IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v. **No. A-1-CA-41889**

JAMES J. BITAKIS,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Britt Baca-Miller, District Court Judge

Raúl Torres, Attorney General
Santa Fe, NM

for Appellee

Bennett J. Baur, Chief Public Defender
Brian Parrish, Assistant Appellate Defender
Santa Fe, NM

for Appellant

MEMORANDUM OPINION

HENDERSON, Judge.

{1} This matter was submitted to this Court on the brief in chief pursuant to the Administrative Order for Appeals in Criminal Cases from the Second, Eleventh, and Twelfth Judicial District Courts in *In re Pilot Project for Criminal Appeals*, No. 2022-002, effective November 1, 2022. Having considered the brief in chief, concluding the briefing submitted to this Court provides no possibility for reversal,

and determining that this case is appropriate for resolution on Track 1 as defined in that order, we affirm for the following reasons.

{2} Defendant appeals from a judgment and sentence convicting him of three counts of criminal sexual contact of a minor (CSCM) in the second-degree and one count of CSCM in the third-degree. [2 RP 347-49] Defendant challenges two of the second-degree convictions on double jeopardy grounds. "A double jeopardy challenge is a constitutional question of law which we review de novo." *State v. Swick*, 2012-NMSC-018, ¶ 10, 279 P.3d 747.

{3} In *State v. Lente*, 2019-NMSC-020, 453 P.3d 416,

> our New Mexico Supreme Court provided new guidance on evaluating due process, multiplicious double jeopardy, and sufficiency of the evidence challenges in "resident child molester" cases, a unique circumstance of abuse wherein child victims in these cases are usually the sole witnesses of the crimes perpetrated and, because of their age and frequency of the sexual abuse to which they are subjected, cannot provide detailed accounts of the abuse but only general accounts of frequent sexual contact with the defendant.

State v. Costillo, 2020-NMCA-051, ¶ 27, 475 P.3d 803 (citation omitted). As Defendant acknowledges, this is a resident child molester case given that the victim, A.R., resided with Defendant during the course of the abuse. [BIC 4] In such cases, the child victim must provide testimony satisfying the following three requirements: (1) "the child victim must describe the proscribed act or acts committed with sufficient specificity to establish that unlawful conduct did in fact occur and to permit a jury to differentiate between the various types of sex acts to which the child

victim was subjected"; (2) "the child must describe the number of proscribed acts committed with sufficient certainty to support each of the counts alleged in the information or indictment"; and (3) "the child must describe the general time period in which the proscribed acts occurred." *Lente*, 2019-NMSC-020, ¶¶ 67-70. Although *Lente* utilized this test for a sufficiency challenge, that case also concluded that when these three requirements are satisfied it "eliminates the double jeopardy violation." *Id.* ¶ 84.

{4} Defendant concedes that the first and third requirements were satisfied by A.R.'s testimony at trial. [BIC 12] However, Defendant asserts that "A.R.'s testimony does not 'describe the number of prohibited acts committed with sufficient certainty to support each of the counts alleged in the information or indictment' (the second requirement)." [Id.] According to Defendant's brief, A.R. testified that Defendant "touched his crotch and bottom when A.R. was not wearing clothes." [BIC 4] A.R. testified this first occurred when he was seven in a hotel shower, potentially at a Days Inn close to the mountains, and continued while he lived with Defendant when he was "seven to nine years old." [BIC 6] A.R. also testified that the conduct all occurred in Albuquerque, some of the incidents occurred in Defendant's car, and Defendant touched his crotch and butt about twenty times each. [BIC 6-8]

{5} Defendant argues this testimony stated a number "without reference to anything that would allow a fact-finder to conclude that there was any basis for that number" and that A.R. did not provide any other details or distinguishing or intervening events. [BIC 12] We disagree with this assessment of A.R.'s testimony and that additional details were necessary under *Lente*. *See Lente*, 2019-NMSC-020, ¶ 64 ("Generic testimony (e.g., an act of intercourse 'once a month for three years') outlines a series of *specific*, albeit undifferentiated, incidents each of which amounts to a separate offense, and *each* of which could support a separate criminal sanction." (alteration, internal quotation marks, and citation omitted)). *Lente* noted that "child victims in resident child molester cases typically testify to repeated acts of molestation occurring over a substantial period of time but are generally unable to furnish specific details, dates or distinguishing characteristics as to individual acts or assaults." *Id.* ¶ 55 (alteration, internal quotation marks, and citation omitted). *Lente* also explained that "[a]dditional details regarding the time, place or circumstance of the various assaults may assist in assessing the credibility or substantiality of the victim's testimony, but are not essential." *Id.* ¶ 64 (internal quotation marks and citation omitted).

{6} Applying *Lente*'s evaluation of the specificity required to the facts of this case, it is apparent that A.R. described the number of proscribed acts committed with sufficient certainty. The victim in *Lente* testified that the defendant in that case

abused her two or three times a week for the duration of the forty-and-one-half month charging period. *Id.* ¶ 82. She "approximated that [the defendant] touched her buttocks 'around five' times, touched her breasts more than five times, touched her breasts with his mouth more than five times, and touched her vagina . . . twenty times." *Id. Lente* concluded that this testimony was sufficiently specific for the jury to find that the defendant had touched the victim's vagina and breasts five times each and her buttocks six times during the forty-and-one-half months the indictment covered. *Id.* Similarly, we conclude that A.R.'s testimony supported both convictions, which were premised on Defendant touching or applying force to A.R's unclothed penis and/or mons pubis on at least two occasions during the approximately two years the charges covered. [2 RP 272-73]

{7} Defendant also questions A.R.'s credibility during his testimony and contends that A.R. "was not consistent throughout his testimony about the number of times he believed the acts occurred." [BIC 11, 13] According to Defendant's brief, A.R. testified to being touched approximately twenty times during his direct examination, but then testified that it was "[a]bout ten" on cross-examination. [*Compare* BIC 8, *with* BIC 9, 13] However, this Court does not assess a witness' credibility on appeal. *See State v. Salas*, 1999-NMCA-099, ¶ 13, 127 N.M. 686, 986 P.2d 482 (recognizing that it is for the fact-finder to resolve any conflict in the testimony of the witnesses and to determine where the weight and credibility lie).

{8} Defendant next argues that there was insufficient evidence to convict him of CSCM in the third-degree. [BIC 14] "The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Montoya*, 2015-NMSC-010, ¶ 52, 345 P.3d 1056 (internal quotation marks and citation omitted). The reviewing court "view[s] the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. We disregard all evidence and inferences that support a different result. *See State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829.

{9} "Jury instructions become the law of the case against which the sufficiency of the evidence is to be measured." *State v. Smith*, 1986-NMCA-089, ¶ 7, 104 N.M. 729, 726 P.2d 883. Here, the jury was instructed, in part, that the State had to prove that Defendant "touched or applied force to the penis and/or mons pubis and/or buttocks of" A.R. [2 RP 279] Defendant asserts that this "required the jury to find that [Defendant] touched A.R. over his clothes, *not* under his clothes or his bare skin" and that the only testimony in this regard was a hearsay statement that came in through the testimony of the nurse who examined and interviewed A.R. following his allegations of abuse. [BIC 15-16] According to Defendant, the nurse asked A.R.

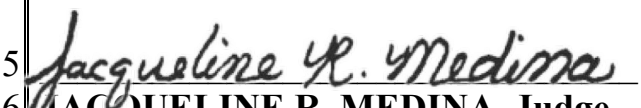
if he was touched on his skin or on his clothes. [BIC 17] A.R. responded, "My skin or clothes." [Id.]

{10} Defendant contends that this statement was not evidence, was equivocal, and did not respond to the question. [Id.] However, Defendant does not argue the statement was admitted in error, and so we must presume the evidence was properly before the jury. *See State v. Aragon*, 1999-NMCA-060, ¶ 10, 127 N.M. 393, 981 P.2d 1211 (stating that we presume correctness in the district court's rulings and the burden is on the appellant to demonstrate district court error). Given our standard our review, we conclude the jury could have reasonably inferred that A.R. was answering in the affirmative to both alternatives posed by the nurse's question. *See State v. Montoya*, 2005-NMCA-078, ¶ 3, 137 N.M. 713, 114 P.3d 393 ("When a defendant argues that the evidence and inferences present two equally reasonable hypotheses, one consistent with guilt and another consistent with innocence, our answer is that by its verdict, the jury has necessarily found the hypothesis of guilt more reasonable than the hypothesis of innocence."); *State v. Sutphin*, 1988-NMSC-031, ¶ 21, 107 N.M. 126, 753 P.2d 1314 ("An appellate court does not evaluate the evidence to determine whether some hypothesis could be designed which is consistent with a finding of innocence."). Consequently, we conclude that the evidence supported Defendant's conviction for CSCM in the third-degree and affirm the judgment of the district court.

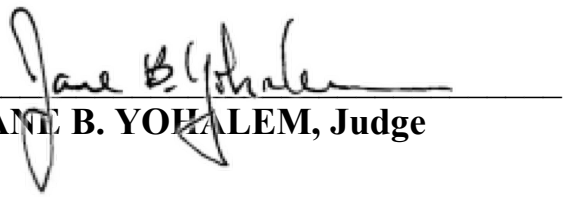
{11} **IT IS SO ORDERED.**

SHAMMARA H. HENDERSON, Judge

WE CONCUR:



JACQUELINE R. MEDINA, Judge



JANE B. YOHALEM, Judge