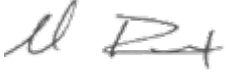


IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico

Filed 11/12/2025 7:13 AM


Mark Reynolds

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

No. A-1-CA-41851

JOSE ELIZALDE,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY

Britt M. Baca-Miller, District Court Judge

Raúl Torrez, Attorney General

Santa Fe, NM

Walter Hart, Assistant Solicitor General

Albuquerque, NM

for Appellee

The Law Office of Scott M. Davidson, Ph.D., Esq.

Scott M. Davidson

Albuquerque, NM

for Appellant

MEMORANDUM OPINION

ATTREP, Judge.

{1} This matter was submitted to the Court on Defendant's 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. Following consideration of the

1 brief in chief, the Court assigned this matter to Track 2 for additional briefing. Now
2 having considered the brief in chief, answer brief, and reply brief, we affirm for the
3 following reasons.

4 {2} Defendant appeals his conviction of three counts of first-degree criminal
5 sexual penetration (child under thirteen), contrary to NMSA 1978, Section 30-9-
6 11(D)(1) (2009), and three counts of second-degree criminal sexual contact of a
7 minor (child under thirteen), contrary to NMSA 1978, Section 30-9-13(B)(1) (2003),
8 for which he was sentenced to thirty-one (31) years in prison. [BIC 7-8] Defendant
9 argues that the district court erred in permitting testimony by two expert witnesses,
10 Nurse Practitioner Lorine DeRusha (Nurse DeRusha) and forensic interviewer
11 Danielle Smith (FI Smith).

12 **BACKGROUND**

13 {3} Defendant's conviction arises out of acts committed against his daughter's
14 half-sister, A.G. [BIC 16] A.G. testified at trial that "[A.G.'s] mother and
15 [Defendant] worked at an office cleaning business, which required them to clean
16 offices at night" and "that she was scared at night because [Defendant] would wake
17 her up and do inappropriate things to her." [BIC 17] A.G. described in detail the
18 abuse she suffered from Defendant. [BIC 17-18] When A.G. told her mother about
19 Defendant's acts sometime later, A.G. was brought to All Faith's Receiving Home

1 for a forensic interview and Para Los Niños for a physical exam and sexual disease
2 testing. [BIC 15, 18]

3 {4} Experts Nurse DeRusha and FI Smith both testified at trial. [BIC 16] Nurse
4 DeRusha testified as an expert in child sex abuse. [BIC 21, 24; AB 13] The State
5 laid a foundation for Nurse DeRusha's testimony outside the presence of the jury,
6 and Defendant did not object to her qualifications. [AB 13; BIC 21] Defense counsel
7 objected to Nurse DeRusha's testimony on hearsay statements about what A.G. had
8 told her, but the district court allowed many of the statements under Rule 11-803(4)
9 NMRA, the exception for medical diagnosis or treatment. [BIC 23] Defendant also
10 objected to Nurse DeRusha's testimony on how common it is for child sex abuse
11 victims to delay disclosing that they had been abused on the ground that this would
12 be duplicative of FI Smith's testimony from earlier in trial. [BIC 23-24] The district
13 court overruled this objection, as Nurse DeRusha would be testifying from a medical
14 perspective, whereas FI Smith testified from a forensic interviewing perspective.
15 [BIC 24] Defendant also objected to statements that Nurse DeRusha would possibly
16 make about what A.G.'s mother told A.G., which would not be pertinent to her
17 medical diagnosis or treatment. [BIC 25] The district court sustained this objection,
18 [BIC 29] and Nurse DeRusha testified consistent with that ruling. [BIC 30-32]

DISCUSSION

{5} On appeal, Defendant argues that three categories of testimony were improperly presented to the jury: (1) Nurse DeRusha should not have been permitted to testify that a lack of observed physical injuries did not preclude prior sexual abuse; (2) Nurse DeRusha and FI Smith should not have been permitted to testify regarding how common it is for child sex abuse victims to delay disclosing that they had been abused; and (3) Nurse DeRusha should not have been permitted to testify regarding hearsay statements made to her in the course of her medical examination. [BIC 38] Defendant presents several bases for why each portion of testimony is improper.

Testimony on Physical Examination

{6} Defendant first argues that the district court erred in permitting Nurse DeRusha's testimony that "the normal findings during her physical examination of AG—i.e., no evidence of any injury from the alleged sexual assault—are consistent with sexual abuse and consistent with the absence of any sexual abuse." [BIC 40] Defendant argues that admitting this testimony is error because: "(1) it does not assist the trier of fact, so cannot be admitted under Rule 11-702 NMRA; (2) it is irrelevant; (3) it is not scientifically reliable; and (4) it fails the [Rule 11-403 NMRA] balancing test." [BIC 40] Defendant has not demonstrated error on any of these bases.

1 {7} “The rule in this State has consistently been that the admission of expert
2 testimony or other scientific evidence is peculiarly within the sound discretion of the
3 trial court and will not be reversed absent a showing of abuse of that discretion.”
4 *State v. Alberico*, 1993-NMSC-047, ¶ 58, 116 N.M. 156, 861 P.2d 192. “[A] court
5 abuses its discretion if it applies an incorrect standard, incorrect substantive law, or
6 its discretionary decision is premised on a misapprehension of the law.” *State v.*
7 *Sena*, 2020-NMSC-011, ¶ 15, 470 P.3d 227 (internal quotation marks and citation
8 omitted). “Broad discretion in the admission or exclusion of expert evidence will be
9 sustained unless manifestly erroneous.” *State v. Chouinard*, 1981-NMSC-096, ¶ 7,
10 96 N.M. 658, 634 P.2d 680.

11 {8} “Rule 11-702 . . . predicates the admissibility of expert testimony on the
12 satisfaction of three requirements: (1) that the expert be qualified; (2) that the
13 testimony be of assistance to the trier of fact; and (3) that the expert’s testimony be
14 about scientific, technical, or other specialized knowledge with a reliable basis.”
15 *State v. Downey*, 2008-NMSC-061, ¶ 25, 145 N.M. 232, 195 P.3d 1244. Defendant
16 did not object to Nurse DeRusha’s qualifications [AB 13; BIC 21] and presents no
17 argument on appeal about this requirement. We thus turn our attention to the second
18 requirement.

19 {9} To this requirement, Defendant relies on the seeming contradiction in Nurse
20 DeRusha’s testimony that a lack of signs of physical injury during her examination

1 does not preclude the possibility that A.G. was abused, while acknowledging on
2 cross-examination that a lack of injury could also mean that the abuse did not
3 happen. [BIC 41] This testimony does not present the contradiction that Defendant
4 seeks to establish. As Defendant recognizes, this testimony was elicited “to prevent
5 the defense from arguing to the jury that there was no examination [of A.G.] when
6 in fact there was” [BIC 41-42], and likely to explain the lack of signs of physical
7 injury to A.G. at the time of the examination. Defendant’s suggestion that “there is
8 a better procedure” to reduce prejudice through stipulations neither establishes that
9 this testimony does not assist the trier of fact nor renders this testimony irrelevant.
10 [BIC 41-42] *See Downey*, 2008-NMSC-061, ¶ 30 (“One aspect of relevance is
11 whether expert testimony proffered in the case is sufficiently tied to the facts of the
12 case that it will aid the jury in resolving a factual dispute.” (internal quotation marks
13 and citation omitted)).

14 {10} Similarly, it cannot be said that the district court erred in its analysis of the
15 balancing test under Rule 11-403 when Nurse DeRusha’s testimony is significantly
16 probative to the physical evidence of Defendant’s abuse against A.G., in comparison
17 to the risk of unfair prejudice. “Evidence is unfairly prejudicial if it is best
18 characterized as sensational or shocking, provoking anger, inflaming passions, or
19 arousing overwhelming sympathetic reactions, or provoking hostility or revulsion or
20 punitive impulses, or appealing entirely to emotion against reason.” *State v. Bailey*,

1 2017-NMSC-001, ¶ 16, 386 P.3d 1007 (internal quotation marks and citation
2 omitted). The evidence that A.G. exhibited no physical evidence of sexual abuse at
3 the time of the physical examination does not fall within any of those
4 characterizations. We therefore conclude the district court did not err in weighing its
5 probative value. *See id.* (“The determination of unfair prejudice is fact sensitive, and,
6 accordingly, much leeway is given trial judges who must fairly weigh probative
7 value against probable dangers.” (internal quotation marks and citation omitted)).

8 {11} Defendant also argues that Nurse DeRusha’s opinion was not scientifically
9 reliable, pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579
10 (1993), and *Alberico*, 1993-NMSC-047. [BIC 42-43] The State correctly argues that
11 this argument was not preserved. [AB 9] Though Defendant moved to exclude Nurse
12 DeRusha’s testimony on this basis in a motion prior to trial [RP 100-109], Defendant
13 has not established that he invoked the district court’s ruling on this motion. *See*
14 Rule 12-321(A) NMRA. A motion in limine alone is not necessarily enough to
15 preserve issues. *See State v. Lopez*, 2008-NMCA-002, ¶ 9, 143 N.M. 274, 175 P.3d
16 942 (holding that a challenge to fruits of a search warrant was not preserved when,
17 after pretrial motion was filed, but the issue was not argued to the district court,
18 briefed by either party, or objected to at trial). Defendant filed the motion, but on
19 appeal, Defendant does not identify where in the record he alerted the district court
20 that the motion remained pending after the trial was continued. [07-21-2023 CD

1 1:37:08-1:43:01] Nonetheless, Defendant has not demonstrated error on this point.
2 Defendant contends that the State did not proffer scientific evidence for this opinion,
3 but Defendant has not established that this fact is “scientific knowledge” that has a
4 scientific methodology requiring verification through peer review. *See State v.*
5 *Torrez*, 2009-NMSC-029, ¶ 21, 146 N.M. 331, 210 P.3d 228 (“[W]hen testing the
6 reliability of non-scientific expert testimony, rather than testing an expert’s scientific
7 methodology as required under *Daubert* and *Alberico*, the court must evaluate a non-
8 scientific expert’s personal knowledge and experience to determine whether the
9 expert’s conclusions on a given subject may be trusted.”). Nurse DeRusha was
10 admitted as an expert in child sex abuse. [BIC 24] Explanation regarding a lack of
11 injury on a child sex abuse victim falls within her area of expertise, and she testified
12 based on her personal knowledge and experience. [AB 3-6] Defendant has not
13 established that this testimony is “scientific knowledge” as opposed to “technical[]
14 or other specialized knowledge” that Nurse DeRusha would be aware of through her
15 “knowledge, skill, experience, [and] training.” *See* Rule 11-702; *see also State v.*
16 *Torres*, 1999-NMSC-010, ¶ 43, 127 N.M. 20, 976 P.2d 20 (agreeing with the
17 conclusion that “application of the *Daubert* factors is unwarranted in cases where
18 expert testimony is based solely upon experience or training” (internal quotation
19 marks and citation omitted)). Accordingly, we conclude the district court did not err

1 in allowing Nurse DeRusha to testify regarding A.G.'s physical injuries or lack
2 thereof.

3 **Delayed Disclosure**

4 {12} Defendant also argues that the district court erred by permitting both Nurse
5 DeRusha and FI Smith to testify regarding how common it is for a child victim to
6 delay in disclosing that they had been abused. [BIC 46] Defendant articulates these
7 arguments under Rule 11-702 and Rule 11-403. [BIC 46] Defendant also cites
8 arguments on scientific reliability raised in his motion filed in July 2023, which were
9 not ruled on by the district court before trial in November 2023 and for which
10 Defendant did not object at trial. [BIC 46; AB 13-14; RP 88-89] *See Lopez*, 2008-
11 NMCA-002, ¶ 9. This scientific reliability argument again was not preserved, but
12 the same reasoning applies as above. Defendant's brief argument does not establish
13 that this is scientific knowledge that requires verification of scientific methodology,
14 nor has Defendant explained why Nurse DeRusha or FI Smith lack the sort of
15 personal knowledge, experience, or training to prohibit them from testifying to this
16 subject. *See Torres*, 1999-NMSC-010, ¶ 43 (stating that where expert testimony
17 relies on scientific knowledge, it must be shown to have scientific reliability and
18 that such proof is not required if testimony is based solely upon experience or
19 training).

1 {13} Defendant also argues that both Nurse DeRusha and FI Smith testifying to this
2 same point—a common delay in child victims disclosing their abuse—unfairly
3 prejudiced him under Rule 11-403. [BIC 51] Defendant has not demonstrated error
4 here either. The State points out that Defendant stipulated to Nurse DeRusha’s
5 admissibility as an expert in child sex abuse. [AB 13-14] Defendant asserts that by
6 testifying about the phenomena of delayed disclosure, Nurse DeRusha essentially
7 vouched for A.G.’s credibility. [BIC 47] We disagree. *See State v. Lucero*, 1993-
8 NMSC-064, ¶ 22, 116 N.M. 450, 863 P.2d 1071 (reversing the admission of expert
9 testimony that repeated the victim’s allegations of abuse by the perpetrator and
10 opined, directly and indirectly, on the victim’s truthfulness). The experts’ testimony
11 provides context and explanation for why A.G. waited to disclose her abuse, which
12 a jury might otherwise think undermines A.G.’s credibility. This testimony explains
13 the medical phenomena of delayed disclosure in sexual abuse cases and is highly
14 probative to the issues before the jury. Defendant does not articulate what unfair
15 prejudice substantially outweighs that probative value under Rule 11-403. While we
16 recognize that “[t]he [trial] court may exclude relevant evidence if its probative value
17 is substantially outweighed by a danger of . . . needlessly presenting cumulative
18 evidence,” Rule 11-403, “[t]he determination of unfair prejudice is fact sensitive,
19 and, accordingly, much leeway is given trial judges who must fairly weigh probative

1 value against probable dangers.” *State v. Bailey*, 2017-NMSC-001, ¶ 16, 386 P.3d
2 1007 (internal quotation marks and citation omitted).

3 {14} Likewise, Defendant’s arguments about presenting cumulative evidence are
4 not persuasive when this evidence provides probative value in explaining A.G.’s
5 delay in disclosing her abuse. [BIC 52-53] The decision whether to exclude
6 cumulative evidence “is a matter within the discretion of the trial court and the trial
7 court’s determination will not be disturbed on appeal in the absence of a clear abuse
8 of that discretion.” *State v. Marquez*, 1998-NMCA-010, ¶ 24, 124 N.M. 409, 951
9 P.2d 1070. “The fact that evidence prejudices [a] defendant is not grounds for its
10 exclusion.” *State v. Watley*, 1989-NMCA-112, ¶ 23, 109 N.M. 609, 788 P.2d 375.
11 The prejudicial effect, rather, must substantially outweigh its probative value. *See*
12 *State v. Salgado*, 1991-NMCA-111, ¶ 11, 112 N.M. 793, 819 P.2d 1351 (citing Rule
13 11-403).

14 {15} The State identifies that Nurse DeRusha described this delay in the medical
15 examination context, and FI Smith described delayed disclosure in the forensic
16 interview context. [AB 15] We are unpersuaded that the district court erred in
17 determining that the risk of “needlessly presenting cumulative evidence” did not
18 outweigh the probative value of each of these experts providing testimony on how
19 common it is for child sexual abuse victims to delay disclosing their abuse,

1 especially in the context of different areas of expertise. We are not persuaded that
2 risk outweighed the probative value of the evidence.

3 {16} Defendant also argues that A.G.’s explanation of why she did not disclose the
4 abuse sooner renders this expert testimony improper under Rule 11-702. Defendant
5 cites out-of-jurisdiction authority for the argument that an expert’s explanation of
6 delayed disclosure in sex abuse cases often would not be helpful to assist the trier of
7 fact when it is duplicative of testimony given by the victim. [BIC 48-49] Neither this
8 issue nor the cited authority were presented in the motion to exclude for which
9 Defendant failed to invoke the district court’s ruling. [RP 100-109] Reviewing for
10 unpreserved error, we cannot say that the district court erred in allowing the experts
11 to testify about how commonly victims delay disclosing sex abuse merely because
12 A.G. also testified to why she did so in her circumstance. *See Lucero*, 1993-NMSC-
13 064, ¶ 12 (explaining that if an evidentiary error is unpreserved “we must be
14 convicted that the admission of the testimony constituted an injustice that creates
15 grave doubts concerning the validity of the verdict” (internal quotation marks and
16 citation omitted)). The expert testimony was sufficiently tied to the facts as testified
17 to by A.G. and therefore assisted the trier of fact. Accordingly, we affirm the district
18 court as to the expert testimony on delay disclosure.

Hearsay Objections

{17} Defendant lastly argues that Nurse DeRusha presented “extensive hearsay testimony” to the jury, which he claims was error by the district court. Defendant argues that it was improper for the district court to permit Nurse DeRusha to describe statements made by A.G. for purposes of medical diagnosis or treatment under Rule 11-803(4)(a) when the examination took place significantly after the abuse. [BIC 53-55] We are not persuaded. As the State correctly observes, [AB 25-27] Defendant’s argument is made without identifying the specific statements (with one exception noted below) that he contends were erroneously admitted under Rule 11-803(4). It is not the proper role of this Court to engage in speculation and surmise to construct an appellate argument for a party. *See State v. Fuentes*, 2010-NMCA-027, ¶ 29, 147 N.M. 761, 228 P.3d 1181 (noting that we will “not review unclear or undeveloped arguments [that] require us to guess at what a part[y’s] arguments might be”). Nor has Defendant cited any authority for the idea that statements for medical diagnosis and treatment from a child abuse victim to a medical provider are inadmissible simply because there is a delay between the abuse and evaluation. *See State v. Vigil-Giron*, 2014-NMCA-069, ¶ 60, 327 P.3d 1129 (“[A]ppellate courts will not consider an issue if no authority is cited in support of the issue and that, given no cited authority, we assume no such authority exists.”).

1 {18} We turn to the one statement Defendant specifically challenges in his brief in
2 chief—that Nurse DeRusha’s testimony that A.G. had told her about her mother
3 working at night constitutes double hearsay and falls outside of the medical
4 diagnosis or treatment exception in Rule 11-803(4). [BIC 55] The district court
5 allowed this testimony as an explanation for the “inceptions” of the “present
6 symptoms, pain, or sensations” that A.G. was describing to Nurse DeRusha during
7 the evaluation. [AB 37] Upon a review of the testimony cited by Defendant, it is
8 clear that A.G.’s testimony about her mother’s schedule was in response to questions
9 aimed at determining the timeframe of the alleged abuse. We cannot say that the
10 district court abused its discretion in allowing this testimony before the jury, as it
11 was relevant to the “inceptions” of the abuse, and A.G. previously had testified to
12 the jury about her mother’s work schedule. [BIC 17] Moreover, this testimony only
13 contains information about A.G.’s mother’s schedule [BIC 26], not double hearsay
14 statements from A.G.’s mother as was otherwise prohibited by the district court.

15 **CONCLUSION**

16 {19} For the foregoing reasons, we affirm Defendant’s conviction on all counts.

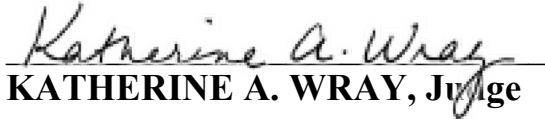
17 {20} **IT IS SO ORDERED.**

18
19 
JENNIFER L. ATTREP, Judge

1 **WE CONCUR:**

2 

3 **J. MILES HANISEE, Judge**

4 

5 **KATHERINE A. WRAY, Judge**