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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,**



Ramon J. Maestas  
Chief Clerk

3 Plaintiff-Appellee,

4 v.

**No. A-1-CA-40121**

5 **LUIS LEDESMA-LOZANO,**

6 Defendant-Appellant.

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

8 **Jared G. Kallunki, District Court Judge**

9 Raúl Torrez, Attorney General

10 Santa Fe, NM

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12 Albuquerque, NM

13 for Appellee

14 Bennett J. Baur, Chief Public Defender

15 Caitlin C.M. Smith, Assistant Appellate Defender

16 Santa Fe, NM

17 for Appellant

18 **MEMORANDUM OPINION**

19 **BACA, Judge.**

20 {1} Defendant Luis Ledesma-Lozano was convicted by a jury of criminal sexual

21 penetration in the third degree (CSP III), contrary to NMSA 1978, Section 30-9-

22 11(F) (2009). Defendant does not challenge his conviction in this appeal. Instead,

23 Defendant challenges the district court's designation of his conviction for CSP III as

1 a serious violent offense for purposes of New Mexico’s Earned Meritorious  
2 Deductions Act (the EMDA), NMSA 1978, § 33-2-34 (2015). Concluding the  
3 district court failed to provide sufficient findings related to its serious violent offense  
4 designation as required by Section 33-2-34(L)(4)(o) and *State v. Morales*, 2002-  
5 NMCA-016, ¶ 16, 131 N.M. 530, 39 P.3d 747, *abrogated on other grounds by State*  
6 *v. Frawley*, 2007-NMSC-057, 143 N.M. 7, 172 P.3d 144, and the cases that have  
7 followed it, we reverse and remand for resentencing of Defendant.

8 **DISCUSSION<sup>1</sup>**

9 {2} In his brief in chief, Defendant argues that the district court’s designation of  
10 CSP III as a serious violent offense should be reversed for two reasons: (1) the  
11 district court failed to make the required findings; and (2) the evidence at trial did  
12 not support a conclusion that the offense was committed in a physically violent  
13 manner. However, in his reply brief, Defendant clarified that “[Defendant] has not  
14 asked this Court for a determination that the district court’s findings were formally  
15 inadequate. Instead, [Defendant] challenges the sufficiency of the evidence to  
16 support the serious violent offense determination.” Accordingly, we consider only  
17 his sufficiency challenge.

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<sup>1</sup>Because this is an unpublished memorandum opinion written solely for the benefit of the parties, *see State v. Gonzales*, 1990-NMCA-040, ¶ 48, 110 N.M. 218, 794 P.2d 361, and the parties are familiar with the factual and procedural background of this case, we omit a background section and leave the discussion of the facts for our analysis of the issues.

1 {3} Even though Defendant has clarified the basis for his appeal, we cannot  
2 evaluate an insufficiently explained serious violent offender designation for  
3 sufficient evidence. *See State v. Branch*, 2018-NMCA-031, ¶ 57, 417 P.3d 1141  
4 (“[T]he standard is not whether there is sufficient evidence in the record to support  
5 the district court’s unexplained conclusion. The standard is a bright line that requires  
6 the district court to explain its conclusions.” (internal quotation marks and citation  
7 omitted)); *State v. Scurry*, 2007-NMCA-064, ¶ 4, 141 N.M. 591, 158 P.3d 1034 (“*If*  
8 *the findings comply with the EMDA*, we then engage in a substantial evidence review  
9 in which we indulge all inferences in favor of the district court’s determination to  
10 determine whether the evidence supports the district court’s findings.” (emphasis  
11 added)).

12 {4} We review the district court’s designation of a crime as a serious violent  
13 offense for an abuse of discretion. *See State v. Solano*, 2009-NMCA-098, ¶ 7, 146  
14 N.M. 831, 215 P.3d 769. A court abuses its discretion when “it acts contrary to law”  
15 and “when its decision is not supported by substantial evidence.” *Id.* (internal  
16 quotation marks and citations omitted). “Thus, we review the district court’s findings  
17 and subsequent serious violent offender designation for sufficient evidence[ and] for  
18 legal error.” *Id.* (internal quotation marks and citation omitted).

19 {5} “The EMDA provides that prisoners convicted of serious violent offenses may  
20 earn only four (as opposed to thirty) days per month of good time credit for time

1 served in our state prisons.”<sup>2</sup> *Branch*, 2018-NMCA-031, ¶ 55 (citing Section 33-2-  
2 34(A)(1), (2)). The EMDA “divides serious violent offenses into two categories: (1)  
3 an enumerated list of crimes, such as second degree murder, that are serious violent  
4 offenses as a matter of law; and (2) several additional offenses that the district court  
5 may determine to be serious violent offenses *due to the nature of the offense and the*  
6 *resulting harm.*” *Id.* (emphasis added) (internal quotation marks and citation  
7 omitted). CSP III falls within the second category. Section 33-2-34(L)(4)(o)(11).

8 {6} In *Morales*, because there “are . . . differences in the ways of committing the  
9 offenses listed in Section 33-2-34(L)(4)[(o), including CSP III,] and a trial judge  
10 must have some way of measuring which ways amount to serious violent offenses  
11 and which do not,” 2002-NMCA-016, ¶ 16, this Court concluded that our Legislature  
12 reserved the designation of a serious violent offense for only those offenses “found  
13 by the trial judge to be committed in a physically violent manner either with an intent  
14 to do serious harm or with recklessness in the face of knowledge that one’s acts are  
15 reasonably likely to result in serious harm.” *Id.*

16 {7} The designation of a crime as a serious violent offense will significantly affect  
17 the length of a defendant’s actual prison term. Therefore, “it is important that the

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<sup>2</sup> While it appears that Defendant has completed the original term of incarceration imposed by the district court’s sentence and is now on parole, the serious violent offense designation could affect Defendant’s ability to earn meritorious deductions in the event he is incarcerated following revocation of parole. *See* § 33-2-34(A)(4).

1 court *make specific findings* both to inform the defendant being sentenced of the  
2 factual basis on which his good time credit is being substantially reduced, and to  
3 permit meaningful and effective appellate review of the court’s designation.”  
4 *Branch*, 2018-NMCA-031, ¶ 56 (emphasis added) (internal quotation marks and  
5 citation omitted). Additionally, the district court’s findings in support of its  
6 designation of a crime as a serious violent offense must be express. *See id.* (stating  
7 that “[e]xpress findings must demonstrate that the crime was committed in a  
8 physically violent manner either with an intent to do serious harm or with  
9 recklessness in the face of knowledge that one’s acts are reasonably likely to result  
10 in serious harm” (emphasis added) (internal quotation marks and citation omitted)).  
11 “[I]t is for the [district] court in the first instance to make the required findings.”  
12 *Morales*, 2002-NMCA-016, ¶ 18. This is true “[e]ven where support exists in the  
13 record for the district court to make such a determination.” *Branch*, 2018-NMCA-  
14 031, ¶ 56. With the foregoing in mind, we turn to the findings made by the district  
15 court in this case.

16 {8} At the sentencing hearing, the State asked that Defendant’s conviction be  
17 considered a serious violent offense for purposes of the EDMA. When announcing  
18 its sentence, the district court noted the following: (1) the victim was a family friend  
19 to Defendant; (2) as such, Defendant took advantage of a person who trusted he  
20 would be a safe person; (3) there was “a lot of damage . . . done” by Defendant’s

1 actions; and (4) Defendant’s conduct was “unfortunate,” “painful,” “horrible,” and  
2 “humiliating” to the victim. As to the serious violent offense determination, the  
3 district court specifically stated,

4 I will find that due to the nature and circumstances and the resulting  
5 harm—the harm emotionally—the harm—the terror—that was caused  
6 by your actions to [the victim]—the process that she’s had to go through  
7 in absorbing, understanding what happened, trying to deal with the  
8 trauma that has been dealt to her—I will find that that does constitute a  
9 serious violent offense.

10 The district court’s written judgment and sentence contained no additional findings  
11 supporting the serious violent offense designation.

12 ¶ Here, unlike a number of other cases that have come before us, the district  
13 court did articulate its reasons for designating the CSP III conviction a serious  
14 violent offense. *See id.* ¶ 58 (concluding that the district court’s “judgment and  
15 sentence contains only the same run-of-the-mill explanation—‘due to the nature of  
16 the offense and the resulting harm’—that frequently causes us to remand cases for  
17 additional factfinding” and citing to other cases remanded for similar deficiencies).  
18 However, the district court focused its relevant findings on the mental and emotional  
19 harm suffered by the victim and the circumstances surrounding Defendant’s actions.  
20 Noticeably absent from the district court’s reasoning were any factual findings  
21 relevant to whether Defendant committed the CSP III for which Defendant was  
22 convicted in a “physically violent manner.” *See id.* ¶ 56 (stating that “[e]xpress  
23 findings must demonstrate that the crime was committed in a physically violent

1 *manner* either with an intent to do serious harm or with recklessness in the face of  
2 knowledge that one’s acts are reasonably likely to result in serious harm” (emphasis  
3 added) (internal quotation marks and citation omitted)). The absence of any findings  
4 related to Defendant’s commission of the CSP III in a physically violent manner in  
5 this case is determinative. We explain.

6 {10} We note that this Court has analyzed “physically violent manner” as relating  
7 to the nature of the offense, *State v. Loretto*, 2006-NMCA-142, ¶ 17, 140 N.M. 705,  
8 147 P.3d 1138, and has stated that “the term ‘physically violent manner’ includes  
9 the intentional use of force that results in some harm.” *Solano*, 2009-NMCA-098,  
10 ¶ 17. However, “[i]nasmuch as the list of offenses [that may qualify as serious  
11 violent offenses] includes several that result in death, which can be viewed as the  
12 greatest harm imaginable, the [L]egislature could not have intended amount of harm  
13 alone to qualify an offense as a serious violent one.” *Morales*, 2002-NMCA-016,  
14 ¶ 13. What’s more, in *Loretto*, while pointing out that the district court there failed  
15 to specify how the defendant committed the crime in a “physically violent manner,”  
16 we clarified that “[s]omething more than the mere elements in the definition of [CSP  
17 III] need to be shown to designate the crime as a serious violent offense.” 2006-  
18 NMCA-142, ¶¶ 17-18.

19 {11} Here, based on the express findings that appear to be limited to mental harm  
20 suffered by the victim, we would have to draw considerable inferences to conclude

1 that the district court found Defendant acted in a “physically violent manner” as  
2 required by *Morales*, 2002-NMCA-016. Consequently, we conclude that the district  
3 court’s serious violent offense designation findings are insufficient. *See Scurry*,  
4 2007-NMCA-064, ¶ 6 (stating “the district court’s findings must describe the manner  
5 in which the offense was committed to qualify it as a serious violent offense” and  
6 “the district court’s findings must demonstrate how the defendant’s acts amounted  
7 to an offense committed in a physically violent manner” (internal quotation marks  
8 and citation omitted)). On remand, the district court should expressly state “why  
9 Defendant’s acts involved *physical violence*, and how the acts were either done with  
10 knowledge that they were reasonably likely to result in serious harm, or that the  
11 circumstances and acts constituted recklessness in the face of knowledge that the  
12 acts were reasonably likely to result in serious harm.” *Loretto*, 2006-NMCA-142,  
13 ¶ 19 (emphasis added). Because we have concluded that the district court’s findings  
14 were insufficient, we need not determine whether the district court’s findings were  
15 supported by sufficient evidence. *See Scurry*, 2007-NMCA-064, ¶ 4 (“Because the  
16 district court’s findings in this case are insufficient as a matter of law, we need not  
17 review the evidence.”).

## 18 **CONCLUSION**

19 {12} For the reasons stated above, we reverse the district court’s designation of  
20 Defendant’s conviction for CSP III as a serious violent offense. We remand to the



1 district court for resentencing of Defendant for the district court to determine  
2 whether Defendant's conviction for CSP III qualifies as a serious violent offense  
3 pursuant to Section 33-2-34(L)(4)(o)(11), *Morales*, and consistent with this opinion.

4 {13} **IT IS SO ORDERED.**

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**GERALD E. BACA, Judge**

7 **WE CONCUR:**

8   
9 \_\_\_\_\_  
**KRISTINA BOGARDUS, Judge**

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11 \_\_\_\_\_  
**JACQUELINE R. MEDINA, Judge**