

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

Court of Appeals of New Mexico
Filed 5/9/2023 9:50 AM

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,

4 v.



Mark Reynolds

No. A-1-CA-39989

5 **PLACIDO CHAVEZ,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

8 **Bruce C. Fox, District Court Judge**

9 Raúl Torrez, Attorney General

10 Santa Fe, NM

11 Charles J. Gutierrez, Assistant Attorney General

12 Albuquerque, NM

13 for Appellee

14 Bennett J. Baur, Chief Public Defender

15 Joelle N. Gonzales, Assistant Appellate Defender

16 Santa Fe, NM

17 for Appellant

18 **MEMORANDUM OPINION**

19 **BOGARDUS, Judge.**

20 {1} Defendant Placido D. Chavez appeals his conviction for two counts of
21 criminal sexual contact of a minor (CSCM) (child under thirteen), contrary to NMSA
22 1978, Section 30-9-13(C)(1) (2003). Defendant argues: (1) the district court erred in
23 admitting Child's forensic interview under the recorded recollection exception to the

1 hearsay rule; and (2) his two CSCM convictions violate double jeopardy. For the
2 following reasons, we affirm.

3 **BACKGROUND**

4 {2} A jury convicted Defendant of two counts of CSCM contrary to Section 30-
5 9-13(C)(1). The only difference between the two counts is that Count 1 required the
6 jury to find that “[D]efendant touched or applied force to the vulva of [Child,]” while
7 Count 2 referenced the “buttocks of [Child].” Child, six years old at the time of trial,
8 was unable to recall the incident, testifying “I don’t know,” “I forgot,” and “I don’t
9 remember” to questions posed by the State. Based on Child’s inability to recall the
10 events, the State submitted a forensic interview in which Child described the
11 incident. The district court, over objection, admitted the forensic interview pursuant
12 to the recorded recollection exception to the hearsay rule. *See* Rule 11-803(5)
13 NMRA. During the interview, Child stated that Defendant touched her genitals,
14 exposed himself by removing his clothes, and forced Child to sit on his exposed lap
15 after she ran away from him. The jury convicted Defendant of both CSCM counts.
16 Defendant appeals.

17 **DISCUSSION**

18 **I. The District Court Did Not Err in Admitting Child’s Forensic Interview**
19 **Under the Recorded Recollection Exception to the Hearsay Rule**

20 {3} The parties agree that the forensic interview is hearsay under Rule 11-801(C)
21 NMRA. Thus, to be admissible, the interview must fall within a hearsay exception.

1 See Rule 11-802 NMRA (“Hearsay is not admissible except as provided by these
2 rules or by other rules adopted by the Supreme Court or by statute.”). The district
3 court admitted the interview under the exception for recorded recollection, which
4 pertains to a record that:

5 (a) is on a matter the witness once knew about but now cannot
6 recall well enough to testify fully and accurately,

7 (b) was made or adopted by the witness when the matter was
8 fresh in the witness’s memory, and

9 (c) accurately reflects the witness’s knowledge.

10 Rule 11-803(5). Defendant challenges the contemporaneity element: whether the
11 interview was “made or adopted by [Child] when the matter was fresh in [her]
12 memory.”¹ See *id.*

13 {4} “We review the admission of evidence under an abuse of discretion standard
14 and will not reverse in the absence of a clear abuse.” See *State v. Sarracino*, 1998-
15 NMSC-022, ¶ 20, 125 N.M. 511, 964 P.2d 72. “An abuse of discretion occurs when
16 the ruling is clearly against the logic and effect of the facts and circumstances of the
17 case. We cannot say the [district] court abused its discretion by its ruling unless we
18 can characterize [the ruling] as clearly untenable or not justified by reason.” *State v.*

¹To the extent that Defendant’s briefs adequately develop an argument challenging the knowledge element, we reject that challenge because Child testified that she told the truth in the forensic interview. See *State v. Padilla*, 1994-NMCA-067, ¶ 34, 118 N.M. 189, 879 P.2d 1208 (admitting recorded recollection after witnesses testified that their recorded statements were correct).

1 *Rojo*, 1999-NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829 (internal quotation marks
2 and citation omitted). We will find an abuse of discretion when the “[district] court’s
3 decision was obviously erroneous, arbitrary or unwarranted.” *State v. Trujillo*, 2002-
4 NMSC-005, ¶ 15, 131 N.M. 709, 42 P.3d 814 (internal quotation marks and citation
5 omitted).

6 {5} Defendant argues that analysis of the district court’s reliance on the recorded
7 recollection exception in this case is similar to *State v. Macias*, 2009-NMSC-028,
8 ¶ 34, 146 N.M. 378, 210 P.3d 804, *overruled on other grounds by State v. Tollardo*,
9 2012-NMSC-008, 275 P.3d 110, because Child “never testified that she made or
10 adopted the recording when the matter was fresh in her memory.” We disagree and
11 explain.

12 {6} In *Macias*, our Supreme Court ruled that the recorded recollection exception
13 was not met because neither witness testified that they made or adopted the
14 recordings when the matter was fresh in their memories or that the recordings
15 accurately reflected their knowledge. 2009-NMSC-028, ¶ 34. The lack of direct
16 testimony supporting the elements was determinative because both witnesses
17 explicitly denied having any recollection of the recorded conversation. *Id.* ¶¶ 10, 12,
18 17. In this case, Child neither denied participating in the interview nor disclaimed
19 the accuracy of the information she provided. To the contrary, Child responded
20 affirmatively when asked whether: (1) she was the person in the interview video, (2)

1 she explained what happened during the incident with Defendant in the interview,
2 and (3) she told the truth in the interview.

3 {7} Under the circumstances present here, we cannot characterize the admission
4 of the forensic interview as clearly untenable or not justified by reason. *See Rojo*,
5 1999-NMSC-001, ¶ 41. Child testified that she told the truth when she stated that
6 Defendant touched her “privates” and “butt” with his hand, and that he sat her on his
7 exposed lap “four times.” Further, Child corrected the forensic interviewer when the
8 interviewer erroneously misstated Child’s description of events by stating that Child
9 took off Defendant’s clothes. The district court could have logically determined that
10 the incident was fresh in Child’s mind at the time of the interview based on Child’s
11 recall of the specific details of the incident, Child’s correction of the interviewer’s
12 description, and the relative importance of the matters described.

13 {8} Furthermore, the time that elapsed between the incident and Child’s
14 interview—less than three months—is not too long to find that the incident was still
15 fresh in Child’s mind. Defendant does not cite any authority adopting a bright-line
16 rule limiting the time period between an incident and a recorded recollection, and
17 we are aware of no such authority. *State v. Vigil-Giron*, 2014-NMCA-069, ¶ 60, 327
18 P.3d 1129 (“[G]iven no cited authority, we assume no such authority exists.”).
19 Defendant has not persuaded us that the three-month delay barred admission here.
20 *See State v. Aragon*, 1999-NMCA-060, ¶ 10, 127 N.M. 393, 981 P.2d 1211 (stating

1 that we presume correctness in the district court’s rulings and the burden is on the
2 appellant to demonstrate district court error). Considering the delay together with all
3 of the other circumstances in this case, we cannot say the admission was “clearly
4 against the logic and effect of the facts and circumstances of the case.” *Rojo*, 1999-
5 NMSC-001, ¶ 41.

6 {9} Defendant further argues that the district court demonstrated a
7 misunderstanding of Rule 11-803(5) when the court noted at the time it admitted
8 Child’s interview that Defendant was free to cross-examine Child regarding whether
9 the statement was made when it was fresh in her memory. *See State v. Vigil*, 2014-
10 NMCA-096, ¶ 20, 336 P.3d 380 (“[A district] court abuses its discretion when it
11 exercises its discretion based on a misunderstanding of the law.”). Defendant
12 contends that the statement demonstrates the district court assumed the
13 contemporaneity element goes to the weight of the evidence rather than
14 admissibility, contrary to Rule 11-803(5).

15 {10} We agree with Defendant that the elements of recorded recollection must be
16 established before the record is admitted. Permitting Defendant to cross-examine
17 Child, however, does not negate a correct determination that the interview had met
18 the elements of recorded recollection. Records admitted under this exception are
19 received in evidence as a supplement to the witnesses’ oral testimony. *See generally*
20 2 Robert P. Mosteller et al., *McCormick on Evidence* § 279 (8th ed. 2022)

1 (discussing the history and theory of the exception). The interview supplemented
2 Child’s testimony, and Defendant had the right to cross-examine Child and cast
3 doubt on the truth of Child’s statements. *See In re Venie*, 2017-NMSC-018, ¶ 15,
4 395 P.3d 516 (“A defense attorney has the right to cross-examine a [state] witness,
5 and impeach them if he can.”); *see also* 4 Christopher B. Mueller & Laird C.
6 Kirkpatrick, *Federal Evidence* § 8:76 (4th ed. 2022) (“[T]he person who made or
7 adopted the [recorded] statement is now a witness and can be questioned.”).

8 {11} As discussed above, Defendant has not persuaded this Court that the district
9 court abused its discretion by concluding that the interview met the elements of
10 recorded recollection under the circumstances presented here. Defendant, therefore,
11 has not persuaded us that the district court misunderstood the law by admitting the
12 interview of Child under the exception, and subsequently allowing Defendant to
13 impeach Child. We conclude that the district court did not abuse its discretion in
14 admitting the Child’s forensic interview under the recorded recollection exception
15 to hearsay.

16 **II. Defendant’s Multiple Convictions Do Not Violate Double Jeopardy**

17 {12} Defendant next argues that his two CSCM convictions violate double
18 jeopardy because the multiple contacts occurred during one continuous course of
19 conduct and therefore there was no sufficient indicia of distinctness to support two
20 separate convictions. We disagree.

1 {13} “A double jeopardy claim is a question of law that we review de novo.” *State*
2 *v. Bernal*, 2006-NMSC-050, ¶ 6, 140 N.M. 644, 146 P.3d 289. “The constitution
3 protects against both successive prosecutions and multiple punishments for the same
4 offense.” *State v. Branch*, 2018-NMCA-031, ¶ 22, 417 P.3d 1141; *see* U.S. Const.
5 amend. V; N.M. Const. art. II, § 15. Defendant raises a unit of prosecution claim “in
6 which an individual is convicted of multiple violations of the same criminal statute.”
7 *Bernal*, 2006-NMSC-050, ¶ 7. “The relevant inquiry in a unit of prosecution case is
8 whether the Legislature intended punishment for the entire course of conduct or for
9 each discrete act.” *State v. Bernard*, 2015-NMCA-089, ¶ 17, 355 P.3d 831
10 (alterations, internal quotation marks, and citation omitted).

11 {14} Section 30-9-13(A) defines criminal sexual contact of a minor as the
12 “unlawful and intentional touching of or applying force to the intimate parts of a
13 minor or the unlawful and intentional causing of a minor to touch one’s intimate
14 parts.” “That language is ambiguous in our determination of whether the
15 [L]egislature intended to create a separate offense for each touch or application of
16 force.” *State v. Ervin*, 2008-NMCA-016, ¶ 44, 143 N.M. 493, 177 P.3d 1067.
17 Because the statute is ambiguous, “we presume that the statute was not intended to
18 impose multiple punishments for acts that are not sufficiently distinct.” *State v.*
19 *Cook*, 2006-NMCA-110, ¶ 10, 140 N.M. 356, 142 P.3d 944 (internal quotation
20 marks and citation omitted). Thus, we must determine “whether [the d]efendant’s

1 acts bore sufficient indicia of distinctness.” *Id.* ¶ 13 (internal quotation marks and
2 citation omitted). In making this determination “we consider the timing, location,
3 and sequencing of the acts, the existence of an intervening event, the defendant’s
4 intent as evidenced by his conduct and utterances, and the number of victims.” *Id.*
5 (listing the factors identified in *Herron v. State*, 1991-NMSC-012, ¶ 15, 111 N.M.
6 357, 805 P.2d 624). Therefore, our primary concern is to ensure that sufficient
7 evidence exists to establish that each act is distinct from the other. *See State v.*
8 *McClendon*, 2001-NMSC-023, ¶ 5, 130 N.M. 551, 28 P.3d 1092. In reviewing the
9 facts of the case to determine if each act is distinct from the other, “we must indulge
10 in all presumptions in favor of the verdict.” *Id.* (internal quotation marks and citation
11 omitted).

12 {15} Reviewing the evidence presented, even if we assume the two acts of CSCM
13 occurred on the same day, we conclude there are sufficient indicia of distinctness to
14 support multiple punishment for the CSCM counts. Indeed, several *Herron* factors
15 support multiple punishments.

16 {16} As to the first factor, Child stated in her forensic interview that after the first
17 act she ran away, then Defendant removed his clothes, chased Child, and placed her
18 in his exposed lap. “[T]he greater the interval between the acts the greater likelihood
19 of separate offenses.” *State v. Haskins*, 2008-NMCA-086, ¶ 18, 144 N.M. 287, 186
20 P.3d 916. In this case, the evidence does not establish the time that elapsed between

1 acts; thus, we weigh this factor neutrally. We nevertheless conclude that there is no
2 double jeopardy violation based on the other factors.

3 {17} The second factor, the movement or repositioning of the victim, which “is
4 specifically tailored to sex crimes,” *id.*, supports a determination that separate acts
5 occurred. Based on Child’s statements, we conclude that Child’s act of running away
6 and Defendant’s act of repositioning Child on his lap are sufficient to support a
7 finding of separate offenses. Looking to the third factor, there were intervening
8 events between the two acts: Child running away, Defendant removing his clothing,
9 and Defendant retrieving Child. We conclude that this factor weighs in favor of
10 separate offenses. With regard to the fourth factor, the sequencing of the acts, this
11 Court has established that touching separate locations on the body, as occurred here,
12 weighs heavily in favor of separate offenses. *See id.* ¶ 19. Although two factors
13 weigh in favor of unitary conduct—the fact that there was only one victim and
14 Defendant’s intent, *see id.* ¶ 20—neither of these two factors is dispositive. *See id.*
15 ¶ 17 (noting that “[n]o single factor is controlling”). On balance, we conclude that
16 there are sufficient indicia of distinctness to support multiple convictions and
17 punishments for CSCM.

18 **CONCLUSION**

19 {18} For the foregoing reasons, we affirm.

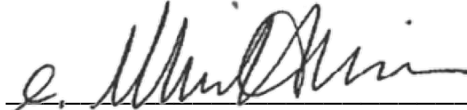
1 {19} IT IS SO ORDERED.

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KRISTINA BOGARDUS, Judge

4 WE CONCUR:

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J. MILES HANISEE, Judge

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ZACHARY A. IVES, Judge