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

Court of Appeals of New Mexico
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2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,



Ramon J. Maestas
Chief Clerk

4 v.

No. A-1-CA-40635

5 **ALBERTO ORDAZ-FONSECA,**

6 Defendant-Appellant.

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

8 **William G. W. Shoobridge, District Court Judge**

9 Raúl Torrez, Attorney General
10 Felicity Strachan, Assistant Solicitor General
11 Santa Fe, NM

12 for Appellee

13 The Law Office of Scott M. Davidson, Ph.D., Esq.
14 Scott M. Davidson
15 Albuquerque, NM

16 for Appellant

17 **MEMORANDUM OPINION**

18 **MEDINA, Judge.**

19 {1} A jury convicted Defendant Alberto Ordaz-Fonseca of one count of Criminal
20 Sexual Penetration of a Minor, two counts of Criminal Sexual Contact of a Minor,
21 and one count of Voyeurism (Victim under 18). *See* NMSA 1978, §§ 30-9-11(D)(1)
22 (2009), 30-9-13(B)(1), (C)(1) (2003), and 30-9-20(A) (2007). On appeal, Defendant

1 presents three arguments: (1) the district court infringed on his Sixth Amendment¹
2 constitutional right to present a defense by excluding evidence of Victim’s sexual
3 orientation and recordings of her safehouse interviews, both of which Defendant
4 contends would have placed Victim’s veracity into question, and by limiting the
5 testimony of Defendant’s expert; (2) the district court abused its discretion by
6 admitting expert opinion testimony during the State’s rebuttal; and (3) the district
7 court committed cumulative error. We affirm for the following reasons.

8 **DISCUSSION**

9 {2} Because this is a memorandum opinion and the parties are familiar with the
10 case on appeal, we discuss the facts only as they become necessary to our analysis.

11 **I. The Exclusion of Evidence Did Not Deprive Defendant of His** 12 **Constitutional Right to Present a Defense**

13 {3} According to Defendant, the district court deprived him of his Sixth
14 Amendment right to present a defense by excluding evidence of Victim’s sexual
15 orientation and recordings of her safehouse interviews and by limiting the testimony
16 of his expert. According to Defendant, Victim’s sexual orientation and safehouse

¹Although Defendant cited to Article II Section 14, of the New Mexico Constitution in his brief in chief, we limit our review to the Sixth Amendment because Defendant did not argue that the New Mexico Constitution afforded him greater protection than the United States Constitution. *Cf. State v. Nance*, 2011-NMCA-048, ¶ 11, 149 N.M. 644, 253 P.3d 934 (limiting review to protection under the United States Constitution where no argument on appeal was made that the New Mexico Constitution provided greater protection).

1 interviews would have presented evidence of Victim’s motive to fabricate her
2 accusations against Defendant. “Claimed violations of the Sixth Amendment right
3 to confrontation are reviewed de novo.” *State v. Tollardo*, 2012-NMSC-008, ¶ 15,
4 275 P.3d 110. We generally review exclusion and admission of evidence for an abuse
5 of discretion. *See State v. Campbell*, 2007-NMCA-051, ¶ 9, 141 N.M. 543, 157 P.3d
6 722 (defining an abuse of discretion as action that was “obviously erroneous,
7 arbitrary and unwarranted” or “clearly against the logic and effect of the facts and
8 circumstances before the court” (internal quotation marks and citation omitted)).
9 “Where the evidence is offered in support of the defense’s theory of the case, we
10 recognize ‘a presumption against exclusion of otherwise admissible defense
11 evidence. No other approach adequately protects the right to present a defense.’” *Id.*
12 ¶ 13 (quoting *McCarty v. State*, 1988-NMSC-079, ¶ 9, 107 N.M. 651, 763 P.2d 360).
13 “A defendant seeking relief because an avenue for [their] defense was foreclosed by
14 an evidentiary ruling must show that he was prejudiced by the ruling.” *Campbell*,
15 2007-NMCA-051, ¶ 14. In doing so, “no more prejudice need be shown than that
16 the trial court’s order may have made a potential avenue of defense unavailable to
17 the defendant.” *Id.* (alteration, internal quotation marks, and citation omitted).

18 **A. The District Court Did Not Err by Excluding Evidence Regarding**
19 **Victim’s Purported Sexual Orientation.**

20 {4} Defendant claims that the district court should have admitted testimony
21 regarding Victim’s sexual orientation (of which there is no evidence in the record)

1 to support his theory that Victim fabricated her accusation of sexual assault in order
2 to “strike back at her mother,” who purportedly disapproved of Victim’s sexual
3 orientation.

4 {5} Specifically, Defendant claims that evidence of Victim’s alleged sexual
5 orientation was necessary to show *why* she had an unhealthy relationship with her
6 mother, which in turn would have provided jury with a motive behind Victim’s
7 accusations of abuse against Defendant.² The district court excluded evidence of
8 Victim’s sexual orientation on relevancy grounds during the cross-examination of
9 Victim’s mother.

10 {6} The State reports in its brief that it has no information or belief of what
11 Victim’s sexual orientation is and our review of the record reveals that Defendant
12 failed to make a record revealing Victim’s sexual orientation, whatever it may be.
13 “It is [the] defendant’s burden to bring up a record sufficient for review of the issues
14 [they] raise[] on appeal.” *State v. Padilla*, 1980-NMCA-141, ¶ 7, 95 N.M. 86, 619
15 P.2d 190. When faced with an incomplete record, we indulge every presumption “in
16 favor of the correctness and regularity of the lower court’s judgment.” *In re Ernesto*
17 *M., Jr.*, 1996-NMCA-039, ¶ 19, 121 N.M. 562, 915 P.2d 318. Here the district court
18 excluded the evidence of Victim’s sexual orientation on relevancy grounds, which

²Defendant is partnered with Victim’s aunt but they are not married.

1 we will address later in this memorandum opinion. We first address the State's
2 arguments.

3 {7} The State claims that this Court should affirm the district court's ruling
4 because (1) Defendant did not file a motion seeking admission of the evidence
5 revealing Victim's sexual orientation under New Mexico's rape shield laws, NMSA
6 1978, § 30-9-16 (1993) and Rule 11-412 NMRA; and (2) even if Defendant had filed
7 a motion under the rape shield laws, "the trial court would have been right to deny"
8 the motion because Defendant "failed to establish that this evidence [was] material
9 or relevant to his claims or that its probative value outweighs its potential for
10 prejudice and confusion."

11 {8} New Mexico's rape shield laws preclude the admission of a "victim's past
12 sexual conduct, opinion evidence of the victim's past sexual conduct or of reputation
13 for past sexual conduct . . . unless, and only to the extent the court finds that, the
14 evidence is material to the case and that its inflammatory or prejudicial nature does
15 not outweigh its probative value." Section 30-9-16(A). A defendant seeking to admit
16 such evidence "shall file a written motion prior to trial" and the court shall hear the
17 motion prior to trial during an in-camera hearing to determine whether the evidence
18 is admissible. Section 30-9-16(C).

19 {9} The record confirms that Defendant did not file a motion seeking admission
20 of Victim's sexual orientation under the rape shield laws. Consequently the parties

1 did not make arguments supporting or rejecting the application of the rape shield
2 laws and the district court’s ruling was not based on the rape shield laws. We
3 therefore interpret the State’s argument to affirm the district court’s ruling as right
4 for any reason. See *State v. Vargas*, 2008-NMSC-019, ¶ 8, 143 N.M. 692, 181 P.3d
5 684 (“Under the ‘right for any reason’ doctrine, we may affirm the district court’s
6 order on grounds not relied upon by the district court if those grounds do not require
7 us to look beyond the factual allegations that were raised and considered below.”
8 (internal quotation marks and citation omitted)).

9 {10} We decline to apply the right for any reason doctrine because Defendant did
10 not make a record of what Victim’s sexual orientation was; neither party addressed
11 before the district court whether evidence of sexual orientation falls under the rape
12 shield laws; and the question of whether evidence of sexual orientation alone may
13 be protected under our rape shield laws has yet to be decided in a formal opinion.

14 {11} Having thus declined to analyze the State’s argument regarding the
15 applicability of the rape shield laws in this instance, we consider whether excluding
16 evidence of Victim’s sexual orientation precluded Defendant from presenting the
17 defense that Victim fabricated her accusations against him in order to get back at her
18 mother. We conclude that any evidence regarding Victim’s sexual orientation was
19 not necessary for Defendant to argue that Victim fabricated her accusation against
20 him, in order to “strike back at her mother for harsh and unfair mistreatment,” and

1 was therefore irrelevant. *See* Rule 11-401 NMRA (“Evidence is relevant if . . . it has
2 any tendency to make a fact more or less probable than it would be without the
3 evidence, and . . . the fact is of consequence in determining the action.”). We reach
4 this conclusion because Defendant introduced evidence that Victim and her mother
5 had a tumultuous relationship and suggested that Victim accused Defendant as a
6 result. Defense counsel elicited testimony from Victim’s mother about the fights
7 they had and questioned Victim about the violent nature of her relationship with her
8 mother, going so far as to directly ask Victim whether she had accused Defendant to
9 make her mother angry. Defendant therefore made the argument he claims to have
10 been denied, the basis for the contentious relationship was not relevant to that
11 argument, and thus, he suffered no demonstrable prejudice. *See Campbell, 2007-*
12 *NMCA-051, ¶ 14.*

13 {12} Moreover, any probative value of the evidence was served by allowing
14 evidence that the relationship between Victim and her mother was contentious and
15 additional information about the basis for the discord “would not have increased the
16 probative value of the evidence and was far outweighed by its prejudicial effect.”
17 *Bourgeois v. Horizon Healthcare Corp., 1994-NMSC-038, ¶ 23, 117 N.M 434, 872*
18 *P.2d 852; cf. id.* (affirming exclusion of evidence regarding romantic relationship
19 where probative value of such evidence was limited to demonstrating that a
20 relationship existed between the individuals in question, and testimony established

1 that they had a relationship as friends). *See generally* Rule 11-403 NMRA (allowing
2 for exclusion of relevant evidence if its probative value is substantially outweighed
3 by a danger of unfair prejudice). We therefore conclude that the district court did not
4 err in excluding evidence of Victim’s alleged sexual orientation. *See In re Ernesto*
5 *M., Jr.*, 1996-NMCA-039, ¶ 19.

6 **B. The District Court Did Not Err by Excluding Recordings of Victim’s**
7 **Safehouse Interviews**

8 {13} Defendant additionally argues the district court should have introduced
9 recordings of two safehouse interviews with Victim “for three purposes: (1) to
10 expose serious flaws in the investigation that led to the prosecution; (2) to show
11 [Victim’s] desire to deport [Defendant] and thus calling into question [Victim’s]
12 credibility and the veracity of the allegations; and (3) to show the jury that when
13 asked if she made the allegations to make her mother angry, [Victim] hesitated.”
14 Defendant claims that he was deprived of a defense “because the recordings would
15 have helped to corroborate for the jury what she said during the second [safehouse]
16 interview.”

17 {14} We begin by noting that Defendant never sought to have the recordings
18 admitted. In fact, the section of the transcript to which Defendant directs this Court
19 to support his assertion that his trial counsel “explained to the trial court that he
20 needed to introduce the recordings of the interviews to show the jury that the
21 accusations were fabricated” concerned the admission of a Sexual Assault Nurse

1 Examiner (SANE) examination report and testimony from a SANE nurse who did
2 not examine Victim. We thus find that Defendant failed to preserve his overarching
3 argument that the district court should have admitted these recordings. *See State v.*
4 *Montoya*, 2015-NMSC-010, ¶ 45, 345 P.3d 1056 (“In order to preserve an issue for
5 appeal, a defendant must make a timely objection that specifically apprises the trial
6 court of the nature of the claimed error and invokes an intelligent ruling thereon.”
7 (internal quotation marks and citation omitted).

8 {15} Nevertheless, we acknowledge that the district court both permitted and
9 curtailed testimony about the safehouse interviews, and consider whether the
10 presentation of that evidence, and the limitations imposed thereon, impacted
11 Defendant’s constitutional right to present a defense. *See Campbell*, 2007-NMCA-
12 051, ¶ 14 (“A defendant seeking relief because an avenue for his defense was
13 foreclosed by an evidentiary ruling must show that he was prejudiced by the
14 ruling.”). In particular, Defendant contends that the testimony of his expert about the
15 procedures used in the safehouse interviews was improperly truncated.

16 {16} We begin with Defendant’s argument that he “was prevented from showing
17 the jury that the genesis of the prosecution—the [safehouse] interviews—were
18 deeply flawed and that these serious defects produced unreliable accusations tainting
19 the entire case.” Defendant further asserts that the district court “restricted” the
20 expert’s testimony and that he was therefore “not allowed to present expert

1 testimony regarding the import of the flaws in the “[safehouse] interviews.”
2 Although the jury did not review the recordings of the interviews, Defendant
3 presented extensive expert testimony about proper safehouse interview techniques
4 and the apparent flaws in the interviews conducted with Victim. The “restrictions”
5 imposed by the district court, based on Defendant’s citations in the brief in chief,
6 appear to involve sustained objections to the expert testifying directly about
7 credibility or restating Victim’s alleged statements from the interview. Defendant
8 offers no argument or authority to undermine the district court’s rulings in these
9 respects. Thus, we conclude that Defendant had an adequate opportunity to cast
10 doubt on how the interviewers obtained information from Victim and call into
11 question the substance of that information.

12 {17} We next turn to Defendant’s argument that the second safehouse interview
13 contained evidence that would have indicated that Victim fabricated her accusation
14 to have Defendant deported. Based on the record before us, it appears Defense
15 counsel misconstrued the content of the second safehouse interview by asking
16 Victim to affirm that she told the interviewer that she wished to see Defendant
17 deported. The district court struck Victim’s response.

18 {18} Although the district court struck Victim’s response to Defendant’s question
19 regarding deporting Defendant, which could have provided evidence of Victim’s
20 motive to fabricate, Defendant elicited testimony from his expert witness, who in

1 addition to testifying about the claimed impropriety of the safehouse interviews,
2 testified that, during the second safehouse interview, Victim and the interviewer
3 could be heard laughing when the interviewer stated, “We are going to ship him off.”
4 The jury thus heard evidence that Victim laughed upon hearing another person
5 express a desire to have Defendant deported, which a jury could conclude was
6 evidence of Victim’s motive to fabricate accusations against Defendant. Therefore,
7 Defendant had an opportunity to present this theory of his defense.

8 {19} Finally, we consider whether Defendant was able to show that Victim had a
9 motive to accuse Defendant to retaliate against her mother based on information in
10 the interviews. Our review shows that the district court allowed Defendant to
11 question Victim directly on this point. Defendant used this opportunity to present his
12 theory that Victim had accused him in order to anger her mother.

13 {20} Even in the absence of the recordings, Defendant offered evidence on each of
14 his theories of defense regarding the alleged failures in the investigation and
15 Victim’s motive to fabricate. He therefore suffered no prejudice. *See Campbell*,
16 2007-NMCA-051, ¶ 14. As such, we conclude that the district court did not violate
17 Defendant’s right of confrontation or otherwise deprive him of any of his purported
18 lines of defense and turn to Defendant’s next series of arguments.

1 **II. The District Court Did Not Abuse Its Discretion by Admitting Expert**
2 **Testimony During the State’s Rebuttal**

3 {21} Defendant asserts the district court erred by allowing the State’s rebuttal
4 expert witness to testify. “Genuine rebuttal evidence consists of evidence on new
5 matters asserted in the defense’s case.” *State v. Simonson*, 1983-NMSC-075, ¶ 29,
6 100 N.M. 297, 669 P.2d 1092. “Ascertaining whether the rebuttal evidence is in
7 response to new matters established by the defense, however, is a difficult matter at
8 times. Frequently true rebuttal evidence, in some degree, will overlap and coincide
9 with the evidence in the [s]tate’s case[]in[]chief.” *Id.* We review this issue for an
10 abuse of discretion. *See State v. Alberico*, 1993-NMSC-047, ¶ 58, 116 N.M. 156,
11 861 P.2d 192. “Broad discretion in the admission or exclusion of expert evidence
12 will be sustained unless manifestly erroneous.” *Id.* (internal quotation marks and
13 citation omitted).

14 {22} Defendant first states that the doctor who testified as a rebuttal witness was
15 not qualified to serve as an expert witness in this case because he “lacked expertise
16 on the subjects that were addressed” in his case in chief, but makes no further
17 argument in that regard. Primarily, Defendant challenges the relevancy of the
18 doctor’s testimony upon a claim that it was not permissible rebuttal testimony. The
19 State tendered a doctor, a licensed professional clinical counselor with a Ph.D. in
20 higher education administration, as an expert in sexual assault victim behavior who
21 could speak broadly to victims’ reasons for delaying disclosure of abuse. The doctor

1 had been qualified as an expert witness on the subject of sexual assault victim
2 behavior five times and had testified as an expert three or four times in New Mexico.
3 Defendant notes that the doctor testified that all of his counseling experience was in
4 a purely therapeutic setting and that he did not have experience conducting safehouse
5 interviews. Defendant did not challenge the doctor's qualifications at trial on the
6 subject of sexual assault victim behavior and instead argued that the doctor's
7 testimony was not relevant.

8 {23} The district court permitted the doctor to testify as an expert regarding sexual
9 assault victim behavior. The doctor testified about abuse occurring at the hands of
10 family members, as well as sexual assault victims' tendency to delay disclosure of
11 abuse; that victims of sexual assault often choose not to disclose abuse right away
12 because of feelings of guilt, family or social pressure, or because their abuser still
13 has access to them; and noted that victims most often suffer abuse at the hands of
14 family members because of trust and access. Defendant claims this testimony
15 exceeded the proper scope of the State's rebuttal because Defendant never raised a
16 delayed disclosure theory during his case in chief, nor did he contest the fact that he
17 had access to Victim.

18 {24} The record reveals that Defendant effectively raised the delayed disclosure
19 theory throughout the trial. He repeatedly suggested that Victim's accusations lacked
20 validity because they arose approximately five years after the abuse began. Defense

1 counsel questioned both Victim and her mother at length about Victim’s failure to
2 disclose until she engaged in the safehouse interviews. We therefore conclude that
3 the doctor’s expert testimony regarding delayed disclosure did not exceed the scope
4 of permissible rebuttal testimony.

5 {25} We otherwise acknowledge that most of the doctor’s general observations
6 about abuse committed by family members did not directly relate to an issue raised
7 by Defendant during his case in chief. However, his testimony coincided with the
8 State’s case in chief that revealed Defendant was like a family member. Additionally
9 Defendant made no objection during the doctor’s testimony, *see Montoya*, 2015-
10 NMSC-010, ¶ 45. Nor has Defendant identified any prejudice resulting from the
11 doctor’s remarks, especially considering that Defendant did not contest the fact that
12 he had access to Victim. *See Alberico*, 1993-NMSC-047, ¶ 58. Finally, the doctor
13 noted that ongoing access by a perpetrator may result in delayed disclosure.
14 Therefore, his comments did not exceed the scope of permissible evidence and we
15 conclude that the district court did not abuse its discretion in permitting the State to
16 present the doctor’s expert testimony on rebuttal.

17 **III. No Cumulative Error Occurred**

18 {26} Defendant claims that the district court committed cumulative error because
19 “the combined impact of [its] rulings produced an impermissibly skewed trial.” “The
20 doctrine of cumulative error applies when multiple errors, which by themselves do

1 not constitute reversible error, are so serious in the aggregate that they cumulatively
2 deprive the defendant of a fair trial.” *State v. Romero*, 2019-NMSC-007, ¶ 45, 435
3 P.3d 1231 (internal quotation marks and citation omitted). Having concluded that
4 the district court did not commit error by excluding evidence of Victim’s sexual
5 orientation, Defendant never sought to introduce recordings of the safehouse
6 interviews, and that the content of the doctor’s expert rebuttal testimony was relevant
7 and permissible, we hold that no cumulative error occurred.

8 **CONCLUSION**

9 {27} For the forgoing reasons, we affirm.

10 {28} **IT IS SO ORDERED.**

11 
12 **JACQUELINE R. MEDINA, Judge**

13 **WE CONCUR:**

14 
15 **KRISTINA BOCARDUS, Judge**

16 
17 **KATHERINE A. WRAY, Judge**