

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-41239

ANTHONY WEST,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF ROOSEVELT COUNTY

Donna J. Mowrer, District Court Judge

Raúl Torrez, Attorney General

Santa Fe, NM

Michael J. Thomas, Assistant Solicitor General

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for Appellee

Bennet J. Baur, Chief Public Defender

Brian Parrish, Assistant Appellate Defender

Santa Fe, NM

for Appellant

MEMORANDUM OPINION

BACA, Judge.

{1} Defendant Anthony West was convicted by a jury of nine counts of sexual
exploitation of children in violation of NMSA 1978, Section 30-6A-3(D) (2016) for
incidents that occurred between December 2016 and June 2018 involving Defendant
and his stepdaughter (Victim). On appeal, Defendant argues that (1) the district court

1 erred in admitting evidence establishing that Defendant and Victim began a sexual
2 relationship after she turned eighteen; (2) his convictions were not supported by
3 substantial evidence; and (3) his convictions violate the prohibition against double
4 jeopardy. Because we conclude that a portion of the admitted evidence was more
5 prejudicial than probative, we reverse Defendant's convictions, and, because
6 sufficient evidence supports the convictions, we remand for a new trial.

7 **DISCUSSION¹**

8 **I. Prejudicial Evidence**

9 {2} Defendant first argues that the district court erred in admitting a photograph
10 of Defendant and Victim in the shower together when she was over eighteen years
11 of age (the shower photo), and, a video showing a portion of Defendant's interview
12 with law enforcement wherein Defendant admits to having a sexual relationship with
13 Victim after she turned eighteen (the interview video). We begin by setting forth the
14 facts relevant to our analysis of the evidence at issue.

15 {3} In 2020, Defendant's in-laws contacted New Mexico State Police to turn over
16 a cell phone that belonged to Defendant, which contained sexually explicit images
17 of Victim. After obtaining a search warrant, law enforcement discovered hundreds

¹Because this is an unpublished memorandum opinion written solely for the benefit of the parties, *see State v. Gonzales*, 1990-NMCA-040, ¶ 48, 110 N.M. 218, 794 P.2d 361, and the parties are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 of sexually explicit photographs of Victim that had been uploaded to Dropbox, a
2 cloud-based storage application. These photographs were the primary evidence used
3 to charge Defendant with ten counts of sexual exploitation of children.²

4 {4} For the jury to convict Defendant of sexual exploitation of children, the State
5 had to prove, in relevant part, that Defendant caused or permitted Victim, while she
6 was under the age of eighteen years, “to engage in a prohibited sexual act or
7 simulation of such an act if that person knows, has reason to know or intends that
8 the act may be recorded in any obscene visual or print medium.” Section 30-6A-
9 3(D). To prove this, the State relied on the theory that Defendant appeared in, and
10 therefore participated in the creation of, the photographs with Victim. However,
11 because none of the photographs associated with the charges showed Defendant’s
12 face, and because both Victim and Defendant denied that Defendant was the
13 individual in the photographs, the State also had to establish that Defendant was the
14 male shown in the photographs.

15 {5} To do so, the State sought to introduce the shower photo and the interview
16 video. The State contended that this evidence was relevant to establish identity, and
17 to establish Defendant’s pattern of conduct and common scheme as it relates to his
18 ongoing sexual relationship with Victim because (1) it showed the same victim in

²The district court granted Defendant’s motion for directed verdict as to Count 10, thus, we did not consider the photos associated with Count 10 for our analysis.

1 the same location as the charged conduct photos, and, Defendant's physically
2 identifying characteristics (which would allow the jury to compare the shower photo
3 and video interview to the charged conduct photos); and (2) it established a distinct
4 pattern attributable to Defendant.

5 {6} Seeking to exclude this evidence, Defendant filed a motion in limine arguing
6 that the evidence was being offered as improper character evidence, and, was not
7 otherwise relevant. At the hearing on the motion, the State argued that the evidence
8 (1) showed the same Victim in the same location as the charged conduct photos; (2)
9 could assist the jury to identify Defendant as the male in the charged conduct photos
10 based on Defendant's physically identifying characteristics and a comparison of the
11 evidence with the charged conduct photos; and (3) it established a distinct pattern
12 attributable to Defendant. After hearing arguments, the district court admitted both
13 the shower photo and the interview video.

14 {7} On appeal, Defendant contends that the district court abused its discretion by
15 admitting the shower photo and the interview video because the evidence was
16 improper character evidence meant to encourage the jury to believe that Defendant
17 was a sexual deviant and the evidence was more prejudicial than probative. We agree
18 and discuss each of these items of evidence in turn, beginning with the interview
19 video.

A. The District Court Erred in Admitting a Photo and the Unredacted Interview Video Because the Prejudicial Effect of This Evidence Substantially Outweighed its Probative Value

{8} “We review the admission of evidence under an abuse of discretion standard and will not reverse in the absence of a clear abuse.” *State v. Arvizo*, 2021-NMCA-055, ¶ 29, 499 P.3d 1221 (internal quotation marks and citation omitted). “An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the [district] court abused its discretion by its ruling unless we can characterize [the ruling] as clearly untenable or not justified by reason.” *Id.* (internal quotation marks and citation omitted).

{9} We begin by discussing the meaning of relevant evidence, its admissibility, and the limitations on admitting relevant evidence. Rule 11-401 NMRA defines “relevant evidence” as any evidence having a “tendency to make a fact more or less probable than it would be without the evidence, and . . . the fact is of consequence in determining the action.” Rule 11-402 NMRA authorizes the admission of relevant evidence and proscribes the admission of relevant evidence where the “United States or New Mexico [C]onstitution, a statute, these rules, or other rules prescribed by the [Supreme] Court” provide otherwise. Rule 11-403 NMRA further limits the admission of relevant evidence, and provides that relevant evidence may be excluded “if its probative value is substantially outweighed by a danger of one or more of the

1 following: unfair prejudice, confusing the issues, misleading the jury, undue delay,
2 wasting time, or needlessly presenting cumulative evidence.”

3 {10} As to the admission of “[e]vidence of a person’s character, character trait,”
4 Rule 11-404(A)(1) NMRA prohibits admission of such evidence “to prove that on a
5 particular occasion the person acted in accordance with the character or trait.”

6 Likewise, as to the admission of “[e]vidence of a crime, wrong, or other act,” Rule
7 11-404(B)(1) prohibits the admission of such evidence “to prove a person’s
8 character in order to show that on a particular occasion the person acted in
9 accordance with the character.”³ Rule 11-404(B)(2), however, authorizes the

10 admission of evidence of prior acts if it is relevant “for another purpose, such as
11 proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence
12 of mistake, or lack of accident.” “This list is not exhaustive and evidence of other
13 wrongs may be admissible on alternative relevant bases so long as it is not admitted
14 to prove conformity with character.” *State v. Otto*, 2007-NMSC-012, ¶ 10, 141 N.M.

15 443, 157 P.3d 8 (internal quotation marks and citation omitted). Importantly, “Rule
16 11-404(B) is a rule of inclusion, not exclusion, providing for the admission of all
17 evidence of other acts that are relevant to an issue in trial, other than the general
18 propensity to commit the crime charged.” *State v. Bailey*, 2017-NMSC-001, ¶ 14,

³For ease of reference, we refer to the evidence described in Rule 11-404(A) and Rule 11-404(B) as “character evidence.”

1 386 P.3d 1007 (alteration, internal quotation marks, and citation omitted).
2 Consequently, before admitting character evidence the district court must find that
3 “the evidence is relevant to a disputed issue other than the defendant’s character,
4 [and] the [district] court must determine that the prejudicial effect of the evidence
5 does not outweigh its probative value.” *State v. Lymon*, 2021-NMSC-021, ¶ 42, 488
6 P.3d 610 (omission, alteration, internal quotation marks, and citation omitted).

7 {11} Here, the State argued that a scar on the abdomen of the perpetrator and a ring
8 on the hand of the perpetrator was relevant to establish that Defendant was the
9 individual in the photos associated with the charged conduct. However, neither the
10 scar on the abdomen nor the ring can be seen in the interview video or the shower
11 photo.⁴ Thus, neither the shower photo nor the interview video was relevant to
12 establish identity by way of the scar or the ring.

13 {12} As to the State’s second argument that the shower photo and video interview
14 were relevant to establish a pattern of conduct—the relevancy depends on the degree
15 of similarity. *See State v. Saavedra*, 1985-NMSC-077, ¶ 6, 103 N.M. 282, 705 P.2d
16 1133, *abrogated on other grounds by State v. Belanger*, 2009-NMSC-025, ¶ 36 n.1,
17 146 N.M. 357, 210 P.3d 783. The State argued that the shower photo and interview

⁴Defendant is fully clothed in the interview video. Consequently, the scar on the abdomen is not visible. As well, because of the positioning of Defendant during the interview video, the ring is not readily identifiable. The shower photo does not depict a ring, and Defendant’s abdomen is not visible in the photo.

1 video demonstrated similarity because the background of the shower photo matches
2 the background of some of the charged conduct photos, and, Defendant admits in
3 the interview video that he had sex with Victim in the same locations depicted in the
4 charged photos after she turned eighteen. But, given that Victim testified that all of
5 the charged photos were taken in her home, and Defendant lived in the same
6 household, we are not persuaded that these similarities establish a unique or distinct
7 pattern that identifies Defendant as the perpetrator in the earlier photographs. *Cf.*
8 *State v. Beachum*, 1981-NMCA-089, ¶¶ 9-10, 96 N.M. 566, 632 P.2d 1204
9 (concluding that a defendant's confession did not fall under the identity exception
10 because the similarities between the crimes discussed in the confession and the
11 crimes charged were "not idiosyncratic or even unusual" and thus insufficient to
12 establish a *modus operandi*).

13 {13} Moreover, relevant evidence under 11-404(B)(2) must still be weighed
14 against its prejudicial effect under Rule 11-403. *See Saavedra*, 1985-NMSC-077,
15 ¶ 7; Rule 11-403 ("The court may exclude relevant evidence if its probative value is
16 substantially outweighed by a danger of . . . unfair prejudice."). "Unfair prejudice,
17 in the context of Rule 11-403, means an undue tendency to suggest decision on an
18 improper basis, commonly, though not necessarily, an emotional one. Evidence is
19 unfairly prejudicial if it is best characterized as sensational or shocking, provoking
20 anger, inflaming passions, or arousing overwhelmingly sympathetic reactions, or

1 provoking hostility or revulsion or punitive impulses, or appealing entirely to
2 emotion against reason.” *State v. Bailey*, 2017-NMSC-001, ¶ 16 (internal quotation
3 marks and citations omitted). In determining the probative value of the proffered
4 evidence, the court should look to the availability of other means of proving the
5 disputed issue and the remoteness in time of the other crime, wrong or act, especially
6 when the prejudicial effect of the proffered evidence is extreme. *State v. Taylor*,
7 1986-NMCA-011, ¶ 17, 104 N.M. 88, 717 P.2d 64.

8 {14} In this case, there is no question but that the shower photo and interview video
9 were highly prejudicial. Undoubtedly, evidence of a sexual relationship between a
10 stepfather and stepdaughter provokes an emotional response, even when that
11 stepdaughter is an adult. The video interview was especially prejudicial because it
12 included many extraneous and graphic details about Defendant’s sexual relationship
13 with Victim that were not relevant to establishing identity in the ways that the State
14 argued, and were unnecessary to establish any element of the crime of sexual
15 exploitation of children. Examples of these details include: (1) Defendant admitting
16 that he initiated the sexual relationship with Victim after she walked in on Defendant
17 while he was masturbating; (2) Defendant stating, “I have permission from my wife
18 to have sex with anybody I desire” but “she does not know that my daughter and I
19 actually had sex”; (3) Defendant providing intimate details about his sexual
20 encounters with Victim, describing the various sex toys they used during their

1 encounters; (4) Defendant stating that he and Victim have vaginal sex, anal sex, oral
2 sex, and do not use condoms given that Victim “has been on birth control since she
3 was sixteen”; (5) Defendant describing the different outfits Victim wore, including
4 “a short little skirt,” a bathrobe, and a “little night[gown]”; and (6) Defendant
5 admitting that he and Victim had sexual intercourse “right before [Defendant’s wife]
6 got pregnant.” These graphic details are best characterized as sensational or
7 shocking, and are therefore unfairly prejudicial, creating a real danger of a verdict
8 based entirely on emotion rather than reason.

9 {15} Even if the shower photo and video interview are minimally probative in
10 establishing that Defendant was the individual in the charged photos, that value is
11 diminished significantly because the State had alternative, less prejudicial means of
12 proving Defendant’s identity, including photographs that law enforcement took of
13 Defendant pursuant to a warrant, which showed a scar on Defendant’s abdomen and
14 a ring on his left hand and photos of the residence, which showed the same bathroom
15 background depicted in the shower photo. *See State v. Martinez*, 1980-NMCA-022,
16 ¶ 6, 94 N.M. 50, 607 P.2d 137 (“In examining the prejudicial effect, it must first be
17 determined whether there were alternative means of establishing the same fact. If so,
18 then the probative value of the questioned evidence is greatly diminished.”).

19 {16} For these reasons, we conclude that the shower photo and interview video
20 were substantially more prejudicial than probative. *Cf. State v. Chavez*, 2024-

1 NMSC-023, ¶ 35, 562 P.3d 521 (concluding that an unredacted jail phone call was
2 substantially more prejudicial than probative where only one statement by the
3 defendant during the phone call had probative value). Therefore, it was error for the
4 district court to admit the shower photo and interview video.

5 **B. The Error Was Not Harmless**

6 {17} Next, we consider whether the admission of the evidence was harmless error.
7 Improperly admitted evidence is not grounds for a new trial unless the error is
8 determined to be harmful. *State v. Tollardo*, 2012-NMSC-008, ¶¶ 25, 36, 275 P.3d
9 110. “Nonconstitutional errors, such as the evidentiary error at issue, are deemed
10 harmful if there is a reasonable probability that the error affected the verdict.” *State*
11 *v. Salazar*, 2023-NMCA-026, ¶ 19, 527 P.3d 693. To assess the probable effect of
12 evidentiary error, we evaluate the circumstances surrounding the error. *See State v.*
13 *Fernandez*, 2023-NMSC-005, ¶ 24, 528 P.3d 621. This evaluation includes “the
14 source of the error, the emphasis placed on the error, evidence of the defendant’s
15 guilt apart from the error, the importance of the erroneously admitted evidence to
16 the prosecution’s case, and whether the erroneously admitted evidence was merely
17 cumulative.” *Id.* (internal quotation marks and citation omitted). “These
18 considerations, however, are not exclusive, and they are merely a guide to facilitate
19 the ultimate determination—whether there is a reasonable probability that the error

1 contributed to the verdict.” *Id.* (internal quotation marks and citation omitted). With
2 this in mind, we turn then to consider the facts of this case.

3 {18} In this case, the jury saw hundreds of photos associated with the charged
4 conduct, which depicted obscene child pornography. As well, the jury was shown
5 the shower photo, which depicted Defendant and Victim partially unclothed in a
6 shower together and the nearly twenty-minute long interview video, in which
7 Defendant recounted the many profoundly graphic details about his sexual
8 encounters with Victim. Lastly, the jury was shown a series of photos taken of
9 Defendant by police during the execution of a search warrant. These photos showed,
10 in pertinent part, Defendant’s unclothed abdomen, and his hands, and revealed that
11 Defendant had a scar on his abdomen and wore a ring on his hand.

12 {19} The State’s discussion of the interview video and shower photo during its
13 closing argument emphasized these two pieces of evidence and reminded the jury of
14 them, thereby inflaming, yet again, the prejudice caused by this evidence, despite
15 the State’s contention that this evidence was meant to establish Defendant’s identity.
16 Further, no limiting instruction was given to the jury instructing them that they could
17 consider this evidence only for the limited purpose of establishing the identity of the
18 perpetrator. We cannot ignore the fact that the evidence of Defendant’s guilt was
19 entirely circumstantial, and thus the trial outcome hinged upon the credibility of the
20 witnesses and which version of events the jury chose to credit. *Cf. State v. Duran,*

1 2015-NMCA-015, ¶ 26, 343 P.3d 207 (stating that where improperly admitted
2 evidence goes to the primary issue of credibility in a sexual abuse case, it is more
3 likely to be prejudicial).

4 {20} For these reasons, we conclude that there is a reasonable probability that
5 admission of the shower photo and the interview video affected the jury’s verdict
6 and thus were not harmless. Accordingly, we reverse.

7 **II. Sufficiency of the Evidence**

8 {21} “Because we have determined that we must reverse Defendant’s convictions
9 . . . , we are required to determine whether sufficient evidence was presented to
10 support these convictions to avoid double jeopardy concerns should the State seek
11 to retry Defendant.” *See State v. Samora*, 2016-NMSC-031, ¶ 34, 387 P.3d 230.

12 {22} “Our standard of review for sufficiency of the evidence is highly deferential
13 to the jury’s verdict.” *State v. Chavez*, 2024-NMSC-023, ¶ 40. “In reviewing the
14 sufficiency of the evidence, we must view the evidence in the light most favorable
15 to the guilty verdict, indulging all reasonable inferences and resolving all conflicts
16 in the evidence in favor of the verdict.” *State v. Cunningham*, 2000-NMSC-009,
17 ¶ 26, 128 N.M. 711, 998 P.2d 176. “The relevant question is whether, after viewing
18 the evidence in the light most favorable to the prosecution, *any* rational trier of fact
19 could have found the essential elements of the crime beyond a reasonable doubt.”
20 *Id.* (alteration, internal quotation marks, and citation omitted). “The jury instructions

1 become the law of the case against which the sufficiency of the evidence is to be
2 measured.” *State v. Holt*, 2016-NMSC-011, ¶ 20, 368 P.3d 409 (alterations, internal
3 quotation marks, and citation omitted). Consequently, we consider the instructions
4 given to the jury for the sexual exploitation of children charges.

5 {23} To convict Defendant of sexual exploitation of children, as charged in counts
6 one through nine of the indictment, the district court instructed the jury that the State
7 had to prove each of the following elements of sexual exploitation of children
8 beyond a reasonable doubt:

- 9 1. [D]efendant intentionally caused or permitted [Victim] to engage
10 in any prohibited sexual act or simulation of such act;
- 11 2. [D]efendant knew or had reason to know that the act was being
12 recorded in a visual or print medium;
- 13 3. The medium depicts a prohibited sexual act;
- 14 4. [D]efendant knew or had reason to know that [Victim] was a
15 child under the age of 18 at the time;
- 16 5. The depictions are obscene;
- 17 6. This happened in New Mexico on or about December 26, 2016,
18 [January 07, 2017; April 10, 2017; August 28, 2017; October 30,
19 2017; December 15, 2017, February 24, 2018; May 19, 2018;
20 and June 7, 2018].

21 Defendant limits his challenge to the sufficiency of the evidence as to the first and
22 sixth elements. We address each challenge in turn.

A. Sufficient Evidence Existed for The Jury to Find Defendant Caused or Permitted a Minor to Engage in a Prohibited Sexual Act

{24} Defendant first argues that the evidence did not sufficiently identify him as the individual in the photographs, and, as a result, the State failed to prove that Defendant caused or permitted Victim to engage in a prohibited sex act. In making this argument, Defendant employs a divide-and-conquer approach, parsing out each piece of evidence to explain why that piece, standing alone, is insufficient to establish that he is the male individual in the photographs associated with the charged conduct. We do not review the sufficiency of the evidence in this manner. *See State v. Montoya*, 2005-NMCA-078, ¶ 3, 137 N.M. 713, 114 P.3d 393 (stating that “the evidence is not to be reviewed with a divide-and-conquer mentality”). Rather, we utilize a holistic approach, viewing the evidence in its entirety. *See State v. Graham*, 2005-NMSC-004, ¶ 13, 137 N.M. 197, 109 P.3d 285 (stating that “[appellate courts] view the evidence as a whole”).

{25} At trial, to prove Defendant was the person depicted in the photographs associated with the charged conduct, the State introduced photographs that law enforcement took of Defendant pursuant to a search warrant. The photographs showed Defendant’s abdomen with a visible scar near his belly button and showed Defendant’s left hand with a ring on one of the fingers. The photographs associated with the charged conduct showed a male abdomen, which was described as having a distinct navel and a visible scar. Some of the photos also showed a male’s left hand

1 with a ring on one of the fingers of this hand. This evidence, viewed as a whole, was
2 sufficient to allow the jury to conclude that Defendant was the male depicted in the
3 photographs, and by extension, that Defendant caused or permitted Victim to engage
4 in a prohibited sex act with the knowledge that it was being recorded.

5 **B. Sufficient Evidence Existed That the Charged Conduct Occurred on or**
6 **Around the Dates Listed in the Jury Instructions**

7 {26} Next, Defendant challenges the sufficiency of the evidence establishing the
8 dates when each of the nine counts of sexual exploitation of children occurred.
9 Defendant asserts that “[he] was convicted on nine count[s] of criminal sexual
10 exploitation based on specific dates, without evidence that the alleged conduct
11 occurred on that date.” In support of his argument, Defendant points to the fact that
12 law enforcement could not rely on the charged photographs’ metadata to pinpoint
13 the exact date that the photos were taken, and that the dates in the jury instructions
14 correspond to the date that the photos were uploaded to DropBox, not necessarily
15 the date that the photos were taken.

16 {27} In response, the State makes two arguments. First the State asserts that “[t]here
17 was extensive testimony from [a forensic digital analyst expert] about the upload
18 dates to Dropbox, all of which in this case were prior to Victim’s attaining the age
19 of eighteen. By simple logic, the pictures had to have been created before they were
20 uploaded.” Second, the State asserts that “the specific date upon which the conduct
21 occurred is not an element of Section 30-6A-3(D). Although the jury instructions

1 contained a date element for each count, the sufficiency of the evidence is measured,
2 ultimately, against the statutory elements.” We agree and explain.

3 {28} For each of the nine counts of sexual exploitation of children charged in the
4 “Grand Jury Indictment” the State alleged that they occurred on the following dates:

5 Count 1: on or about December 26, 2016,

6 Count 2: on or about January 7, 2017,

7 Count 3: on or about April 10, 2017,

8 Count 4: on or about August 28, 2017,

9 Count 5: on or about October 30, 2017,

10 Count 6: on or about December 15, 2017,

11 Count 7: on or about February 24, 2018,

12 Count 8: on or about May 19, 2018, and

13 Count 9: on or about June 7, 2018.

14 The jury instruction also required the jury to find that Defendant knew or had reason
15 to know that Victim was a child under the age of eighteen at the time. The parties do
16 not dispute that the photos associated with the charged conduct were taken before
17 Victim was eighteen years old. Thus, under the circumstances of this case, the exact
18 date that the offenses were committed is not an essential element to the crimes
19 charged. *Cf. State v. Cawley*, 1990-NMSC-088, ¶ 14, 110 N.M. 705, 799 P.2d 574
20 (concluding that the date on which a crime was committed was not an essential

1 element to the crimes charged where the time of commission of the offenses
2 contained in the information clearly established that the applicable statute of
3 limitations was satisfied).

4 {29} During trial the State asked the jury to infer that the photos were taken soon
5 before they were uploaded to DropBox. At trial, Victim testified that (1) she was
6 twenty-two years old; and (2) the photos were taken “over many dates” while she
7 was in high school. Based on this testimony, the jury could infer that the photos were
8 taken on various dates between 2016 and 2018. *Cf. State v. Gipson*, 2009-NMCA-
9 053, ¶ 14, 146 N.M. 202, 207 P.3d 1179 (concluding that sufficient evidence
10 supported the State’s charges of one count of criminal sexual contact of a minor
11 (CSCM) for each month between October 2001 and March 2002 where the victim
12 testified that she accompanied the defendant to the dump every two to three weeks
13 and that every time she accompanied him, he committed acts constituting the crime
14 of CSCM); *State v. Altgilbers*, 1989-NMCA-106, ¶ 56, 109 N.M. 453, 786 P.2d 680
15 (affirming the defendant’s convictions despite the lack of specificity in the dates of
16 the alleged crimes because the victims “gave specific accounts of the acts of
17 [criminal sexual penetration] and [criminal sexual contact], and the locations in
18 which the acts occurred” and holding that even in the absence of specific dates, there
19 was sufficient evidence to support a finding that the defendant committed the sexual
20 offenses during the period alleged).

1 {30} Lastly, to the extent Defendant argues that there is insufficient evidence to
2 establish that the photos associated with each charge were taken on more than one
3 date, we note that each charge has at least one photo showing distinct characteristics
4 that are not depicted in the photos associated with any of the other charges. For
5 example, Victim is wearing green nail polish in some of the photos associated with
6 Count 7, but is not wearing green nail polish in any photo associated with Counts 1
7 through 6, or Counts 8 or 9. We also note that Defendant does not identify any
8 prejudice he suffered based on the dates listed in the jury instructions.

9 {31} We therefore sustain the verdict on each count because the evidence could
10 convince a reasonable juror beyond a reasonable doubt that Defendant committed
11 the charged offense on or about the dates specified in the jury instructions. Because
12 sufficient evidence supports Defendant's convictions, we conclude that retrial will
13 not violate double jeopardy. Accordingly, we remand for a new trial. Because of the
14 disposition of the above issues, we need not address Defendant's argument that his
15 convictions violate the prohibition against double jeopardy.

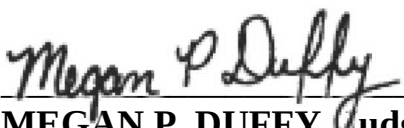
16 **CONCLUSION**

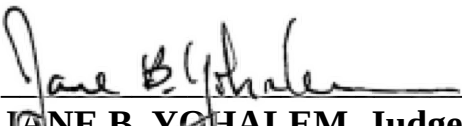
17 {32} We reverse Defendant's convictions and remand for a new trial.

18 {33} **IT IS SO ORDERED.**

19 
20 **GERALD E. BACA, Judge**

1 **WE CONCUR:**

2 
3 **MEGAN P. DUFFY, Judge**

4 
5 **JANE B. YOHALEM, Judge**