IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v. **No. A-1-CA-41575**

DANNY CHRISTOPHER ALDAZ,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Joseph Montaño, District Court Judge

Raúl Torrez, Attorney General
Santa Fe, NM
Serena R. Wheaton, Assistant Solicitor General
Albuquerque, NM

for Appellee

Harrison & Hart, LLC
Nicholas T. Hart
Albuquerque, NM

for Appellant

MEMORANDUM OPINION

BACA, Judge.

{1} A jury convicted Defendant Danny Christopher Aldaz of two counts of first degree criminal sexual penetration, contrary to NMSA 1978, Section 30-9-11 (D)(1) (2009); one count of second degree criminal sexual contact of a minor, contrary to NMSA 1978, Section 30-9-13(B)(1) (2003); and one count of third degree criminal

sexual contact of a minor, contrary to Section 30-9-13(C)(1) for sexually abusing a student in his second grade class. On appeal, Defendant contends that the convictions should be reversed because the district court improperly allowed (1) an expert to testify about the process of grooming, and (2) a nurse practitioner to read portions of her chart containing Victim's statements to the jury. Defendant also argues that the doctrine of cumulative error requires reversal. Finding no error, we affirm Defendant's convictions.

BACKGROUND

{2} During the 2018-19 school year, Victim was a second grade student at an elementary school in New Mexico. Defendant was her teacher. In 2021, Victim disclosed to her mother that Defendant had sexually abused her.

{3} After Victim disclosed the abuse to her mother, Victim's mother contacted police. In accordance with standard operating procedures in child sexual abuse cases, police requested that Victim undergo a forensic interview, which occurred. Following the forensic interview, police scheduled Victim for a medical examination with Para Los Niños (PLN).[1] A specially trained nurse practitioner (the nurse) examined Victim at PLN. During the examination, Victim made statements to the

[1]PLN is a specialty clinic associated with the University of New Mexico Children's Hospital that sees children when there are concerns of child sexual abuse.

nurse about the abuse by Defendant. The nurse documented Victim's statements in her chart.

The Pretrial Ruling on Expert Testimony About Grooming

{4} Before trial, the State gave notice that it intended to call Dr. Darrel Turner to "testify as an expert in the field of [c]linical [p]sychology with a specialty in [f]orensic [p]sychology and [s]ex [o]ffending." Dr. Turner was to opine on the "aspects of grooming he sees in this case, modus operandi, the modus operandi he sees this Defendant using in this case[;] and how offenders gain and maintain access to children, including by putting themselves in places of employment that give them easy access to children." In response, Defendant filed "Defendant's *Daubert/Alberico* Motion to Preclude Testimony of Darrel Turner" (the motion).

{5} In the motion, Defendant sought to exclude Dr. Turner's testimony, arguing that Dr. Turner's anticipated testimony about grooming was neither reliable nor relevant because "[g]rooming is not a generally accepted scientific concept, and it lacks the necessary scientific evidence to be considered a credible or statistically validated forensic concept." In response, the State submitted several scientific studies and one publication summarizing the process of grooming.

{6} Following a pretrial evidentiary hearing on the motion, the district court found that Dr. Turner was qualified as an expert in the fields of psychology and forensic psychology, the research on grooming the State provided, along with Dr. Turner's

testimony was reliable, Dr. Turner's testimony was relevant under Rule 11-401 NMRA because it would help the jury evaluate the element of unlawfulness, and the probative value of Dr. Turner's testimony was not substantially outweighed by the danger of unfair prejudice under Rule 11-403 NMRA.

The Pretrial Ruling on Victim's Statements to the Nurse

{7} At trial, the State intended to call the nurse to read to the jury from the chart where she documented Victim's medical examination. The portions that were to be read to the jury contained statements Victim made to the nurse during the examination. The day before trial began, Defendant objected to the admission of these statements because Victim's statements to the nurse during the examination were inadmissible hearsay as they were not made for purposes of medical diagnosis or treatment and no other hearsay exception applied.

{8} In response to Defendant's objection, the district court scrutinized, line-by-line, the nurse's chart to determine whether the challenged statements were inadmissible hearsay. Following completion of this process, the district court concluded that some of Victim's statements were not hearsay because they were made for purposes of medical diagnosis or treatment. Accordingly, the district court ruled that the nurse would be permitted to read only those statements from her chart to the jury.

Trial

{9} At trial, Victim testified that while she was in second grade, Defendant "started being really close and touchy" and would put his hand inside her shirt to rub her back during class. He began giving her "notes and little candies" during class. Then, during designated reading period, Defendant would ask Victim to help him get school supplies out of the "backpack closet"—a closet separated from the main portion of the classroom where students would hang their backpacks. The entrance to the backpack closet was covered by a blanket. Victim testified that there was only one way in and out of the closet and that Defendant controlled who accessed the closet. Once in the closet, Defendant would put his hand down her pants. While his hand was in her pants, Defendant would rub the outside of her genitalia and would insert his finger into her vagina. Victim testified that it hurt when Defendant touched her genitalia. Sometimes while in the closet, Defendant would put Victim's hand in his pants and have her touch his penis. Victim testified that the abuse happened more than once.

{10} On the second day of trial, the State called the nurse who examined Victim at PLN as a witness. The nurse testified about the process she follows in conducting the examinations, explaining that she begins each examination by obtaining the victim's medical background and history to help guide the medical examination, diagnosis, and treatment; specifically, treatment related to physical trauma, sexually

transmitted infection (STI), and safety assessment. The nurse then read some of Victim's statements to the jury from her chart. The nurse testified that after the interview, she completed a genital examination of Victim, ordered STI testing, and referred Victim to counseling.

{11} Following the testimony of the nurse, Dr. Turner testified as an expert in clinical and forensic psychology. Dr. Turner defined "grooming" as "behaviors that an adult that intends to sexually abuse a child will engage in for the purpose of making that abuse easier, making it less likely that the child will tell, and an attempt to keep access, maintain that access to the child. Grooming is the behaviors that go about making that happen." Dr. Turner testified that grooming behaviors include: (1) "isolation, which is having as much time alone with that child as possible, or semi-alone, but primarily alone"; (2) slowly normalizing sex via "graduated touching, meaning pats, and then rubs, and then hugs, and then so on and so forth" and "compliments and statements that are graduatingly and increasingly sexual"; and (3) efforts to avoid disclosure, such as "telling [the victim] they won't be believed, telling them that they'll get in trouble, or that they're responsible as well." Dr. Turner then testified that he evaluated Victim's case and identified grooming behaviors, such as isolating Victim in the backpack closet, and graduated touching by rubbing Victim's back under her clothes that progressed to touching Victim's outer genital area that progressed to digital penetration.

{12} At the conclusion of the trial, Defendant was convicted of two counts of first degree criminal sexual penetration of a minor, one count of second degree criminal sexual contact of a minor, and one count of third degree criminal sexual contact of a minor. This appeal followed.

DISCUSSION

{13} In this appeal, Defendant challenges (1) the admission of expert testimony regarding grooming, and (2) the admission of statements made by Victim to a nurse during an examination of Victim by the nurse. Generally, "[w]e review the admission of evidence under an abuse of discretion standard and will not reverse in the absence of clear abuse." *State v. Hnulik*, 2018-NMCA-026, ¶ 6, 458 P.3d 475 (internal quotation marks and citation omitted). "An abuse of discretion occurs when a trial court exercises its discretion based on a misunderstanding of the law, *id.* (internal quotation marks and citation omitted); or "when the ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the trial court abused its discretion by its ruling unless we can characterize it as clearly untenable or not justified by reason." *State v. Rojo*, 1999-NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829 (internal quotation marks and citation omitted). We analyze each of Defendant's challenges in turn, beginning with Defendant's challenge to the admissibility of expert testimony about grooming.

I. The Admission of Expert Testimony About Grooming

{14} Admission of expert testimony is governed by Rule 11-702 NMRA and by Rules 11-401 and 11-403. *See State v. Alberico*, 1993-NMSC-047, ¶ 55, 116 N.M. 156, 861 P.2d 192 ("Even if the expert testimony passes muster under Rule [11-]702, it must still be material to the particular case to be admissible under Rule [11-]401, and even if relevant . . . , the scientific evidence may be excluded if its prejudicial effect substantially outweighs its probative value under Rule [11-]403."). Rule 11-702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

Our Supreme Court has "interpreted this rule to predicate the admissibility of expert testimony on the satisfaction of three requirements: (1) that the expert be qualified; (2) that the testimony be of assistance to the trier of fact; and (3) that the expert's testimony be about scientific, technical, or other specialized knowledge with a reliable basis." *State v. Yepez*, 2021-NMSC-010, ¶ 19, 483 P.3d 576 (internal quotation marks and citation omitted). The party seeking admission of expert testimony bears the burden of meeting these requirements. *Andrews v. U.S. Steel Corp.*, 2011-NMCA-032, ¶ 11, 149 N.M. 461, 250 P.3d 887. "The district court's

role is to ensure that the proffered expert evidence meets the foregoing requirements" for admission. *Yepez*, 2021-NMSC-010, ¶ 19.

{15} Defendant makes three challenges to the expert testimony: (1) the evidence concerning grooming is not reliable; (2) the testimony was not relevant and was impermissible character evidence; and (3) the testimony was unfairly prejudicial. We discuss each of these challenges in turn.

A. Reliability of Dr. Turner's Expert Testimony Concerning Grooming Under Rule 11-702

{16} On appeal, Defendant argues that grooming evidence is not reliable. When determining whether scientific evidence is reliable, the district court should consider: "(1) whether a theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error in using a particular scientific technique and the existence and maintenance of standards controlling the technique's operation; and (4) whether the theory or technique has been generally accepted in the particular scientific field" as well as "whether the scientific technique is capable of supporting opinions based upon reasonable probability rather than conjecture." *Id.* ¶ 22 (omission, internal quotation marks, and citations omitted).

{17} Here, as a part of its foundation for the admission of the grooming evidence, the State submitted several scientific studies and one publication summarizing the process of grooming. Additionally, Dr. Turner testified during the *Daubert*/*Alberico*

hearing that grooming has been studied extensively and that professionals in the field of forensic psychology widely acknowledge that grooming is a real and observable phenomenon. What is more, Dr. Turner testified that he conducted research that successfully replicated an earlier study on grooming, specifically relating to the methods that offenders use to deter victims from disclosing abuse, and that his research was subjected to peer review. In his testimony, Dr. Turner discussed the methodology employed in his research about grooming, and the known or potential rate of error associated with other studies conducted on grooming. Dr. Turner acknowledged that there is no validated model of sexual grooming in the field of forensic psychology, but also stated that he recommends against creating a model that quantifies a specific number of "steps" in the grooming process, because grooming behaviors manifest differently across various contexts. On cross-examination, Dr. Turner also distinguished the contrary literature referred to by defense counsel, pointing out that the articles are not about the grooming process, rather they are focused on defining grooming. The district court concluded that Dr. Turner's expert testimony about grooming satisfied the *Daubert/Alberico* factors.

{18} On appeal, Defendant does not engage with the entirety of the material that the district court relied on, instead Defendant critiques only one publication that the State provided. But the district court's decision relied on all of the evidence presented to it, including scientific research studies and Dr. Turner's extensive

testimony. Thus, even assuming that the one publication Defendant criticizes is not reliable for purposes of Rule 11-702, this alone does not convince us that the district court's reliability determination was "clearly untenable or not justified by reason." *See Rojo*, 1999-NMSC-001, ¶ 41 (internal quotation marks and citation omitted). Moreover, "any doubt regarding the admissibility of expert opinion evidence should be resolved in favor of admission, rather than exclusion." *State v. Martinez*, 2020-NMCA-043, ¶ 47, 472 P.3d 1241 (alteration, internal quotation marks, and citation omitted). Accordingly, we hold that the district court did not abuse its discretion in concluding that Dr. Turner's expert testimony about grooming was reliable.

B Admissibility of Dr. Turner's Testimony Concerning Grooming Under Rules 11-401 and 11-404(B) NMRA

{19} Defendant argues that even if Dr. Turner's testimony concerning grooming was admissible under Rule 11-702, the district court should have excluded the testimony under Rules 11-401 and 11-404 because it "was nothing more than testimony that [Defendant]'s previous behavior showed a character or a propensity for abusing children" and thus constitutes impermissible character evidence.[2] Defendant further argues that Dr. Turner's testimony was not admissible because Defendant "has always maintained that the touching did not occur" and thus, the grooming evidence was not probative in establishing intent.

[2]For ease of reference, we refer to the evidence described in Rule 11-404(A) and Rule 11-404(B) as "character evidence."

{20} Rule 11-401 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 11-404(A)(1) prohibits admission of "[e]vidence of a person's character or character trait . . . to prove that on a particular occasion the person acted in accordance with the character or trait." Likewise, Rule 11-404(B)(1) prohibits the admission of "[e]vidence of a crime, wrong, or other act . . . to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Rule 11-404(B)(2), however, authorizes the admission of evidence of prior acts if it is relevant "for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." "This list is not exhaustive and evidence of other wrongs may be admissible on alternative relevant bases so long as it is not admitted to prove conformity with character." *State v. Otto*, 2007-NMSC-012, ¶ 10, 141 N.M. 443, 157 P.3d 8 (internal quotation marks and citation omitted). Importantly, "Rule 11-404(B) is a rule of inclusion, not exclusion, providing for the admission of all evidence of other acts that are relevant to an issue in trial, other than the general propensity to commit the crime charged." *State v. Bailey*, 2017-NMSC-001, ¶ 14, 386 P.3d 1007 (alteration, internal quotation marks, and citation omitted).

{21} As stated, Defendant maintains that since he denied that he touched Victim, Dr. Turner's testimony was not relevant to establish intent, and thus the testimony was not admissible under Rule 11-404(B)(2). In response, the State argues that even if Dr. Turner's testimony was not admissible to establish intent, his testimony was relevant and admissible under Rule 11-404(B)(2) as proof of, among other things, "opportunity, preparation, [and] plan." Defendant did not file a reply brief addressing the State's arguments. In the absence of an argument from Defendant, we have no basis to conclude the district court abused its discretion in holding Dr. Turner's testimony relevant or that such testimony was not impermissible character evidence under Rule 11-404(B)(1). *See Delta Automatic Sys., Inc. v. Bingham*, 1999-NMCA-029, ¶ 31, 126 N.M. 717, 974 P.2d 1174 (stating that failing to respond to an argument in the answer brief "constitutes a concession on the matter"); *Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 (stating that this Court "will not review unclear arguments, or guess at what [a party's] arguments might be"); *see also State v. Aragon*, 1999-NMCA-060, ¶ 10, 127 N.M. 393, 981 P.2d 1211 (recognizing the "presumption of correctness in the district court's rulings" and explaining that it is the appellant's "burden on appeal to demonstrate any claimed error below" (internal quotation marks and citation omitted)).

C. Admissibility of Dr. Turner's Testimony Concerning Grooming Under Rule 11-403

{22} Defendant also argues that Dr. Turner's testimony would encourage the jury to believe that Defendant sexually abused Victim because Defendant engaged in the same behavior as other sex offenders, and thus the district court should have excluded Dr. Turner's testimony as being unfairly prejudicial.

{23} Even if evidence is admissible under Rule 11-404(B), Rule 11-403 limits its admission "if its probative value is substantially outweighed by a danger of . . . unfair prejudice." In *Rojo*, our Supreme Court stated that

> [d]etermining whether the prejudicial impact of evidence outweighs its probative value is left to the discretion of the [district] court. In determining whether the [district] court has abused its discretion in applying Rule 11-403, the appellate court considers the probative value of the evidence, but the fact that some jurors might find this evidence offensive or inflammatory does not necessarily require its exclusion.

1999-NMSC-001, ¶ 48 (alteration, internal quotation marks, and citations omitted).

{24} In this instance, Defendant argues that Dr. Turner's testimony was "unfairly prejudicial" and inadmissible because it was "profile testimony" suggesting to the jury that because Defendant engaged in grooming behavior, as described by Dr. Turner, Defendant sexually abused Victim. In response, the State argued that Dr. Turner's testimony was relevant and admissible under Rule 11-404(B)(2) and that Defendant "failed to bring any evidence to establish prejudice." Certainly, Dr. Turner's testimony carried some prejudice. However, "[t]he purpose of Rule 11-403

is not to guard against any prejudice whatsoever, but only against the danger of *unfair* prejudice." *Otto*, 2007-NMSC-012, ¶ 16 (alteration, internal quotation marks, and citation omitted). "Evidence is not unfairly prejudicial simply because it inculpates the defendant." *Id.* (internal quotation marks and citation omitted). As well, "[a]n assertion of prejudice is not a showing of prejudice." *State v. Ernesto M., Jr.* (*In re Ernesto M., Jr.*), 1996-NMCA-039, ¶ 10, 121 N.M. 562, 915 P.2d 318.

{25} The State additionally argued, in its answer brief that Dr. Turner's testimony was important to rebut one of Defendant's theories of the case, namely that Victim's delayed disclosure about the abuse made her story untrustworthy. Because Defendant did not file a reply brief, Defendant did not respond to this argument. Defendant's failure to rebut the State's argument is fatal to Defendant's challenge to the admission of Dr. Turner's expert testimony. *See Bingham*, 1999-NMCA-029, ¶ 31; *Headley*, 2005-NMCA-045, ¶ 15; *Aragon*, 1999-NMCA-060, ¶ 10.

{26} Consequently, we cannot conclude that the district court abused its discretion by finding Dr. Turner's expert testimony about grooming to be relevant and in accord with Rule 11-403's balancing test.

II. Admission of Victim's Statements Made to the Nurse During the Examination at PLN

{27} Defendant contends that the district court impermissibly allowed the nurse to read to the jury portions of her chart containing Victim's statements made to the nurse during her examination of Victim. Defendant argues that Victim's statements

to the nurse were inadmissible hearsay because (1) they were not made for purposes of medical diagnosis or treatment, and (2) one of Victim's statements was a statement of fault or identity. We are unpersuaded.

A. The District Court Properly Admitted Victim's Statements to the Nurse Under Rule 11-803(4) NMRA as Statements Made for Purposes of Medical Diagnosis or Treatment

{28} We turn to Defendant's argument that the district court erred by admitting Victim's statements to the nurse as exceptions to the proscription against hearsay pursuant to Rule 11-803(4), statements made for purposes of medical diagnosis or treatment. "We review a district court's application of exceptions to the rule against hearsay for an abuse of discretion." *State v. Imperial*, 2017-NMCA-040, ¶ 21, 392 P.3d 658.

{29} "Hearsay is an out-of-court statement offered for the truth of the matter asserted and is inadmissible at trial except as allowed by exclusions or enumerated exceptions." *Id.*; Rule 11-801(C) NMRA. Pursuant to Rule 11-802 NMRA, "[h]earsay is not admissible except as provided by [the New Mexico Rules of Evidence] or by other rules adopted by the [New Mexico] Supreme Court or by statute." However, Rule 11-803(4), provides an exception to the rule against hearsay for statements made for medical diagnosis or treatment if the statement: "(a) is made for—and is reasonably pertinent to—medical diagnosis or treatment, and (b)

describes medical history, past or present symptoms, pain, or sensations, their inception, or their general cause."

{30} In *State v. Mendez*, 2010-NMSC-044, ¶ 20, 148 N.M. 761, 242 P.3d 328, our Supreme Court clarified existing law for applying Rule 11-803(4), and explained that "[t]wo underlying rationales traditionally animate Rule 11-803([4])."[3] The first rationale is the "help-seeking motivation," and the second rationale is referred to as "pertinence." *Mendez*, 2010-NMSC-044, ¶¶ 20-21 (internal quotation marks omitted). Under the help-seeking motivation rationale, "the declarant's self-interest in obtaining proper medical attention renders the usual risks of hearsay testimony minimal when associated with medical treatment." *Id.* ¶ 20 (omission, internal quotation marks, and citation omitted). Under the pertinence rationale, "if a statement is pertinent to a medical condition, such that a medical care provider

[3]Rule 11-803 was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, to make them more easily understood, and to make style and terminology consistent throughout the rules. *See* Rule 11-803 comm. cmt. ¶ 2. These changes were intended to be stylistic only. *Id.* Apart from Rule 11-803(D) (2011) being renumbered as Rule 11-803(4), the essence of the rule remained. *Compare* Rule 11-803(D) (2011) (defining "statements made for purposes of medical diagnosis or treatment" as "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment"), *with* Rule 11-803(4) (defining "a statement made for medical diagnosis or treatment" as "[a] statement that (a) is made for—and is reasonably pertinent to—medical diagnosis or treatment, and (b) describes medical history, past or present symptoms, pain, or sensations, their inception, or their general cause."). We therefore accept as controlling precedent case law interpreting Rule 11-803(D) (2011).

reasonably relies upon it in arriving at a diagnosis or treatment, the statement is deemed sufficiently reliable to overcome hearsay concerns." *Id.* ¶ 21. *Mendez* requires trial courts to closely scrutinize the exchange between the medical provider and patient "to determine the statement's overall trustworthiness under Rule 11-803([4]) in light of the two rationales." *Mendez*, 2010-NMSC-044, ¶ 42. To do so, the trial court must "carefully parse each statement made to a [medical provider] to determine whether the statement is sufficiently trustworthy." *Id.* ¶ 43.

{31} With this in mind, we turn to Defendant's specific contentions challenging the admission of this evidence, addressing each in turn. First, Defendant argues that the statements in the chart were not made for purposes of medical diagnosis or treatment because the primary purpose of the examination of Victim at PLN was for law enforcement purposes and not for medical diagnosis or treatment. Defendant's argument fails because in *Mendez* our Supreme Court rejected the "primary purpose" argument, explaining that an inquiry "to determine the purpose of the encounter, instead of considering the substance of, and circumstances surrounding, individual statements" is "irreconcilable" with the touchstone of admissibility under Rule 11-803(4)—the trustworthiness of the statements. *See Mendez*, 2010-NMSC-044, ¶¶ 39-40, 46.

{32} Next, to the extent that Defendant alleges that the truthfulness of the statements was suspect because police "attempted to manipulate the investigation,"

this argument also fails. In support of this argument Defendant claims in his brief that the investigating detective "told [Victim]'s mother that she should take [Victim] to [PLN] instead [of to her regular pediatrician] because that would be more helpful for the investigation." Critically, Defendant does not further develop this argument, nor does he point out where in the record this claim is supported.[4] Consequently, we do not consider this argument further. *See Muse v. Muse*, 2009-NMCA-003, ¶ 72, 145 N.M. 451, 200 P.3d 104 ("We will not search the record for facts, arguments, and rulings in order to support generalized arguments."); *see also Ross v. City of Las Cruces*, 2010-NMCA-015, ¶ 18, 148 N.M. 81, 229 P.3d 1253 ("Where a party fails to cite any portion of the record to support its factual allegations, the Court need not consider its argument on appeal."); *Headley*, 2005-NMCA-045, ¶ 15 (stating that "[w]e decline to review . . . an undeveloped argument" "or guess at what [a party's] arguments might be").

{33} Next, Defendant argues that "the [PLN] evaluation could not be relied on for medical treatment or diagnosis because it occurred [twenty-six] months after [Victim]'s last contact with [Defendant]," which Defendant claims "is confirmed by

[4]Defendant's factual background section cites a pretrial argument wherein defense counsel alleged during oral arguments that the investigating detective called Victim's mother and told her not to take Victim for a physical examination because "we can't use that in trial." But "[a]rguments of counsel are not evidence and cannot be used to prove a fact." *State v. Wacey C.*, 2004-NMCA-029, ¶ 13, 135 N.M. 186, 86 P.3d 611.

the lack of evidence that [Victim] received any treatment following this evaluation." In support of his argument, Defendant cites *Mendez*, 2010-NMSC-044, ¶ 41, for the proposition that "a statement is not for medical diagnosis if . . . the circumstances surrounding the evaluation call into question whether any statement can be relied on for diagnosis or treatment."

{34} The State responds that "despite the delay—the delay attributable to the fact that this was a minor child—the statements to the . . . nurse [was] for a medical purpose and not a law enforcement purpose," explaining that the

> statements made to the . . . nurse were a direct result of Victim reaching out for help to her mother through her disclosure of the abuse. Victim, through her mother, reached out to law enforcement to report the abuse and the hardship she suffered in silence since. Pursuant to best practices contained within law enforcement standard operating procedures, the detective set up first Victim's forensic interview and the PLN.

We agree with the State and explain.

{35} Contrary to Defendant's assertions, many of Victim's statements to the nurse demonstrate they were made for the purposes of medical diagnosis or treatment as the nurse explicitly testified that she provided treatment to Victim based on statements Victim made during the examination. The nurse said Victim was tested for STIs after the nurse learned that Victim was exposed to penile emissions. Specifically, Victim told the nurse that her hand "got wet and really gooey" after Defendant "grabbed [her] hand" and put it on top of his penis. The nurse also

testified generally that the purpose of the PLN examination was, in part, to render medical aid to Victim.

{36} Importantly, prior to admitting the statements Victim made to the nurse, the district court, pursuant to direction given by our Supreme Court in *Mendez*, "shoulder[ed] the heavy responsibility of sifting through [the] statements, piece-by-piece, making individual decisions on each one." *Id.* ¶ 46. During the parsing of these statements, the district court concluded that certain statements made by Victim to the nurse during the examination at PLN were not made for purposes of medical diagnosis and treatment and prohibited those statements from being disclosed to the jury. [5] However, during the parsing process, the district court also concluded that certain statements made by Victim to the nurse were made for purposes of medical diagnosis and treatment and permitted them to be disclosed to the jury. These latter statements were read to the jury by the nurse during her testimony.

{37} Given the nurse's testimony and the district court's care in parsing the statements made by Victim, we agree that Victim's statements disclosed to the jury during the nurse's testimony were made for purposes of medical diagnosis and

[5] We note that the challenge to the nurse's chart containing Victim's statements was first raised on the eve of trial. The district court issued its ruling the following morning, and stated that it would, at either party's request, voir dire the nurse before she testified. Neither party requested the district court to do so during trial.

treatment. Accordingly, we conclude that the district court did not abuse its discretion in allowing the nurse to read Victim's statements to the jury.

B. The District Court Did Not Commit Plain Error by Allowing the Nurse to Testify That Victim Told her "My Teacher Touched Me"

{38} Lastly, Defendant argues that the district court erred by allowing the nurse to read Victim's specific statement "my teacher touched me" to the jury. Defendant asks us to conclude that the statement "my teacher touched me" constitutes a statement of fault or identity, presumably because the jury could infer that Victim was referring to Defendant even though she did not state Defendant's name. "As a general matter, statements of fault or identity are inadmissible under the hearsay exception for purposes of medical diagnosis or treatment because they are not pertinent to treatment or diagnosis." *Id.* ¶ 52.

{39} Defendant acknowledges that this issue was not preserved. We therefore review the issue for plain error. *State v. Montoya*, 2015-NMSC-010, ¶ 46, 345 P.3d 1056. "The plain-error rule, however, applies only if the alleged error affected the substantial rights of the accused." *Id.* (internal quotation marks and citation omitted). To find plain error, the Court "must be convinced that admission of the testimony constituted an injustice that created grave doubts concerning the validity of the verdict." *Id.* (internal quotation marks and citation omitted). Further, in determining whether there has been plain error, "we must examine the alleged errors in the

context of the testimony as a whole." *Id.* (internal quotation marks and citation omitted).

{40} Here, during trial, Victim testified that "Mr. Aldaz" would take her to a closet, put his hands down her pants and touch her genitals, and inserted his fingers into her. In light of Victim's testimony that unequivocally identified Defendant as the individual who abused her, the admission of Victim's statement to the nurse that "my teacher touched me," even if error, does not give us grave doubts about the validity of the jury's verdict and therefore does not constitute plain error. *See id.*

III. Cumulative Error

{41} Defendant lastly argues that the foregoing errors cumulatively warrant reversal of his convictions and a new trial. However, because we have concluded there was no error, there can be no cumulative error. *See State v. Samora*, 2013-NMSC-038, ¶ 28, 307 P.3d 328 (noting that there is no cumulative error where there is no error).

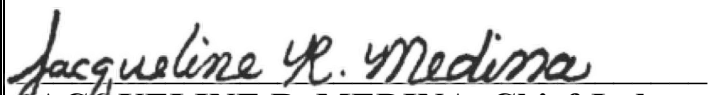
CONCLUSION

{42} For the foregoing reasons, we affirm Defendant's convictions.

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

GERALD E. BACA, Judge

WE CONCUR:



JACQUELINE R. MEDINA, Chief Judge

JENNIFER L. ATTREP, Judge