 18, manufacturing on January 26, and possession on  
16 January 28.<sup>4</sup> Notably, Defendant does not contend that the jury relied on the same

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17 <sup>4</sup>We note that Defendant’s double jeopardy argument relies on an outdated  
18 criminal information—the third amended criminal information filed in January 2014  
19 rather than the *corrected* third amended criminal information filed in May 2014—that  
20 did not contain these distinct dates but instead identified January 28, 2013, as the date  
21 on which all alleged prohibited conduct occurred.

1 evidence to convict Defendant of possession and manufacturing, nor, as we next  
2 explain, would such a contention be availing. *Cf. id.* ¶ 14. We turn to the evidence  
3 presented at trial. *See id.* ¶ 15.

4 {14} As to the manufacturing counts, Friend testified that Defendant was the person  
5 who recorded (i.e., manufactured) the videos and that the videos show her—a “child”  
6 under Section 30-6A-3(D)—and Defendant having sex (i.e., the videos were of child  
7 pornography). Detective Munro testified regarding the videos recovered from  
8 Defendant’s phone that (1) the video titled “video 005”—which formed the basis for  
9 Count 2—had a “creation date” of January 26, 2013; and (2) the video titled “video  
10 006”—which formed the basis for Count 3—had a “creation date” of January 18,  
11 2013. This evidence alone was sufficient to support each of the distinct elements  
12 contained in Counts 2 and 3.

13 {15} Regarding the possession charge—which was based not on any particular video  
14 but rather on what the State describes as Defendant’s “possession of a collection of  
15 child pornography”<sup>5</sup>—the State presented altogether different evidence to establish  
16 the elements of possession than that used to support the manufacturing charges.

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17 <sup>5</sup>The State originally relied on the video titled “us” to form the basis for the  
18 possession charge. However, the final criminal information filed prior to trial  
19 removed the specific reference to video “us” from the possession count and based the  
20 charge on Defendant’s knowing and intentional possession of “any visual or print  
21 medium depicting” child pornography.

1 Deputy Hernandez testified that he executed a search warrant at Defendant's home  
2 on January 28, 2013, during which he seized Defendant's phone. He further testified  
3 that three videos were downloaded from the phone, meaning that it could be  
4 reasonably inferred that the videos existed on the phone—and thus were in  
5 Defendant's possession—on or about January 28 when the phone was seized from  
6 Defendant. Detective Munro, in addition to testifying that the videos had been created  
7 at an earlier point in time (i.e., on January 18 and 26, 2013), testified that two of the  
8 videos—those titled “us” and “video005”—had been “duplicated,” meaning that a  
9 second copy of each video had been saved on the phone. Furthermore, all of the  
10 videos that were downloaded from the phone seized on January 28, 2013, were  
11 published to the jury; those videos showed Friend engaged in a prohibited sexual act  
12 (to wit, sexual intercourse). *See* § 30-6A-2(A)(1) (defining “prohibited sexual act” as  
13 including, among other acts, “sexual intercourse”).

14 {16} From this, the jury could independently infer that Defendant completed a  
15 separate act—possession of child pornography—that was sufficiently distinct from  
16 the previously completed acts of manufacturing because the acts of manufacturing  
17 and possession were separated not only in time but also by the intervening event of  
18 the duplication of the videos. *See Vance*, 2009-NMCA-024, ¶¶ 13, 17; *Contreras*,  
19 2007-NMCA-045, ¶¶ 19, 22-23 (rejecting a double jeopardy challenge to convictions

1 for possessing and trafficking cocaine where the state had “provided the jury with  
2 sufficient factual bases for finding that [the d]efendant possessed the cocaine both  
3 before and after he sold some if it[,]” and holding that the conduct supporting  
4 possession and trafficking was not unitary). Ignoring the evidence of  
5 duplication—which implies a later action by Defendant taken in order to continue to  
6 possess the copied videos—Defendant argues that he “took no additional steps to  
7 commit the crime of possession; the cell phone stored the recording automatically.”  
8 But that is not what the evidence presented at trial indicates. Moreover, as in  
9 *Contreras*, we conclude that “it is extremely unlikely that the jury based its verdict  
10 on a theory that [the d]efendant only possessed” the videos at the time he  
11 manufactured them. 2007-NMCA-045, ¶ 23. Rather, the evidence established that  
12 Defendant continued to possess the videos after he had completed the act of  
13 manufacturing them and that the State’s basis for charging Defendant with possession  
14 was separate and independent from the bases for charging him with manufacturing.  
15 {17} We hold that Defendant’s separate acts of manufacturing and possessing child  
16 pornography were not unitary under the facts of this case because there was distinct  
17 evidence from which “the jury reasonably could have inferred independent factual  
18 bases for the charged offenses.” *Vance*, 2009-NMCA-024, ¶ 17 (internal quotation

1 marks and citation omitted). Thus, Defendant’s convictions do not violate his right  
2 to be free from double jeopardy.

### 3 **II. Evidentiary Errors**

4 {18} Defendant argues that multiple evidentiary errors deprived him of a fair trial.  
5 Specifically, he contends that the district court erred in admitting: (1) Stepdaughter’s  
6 testimony that she had witnessed a prior sexual encounter between Defendant and  
7 Friend; (2) Detective Munro’s opinion testimony—including his comparison of  
8 photographs of Defendant’s torso with screenshot images from the videos—regarding  
9 his belief that Defendant was the male participant in the videos; and (3) Deputy  
10 Hernandez’s statements indicating there was another “victim” in the case. We address  
11 each of Defendant’s claimed evidentiary errors in turn and conclude that even  
12 assuming error occurred, it was harmless, not cumulative, and does not require  
13 reversal.

#### 14 **A. Stepdaughter’s Testimony Regarding Defendant’s and Friend’s Prior** 15 **Sexual Encounter**

16 {19} Defendant filed a motion in limine seeking to exclude Stepdaughter’s  
17 testimony “concerning what she perceived as sexual activity between [D]efendant and  
18 [Friend]” on a prior occasion. The district court denied the motion, and Stepdaughter  
19 was allowed to testify as follows. On one occasion, Stepdaughter saw Friend “moving  
20 up and down” in the bedroom around ten o’clock at night and that Defendant, who

1 was also in the bedroom, had his pajama pants pulled down “more than they  
2 should’ve been.” Based on that observation, she confronted Friend about whether  
3 Friend was having a sexual relationship with Defendant. Stepdaughter thereafter  
4 reported to an adult her “concerns about [Friend] . . . and things going on at [the]  
5 house” and spoke with law enforcement a few days after making her initial report.

6 {20} Defendant argues that under Rule 11-404(B) NMRA, Stepdaughter’s testimony  
7 about a prior sexual contact between Friend and Defendant should not have been  
8 admitted because it was offered for the prohibited purpose of showing that because  
9 Defendant “had relations with [Friend] on one day, he was more likely to act in  
10 conformity on the day the video was made[,]” and because its probative value was  
11 outweighed by its prejudicial effect. *See State v. Dietrich*, 2009-NMCA-031, ¶ 40,  
12 145 N.M. 733, 204 P.3d 748 (explaining that appellate courts “consider two  
13 paramount factors in deciding whether the district court abused its discretion in  
14 admitting [Rule 11-404(B)] evidence: whether the [s]tate made a sufficient showing  
15 that the evidence would serve a legitimate purpose other than to show character . . .  
16 and whether the probative value was substantially outweighed by the danger of unfair  
17 prejudice or other factors” (internal quotation marks and citation omitted)). The State  
18 argues that the testimony was “properly admitted for purposes of establishing  
19 Defendant’s identity and opportunity to film a sexual act with [Friend.]”

1 {21} While the State is correct that proving “identity” is a proper purpose for which  
2 otherwise inadmissible Rule 11-404(B) evidence may be admitted, it is the  
3 proponent’s burden “to cogently inform the court—whether the trial court or a court  
4 on appeal—the rationale for admitting the evidence to prove something other than  
5 propensity. In other words, more is required to sustain a ruling admitting other-acts  
6 evidence than the incantation of the illustrative exceptions contained in the Rule.”  
7 *State v. Gallegos*, 2007-NMSC-007, ¶ 25, 141 N.M. 185, 152 P.3d 828 (alteration,  
8 internal quotation marks, and citation omitted). We are not convinced that the State  
9 has met its burden, particularly given that “[t]he identity exception to Rule 11-404(B)  
10 may be invoked when identity is at issue *and when the similarity of the other [act]*  
11 *demonstrates a unique or distinct pattern easily attributable to one person.*” *State v.*  
12 *Peters*, 1997-NMCA-084, ¶ 14, 123 N.M. 667, 944 P.2d 896 (emphasis added)  
13 (alteration, internal quotation marks, and citation omitted). The State, without  
14 pointing to anything in Stepdaughter’s testimony that demonstrates a unique or  
15 distinct pattern that would be easily attributable to Defendant, merely argues that  
16 “because Defendant and [Friend] were engaged in a sexual relationship at the time the  
17 videos were manufactured and the videos depict[] sexual acts between [Friend] and  
18 a male, it becomes more likely that Defendant is the male in the video.” Additionally,  
19 the State fails to establish that “opportunity” was even a fact in issue, meaning that



1 it could not have served as the basis for the admission of the testimony. *See Gallegos*,  
2 2007-NMSC-007, ¶¶ 33-35 (rejecting “opportunity” as a basis for admitting Rule 11-  
3 404(B) evidence where the undisputed facts established that the defendant had an  
4 opportunity to commit the charged acts).

5 {22} However, even assuming, without deciding, that the district court’s admission  
6 of Stepdaughter’s testimony was contrary to Rule 11-404(B), we conclude that such  
7 error was harmless. *See State v. Tollardo*, 2012-NMSC-008, ¶ 25, 275 P.3d 110  
8 (explaining that even if evidence is improperly admitted, such error “is not grounds  
9 for a new trial unless the error is determined to be harmful”); *State v. Griscom*, 1984-  
10 NMCA-059, ¶¶ 16-18, 101 N.M. 377, 683 P.2d 59 (proceeding to a harmless error  
11 analysis without first resolving the primary evidentiary challenge). That is because  
12 after evaluating “all of the circumstances surrounding the error”—including “the  
13 importance of the erroneously admitted evidence in the prosecution’s case”—as well  
14 as “evidence of [Defendant’s] guilt separate from the error[,]” we conclude that there  
15 is not a “reasonable probability the error affected that verdict.” *Tollardo*, 2012-  
16 NMSC-008, ¶¶ 36, 43 (alteration, emphasis, internal quotation marks, and citation  
17 omitted).

18 {23} The primary evidence supporting Defendant’s convictions for manufacturing  
19 of child pornography came from (1) Friend’s testimony that Defendant was the male

1 participant in the videos and that he was the person recording the videos of the two  
2 of them having sexual intercourse, and (2) the videos themselves and the photographs  
3 of Defendant's torso showing a distinct scar, which were admitted at trial and shown  
4 to the jury over no objection. The primary evidence supporting Defendant's  
5 conviction for possession of child pornography came from (1) Deputy Hernandez's  
6 testimony regarding seizing Defendant's phone, which contained the videos, from  
7 Defendant's residence on January 28, 2012, and (2) the videos themselves, which  
8 contained child pornography. From the State's closing argument, it is clear that the  
9 State attributed little, if any, importance to Stepdaughter's challenged testimony. On  
10 numerous occasions, the State emphasized the aforementioned unchallenged pieces  
11 of evidence as being what supported the charges against Defendant. On only one  
12 occasion did the State, in passing, refer to Stepdaughter's statement that Stepdaughter  
13 once saw "something going on in the bedroom." In fact, it was defense counsel who,  
14 during closing, repeatedly reminded the jury of the evidence he sought to exclude  
15 when he first stated, "[Stepdaughter] is so outraged because she sees a head bobbing  
16 up and down that she feels compelled to report it[,]" and later reiterated,  
17 "[Stepdaughter] said the reason she was outraged is because she could see a fully-  
18 dressed young lady with her head going up and down, and that's the reason  
19 [Stepdaughter] was propelled out into reporting this."

1 {24} In the context of all of the evidence presented at trial, we cannot say that there  
2 is a reasonable probability that Stepdaughter’s testimony describing her observation  
3 of a sexual encounter between Friend and Defendant contributed to any of  
4 Defendant’s convictions. *See id.* ¶ 46 (explaining that “because an error may be  
5 prejudicial with respect to one conviction, but harmless with respect to another,  
6 courts must separately assess the effect the error may have had on each of the  
7 defendant’s convictions”). We thus hold that any error that occurred in admitting  
8 Stepdaughter’s testimony was harmless and does not support reversal.

9 **B. Detective Munro’s and Deputy Hernandez’s Testimony**

10 {25} Defendant alleges three evidentiary errors related to the testimony of Detective  
11 Munro and Deputy Hernandez. First, Defendant contends that the district court erred  
12 in allowing Detective Munro to engage in “image-to-image comparison” and “digital  
13 manipulation” of the photographs of Defendant’s torso and the screenshot images that  
14 Detective Munro made from the videos without first qualifying Detective Munro as  
15 an expert. Next, Defendant alternatively argues that Detective Munro’s testimony—if  
16 deemed lay opinion—was inadmissible because it was not “helpful to a factual issue  
17 in dispute.” Finally, regarding Deputy Hernandez’s testimony, Defendant argues that  
18 Deputy Hernandez’s “repeated references to a ‘second victim’ result[ed] in undue

1 prejudice.” Because the parties dispute whether certain of these challenges were  
2 preserved, we begin by identifying the applicable standard of review.

3 {26} Defendant concedes that he failed to preserve his challenge to Deputy  
4 Hernandez’s testimony, as well as his challenge to the admission of Detective  
5 Munro’s testimony adjusting the screenshot images and comparing those images to  
6 the photograph of Defendant’s torso as lay opinion. Absent preservation, we only  
7 review for plain error. *See State v. Bregar*, 2017-NMCA-028, ¶ 28, 390 P.3d 212,  
8 *cert. denied*, \_\_\_-NMCERT-\_\_\_ (No. S-1-SC-36258, Feb. 7, 2017) (“If an appellant  
9 fails to object to the admission of evidence below, on appeal we will only review for  
10 plain error[.]”). With regard to the admission of alleged improper expert testimony  
11 by Detective Munro, while not clear, Defendant appears to suggest that he preserved  
12 his challenge to the admission of that testimony; however, his failure to comply with  
13 the requirements of Rule 12-318(A)(4) NMRA renders his argument waived. Rule 12-  
14 318(A)(4) requires that as to each argument made on appeal, the appellant’s brief in  
15 chief “shall contain a statement of the applicable standard of review . . . and a  
16 statement explaining how the issue was preserved in the court below, with citations  
17 to authorities, record proper, transcript of proceedings, or exhibits relied on.”  
18 Defendant neither explains how the issue was preserved nor argues that we should  
19 apply an abuse of discretion standard. *See Bregar*, 2017-NMCA-028, ¶ 28 (explaining

1 that “if an evidentiary issue is preserved by objection, we review the district court’s  
2 decision to admit or exclude for an abuse of discretion”). Moreover, Defendant does  
3 nothing more than describe three instances during trial when defense counsel objected  
4 during Detective Munro’s testimony. Critically, Defendant wholly fails to establish  
5 that the grounds for those objections—one of which Defendant concedes was, in fact,  
6 “inaudible”—are the same that provide the basis for his challenges on appeal. Thus,  
7 we do not consider his appellate arguments to be properly preserved. *See State v.*  
8 *Baca*, 1997-NMSC-045, ¶ 13, 124 N.M. 55, 946 P.2d 1066, *overruled on other*  
9 *grounds by State v. Belanger*, 2009-NMSC-025, ¶ 36, 146 N.M. 357, 210 P.3d 783  
10 (“An objection that does not state the grounds for the objection preserves no issue for  
11 appeal.”); *Bregar*, 2017-NMCA-028, ¶ 29 (“[F]or an objection to preserve an issue  
12 for appeal, it must appear that the appellant fairly invoked a ruling of the district court  
13 on the same grounds argued in the appellate court.” (alterations, internal quotation  
14 marks, and citation omitted)); *State v. Gonzales*, 2011-NMCA-007, ¶ 19, 149 N.M.  
15 226, 247 P.3d 1111 (stating that “this Court has no duty to review an argument that  
16 is not adequately developed”). We therefore review Defendant’s challenges to  
17 Detective Munro’s testimony for plain error. *See Bregar*, 2017-NMCA-028, ¶ 28.

1 **Plain Error**

2 {27} “Plain error is an exception to the general rule that parties must raise timely  
3 objection to improprieties at trial, and therefore it is to be used sparingly.” *State v.*  
4 *Dylan J.*, 2009-NMCA-027, ¶ 15, 145 N.M. 719, 204 P.3d 44 (internal quotation  
5 marks and citation omitted). “Under the plain error rule, there must be (1) error, that  
6 is (2) plain, and (3) that affects substantial rights.” *State v. Hill*, 2008-NMCA-117,  
7 ¶ 21, 144 N.M. 775, 192 P.3d 770 (internal quotation marks and citation omitted).  
8 “We apply the rule only in evidentiary matters and only if we have grave doubts about  
9 the validity of the verdict, due to an error that infects the fairness or integrity of the  
10 judicial proceeding.” *Dylan J.*, 2009-NMCA-027, ¶ 15 (internal quotation marks and  
11 citation omitted). Appellate courts do not “use the plain error rule to review the  
12 validity of the admission of [erroneously admitted] testimony.” *State v. Contreras*,  
13 1995-NMSC-056, ¶ 24, 120 N.M. 486, 903 P.2d 228. “We must be convinced that  
14 admission of the testimony constituted an injustice that created grave doubts  
15 concerning the validity of the verdict.” *Id.* ¶ 23 (internal quotation marks and citation  
16 omitted). “In determining whether there has been plain error, we must examine the  
17 alleged errors in the context of the testimony as a whole.” *Dylan J.*, 2009-NMCA-  
18 027, ¶ 15 (omission, internal quotation marks, and citation omitted).

## 1 **Detective Munro's Testimony**

2 {28} Detective Munro's primary purpose at trial was to explain how, as a result of  
3 his investigation, he concluded that Defendant was the male participant in the videos.  
4 Detective Munro did so by first describing the personal observations he made from  
5 watching the videos. He testified that while only the face of the female in the videos  
6 was "readily apparent," the abdomen and genitals of the male participant were visible  
7 and contained what Detective Munro described as a "consistent abnormality to the  
8 abdomen, . . . some sort of scar or possibly a tattoo" in each of the videos. He then  
9 explained that he reviewed photographs of Defendant's unclothed torso that were  
10 taken by a fellow investigating officer and watched the videos again, comparing the  
11 images in the video of the male participant's abdominal area to the photographs of  
12 Defendant. The State published the photographs taken of Defendant's abdominal  
13 area, which, Detective Munro testified, showed a "vertical scar that goes above and  
14 below the belly button" that was similar to what Detective Munro observed on the  
15 videos. At that point in Detective Munro's testimony, the State published Exhibit  
16 1—containing the three videos—to the jury and asked that Detective Munro be  
17 allowed to play the videos for the jury. One by one, the jury was shown each of the  
18 three videos. After each video was played, Detective Munro explained that he made  
19 screenshots—also described as "freeze frames"—from the video, displayed the

1 screenshot, then pointed to the area on the screenshot showing the same “indentation”  
2 or “abnormality” that Detective Munro had pointed out to the jury in the photographs  
3 of Defendant. While publishing the screenshot images to the jury, Detective Munro  
4 noted that the images as projected in the courtroom were “a little dark” and offered  
5 to “lighten [the] image if it could assist.” As he was making the in-court adjustments  
6 to the laptop display settings, Detective Munro explained that “without altering the  
7 actual intent of it, I can adjust the brightness level and increase the contrast.”

8 {29} Defendant describes these adjustments as “digital manipulation” and “digital  
9 alteration.” Citing a Connecticut case, *State v. Swinton*, 847 A.2d 921, 934-38 (Conn.  
10 2004), he contends that “digital alteration of digital images is . . . the province of  
11 expert testimony” and thus that Detective Munro’s reliance on “specialized  
12 knowledge” in “comparing [Defendant’s] torso photos to the video[s]” was only  
13 admissible if he was first qualified as an expert. Defendant’s argument is unavailing  
14 for two reasons: first, because *Swinton* is distinguishable; and second, because  
15 Defendant misconstrues the nature of Detective Munro’s testimony.

16 {30} In *Swinton*, the defendant challenged the adequacy of the foundation for  
17 admitting what he contended was “computer generated evidence”—specifically,  
18 photographs of a bite mark that had been digitally enhanced using a computer  
19 software program. *Id.* at 934-36. The state argued that the photographs were not



1 “computer generated evidence” but were “mere ‘reproductions’ ” and thus governed  
2 by a different foundational standard that only required the testifying witness to be  
3 able to verify that the photograph is “a fair and accurate representation of what it  
4 depicts.” *Id.* at 936-37. The court described the issue as being one that involved a  
5 question of “the difference between *presenting* evidence and *creating* evidence.” *Id.*  
6 at 938. It agreed with the defendant that the photographs admitted were “computer  
7 generated”—i.e., “created”—and not mere photographic reproductions and thus were  
8 subject to different foundational requirements. *Id.* at 936, 938, 942-43. However, after  
9 applying the proper test as announced in that case, the court concluded that the state  
10 had laid a proper foundation to admit the evidence. *Id.* at 943-45.

11 {31} Here, Defendant attempts to liken Detective Munro’s in-court adjustments to  
12 the laptop’s display setting (for the purpose of improving the visibility of the image  
13 being projected to the jury) to the software-altered, i.e., computer-generated,  
14 photographs in *Swinton*. According to Defendant, Detective Munro’s testimony  
15 included the presentation of “altered photographs,” but that is simply not what the  
16 record indicates. The record is clear (1) that Detective Munro’s screenshots were  
17 nothing more than “freeze frames,” i.e., images depicting single frames from the  
18 video akin to pausing the video at a particular moment, and (2) that Detective Munro  
19 did nothing more than alter the “brightness” setting on the laptop to control the

1 outward projection of the image. Unlike in *Swinton*, where the witness’s testimony  
2 included an in-court demonstration of how he used special software to manipulate the  
3 bite-mark photograph, *id.* at 935, i.e., there was no doubt that the photographs  
4 themselves were altered before being presented to the jury, here, there is no evidence  
5 that any of the images presented to the jury had been modified in any way. As noted  
6 previously, Detective Munro even stated that the in-court adjustments he was making  
7 were done “without altering the actual intent.” We have little difficulty concluding  
8 that the screenshots and Detective Munro’s testimony were simply a means of  
9 *presenting* evidence to the jury rather than the creation of new evidence that would  
10 necessitate qualification as expert opinion. *Cf. id.* at 938. As such, they did not  
11 constitute expert testimony, and we hold that there was no error in not qualifying  
12 Detective Munro as an expert.

13 {32} Defendant next argues that Detective Munro’s testimony identifying Defendant  
14 as the male in the videos was improper lay opinion because “the jury could watch the  
15 video[s] for itself,” meaning that Detective Munro’s testimony was not “helpful to  
16 [determining] a factual issue in dispute”—i.e., the identity of the male participant—as  
17 required by Rule 11-701 NMRA. *See* Rule 11-701(B) (providing that “testimony in  
18 the form of an opinion is limited to one that is . . . helpful . . . to determining a fact  
19 in issue”). This Court recently rejected a similar argument in *State v. Sweat*, 2017-

1 NMCA-069, ¶¶ 20-24, 404 P.3d 20, *cert. denied*, \_\_\_\_-NMCERT-\_\_\_\_ (No. S-1-SC-  
2 36574, Aug. 16, 2017).

3 {33} In *Sweat*, the issue was whether a detective was properly allowed to testify to  
4 his opinion of the identity of the person shown in a surveillance video, which had  
5 been admitted into evidence and was available for the jury to view. *Id.* ¶¶ 8, 21. The  
6 defendant argued that “the surveillance video speaks for itself” and that allowing the  
7 detective to offer his opinion “invaded the province of the jury” by not “allowing the  
8 jury to view the surveillance video and draw its own conclusion.” *Id.* ¶ 21 (internal  
9 quotation marks omitted). This Court concluded otherwise, adopting for purposes of  
10 analysis the five-factor approach “deemed relevant to a determination of whether a  
11 lay witness is more likely than the jury to identify the defendant correctly” that was  
12 articulated in *People v. Thompson*, 2016 IL 118667, ¶ 41, 49 N.E.3d 393. *Sweat*,  
13 2017-NMCA-069, ¶ 22 (internal quotation marks and citation omitted). Relevant to  
14 the *Sweat* Court’s analysis was, among others, the fifth factor: “the degree of clarity  
15 of the surveillance recording and the quality and completeness of the subject’s  
16 depiction in the recording.” *Id.* ¶¶ 22, 24 (internal quotation marks and citation  
17 omitted). In *Sweat*, this Court considered that the defendant “himself describe[d] the  
18 quality of the surveillance video as ‘grainy’ and ‘of poor quality’ ” in reaching its  
19 conclusion that the detective’s testimony regarding the identity of the person in the

1 surveillance video was admissible because it was helpful to the jury.<sup>6</sup> *Id.* ¶ 24.  
2 Likewise, here, Defendant describes the videos in question as “dark and grainy” and  
3 asserts that “scarring or other details in the video are *not* clear . . . when viewed on  
4 a computer monitor.” Thus, we conclude that Detective Munro’s testimony was  
5 admissible under Rule 11-701 because it would have been “helpful . . . to determining  
6 a fact in issue[,]” i.e., the identity of the male participant in the videos. *Id.* ¶ 22  
7 (internal quotation marks and citation omitted). Because we hold that it was not error  
8 to admit Detective Munro’s testimony, our review of Defendant’s challenge on that  
9 basis ends here. *See Hill*, 2008-NMCA-117, ¶ 21 (“Under the plain error rule, there  
10 must be (1) error, that is (2) plain, and (3) that affects substantial rights.” (internal  
11 quotation marks and citation omitted)).

## 12 **Deputy Hernandez’s Testimony**

13 {34} As with our plain-error review of Detective Munro’s testimony, we begin by  
14 examining the complained-of portion of Deputy Hernandez’s testimony as a whole.  
15 *See Dylan J.*, 2009-NMCA-027, ¶ 15.

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16 <sup>6</sup>While the *Sweat* Court also considered the presence of other factors, it stated  
17 that “[t]he existence of even one of the[] factors indicates that there is some basis for  
18 concluding that the witness is more likely to correctly identify the defendant from the  
19 photograph than is the jury[,]” i.e., that the witness’s testimony is admissible under  
20 Rule 11-701 because it is helpful to the jury. *Id.* ¶ 22.

1 {35} During Deputy Hernandez's testimony, the State moved to admit into evidence  
2 Exhibit 1, the CD containing the videos downloaded from Defendant's phone.  
3 Defense counsel objected, arguing that the State had not laid a sufficient foundation  
4 for the admission of the CD because it had not been established whether Deputy  
5 Hernandez was the "police officer [that created the CD] or not." During defense  
6 counsel's ensuing voir dire of Deputy Hernandez, defense counsel elicited from  
7 Deputy Hernandez that the videos were taken off the cell phone using Cellebrite,<sup>7</sup> and  
8 that Deputy Hernandez was not the person who downloaded the videos onto the CD.  
9 Based on this, defense counsel again objected to the CD's admission, arguing that the  
10 State had not established chain of custody. Even after the State established that  
11 Deputy Hernandez was present when the CD was created, took possession of the CD  
12 after it was created, and could confirm that the data on the CD was identical to that  
13 on the cell phone, defense counsel continued to object to the CD's admission.

14 {36} Defense counsel was allowed to continue his voir dire, during which he  
15 questioned Deputy Hernandez about the serial numbers of the seized cell phones that  
16 Deputy Hernandez had recorded on the search warrant inventory. Defense counsel

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17 <sup>7</sup>Later testimony from Detective Munro clarified that Cellebrite is a "forensic  
18 evidence recovery device" that (1) allows for the removal of information from a cell  
19 phone onto a CD, USB, or other storage device, (2) prevents the cell phone and  
20 information contained thereon from "being manipulated in any way" during the  
21 removal/copying process, and (3) generates a report and a CD on which the evidence  
22 can be reviewed without risk of manipulating the cell phone.

1 then questioned Deputy Hernandez about information contained on the Cellebrite-  
2 generated report, which contained numbers identifying each of the cell phones that  
3 had been seized, and attempted to show that the serial numbers documented in the  
4 search warrant inventory did not match the numbers contained in the Cellebrite  
5 report. Deputy Hernandez, after comparing the documents, confirmed that the  
6 numbers on the two documents did not match. Defense counsel, seizing upon what  
7 he perceived as a fatal discrepancy, then challenged Deputy Hernandez to explain  
8 how the court could admit “evidence of a cell phone that wasn’t seized.” Deputy  
9 Hernandez responded by pointing out to defense counsel that the Cellebrite report in  
10 question “has nothing to do with [Friend]” but rather contained the name of a  
11 different person, whom Deputy Hernandez referred to as “also a victim.”

12 {37} Upon hearing Deputy Hernandez refer to another “victim,” the district court  
13 immediately called a bench conference, asked counsel if the current line of  
14 questioning should occur outside the presence of the jury, and excused the jury. The  
15 district court, attempting to clarify matters, asked counsel if the discrepancy in the  
16 numbers was attributable to there being separate evidence related to another victim.  
17 The prosecutor answered “no” and explained that the numbers did not match because  
18 the Cellebrite report contained the phones’ model numbers, not serial numbers. After  
19 a short recess, defense counsel indicated he had no further voir dire and agreed to

1 allow the State to proceed with its direct examination of Deputy Hernandez. The State  
2 then laid a foundation for the admission of and again moved to admit Exhibit 1,  
3 which the district court then admitted over no objection.

4 {38} In light of the context of Deputy Hernandez’s testimony, we conclude that it  
5 was not plain error to admit Deputy Hernandez’s passing mention of another  
6 “victim.” As Defendant himself describes it, what he complains of is “essentially a  
7 spontaneous statement”—one that the record indicates Deputy Hernandez  
8 inadvertently made as he explained counsel’s misinterpretation of documents on  
9 which the State relied for the admission of key evidence. While it may have been  
10 error to allow Deputy Hernandez to testify as he did, and while such error could be  
11 deemed plain as evidenced by the district court’s immediate reaction to the testimony,  
12 we are unconvinced that admission of the testimony “constituted an injustice that  
13 creates grave doubts concerning the validity of the verdict.” *Hill*, 2008-NMCA-117,  
14 ¶ 21 (internal quotation marks and citation omitted). That is to say, the error did not  
15 “seriously affect[] the fairness, integrity or public reputation of judicial  
16 proceedings[,]” i.e., the substantial rights of Defendant. *State v. Paiz*, 1999-NMCA-  
17 104, ¶ 28, 127 N.M. 776, 987 P.2d 1163 (internal quotation marks and citation  
18 omitted); *cf. id.* ¶¶ 26-29 (reversing the defendant’s conviction because this Court  
19 concluded that all three elements of the plain error test—“(1) error, that is (2) plain,

1 and (3) that affects substantial rights”—were present in that case). As such, we hold  
2 that the admission of Deputy Hernandez’s testimony was not plain error.

3 {39} As a final matter regarding Defendant’s challenge to Deputy Hernandez’s  
4 testimony, we briefly address Defendant’s claim of ineffective assistance of counsel  
5 that he appends to this argument. Defendant argues that “eliciting this [other ‘victim’]  
6 evidence during an unnecessary voir dire [of Deputy Hernandez] without then seeking  
7 a mistrial or at least a curative instruction constituted ineffective assistance of  
8 counsel.” We disagree.

9 {40} “To establish ineffective assistance of counsel, a defendant must show: (1)  
10 ‘counsel’s performance was deficient,’ and (2) ‘the deficient performance prejudiced  
11 the defense.’ ” *State v. Paredes*, 2004-NMSC-036, ¶ 13, 136 N.M. 533, 101 P.3d 799  
12 (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Without passing on  
13 Defendant’s arguments regarding the deficient-performance prong, we conclude that  
14 Defendant has not met his burden of establishing a prima facie case for ineffective  
15 assistance of counsel based on his failure to explain how any alleged deficiency in  
16 trial counsel’s performance prejudiced him. Defendant does nothing more than quote  
17 the standard for establishing prejudice<sup>8</sup>, then states, “As argued above, [Deputy

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18 <sup>8</sup> “[I]n order to satisfy the prejudice prong, it is necessary to show that there is  
19 a reasonable probability that, but for counsel’s unprofessional errors, the result of the  
20 proceeding would have been different[.]” *Patterson v. LeMaster*, 2001-NMSC-013,  
21 ¶ 28, 130 N.M. 179, 21 P.3d 1032 (internal quotation marks and citation omitted).



1 Hernandez’s references to a second victim] was of an inherently prejudicial nature  
2 and implicated prior acts of a similar nature to those charged, carrying an obvious  
3 prejudicial impact.” But “mere evidentiary prejudice is not enough.” *State v. Roybal*,  
4 2002-NMSC-027, ¶ 25, 132 N.M. 657, 54 P.3d 61. Because Defendant does nothing  
5 more than point to evidentiary prejudice and fails to explain how any deficiency in  
6 trial counsel’s performance “represent[s] so serious a failure of the adversarial  
7 process that it undermines judicial confidence in the accuracy and reliability of the  
8 outcome[.]” *id.*, we decline to further consider Defendant’s argument. *See State v.*  
9 *Guerra*, 2012-NMSC-014, ¶ 21, 278 P.3d 1031 (explaining that appellate courts are  
10 under no obligation to review unclear or undeveloped arguments).

### 11 **C. Cumulative Error**

12 {41} Defendant contends that “[i]f this Court finds error in any two of the above  
13 issues, cumulative error supports reversal.” Defendant is incorrect. The mere fact that  
14 more than one error may have occurred is insufficient, alone, to require reversal. The  
15 doctrine of cumulative error “requires reversal of a defendant’s conviction when the  
16 cumulative impact of errors which occurred at trial was so prejudicial that the  
17 defendant was deprived of a fair trial.” *State v. Martin*, 1984-NMSC-077, ¶ 17, 101  
18 N.M. 595, 686 P.2d 937. “The doctrine cannot be invoked if . . . the record as a whole  
19 demonstrates that a defendant received a fair trial[.]” *Id.* Importantly, “a fair trial is

1 not necessarily a perfect one[.]” *State v. Allen*, 2000-NMSC-002, ¶ 95, 128 N.M. 482,  
2 994 P.2d 728. Even given the purported imperfections in Defendant’s trial—i.e.,  
3 failing to correct the admission of Deputy Hernandez’s testimony regarding another  
4 “victim” and allowing Stepdaughter to testify to observing a prior sexual encounter  
5 between Defendant and Friend—we conclude that the record as a whole demonstrates  
6 that Defendant received a fair trial.

### 7 **III. The Constitutionality of Section 30-6A-3(D) as Applied in This Case**

8 {42} Defendant contends that “contrary to constitutional guarantees of equal  
9 protection and substantive due process, there is no rational basis for punishing  
10 [Defendant] with second-degree manufacture and fourth-degree possession for  
11 recording a sex act to which the minor participant legally consented.” Defendant’s  
12 equal protection challenge fails because he has not established that he is being treated  
13 differently than similarly situated individuals. *See Breen v. Carlsbad Mun. Schs.*,  
14 2005-NMSC-028, ¶ 10, 138 N.M. 331, 120 P.3d 413 (“The threshold question in  
15 analyzing all equal protection challenges is whether the legislation creates a class of  
16 similarly situated individuals who are treated dissimilarly.”). Those who challenge  
17 the constitutionality of a statute “must first prove that they are similarly situated to  
18 another group but are treated dissimilarly. In other words, [they] must prove that they  
19 should be treated equally with another group but they are not because of a legislative

1 classification.” *Id.* ¶ 8. A statute that “does not create two separate classifications  
2 subject to different treatment” cannot be said to violate equal protection. *Montez v.*  
3 *J & B Radiator, Inc.*, 1989-NMCA-060, ¶¶ 12, 14-15, 108 N.M. 752, 779 P.2d 129.  
4 {43} Defendant is in a class of persons that includes (1) adults who have (2)  
5 recorded consensual, non-criminal sexual acts (3) involving a minor participant.  
6 Defendant compares himself to “[a] person who records the same exact legal [sexual]  
7 activity with a consenting eighteen-year-old.” Defendant emphasizes the fact that the  
8 underlying act Defendant recorded—sexual intercourse between a thirty-five-year-old  
9 and a sixteen-year-old—is not criminal. However, he ignores the purpose of and harm  
10 addressed by the Sexual Exploitation of Children Act, which defines “prohibited  
11 sexual act” as including, among other acts, “sexual intercourse” regardless of whether  
12 the act was, itself, legal. Section 30-6A-2(A). As our Supreme Court explained in  
13 *State v. Myers*, 2009-NMSC-016, 146 N.M. 128, 207 P.3d 1105, “The purpose of the  
14 Act is to protect children from the harm to the child that flows from trespasses against  
15 the child’s dignity when treated as a sexual object.” *Id.* ¶ 17 (internal quotation marks  
16 and citation omitted). Thus, even if the act recorded is legal, the act of recording the  
17 act is what the Legislature elected to criminalize based on the harm that occurs when  
18 “the child’s actions are reduced to a recording which could haunt the child in future  
19 years[.]” *Id.* (internal quotation marks and citation omitted).

1 {44} Defendant’s comparison, in addition, is not a proper one because a person who  
2 records consensual sex between two adults is not similarly situated to a person who  
3 records consensual sex between an adult and a minor; such individuals occupy  
4 entirely different classes. *Cf. Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932)  
5 (rejecting an equal protection challenge to a state law that treats differently tobacco  
6 advertisements on billboards and those in newspapers, magazines, or periodicals, and  
7 explaining that “the state has power to legislate with respect to persons in certain  
8 situations and not with respect to those in a different one”); *Carney v. Okla. Dep’t of*  
9 *Pub. Safety*, 875 F.3d 1347, 1353 (10th Cir. 2017) (explaining that a convicted  
10 “aggravated sex offender” had failed to make an equal protection claim where he  
11 contended that he was “not similarly situated to ordinary sex offenders” and “ha[d]  
12 not shown that he [was] being treated differently than other aggravated sex  
13 offenders”); *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 53-54 (10th Cir. 2013)  
14 (explaining that the Equal Protection Clause “simply keeps governmental  
15 decision[]makers from treating differently persons *who are in all relevant respects*  
16 *alike*” and rejecting an equal protection challenge where the plaintiffs failed to  
17 establish that their prohibited activity—which the court described as “different in  
18 kind and scale”—was similar to permitted activity (internal quotation marks and  
19 citation omitted)). Because Defendant cites no authority and develops no argument

1 to support his contention that he is, in the first instance, similarly situated to his  
2 proffered comparator, we decline to consider further his equal protection challenge.  
3 *See Guerra*, 2012-NMSC-014, ¶ 21; *State v. Murillo*, 2015-NMCA-046, ¶ 17, 347  
4 P.3d 284 (refusing to consider the defendant’s equal protection argument where the  
5 defendant failed to address how the challenged statute treated differently groups that  
6 were similarly situated).

7 {45} Defendant—who dedicates the majority of his discussion on this issue to  
8 arguing that the Legislature lacks a rational basis for treating differently adults who  
9 record sex acts depicting minors than those who record sex acts depicting  
10 adults—similarly fails to provide any principled analysis to support his claim of a  
11 substantive due process violation. He does nothing more than (1) refer to general  
12 principles of law without explaining how they apply to the facts of this case and (2)  
13 rely on the irrelevant claim that Defendant “had *no* intent to disseminate the video”  
14 to support his assertion that “it shocks the conscience to punish [Defendant] with  
15 [nineteen-and-one-half-years] in prison.” We decline to construct Defendant’s  
16 argument on his behalf, *see Murillo*, 2015-NMSC-046, ¶ 17, and hold that Defendant  
17 has failed to establish either an equal protection or a substantive due process  
18 violation.

1 {46} As a final matter, we offer as an observation that Defendant’s challenge is more  
2 properly directed to the attention of the Legislature than the courts. What Defendant  
3 essentially—though obliquely—asks us to do is that which we are constitutionally  
4 prohibited from doing: encroach on the power of the Legislature by questioning the  
5 wisdom of its enactments, particularly when Defendant has failed to establish that the  
6 challenged enactment is constitutionally infirm. *See State v. Thompson*, 1953-NMSC-  
7 072, ¶¶ 11-12, 57 N.M. 459, 260 P.2d 370 (“The judiciary can only arrest the  
8 execution of a statute when it conflicts with the constitution. It cannot run a race of  
9 opinions upon points of right, reason, and expediency with the lawmaking power. . . .  
10 It is no part of the duty of the courts to inquire into the wisdom, the policy, or the  
11 justness of an act of the [L]egislature.” (internal quotation marks and citation  
12 omitted)); *State v. Torres*, 2012-NMCA-026, ¶ 33, 272 P.3d 689 (explaining that  
13 under the doctrine of separation of powers, “one branch of the state government may  
14 not exercise powers and duties belonging to another” (internal quotation marks and  
15 citation omitted)).

16 {47} Our Legislature has, by enacting Section 30-6A-3, established as the policy of  
17 this state that it is a crime to record sexual activity where at least one of the depicted  
18 participants is a minor, regardless of whether the underlying activity depicted is non-  
19 criminal. Defendant contends that the fact that Friend could consent to the underlying

1 act—i.e., legally engage in sexual intercourse with Defendant—but is disallowed  
2 under the law from consenting to a recording of that act is irrational. Yet it is the  
3 Legislature’s prerogative to do exactly that: declare and define what acts are criminal.  
4 *See State v. Lassiter*, 2016-NMCA-078, ¶ 12, 382 P.3d 918, *cert. denied*, \_\_\_-  
5 NMCERT-\_\_\_ (No. S-1-SC-36012, Aug. 18, 2016) (“It is the Legislature’s exclusive  
6 responsibility to define crimes, not the judiciary’s.”); *State v. Bryant*, 1982-NMCA-  
7 178, ¶ 14, 99 N.M. 149, 655 P.2d 161 (“The decision as to which acts shall be  
8 declared criminal offenses is entirely a legislative function.”). And to the extent  
9 Defendant challenges not only the very criminalization of the conduct at issue but  
10 also the degree to which the Legislature has elected to punish the conduct, such a  
11 challenge is equally afield of this Court’s powers. *See State v. Frawley*, 2007-NMSC-  
12 057, ¶ 6, 143 N.M. 7, 172 P.3d 144 (“No point of law has longer been established in  
13 New Mexico than the rule that the prescription of the mode of punishment is pre-  
14 eminently a rightful subject of legislation.” (alterations, internal quotation marks, and  
15 citation omitted)). Even were this Court to agree with Defendant that the length of his  
16 sentence is disproportionate to the offense committed given the particular facts of this  
17 case,<sup>9</sup> Defendant has failed to offer any basis on which we could properly—i.e.,

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18 <sup>9</sup>Notably, even the district court initially expressed concern about the State’s  
19 recommendation of nineteen-and-a-half years, asking the State how the court could  
20 reconcile such a sentence with the ten-year sentence it had just imposed in a different  
21 case on a defendant who had killed a person. However, apparently persuaded by the

1 within the limits of our constitutional authority—consider this issue. “The question  
2 of whether the punishment for a given crime is too severe and disproportionate to the  
3 offense is for the [L]egislature to determine.” *State v. Peters*, 1967-NMSC-171, ¶ 10,  
4 78 N.M. 224, 430 P.2d 382 (internal quotation marks and citation omitted). Thus we  
5 leave it for the Legislature to address whether someone—like Defendant—who  
6 records a legal sexual act with a consenting minor should be subject to the sentence  
7 Defendant received in this case.<sup>10</sup>

#### 8 **IV. Sufficiency of the Evidence**

9 {48} Defendant argues that the State failed to present sufficient evidence to sustain  
10 his convictions. We disagree.

11 {49} “The test for sufficiency of the evidence is whether substantial evidence of  
12 either a direct or circumstantial nature exists to support a verdict of guilt beyond a

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13 State’s argument regarding the distinctions between the two cases and likely owing  
14 to the fact that defense counsel neither argued that there were mitigating factors the  
15 court should consider nor asked the court to run the sentences concurrently, the  
16 district court acted within its discretion and sentenced Defendant in accordance with  
17 the State’s recommendation.

18 <sup>10</sup>We note that the Legislature, in fact, very recently amended the Criminal  
19 Sentencing Act in order to *increase* the penalties for those who are convicted of  
20 manufacturing, distributing, and/or possessing child pornography. *Compare* Section  
21 31-18-15 (2007), *with* Section 31-18-15 (2016)]. Under the amended act, someone  
22 convicted of the charges against Defendant in this case would face a term of  
23 imprisonment of up to thirty-four years: twelve years for each of the manufacturing  
24 counts and ten years for possession. *See* § 31-18-15(A)(6), (12).



1 reasonable doubt with respect to every element essential to a conviction.” *State v.*  
2 *Cabezuela*, 2015-NMSC-016, ¶ 14, 350 P.3d 1145 (internal quotation marks and  
3 citation omitted). Our review involves a two-step process in which we first “view the  
4 evidence in the light most favorable to the guilty verdict, indulging all reasonable  
5 inferences and resolving all conflicts in the evidence in favor of the verdict.” *State*  
6 *v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. We then  
7 “evaluate whether the evidence, so viewed, supports the verdict beyond a reasonable  
8 doubt.” *State v. Garcia*, 2016-NMSC-034, ¶ 24, 384 P.3d 1076. We disregard all  
9 evidence and inferences that support a different result. *See State v. Rojo*, 1999-  
10 NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829. Our appellate courts “will not invade  
11 the jury’s province as fact-finder by second-guessing the jury’s decision concerning  
12 the credibility of witnesses, reweighing the evidence, or substituting its judgment for  
13 that of the jury.” *State v. Garcia*, 2011-NMSC-003, ¶ 5, 149 N.M. 185, 246 P.3d 1057  
14 (alterations, internal quotation marks, and citation omitted).

15 {50} Contrary to these well-established rules, Defendant’s entire sufficiency  
16 challenge is premised on reweighing the evidence, attacking the credibility of  
17 witnesses, and relying on evidence and inferences that would support a different  
18 result. As such and because we have previously reviewed at length the evidence that  
19 was presented in this case that supports Defendant’s convictions for both

1 manufacturing and possession of child pornography, we see no need to rehash that  
2 evidence here. We hold that sufficient evidence supports each of Defendant's  
3 convictions.

4 **CONCLUSION**

5 {51} For the foregoing reasons, we affirm Defendant's convictions.

6 {52} **IT IS SO ORDERED.**

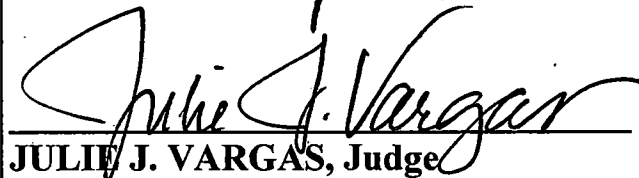
7 

8 **J. MILES HANISEE, Judge**

9 **WE CONCUR:**

10 

11 **MICHAEL E. VIGIL, Judge**

12 

13 **JULIE J. VARGAS, Judge**