


Corrections to this opinion/decision not affecting the outcome, at the Court's discretion, can occur up to the time of publication with NM Compilation Commission. The Court will ensure that the electronic version of this opinion/decision is updated accordingly in Odyssey.

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

Court of Appeals of New Mexico
Filed 6/6/2024 10:13 AM

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,



Ramon J. Maestas
Chief Clerk

4 v.

No. A-1-CA-40821

5 **DAKOTA SMALLCANYON,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY**

8 **Daylene A. Marsh, District Court Judge**

9 Raúl Torrez, Attorney General

10 Santa Fe, NM

11 Michael J. Thomas, Assistant Attorney General

12 Albuquerque, NM

13 for Appellee

14 Bennett J. Baur, Chief Public Defender

15 Mary Barket, Assistant Appellate Defender

16 Santa Fe, NM

17 for Appellant

18 **MEMORANDUM OPINION**

19 **HENDERSON, Judge.**

20 {1} Defendant Dakota Smallcanyon appeals his conviction for one count of
21 criminal sexual contact of a minor (CSCM) under thirteen, contrary to NMSA 1978,
22 Section 30-9-13(B)(1) (2003). Defendant asserts that (1) the district court erred by
23 failing to grant a mistrial; (2) the prosecution committed prosecutorial misconduct;

1 (3) “[t]he evidence was not sufficient to sustain [Defendant’s] conviction”; and (4)
2 the district court committed fundamental error by failing to provide an instruction
3 on an essential element of the crime. Because we hold that under the facts of this
4 case the district court committed fundamental error by failing to instruct the jury on
5 unlawfulness, an essential element of CSCM, we reverse Defendant’s conviction.

6 **DISCUSSION**

7 **I. Jury Instruction**

8 {2} Defendant argues that the district court should have instructed the jury as to
9 the element and definition of unlawfulness, and this instructional failure amounted
10 to fundamental error because unlawfulness was at issue and was an essential element
11 of the crime.¹ Defendant concedes that this issue was not preserved at trial and “[w]e

¹Additionally, Defendant argues that, because the State intentionally elicited improper testimony, and the district court’s curative instruction exacerbated the harm, the district court’s failure to grant a mistrial was reversible error. Further, Defendant argues that the State committed prosecutorial misconduct during the trial and in closing. Because we reverse on other grounds, we will not review these issues in depth. However, we remind the district court and the State that intentionally eliciting improper testimony may be reversible error if “there is a reasonable probability that the improperly admitted evidence could have induced the jury’s verdict.” *State v. Ruiz*, 2003-NMCA-069, ¶ 6, 133 N.M. 717, 68 P.3d 957. Further, a curative instruction that “attempt[s] to address a critical and prejudicial error,” but that fails to do so or that emphasizes the improper evidence, does not remove the need for a mistrial. *State v. Hernandez*, 2017-NMCA-020, ¶ 25, 388 P.3d 1016; *see also State v. Garcia*, 1994-NMCA-147, ¶¶ 17-18, 118 N.M. 773, 887 P.2d 767 (concluding that both a vague curative instruction and a “direct comment” would have failed to cure the prejudice). Lastly, we remind the State “that credibility of witnesses is to be determined by the jury, not by the witnesses,” *State v. Duran*, 2006-NMSC-035, ¶ 21, 140 N.M. 94, 140 P.3d 515, and that “[p]rosecutorial

1 review unpreserved assertions of error in a jury instruction for fundamental error.”
2 *State v. Grubb*, 2020-NMCA-003, ¶ 7, 455 P.3d 877. “Error that is fundamental must
3 be such error as goes to the foundation or basis of a defendant’s rights or must go to
4 the foundation of the case or take from the defendant a right which was essential to
5 [their] defense.” *State v. Cunningham*, 2000-NMSC-009, ¶ 13, 128 N.M. 711, 998
6 P.2d 176 (internal quotation marks and citation omitted).

7 {3} We begin our analysis by a review of the jury instructions. UJI 14-925 NMRA
8 is the applicable uniform jury instruction for CSCM of a child under thirteen. UJI
9 14-925 includes the element of unlawfulness in brackets and use note 4 states: “Use
10 the bracketed element if the evidence raises a genuine issue of the unlawfulness of
11 the defendant’s actions. If this element is given, UJI 14-132 NMRA, ‘unlawful
12 defined,’ must be given after this instruction.” UJI 14-925 use note 4.

13 {4} In this case, the district court instructed the jury that to find Defendant guilty
14 of CSCM, the State had to prove the following relevant elements: “[D]efendant
15 touched or applied force to the unclothed mons pubis and or vulva of [P.B.] and
16 [P.B.] was a child under the age of [thirteen].” The district court did not instruct the
17 jury on the element of unlawfulness.

commentary that urges a jury to convict for reasons other than the evidence defies
the law and undermines the integrity of a verdict,” *State v. Cooper*, 2000-NMCA-
041, ¶ 15, 129 N.M. 172, 3 P.3d 149.

1 {5} Our Supreme Court has held that by specifically including “unlawfully” in the
2 definition of CSCM, the Legislature intended it to be a distinct and essential element
3 of the crime. *State v. Osborne*, 1991-NMSC-032, ¶ 33, 111 N.M. 654, 808 P.2d 624.
4 “The failure of the court to instruct the jury on the essential elements of a crime
5 constitutes fundamental . . . error.” *Id.* ¶ 10. “A trial court’s failure to instruct on an
6 essential element may only be justified if that element is not contested or there is no
7 evidence supporting a defendant’s theory of the case.” *State v. Smith*, 2021-NMSC-
8 025, ¶ 12, 491 P.3d 748. Therefore, to determine if fundamental error occurred, we
9 must first determine whether or not the essential element of unlawfulness was at
10 issue in this case, and if there was evidence to support a theory that the touching was
11 lawful.

12 {6} Defendant argues that his testimony put the element of unlawfulness directly
13 in issue. The State argues that because Defendant denied touching “in any manner
14 on or even near” P.B.’s vagina, “the ‘unlawfulness’ of any touching was not at
15 issue.” We agree with Defendant that the essential element of unlawfulness was at
16 issue and we explain further.

17 {7} When determining whether unlawfulness is at issue, “[t]he question is whether
18 there was any evidence or suggestion in the facts, however slight, [which] could
19 have put the element of unlawfulness in issue.” *State v. Orosco*, 1992-NMSC-006,
20 ¶ 10, 113 N.M. 780, 833 P.2d 1146. Moreover, because a defendant may deny that

1 an incident occurred in its entirety as a matter of trial strategy, “[w]e do not look to
2 the defendants’ assertions alone” to determine if the element of unlawfulness is at
3 issue. *Id.* Because “every touching of the intimate parts of a minor [cannot] be
4 presumed to be unlawful,” touching for reasonable medical care, non-abusive
5 parental care and custodial care are excluded from the definition of unlawful.
6 *Osborne*, 1991-NMSC-032, ¶ 29; *see* UJI 14-132 (excluding medical treatment,
7 non-abusive parental, and custodial care from the definition of unlawful). Therefore,
8 evidence that suggests that a touching was for medical treatment, non-abusive
9 parental care or custodial care would put the element of unlawfulness at issue. *See*
10 *Orosco*, 1992-NMSC-006, ¶¶ 10-11 (holding that unlawfulness was not at issue in
11 two cases for CSCM, in which the defendants denied that touching occurred at all,
12 not because the defendants denied the touching, but rather because “[i]n neither case
13 was there anything in the facts to suggest that the touchings, if they occurred, might
14 have involved the provision of medical care, custodial care or affection, or any other
15 lawful purpose”).

16 {8} Here, the victim, P.B., was age eleven at the time of the incident and along
17 with her mother and siblings, lived with Defendant, P.B.’s uncle. At Defendant’s
18 trial for one count of CSCM, P.B.’s mother testified that she and her kids had moved
19 in with her sister and her sister’s husband, Defendant. P.B.’s mother also testified
20 that although she and her kids were sleeping in a converted garage, P.B. and the

1 other kids would sometimes fall asleep in the living room. P.B. testified that “she
2 was sleeping on the couch late one night and woke up to the smell of alcohol and the
3 feel of cold hands touching her.” She testified that the hands were “on my breast and
4 my vagina.” She further testified that when Defendant touched her vagina,
5 Defendant touched her skin, his hands went into her pants and was “under, but like
6 it wasn’t all the way.”

7 {9} In his testimony, Defendant denied touching P.B.’s breast or vagina and
8 instead claimed that he and his wife placed their cold hands on P.B.’s bare skin in
9 an attempt to wake her so that she could go to her bedroom; specifically that he
10 placed his cold hands on P.B.s belly and lower back. Defendant stated that he
11 touched her “because you feel something cold, you would jump up and wake up, but
12 that did not happen.” Defendant reiterated that he was trying to wake her up “to have
13 her go back to her bedroom.” Therefore, Defendant’s testimony asserts that his
14 purpose in touching P.B. was to provide non-abusive, parental or custodial care,
15 which would be lawful. Defendant’s testimony asserting a lawful purpose for the
16 touching, even though slight, is sufficient evidence to put the unlawfulness of the
17 touching in issue. *See Osborne*, 1991-NMSC-032, ¶ 7 (holding that in a CSCM case,
18 unlawfulness of touching was sufficiently in issue when “[d]efendant did not recall
19 ever touching [the victim’s] bottom and said that while it was possible he might have
20 touched her bottom at some point, it would not have been in an inappropriate manner

1 or with an inappropriate intent”). Thus, the essential element of unlawfulness was in
2 issue in this case, and the district court’s failure to provide the jury an instruction on
3 the essential element of unlawfulness constituted error.

4 {10} Moreover, the district court’s failure to instruct on the essential element of
5 unlawfulness constituted fundamental error. Generally, “fundamental error occurs
6 when jury instructions fail to inform the jurors that the [s]tate has the burden of
7 proving an essential element of a crime and we are left with no way of knowing
8 whether the jury found that element beyond a reasonable doubt.” *State v. Sena*, 2020-
9 NMSC-011, ¶ 34, 470 P.3d 227 (alteration, internal quotation marks, and citation
10 omitted). However, “[t]he rule of fundamental error applies only if there has been a
11 miscarriage of justice, if the question of guilt is so doubtful that it would shock the
12 conscience to permit the conviction to stand, or if substantial justice has not been
13 done.” *Orosco*, 1992-NMSC-006, ¶ 12.

14 {11} Here, because the jury was not instructed on the element of unlawfulness, it
15 did not make a finding as to whether Defendant touched P.B. “with the intent to
16 arouse or gratify sexual desire or to intrude upon the bodily integrity or personal
17 safety of” her, or if he did so to provide non-abusive custodial care. *See* UJI 14-132.
18 The jury’s inability to make a finding on the essential element of unlawfulness due
19 to the court’s failure to instruct is a “mistake in the process [that] makes
20 [Defendant’s] conviction fundamentally unfair” and “would shock the court’s

1 conscious to allow the conviction to stand.” *State v. Ocon*, 2021-NMCA-032, ¶ 8,
2 493 P.3d 448 (alteration, internal quotation marks, and citations omitted). Thus, we
3 hold that the district court’s failure to instruct the jury on the elements of
4 unlawfulness amounted to fundamental error, and therefore we reverse Defendant’s
5 CSCM conviction.

6 **II. Sufficiency of the Evidence**

7 {12} Although we reverse Defendant’s conviction because the jury was not
8 instructed on the essential element of “unlawfulness,” we review the sufficiency of
9 the evidence in light of the erroneous jury instruction. *See State v. Samora*, 2016-
10 NMSC-031, ¶ 34, 387 P.3d 230 (“Because we have determined that we must reverse
11 [the d]efendant’s convictions . . . , we are required to determine whether sufficient
12 evidence was presented to support these convictions to avoid double jeopardy
13 concerns should the [s]tate seek to retry [the d]efendant.”). “The test for sufficiency
14 of the evidence is whether substantial evidence of either a direct or circumstantial
15 nature exists to support a verdict of guilty beyond a reasonable doubt with respect to
16 every element essential to a conviction.” *Id.* (internal quotation marks and citation
17 omitted). “In doing so, we view the evidence in the light most favorable to the guilty
18 verdict, indulging all reasonable inferences and resolving all conflicts in the
19 evidence in favor of the verdict.” *Id.* (internal quotation marks and citation omitted).


1 Moreover, we “review[] the evidence in light of the defective jury instruction given
2 below.” *State v. Rosaire*, 1996-NMCA-115, ¶ 20, 123 N.M. 250, 939 P.2d 597.

3 {13} In this case, it is uncontested that P.B. was under the age of thirteen at the time
4 of the incident. Additionally, P.B. testified that Defendant touched her vagina. Given
5 that the jury may convict based on the testimony of a single witness, *see State v.*
6 *Roybal*, 1992-NMCA-114, ¶ 9, 115 N.M. 27, 846 P.2d 333, the jury had sufficient
7 evidence to reasonably conclude that Defendant touched the vagina of a child under
8 the age of thirteen. Because there was sufficient evidence to convict Defendant under
9 the erroneous instruction submitted to the jury, we conclude that retrial is
10 permissible.

11 **CONCLUSION**

12 {14} For the reasons discussed above, we reverse and remand for a new trial.

13 {15} **IT IS SO ORDERED.**



14
15 **SHAMMARA H. HENDERSON, Judge**

16 **WE CONCUR:**

17 *Jacqueline R. Medina*
18 **JACQUELINE R. MEDINA, Judge**

19 *Megan P. Duffy*
20 **MEGAN P. DUFFY, Judge**