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

Court of Appeals of New Mexico  
Filed 6/18/2024 9:30 AM

2 **STATE OF NEW MEXICO,**



Ramon J. Maestas  
Chief Clerk

3 Plaintiff-Appellee,

4 v.

**No. A-1-CA-41047**

5 **ORLANDO URTIAGA,**

6 Defendant-Appellant.

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

8 **James Lawrence Sanchez, District Court Judge**

9 Raúl Torrez, Attorney General

10 Santa Fe, NM

11 for Appellee

12 Bennett J. Baur, Chief Public Defender

13 Melanie C. McNett, Assistant Appellate Defender

14 Santa Fe, NM

15 for Appellant

16 **MEMORANDUM OPINION**

17 **YOHALEM, Judge.**

18 {1} Defendant Orlando Urtiaga has appealed his convictions for criminal sexual  
19 contact of a minor (CSCM), criminal sexual penetration of a minor (CSPM), and  
20 false imprisonment. We previously issued a notice of proposed summary disposition  
21 in which we proposed to affirm. Defendant has filed a combined memorandum in  
22 opposition and motion to amend the docketing statement. After due consideration,

1 we remain unpersuaded by the assertions of error. We therefore deny the motion,  
2 and affirm.

3 {2} The relevant background information and principles have previously been set  
4 forth. We will avoid undue reiteration here, and focus instead on the content of the  
5 memorandum in opposition and motion to amend.

6 {3} We will begin with the motion to amend, by which Defendant seeks to  
7 advance a double jeopardy challenge to his CSPM conviction and one of his CSCM  
8 conviction arising out of the same assaultive episode. [MIO 9-15] This is a double  
9 description issue, in relation to which we utilize a two-part analysis. *See State v.*  
10 *Sena*, 2020-NMSC-011, ¶ 45, 470 P.3d 227. First, we must determine whether the  
11 conduct underlying the offenses is unitary. *Id.* If so, we must endeavor to ascertain  
12 whether the Legislature intended multiple punishments for the unitary action. *Id.*

13 {4} With respect to the first step of the analysis, we generally evaluate the conduct  
14 to determine whether “[s]ufficient indicia of distinctness” separate the illegal acts;  
15 if so, the conduct is not unitary, and there is no double jeopardy violation. *Id.* ¶ 46.  
16 “Sufficient indicia of distinctness are present when the illegal acts are sufficiently  
17 separated by either time or space (in the sense of physical distance between the  
18 places where the acts occurred).” *Id.* (alteration, internal quotation marks, and  
19 citation omitted). “If these considerations do not suffice to make the determination,  
20 resort must be had to the quality and nature of the acts or to the objects and results

1 involved.” *Id.* (internal quotation marks and citation omitted). “[W]e have also  
2 looked to the elements of the charged offenses, the facts presented at trial, and the  
3 instructions given to the jury.” *Id.*; see *State v. DeGraff*, 2006-NMSC-011, ¶¶ 28-  
4 30, 139 N.M. 211, 131 P.3d 61 (considering the statutory definition of the crime, the  
5 instructions given to the jury, and the evidence presented at trial). Importantly,  
6 conduct is not unitary “when one crime is completed before another is committed,  
7 or when the force used to commit a crime is separate from the force used to commit  
8 another crime.” *Sena*, 2020-NMSC-011, ¶ 46.

9 {5} As previously mentioned, the convictions at issue arose out of a single  
10 assaultive episode. Victim described the incident as having occurred when her  
11 guardian was working late and Defendant was watching her. [MIO 6] Defendant  
12 compelled Victim to enter a bedroom and turned on a TV to try to convince her to  
13 stay. [MIO 6-7] Defendant then removed Victim’s clothes and touched her vagina  
14 with his hand. [MIO 7] Thereafter Defendant stuck his penis in her vagina. [MIO 7]  
15 Victim testified that Defendant ultimately “got off of her when he heard the door  
16 open.” [MIO 7]

17 {6} The foregoing description does not suggest that the illegal acts were separated  
18 by significant passage of time or physical distance. We therefore turn to the quality  
19 and nature of the acts. See *Sena*, 2020-NMSC-011, ¶ 46. These considerations  
20 clearly reflect that the *contact*, which supplies the basis for the CSCM was

1 performed with Defendant’s *hand*, whereas the conviction for CSPM was premised  
2 on *penile penetration*. Moreover, the conduct upon which the conviction for CSCM  
3 is premised was completed before the conduct, which forms the basis for the CSPM  
4 commenced. In light of these considerations, we conclude that these are separate  
5 acts, the results of which are clearly and meaningfully distinct, such that nonunitary  
6 conduct is at issue. *See, e.g., id.* ¶¶ 54-56 (holding that conduct was nonunitary, in a  
7 case involving a single assaultive episode, where evidence that each crime was  
8 completed before the other crime occurred, such that the conduct by which CSP was  
9 committed was separable and distinguishable from conduct by which CSC was  
10 committed). *See generally State v. Armendariz*, 2006-NMCA-152, ¶ 7, 140 N.M.  
11 712, 148 P.3d 798 (observing that “[t]here are also sufficient indicia of distinctness  
12 when the conviction is supported by at least two distinct acts or forces, one which  
13 completes the first crime and another which is [performed] in conjunction with the  
14 subsequent crime” indeed, in any situation, “the key inquiry is whether the same  
15 force was used to commit both crimes”).

16 {7} In view of the foregoing, we conclude that the additional double jeopardy  
17 issue that Defendant seeks to raise is not viable. We therefore deny the motion to  
18 amend. *See, e.g., State v. Sommer*, 1994-NMCA-070, ¶ 11, 118 N.M. 58, 878 P.2d  
19 1007 (illustrating).

1 {8} We turn next to the issues originally advanced in the docketing statement and  
2 renewed in the memorandum in opposition, by which Defendant continues to  
3 challenge the sufficiency of the evidence to support his conviction for false  
4 imprisonment, [MIO 15-21] and argues relatedly that his convictions for false  
5 imprisonment and CSCM violate double jeopardy. [MIO 21-23]

6 {9} In support of Defendant’s conviction for false imprisonment, the State was  
7 required to establish that Defendant restrained Victim against her will, knowing that  
8 he had no authority to do so. [RP 112] In satisfaction of these requirements Victim  
9 testified that Defendant “grabbed her hand” and “kept trying to pull her in.” [MIO  
10 6] Thereafter Defendant touched Victim over her underwear. [MIO 6] She ultimately  
11 escaped and locked herself in a bathroom. [MIO 6]

12 {10} As we observed in the notice of proposed summary disposition, the restraint  
13 described by Victim supplies an adequate basis for the conviction for false  
14 imprisonment. *See, e.g., State v. Cordova*, 1999-NMCA-144, ¶ 23, 128 N.M. 390,  
15 993 P.2d 104 (indicating that victim’s testimony that the defendant physically  
16 restrained her for the purpose of committing CSCM supported conviction for false  
17 imprisonment). Accordingly, we reject Defendant’s challenge to the sufficiency of  
18 the evidence.

19 {11} With respect to the related double jeopardy challenge, Defendant primarily  
20 contends that the restraint of Victim for the false imprisonment charge was

1 “incidental” to the commission of CSCM. [MIO 16-23] In support of his claim of  
2 incidental conduct Defendant relies on *State v. Trujillo*, 2012-NMCA-112, ¶ 29, 289  
3 P.3d 238, in which we held “the Legislature did not intend to punish as kidnapping  
4 restraint or movement that is merely incidental to another crime.” *Id.* ¶ 1. Strictly  
5 speaking, *Trujillo* is inapplicable to this case because it pertains specifically and  
6 exclusively to the offense of kidnapping. *See id.* ¶¶ 23-42 (considering the history  
7 of the kidnapping statutes and the serious nature of that offense, while also  
8 emphasizing that we were specifically considering whether the Legislature intended  
9 the defendant’s conduct to constitute kidnapping under the factual circumstances of  
10 that case). Apart from his invocation of *Trujillo*, Defendant’s contention that his  
11 convictions for false imprisonment and CSCM violate double jeopardy is  
12 fundamentally premised on the assertion that the conduct underlying Defendant’s  
13 convictions was unitary. [MIO 16-23] We disagree.

14 {12} As noted above, conduct is not unitary if “sufficient indicia of distinctness  
15 separate the illegal acts” so that the “defendant does not face conviction and  
16 punishment for the same factual event.” *Sena*, 2020-NMSC-011 ¶ 46 (internal  
17 quotation marks and citation omitted). “The proper analytical framework is whether  
18 the facts presented at trial establish that the jury reasonably could have inferred  
19 independent factual bases for the charged offenses.” *State v. Franco*, 2005-NMSC-  
20 013, ¶ 7, 137 N.M. 447, 112 P.3d 1104. Importantly, force or coercion exerted prior

1 to the sexual offense itself will support a conviction for false imprisonment. *See State*  
2 *v. Corneau*, 1989-NMCA-040, ¶ 11, 109 N.M. 81, 781 P.2d 1159 (distinguishing  
3 restraint before or after criminal sexual penetration from the restraint necessarily  
4 involved in every act of criminal sexual conduct). *See generally State v. Montoya*,  
5 2011-NMCA-074, ¶ 31, 150 N.M. 415, 259 P.3d 820 (“Sufficient indicia of  
6 distinctness exist when one crime is completed before another.” (internal quotation  
7 marks and citation omitted)).

8 {13} The crime of false imprisonment is complete when the defendant, with the  
9 requisite intent, restrains the victim, even though the restraint continues through the  
10 commission of a separate crime. *See State v. Dominguez*, 2014-NMCA-064, ¶ 10,  
11 327 P.3d 1092 (recognizing this principle in relation to the offense of kidnapping).  
12 “[T]he key to finding the restraint element . . . separate from that involved in criminal  
13 sexual [conduct], is to determine the point at which the physical association between  
14 the defendant and the victim was no longer voluntary.” *State v. Jacobs*, 2000-  
15 NMSC-026, ¶ 24, 129 N.M. 448, 10 P.3d 127, *overruled on other grounds by State*  
16 *v. Martinez*, 2021-NMSC-002, ¶ 72, 478 P.3d 880.

17 {14} In this case, to the extent that the factual basis for Defendant’s false  
18 imprisonment conviction was his act of grabbing Victim by the hand and “pulling  
19 her in,” [MIO 6] the offense was complete before the CSCM transpired. *See, e.g.,*  
20 *State v. Garcia*, 2019-NMCA-056, ¶¶ 19-23, 450 P.3d 418 (concluding there was

1 sufficient evidence of restraint and confinement to support a kidnapping conviction,  
2 independent from restraint used during a sexual assault, and stating that, despite “the  
3 short time period between [the d]efendant’s initial acts and the sexual assault, as well  
4 as the confined space in which they occurred, [the d]efendant’s actions constituted  
5 a completed kidnapping upon preventing [the v]ictim’s escape, regardless of the  
6 sexual assault that followed” and noting that “[the d]efendant not only restrained  
7 [the v]ictim during the sexual assault, but also thwarted her attempt to escape”); *see*  
8 *also Corneau*, 1989-NMCA-040, ¶ 16 (holding that “the restraint which preceded  
9 the act of CSP was not the same ‘force or coercion’ necessary to establish CSP, or  
10 the same restraint inherent in CSP”). At that point the association between Defendant  
11 and Victim was no longer voluntary, and it was not until Defendant removed  
12 Victim’s pants and touched her vagina over her underwear that he committed  
13 CSCM. The fact that these offenses occurred during the same encounter does not  
14 create unitary conduct out of the independent and factually distinct bases for these  
15 crimes. *See, e.g., Garcia*, 2019-NMCA-056, ¶¶ 19-23 (arriving at a similar  
16 conclusion under analogous circumstances); *see also Cordova*, 1999-NMCA-144,  
17 ¶¶ 21-23 (holding facts supporting convictions for CSCM and false imprisonment  
18 were not unitary where the CSCM and false imprisonment were completed at  
19 different points in time, though each criminal offense occurred during the same  
20 encounter); *State v. Corneau*, 1989-NMCA-040, ¶ 11, 109 N.M. 81, 781 P.2d 1159



1 (concluding that “[e]vidence exist[ed] in the record to support a finding by the jury  
2 that the underlying felony of false imprisonment was separate and apart from any  
3 false imprisonment necessarily involved in almost every act of CSP”). We therefore  
4 reject the double jeopardy challenge to Defendant’s convictions for CSCM and false  
5 imprisonment.

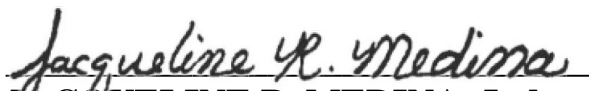
6 {15} Accordingly, for the reasons stated in our notice of proposed summary  
7 disposition and above, we affirm.

8 {16} **IT IS SO ORDERED.**

9  
10   
**JANE B. YOHALEM, Judge**

11 **WE CONCUR:**

12   
13 **KRISTINA BOGARDUS, Judge**

14   
15 **JACQUELINE R. MEDINA, Judge**