

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-41999

NICOLE M. CRUZ,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF UNION COUNTY

Steven A. Romero, District Court Judge

Raúl Torrez, Attorney General

Santa Fe, NM

Henry Chynoweth, Assistant Solicitor General

Albuquerque, NM

for Appellee

Bennet J. Baur, Chief Public Defender

Nina Lalevic, Assistant Appellate Defender

Santa Fe, NM

for Appellant

MEMORANDUM OPINION

HENDERSON, Judge.

{1} This matter was submitted to the Court on the brief in chief in the above-entitled cause, pursuant to this Court's notice of assignment to the general calendar with modified briefing. Following consideration of the brief in chief, the Court assigned this matter to Track 2 for additional briefing, pursuant to the Administrative

Order in *In re Pilot Project for Criminal Appeals*, No. 2022-002, effective November 1, 2022. Now having considered the brief in chief, answer brief, and reply brief, for the following reasons we reverse and remand for retrial.

{2} Defendant appeals from her conviction for criminal sexual penetration (CSPM) by the use of force or coercion on a child thirteen to eighteen years of age. [2 RP 367] Defendant does not challenge the sufficiency of the evidence under the jury instructions given. Instead, Defendant argues that fundamental error occurred because the jury was instructed pursuant to UJI 14-945 NMRA and, therefore, convicted her of a nonexistent crime. [BIC 4-9; 2 RP 315] We agree.

{3} It is established in New Mexico that “[a] conviction for ‘position of authority’ CSPM[] based on conduct occurring after the 2007 amendment of [NMSA 1978,] Section 30-9-11 [(2009)] is a legal nullity.” *State v. Figueroa*, 2020-NMCA-007, ¶ 14, 457 P.3d 983. The conduct in this case is alleged to have occurred in 2020, well after the 2007 amendment of Section 30-9-11. [2 RP 315] And the force or coercion in this case was based off of Defendant’s status as a parent to the minor victim. [Id.] Defendant’s conviction “was therefore fundamentally unfair notwithstanding [her] apparent guilt.” *See Figueroa*, 2020-NMCA-007, ¶ 14 (alteration, internal quotation marks, and citation omitted); *see also id.* ¶ 11 (noting that the CSPM statute does not permit a finding of force or coercion under a position of authority theory).

1 {4} The State argues that fundamental error did not occur here because, as a lesser
2 included offense, the jury was instructed on the elements of criminal sexual contact
3 of a minor (CSCM) by a person in a position of authority and the jury necessarily
4 found all the elements of CSCM when they returned their guilty verdict as to the
5 CSPM. [AB 6-20] We are cognizant that *Figueroa* is distinguishable from this case
6 for the reasons claimed by the State. [AB 14-20] Nonetheless, we are unpersuaded
7 by the State’s argument that these distinctions are material. [Id.] As we held in
8 *Figueroa*, “[i]t is fundamentally unfair, and thus per se fundamental error, to convict
9 a criminal defendant of a nonexistent crime, regardless of whether the evidence
10 would have been sufficient to prove a crime that the law does recognize.” *Id.* ¶ 13.
11 We are thus compelled to conclude that Defendant’s conviction amounted to
12 fundamental error and must be reversed. *See id.* ¶ 14.

13 {5} Having determined that fundamental error occurred, we address the State’s
14 request that this Court direct remand of this case for entry of an amended judgment
15 and sentence for CSCM. [AB 21-30] Our Supreme Court recently clarified that “the
16 direct remand rule applies only to cases that are reversed on appeal for insufficient
17 evidence.” *State v. Revels*, 2025-NMSC-021, ¶ 40, 572 P.3d 974. In so clarifying,
18 our Supreme Court held that the direct remand rule is not available in cases, like this
19 one, where a conviction must be reversed or vacated as a nonexistent crime. *See id.*
20 ¶¶ 38, 40, 47. As we are bound by New Mexico Supreme Court precedent, *see State*

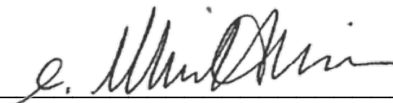
1 *v. Mares*, 2024-NMSC-002, ¶ 34, 543 P.3d 1198, we decline the State’s invitation
2 to apply the direct remand rule in this case [AB 21-30]. Instead, we agree with
3 Defendant that the remedy is to remand the matter to the district court for a new trial.
4 [BIC 4, 9]

5 {6} Based on the foregoing, we reverse Defendant’s conviction and remand for a
6 new trial.

7 {7} **IT IS SO ORDERED.**

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9 
SHAMMARA H. HENDERSON, Judge

10 **WE CONCUR:**

11 
12 **J. MILES HANISEE, Judge**

13 
14 **JENNIFER L. ATTREP, Judge**