

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico

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STATE OF NEW MEXICO

Plaintiff-Appellee,


Mark Reynolds

v.

No. A-1-CA-41573

**ANGEL BENAVIDEZ a/k/a ANGEL A.
BENAVIDEZ a/k/a ANGEL ANTONIO
BENAVIDEZ a/k/a ANGEL ANTONIO
BENAVIDEZ-MOORE,**

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY

Bruce C. Fox, District Court Judge

Raúl Torrez, Attorney General

Santa Fe, NM

Eric Orona, Assistant Solicitor General

Albuquerque, NM

for Appellee

Bennett J. Baur, Chief Public Defender

Joelle N. Gonzales, Assistant Appellate Defender

Santa Fe, NM

for Appellant

MEMORANDUM OPINION

MEDINA, Chief Judge.

{1} Defendant Angel Antonio Benavidez-Moore appeals his convictions for two
counts of second degree criminal sexual contact with a minor (CSCM), contrary to
NMSA 1978, Section 30-9-13(B)(1) (2003), regarding one victim; and one count of

1 third degree CSCM, contrary to Section 30-9-13(C)(1), with respect to a second
2 victim. The victims M.R. and J.A. (Victims), are siblings. Defendant raises a number
3 of alleged evidentiary errors. The majority of these are raised under plain error. In
4 particular, Defendant contends that the admission of statements Victims made to a
5 nurse practitioner, Marianne Chavez, at Para Los Niños (Nurse), was error because
6 they were not made for the purpose of diagnosis or treatment and Nurse's testimony
7 impermissibly bolstered Victims' testimonies. Defendant also contends he received
8 ineffective assistance of counsel. We affirm.

9 **BACKGROUND**

10 {2} Both Victims testified during trial. Defendant lived with M.R. and his family
11 when M.R. was eight or nine years old. M.R. testified that on more than one occasion
12 Defendant touched the part of his body that he pees with and that Defendant did so
13 over M.R.'s clothes with his hand. M.R. disclosed the touching after his grandmother
14 received a text from Defendant, and M.R.'s parents asked him about being touched.

15 {3} J.A. testified that Defendant lived with his family when he was seven years
16 old. At the time, Victims shared a bedroom. J.A. testified that Defendant touched his
17 "pee pee and [his] butt" both over his clothes, on his skin more than one time, and
18 that it most often took place in his bedroom.

19 {4} At trial, Nurse testified as an expert in child sexual abuse. During the relevant
20 time period, Nurse worked at Para Los Niños as a nurse practitioner. Nurse evaluated

1 children at Para Los Niños when there was a concern regarding sexual abuse and
2 made medical diagnoses as appropriate. Nurse explained that she obtains medical
3 history from the child by asking if they know why they are there, or why they were
4 brought to the clinic and, in doing so, learns what may have happened and where to
5 look for potential injury or infection and to make a diagnosis.

6 {5} Nurse examined M.R. and J.A. at Para Los Niños in December 2019 during
7 which time she took their medical history. During Nurse’s testimony, she repeated
8 statements M.R. and J.A. made during their examinations, which are the subject of
9 issues raised in this appeal. We discuss the challenged testimony in further detail in
10 the applicable analysis sections below.

11 **DISCUSSION**

12 **I. Evidentiary Claims of Error**

13 {6} All of the evidentiary issues raised by Defendant concern various aspects of
14 the testimony of Nurse who evaluated M.R. and J.A. for medical purposes,
15 subsequent to the forensic evaluation. However, Defendant only objected to one
16 instance of the various parts of Nurse’s testimony at issue on appeal.

17 **A. Testimony Objection Raised**

18 {7} While Nurse was discussing statements made to her by M.R., she recounted
19 that she asked M.R. if he knew why he was there meeting with her, to which M.R.
20 replied that it was because he and his brother had been “touched.” Nurse then

1 inquired as to how M.R. knew J.A. had been touched, and M.R. replied, “Because
2 he tells me.” Defendant objected to this last statement and the State responded by
3 arguing that a hearsay exception applied, specifically statements given for the
4 purpose of medical diagnosis or treatment. Defendant contends the district court
5 erred in overruling defense counsel’s objection.

6 {8} Assuming without deciding that the admission of Nurse’s testimony here was
7 error, we hold that it was harmless error. When there is a nonconstitutional error, as
8 is claimed here, relating to an evidentiary matter, we evaluate whether there is “no
9 reasonable probability the error affected the verdict” to determine whether the error
10 was harmless, and thereby leave the verdict undisturbed. *See State v. Tollardo*, 2012-
11 NMSC-008, ¶ 36, 275 P.3d 110 (emphasis, internal quotation marks, and citation
12 omitted). “The likely effect of a[n] . . . error is determined on a case-by-case basis
13 by considering, among other things, the emphasis placed on the error, evidence of a
14 defendant’s guilt apart from the error, the importance of the improperly-admitted
15 evidence, and whether the erroneously-admitted evidence introduced new facts or
16 was merely cumulative.” *State v. Arguello*, 2024-NMCA-074, ¶ 6, 557 P.3d 1018,
17 *cert. denied*, 2024-NMCERT-009, 557 P.3d 995.

18 {9} An improper statement that is cumulative to other evidence presented to the
19 jury corroborating a guilty verdict weighs against finding the error harmful. *See State*
20 *v. Johnson*, 2004-NMSC-029, ¶¶ 11, 39, 136 N.M. 348, 98 P.3d 998 (examining the

1 cumulative versus corroborative nature of improperly admitted evidence in context
2 of the Confrontation Clause and providing that “the possible prejudicial effect—of
3 . . . evidence tends to decrease the more redundant that evidence is in the context of
4 other similar evidence”); *see also Arguello*, 2024-NMCA-074, ¶ 7, (“[Witness]’s
5 statements were cumulative of other evidence and were corroborated by other
6 witnesses on all material points.”).

7 {10} Nurse repeated one sentence spoken to her by M.R., who testified at trial and
8 was therefore available to be cross-examined. *See State v. La Madrid*, 1997-NMCA-
9 057, ¶ 23, 123 N.M. 463, 943 P.2d 110 (observing that availability of declarant to
10 be cross-examined about hearsay statements weighed in favor of a finding of
11 harmless error). J.A. also testified directly to experiences with Defendant where J.A.
12 was inappropriately touched. Moreover, Facebook message exchanges entered into
13 evidence revealed Defendant was asked whom Defendant was in a relationship with
14 and Defendant responded, “Its [J.A.] it always has been and always will be [J.A.] he
15 took my heart what can [I] say . . . [I’m] not sorry if he loves me cause I know he
16 will protect me [I] just got to give him time to grow but he loves me.” The other
17 person messaged back to clarify if Defendant is, in fact, referring to J.A. and
18 Defendant responds, “Yes . . . are you gonna hate us cause we grown on each other[.]
19 . . . But [I] want him to grow up a little first. . . . [I’m] not in it for sex or anything
20 [I’m] in it for his personality” and “[J.A.’s parents would] probably beat my ass and

1 [I] don't care [if they found out.]" J.A.'s father testified that after seeing these
2 messages, he asked J.A. about the relationship and then they went to the police.

3 {11} Given the other evidence of Defendant's guilt, the statement's cumulative
4 nature and the fact that the State did not emphasize or rely on the statement, we
5 conclude that there is no reasonable probability that Nurse's testimony regarding
6 M.R.'s statement about J.A. affected the verdict. *See Tollardo*, 2012-NMSC-008,
7 ¶ 36. The error, if any, was harmless.

8 **B. Hearsay Testimony With No Objection**

9 {12} With respect to the other evidentiary issues raised by Defendant, he either
10 failed to object or he elicited the testimony himself. We therefore examine these
11 claims of error to determine whether plain error occurred. *See State v. Chavez*, 2024-
12 NMSC-023, ¶ 10, 562 P.3d 521 ("Unpreserved evidentiary errors are reviewable on
13 appeal under a plain error standard."). For plain error to be present, a substantial
14 right of the defendant must be affected by the admission of the evidence, and that
15 admission must constitute an injustice creating "grave doubts concerning the validity
16 of the verdict." *Id.* ¶¶ 10, 11 (internal quotation marks and citation omitted). "[W]e
17 consider the error's effect on the overall fairness, integrity, or public reputation of
18 judicial proceedings." *Id.* ¶ 11 (internal quotation marks and citation omitted).

19 {13} With this standard in mind we turn to the specific evidentiary errors that
20 Defendant alleges. First, Defendant contends that Nurse's testimony amounted to

1 improper vouching because Nurse repeated for the jury statements made to her by
2 M.R. and J.A., specifically that J.A. said he had been touched on his “pee pee” and
3 his “butt,” both unclothed and clothed, more than one time; and that M.R. said that
4 his “privates” had been touched, on top of his clothes, more than one time. Defendant
5 further contends that Nurse engaged in impermissible vouching when she opined
6 that she had no concerns about “coaching” in this case, Nurse testified that she did
7 not have any suspicion that M.R. and J.A. were making false utterances in an excited
8 state, and that she was concerned about post-traumatic stress disorder (PTSD) based
9 on what M.R. told her. Second, Defendant contends generally that the district court
10 should have performed a voir dire examination of Nurse prior to her testimony, and
11 then “parsed” her testimony to remove statements that were not properly considered
12 exceptions to the hearsay rule under the medical diagnosis and treatment exception.
13 Third, Defendant argues that on direct examination Nurse briefly referred to an
14 instance of uncharged prior conduct—specifically, Nurse testified J.A. told her the
15 first time the touching happened was on a trip.

16 {14} Turning first to Defendant’s contention that Nurse vouched for Victims. An
17 expert’s testimony as to the credibility of an accuser in a sexual abuse case can be
18 “extremely prejudicial,” and may amount to plain error. *See State v. Garcia*, 2019-
19 NMCA-056, ¶ 11, 450 P.3d 418 (“[W]hile testimony may be offered to show that
20 the victim suffers from symptoms that are consistent with sexual abuse, it may not

1 be offered to establish that the alleged victim is telling the truth.” (alteration, internal
2 quotation marks, and citation omitted)). If an expert comments on the details of a
3 victim’s statements repeatedly, and directly vouches for a victim’s credibility,
4 especially if the expert identifies the defendant as the perpetrator of the abuse, this
5 Court has determined that the testimony is plain error. *See id.* ¶ 12 (holding that plain
6 error occurred because the expert did all of the above).

7 {15} In *Garcia*, the nurse “testified about the [v]ictim’s account of sexual assault
8 at length” and stated that the “[v]ictim had identified [the d]efendant and [the
9 d]efendant’s son as” the perpetrators of the sexual assault, *id.* ¶ 9. Here, Nurse’s
10 recitation of what she was told by M.R. and J.A. concerning the touching incidents
11 was brief and Nurse did not identify Defendant as the perpetrator of the abuse.

12 {16} Defendant also contends that Nurse engaged in improper vouching when
13 Nurse testified during cross-examination that “she had absolutely no concern that
14 [Victims] were coached” and “had no suspicion that the [Victims] simply made an
15 excited statement that was untrue.” Defendant argues that Nurse’s opinions
16 constituted impermissible indirect vouching for the testimony of M.R. and J.A.,
17 which is prohibited under *Garcia*, 2019-NMCA-056, ¶ 11. We disagree with
18 Defendant’s characterization of Nurse’s testimony.

19 {17} The transcript reveals that defense counsel elicited the testimony Defendant
20 now complains about on appeal during Nurse’s cross-examination, presumably as

1 Defendant was attempting to raise questions regarding the veracity of the Victims’
2 statements to Nurse and in court. “Having brought this testimony into the case, [the
3 defendant] is not in a position to complain about it.” *State v. Phillips*, 1971-NMCA-
4 114, ¶ 16, 83 N.M. 5, 487 P.2d 915. Furthermore, Nurse did not testify definitively
5 that either M.R. or J.A. had been coached, or that either one of them had made a
6 false statement while in an excited state. Instead, Nurse testified that she had not
7 seen evidence of coaching, and therefore did not have concerns about that during her
8 interviews. Nurse also testified that while children can make false statements while
9 they are in an excited state, she did not have a suspicion “for that” in this case.
10 Significantly, and unlike the testimony in *Garcia*, wherein the nurse testified that
11 “the things that [the v]ictim said had happened to her had, in fact, happened to her,”
12 2019-NMCA-056, ¶ 9, Nurse testified that it was not her job in this case to decide
13 whether M.R. or J.A.’s reports of abuse were false; instead, her job pertained to
14 medical diagnosis. *See State v. Montoya*, 2015-NMSC-010, ¶ 46, 345 P.3d 1056
15 (stating that “in determining whether there has been plain error, we must examine
16 the alleged errors in the context of the testimony as a whole” (alteration, omission,
17 internal quotation marks, and citation omitted)).

18 {18} In this case, Nurse did not identify Defendant as the perpetrator of the abuse;
19 she testified that M.R. and J.A. said they had been touched. Nurse also did not
20 diagnose either M.R. or J.A. as having been sexually abused, and did not say that

1 they were telling the truth when they revealed the abuse to her. Furthermore, Nurse's
2 recitation of what she was told by M.R. and J.A. concerning the touching incidents
3 was brief.

4 {19} This case, therefore, is distinguishable from *Garcia*, and there is no basis to
5 find plain error as to Nurse's recitation of what M.R. and J.A. told her concerning
6 the specifics of the abuse. *Compare, State v. Smith*, 2024-NMCA-068, ¶¶ 3, 16, 556
7 P.3d 988 (finding plain error occurred when the investigating officer and the forensic
8 interviewer both testified that they believed the victim and the officer also
9 commented on the defendant's truthfulness or lack thereof and explained at length
10 how he could determine when a person is lying), *with State v. Dylan J.*, 2009-
11 NMCA-027, ¶¶ 19-20, 204 P.3d 44 (declining to find plain error where sex abuse
12 counselor repeated only three statements made by the victim).

13 {20} And while we agree that an expert may not testify that a victim's symptoms
14 were in fact caused by sex abuse because doing so is tantamount to validating the
15 victim's credibility, *see State v. Lucero*, 1993-NMSC-064, ¶ 18, 116 N.M. 450, 863
16 P.2d 1071, that is not what took place in this case. Nurse did not testify that M.R.'s
17 symptoms were caused by the abuse at issue, but rather that she had concerns that
18 M.R. was at risk for PTSD.

19 {21} Next, Defendant maintains that the district court should have intervened, sua
20 sponte, and conducted a voir dire examination of Nurse to determine what her

1 testimony would be and to excise from that testimony statements that were not
2 subject to the Rule 11-803(4) NMRA exception for medical-purposes. According to
3 Defendant, these objectionable statements include: (1) a description by M.R. of the
4 first instance of abuse, including where the abuser was standing; (2) M.R.'s
5 statement that the abuse occurred more than once, "about every day"; (3) M.R.'s
6 account of being fearful of being spanked by his parents prior to their discovery of
7 the abuse, and being relieved now that "it was out"; (4) Nurse's opinion that she had
8 concerns about possible PTSD with respect to M.R.; and (5) J.A.'s statement that
9 the abuse stopped when his mother found out about it.

10 {22} Initially, we observe "[w]hile a trial judge is not prohibited from excluding
11 evidence sua sponte, a judge should exercise this authority sparingly. This is
12 because: (1) development of the facts at trial is the responsibility of counsel; (2)
13 often counsel may intentionally withhold objection to the admissibility of evidence
14 for strategic reasons; and (3) a trial judge should be careful to avoid the appearance
15 of being more of an advocate or partisan than an objective jurist." *State v.*
16 *Balderama*, 2004-NMSC-008, ¶ 20, 135 N.M. 329, 88 P.3d 845. In addition, we
17 disagree with Defendant's premise, that none of the above statements were subject
18 to the hearsay exception for statements made for the purpose of diagnosis or
19 treatment.

1 {23} As we discussed above, Nurse was interviewing M.R. and J.A. for medical
2 purposes rather than investigative purposes. It was therefore important for Nurse to
3 have a full understanding of the nature and extent of the abuse to properly assess
4 M.R. and J.A. for possible psychological or perhaps even physical harm. *See State*
5 *v. Tsosie*, 2022-NMSC-017, ¶ 112, 516 P.3d 1116 (stating that information
6 concerning the details of a sexual assault can “certainly” be important to guiding the
7 provision of medical care). All of the above statements made by Victims concern
8 either the nature or extent of the abuse suffered by M.R. and J.A., or their mental
9 states concerning that abuse and the surrounding circumstances. This is also true of
10 Nurse’s testimony concerning M.R.’s possible PTSD symptoms. Nurse did not tie
11 the possible PTSD symptoms to any abuse committed by Defendant; rather, she
12 noted her concern about the possibility that PTSD might be present. Therefore, the
13 admission of these statements was not plain error.

14 {24} Finally, Defendant discusses Nurse’s testimony that J.A. told her the first
15 instance of abuse occurred on a trip. Defendant describes that statement as a
16 reference to uncharged prior wrongful conduct, disallowed under Rule 11-404(B)
17 NMRA, if evidence of the conduct is used to show that a defendant committed the
18 criminal acts for which he is on trial. *See* Rule 11-404(B)(1). Even assuming that it
19 was error to admit this statement, it did not rise to the level of plain error. The
20 statement contains no details about the trip, failing to mention either when or where

1 it was taken. The State did not follow-up on the statement or request more details
2 about the alleged incident. In addition, Nurse’s testimony about the statement was
3 not mentioned in closing argument by either party. *Cf. State v. Serna*, 2013-NMSC-
4 033, ¶¶ 25, 32, 305 P.3d 936 (concluding that where “the [s]tate did not exploit the
5 erroneously admitted evidence at trial” or “make the evidence a significant part of
6 its case against [the d]efendant” and “[g]iven the abundance of other evidence
7 against [the d]efendant,” reference to the evidence “though error, was harmless”).
8 The vague statement made in passing does not constitute an injustice raising grave
9 doubts about the validity of the verdict. The admission of this statement therefore is
10 not an instance of plain error. *See Chavez*, 2024-NMSC-023, ¶ 11.

11 **II. Ineffective Assistance of Counsel**

12 {25} Defendant contends that he received ineffective assistance of counsel (IAC)
13 below. It is rare for an IAC claim to be successful on direct appeal. Instead, appellate
14 courts strongly prefer that IAC claims be brought in habeas corpus proceedings,
15 where a complete record can be made. *See State v. Astorga*, 2015-NMSC-007, ¶ 17,
16 343 P.3d 1245; *State v. Ortega*, 2014-NMSC-017, ¶ 60, 327 P.3d 1076. There are
17 two parts of the IAC inquiry that must be met in order to demonstrate a prima facie
18 case. First, “[the d]efendant must first show that counsel’s performance fell below
19 that of a reasonably competent attorney” under the circumstances. *Ortega*, 2014-
20 NMSC-017, ¶ 55. Second, “[the d]efendant must then show he was prejudiced by

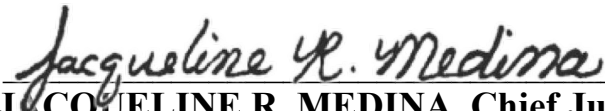
1 counsel's deficient performance." *Id.* We need not consider the two parts of the IAC
2 inquiry in any particular order and turn first to the prejudice inquiry. *See State v.*
3 *Hernandez*, 1993-NMSC-007, ¶ 27, 115 N.M. 6, 846 P.2d 312. We do so as
4 Defendant failed to show that he suffered any prejudice as a result of counsel's
5 alleged errors.

6 {26} To establish prejudice stemming from counsel's deficient performance, there
7 must be a showing that absent the deficiency, there was a reasonable probability that
8 the result of the trial would have been different. *Lukens v. Franco*, 2019-NMSC-
9 002, ¶ 17, 433 P.3d 288. On the record before us, Defendant has failed to meet the
10 prejudice prong of the IAC test—there is no reasonable probability that, but for trial
11 counsel's errors, the result of the proceeding would have been different. *See Ortega*,
12 2014-NMSC-017, ¶¶ 55, 58 (stating the prejudice standard and holding that the
13 defendant could not show prejudice given the evidence supporting his conviction,
14 including testimony from eyewitnesses and other corroborating evidence). None of
15 the purported deficiencies in counsel's performance were significant enough to
16 overcome the evidence presented by the State. We therefore hold that Defendant has
17 not established a prima facie case of IAC on appeal.

18 **CONCLUSION**

19 {27} For the foregoing reasons, we affirm.

1 {28} IT IS SO ORDERED.

2 
3 JACQUELINE R. MEDINA, Chief Judge

4 WE CONCUR:

5 
6 JENNIFER L. ATTREP, Judge

7 
8 SHAMMARAH. HENDERSON, Judge