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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 Opinion Number: _____

Court of Appeals of New Mexico

Filed 1/15/2026 11:25 AM

3 Filing Date: **January 15, 2026**



Mark Reynolds

4 **No. A-1-CA-41555**

5 **STATE OF NEW MEXICO,**

6 Plaintiff-Appellee,

7 v.

8 **DEREK LAURICE FOOTE,**

9 Defendant-Appellant.

10 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

11 **Stan Whitaker, District Court Judge**

12 Raúl Torrez, Attorney General

13 Teresa Ryan, Assistant Solicitor General

14 Santa Fe, NM

15 for Appellee

16 Bennett J. Baur, Chief Public Defender

17 Mallory E. Harwood, Assistant Appellate Defender

18 Santa Fe, NM

19 for Appellant

OPINION

YOHALEM, Judge.

3 {1} This case requires us to weigh the competing policies between our rape shield
4 law, which protects the privacy of a victim of sexual assault concerning prior sexual
5 conduct or reputation, NMSA 1978, § 30-9-16(A) (1993), and the accused's Sixth
6 Amendment right "to be confronted with the witnesses against him." U.S. Const.
7 amend. VI. Defendant Derek Laurice Foote was convicted following a bench trial
8 on one count of kidnapping with intent to commit a sexual offense, contrary to
9 NMSA 1978, Section 30-4-1(A) (2003); one count of criminal sexual penetration
10 (CSP) (great bodily harm or great mental anguish), contrary to NMSA 1978, Section
11 30-9-11(D)(2) (2009); and one count of aggravated battery (great bodily harm),
12 contrary to NMSA 1978, Section 30-3-5(A), (C) (1969). Defendant filed a motion
13 under Rule 11-412(C) NMRA, our rule of evidence adopting the rape shield law,
14 seeking to admit evidence of a sexual encounter between Victim and Defendant's
15 neighbor (Neighbor), which occurred after Victim encountered Neighbor as she left
16 Defendant's house the night of the charged crimes. Victim did not remember the
17 sexual encounter with Neighbor at the time of trial. Victim, however, told an
18 emergency room nurse only hours after the sexual encounter with Neighbor that she
19 had been vaginally raped, a crime not charged against Defendant, and told law
20 enforcement she would not have consented to intercourse with Neighbor. The

1 defense wanted to introduce this evidence and to cross-examine Victim about
2 Victim's memory of the events of that night to raise doubt about Victim's account
3 of Defendant's conduct and about the cause of Victim's physical injuries.

4 {2} We agree with Defendant that exclusion of this evidence and the limitation on
5 the scope of cross-examination of Victim about her failure to remember another
6 potential sexual assault that was part of the course of events the same night as the
7 crimes charged against Defendant violated Defendant's Sixth Amendment right to
8 confront his accuser. By failing to ensure the fact-finder was fully informed about
9 the events of that night, the court improperly prevented Defendant from adequately
10 challenging the credibility of Victim and the source of her injuries, and usurped the
11 fact-finder's role in determining whether the State proved Defendant guilty "beyond
12 a reasonable doubt." We reverse and remand for retrial.

13 **BACKGROUND**

14 {3} Defendant was convicted after a bench trial in the district court. The charges
15 were based on Victim's account of events that occurred on the evening of November
16 1, 2015, and in the early morning hours of November 2, 2015, when, according to
17 Victim's testimony, Defendant sexually assaulted her as she prepared to leave his
18 house.

19 {4} The night began with Victim running into Defendant and another friend at a
20 bar. Victim knew the two men as friends of her then-boyfriend. After drinking at the

1 bar, Victim went with Defendant and the other man to Defendant's aunt's house to
2 have more drinks. Around 2:00 a.m., Victim noticed Defendant's friend had left and
3 Victim decided she should leave. Victim went to Defendant's bedroom to gather her
4 things in preparation for leaving.

5 {5} According to Victim's trial testimony, Defendant followed her to the
6 bedroom, blocked the bedroom door, and told her to undress. When Victim
7 complied, he hit her several times across the face, hard enough to injure her right
8 ear, and to render Victim unconscious. Victim testified that she woke up on her back
9 with Defendant's hand on her neck. Victim described being forced to perform oral
10 sex on Defendant. Defendant then pushed her out of the house—according to Victim
11 without pants or shoes, wearing only underwear. Victim fell into a bush, then hit her
12 head on the concrete. Victim testified that her only memory after being pushed out
13 of the house was crying and screaming for help and Neighbor, whom she had never
14 met before, helping her into her car. She woke up in the morning to find herself in
15 her car, wearing an unidentified man's sweatpants and her underwear. She noticed a
16 large dent on the hood of the car that had not been there the night before.

17 {6} Victim drove herself to the hospital. Victim reported to a nurse at the hospital
18 that she had been "raped by a vaginal penetration" and complained of hearing loss
19 and pain in her right ear and jaw. The hospital diagnosed a right eardrum rupture and
20 referred her to a nearby rape crisis center for further examination.

1 {7} At the rape crisis center, Victim reported to law enforcement that Defendant
2 had forced her to perform oral sex two times. At trial she testified to one act; a second
3 count was dismissed by the court. Victim did not mention again having been
4 vaginally penetrated against her will. The SANE nurse collected a number of swabs
5 from Victim's body including oral and cervical canal swabs.

6 {8} Law enforcement collected DNA from Defendant and compared the DNA
7 swabs to Victim's rape kit. No DNA matching Defendant was found anywhere on
8 Victim's body or in her mouth. The State's expert explained that DNA breaks down
9 in the mouth and that it is common not to be able to identify male DNA from the
10 mouth.

11 {9} The State also obtained and tested DNA from Neighbor and compared it to
12 Victim's rape kit. Neighbor's DNA conclusively matched sperm found inside
13 Victim's cervical canal. When informed that testing showed she had sexual
14 intercourse with Neighbor, Victim told law enforcement that she did not remember
15 having sex with Neighbor and would not have consented to it. When law
16 enforcement asked Neighbor about the DNA evidence, Neighbor claimed he had
17 consensual sex with Victim that night.

18 {10} Neighbor's testimony at trial about what happened that night conflicted with
19 Victim's testimony. Neighbor testified that Victim was fully clothed when she left

1 Defendant's house, she appeared uninjured, she walked to her car alone, without his
2 help, and he did not approach her until she drove to the end of the street and stopped.
3 {11} Prior to trial, Defendant filed a pretrial motion to admit the sexual conduct of
4 the complaining witness, as required by Rule 11-412(B) when a defendant wants to
5 admit evidence of other sexual conduct by a victim. Defendant asked the district
6 court to allow the defense to admit "evidence that . . . [V]ictim had a sexual
7 encounter after the alleg[ed encounter] with . . . Defendant and before she went to
8 the SANE exam . . . because it goes to the possible source of the documented injuries
9 [to Victim] and the male DNA found on the oral swabs. It is also important for
10 impeaching the witness's memory."

11 {12} Defendant argued that personal injury was an element of the CSP charge, and
12 the evidence could create a reasonable doubt about whether the source of Victim's
13 injuries was Defendant's conduct or Neighbor's. Defendant also stated that given
14 the evidence of another sexual encounter the same night, "whether it was consensual
15 or not consensual, . . . [Victim] reports having no memory of it at all. This calls into
16 question her ability to recall the events [earlier] that night." At the hearing on
17 Defendant's motion, the attorneys acknowledged that Victim admitted to having
18 major gaps in her memory of the events before her encounter with Neighbor. Victim
19 admitted to drinking alcohol, being knocked unconscious, and to hitting her head on
20 the cement outside Defendant's home. Defendant argued that the evidence that

1 Victim had a sexual encounter with Neighbor, which she did not remember at all, is
2 highly important to evaluate her memory of events earlier that night and is necessary
3 to show whether Victim is a witness the fact-finder could rely on.

4 {13} The district court denied Defendant's motion, applying the rape shield law.
5 The district court clarified that the State was not seeking to prevent the admission of
6 the DNA evidence, and indicated that the defense could use the DNA evidence to
7 establish that the DNA profile did not match Defendant, but could not identify
8 Neighbor as the source of the DNA. As for the defense request to impeach Victim's
9 memory, the district court indicated that the defense could examine Victim about the
10 fact that she does not have any recollection about what happened after leaving
11 Defendant's house. The district court concluded that Defendant's constitutional right
12 to confront and cross-examine Victim was not violated because the defense theory
13 that Neighbor caused Victim's injuries was "speculative" and the evidence as a
14 whole was "overly prejudicial," so that the balance weighed in favor of exclusion.

15 {14} In a written order after a subsequent request from Defendant to question
16 Neighbor about these same issues, the court stated that testimony about Victim's
17 vaginal intercourse with someone other than Defendant on the same evening was not
18 material or relevant because there was no allegation that Defendant had vaginal
19 intercourse with Victim. On these bases, the district court concluded that the
20 evidence was inadmissible under our rape shield law and Rule 11-412(A).

1 {15} Following a bench trial, the court concluded that the State had proved
2 Defendant's guilt of first-degree CSP with great bodily harm, third-degree
3 kidnapping with the intent to commit CSP, and first-degree aggravated battery
4 beyond a reasonable doubt.

5 **DISCUSSION**

6 {16} Defendant appeals the district court's order excluding the evidence of
7 Neighbor's sexual encounter with Victim, and limiting Defendant's cross-
8 examination of Victim and Neighbor, arguing that the court's ruling prevented him
9 from mounting a full and fair defense, thereby violating his constitutional right to
10 confront the witnesses against him. Defendant relies on longstanding New Mexico
11 precedent acknowledging that when our rape shield law and rule "preclude the
12 defendant from presenting a full and fair defense, the statute and rule must yield."
13 *State v. Johnson*, 1997-NMSC-036, ¶ 24, 123 N.M. 640, 944 P.2d 869. "[E]vidence
14 of prior sexual conduct must be admitted if a defendant shows that evidence
15 implicates [their] constitutional right of confrontation." *Id.* ¶ 22.

16 {17} Specifically, Defendant argues that he made an adequate showing that the
17 evidence excluded by the district court was essential to his defense theory that
18 Victim was unable to accurately recall the events of that night and that Victim may
19 have confused "which man had raped her due to her memory issues that night."
20 Defendant argues this evidence was probative given Victim's conflicting accounts

1 of what happened, in particular that she described a vaginal rape in the morning to
2 medical personnel but only told the SANE nurse later the same morning that she was
3 forced to perform oral sex. Defendant argues that the evidence tending to show that
4 Victim had been raped by Neighbor was probative of the truth about what happened
5 and relevant to the credibility of the two key witnesses against Defendant, and that
6 there was little to no counterbalancing prejudice to Victim.

7 {18} We first address how our courts have balanced the competing interests
8 between the protections of the Sixth Amendment of the United States Constitution
9 and New Mexico's rape shield law and rule of evidence, and then apply these
10 principles to the facts and circumstances of this case.

11 I. The Confrontation Clause and Our Rape Shield Statute

12 {19} “The Confrontation Clause of the Sixth Amendment guarantees all criminal
13 defendants, state and federal, the right ‘to be confronted with the witnesses against’
14 them.” *State v. Alvarez-Lopez*, 2004-NMSC-030, ¶ 6, 136 N.M. 309, 98 P.3d 699
15 (quoting U.S. Const. amend. VI). “The Fourteenth Amendment applies the Sixth
16 Amendment to the states.” *State v. Montoya*, 2014-NMSC-032, ¶ 21, 333 P.3d 935.
17 “[T]he [district] court’s discretion to exclude evidence a defendant wishes to admit”
18 is “critical[ly] limit[ed]” by the Sixth Amendment’s protections guaranteeing every
19 criminal defendant the right “to cross-examine, test credibility, detect bias, and
20 otherwise challenge an opposing version of facts.” *Id.* ¶ 22 (internal quotation marks

1 and citation omitted). “[T]he Constitution guarantees criminal defendants a
2 meaningful opportunity to present a complete defense.” *Id.* ¶ 28 (internal quotation
3 marks and citation omitted).

4 {20} Unlike the Confrontation Clause, our rape shield statute is “not constitutional
5 in nature.” *Id.* ¶ 28. “[R]ape shield protections arise in the context of evidentiary
6 rules regarding relevance.” *Id.* Together with Rule 11-412, which adopts the
7 protections of the rape shield law as a rule of evidence, the rape shield law imposes
8 restrictions on the admission of evidence of past sexual conduct when that evidence
9 is not relevant to a defense to the charges. Rule 11-401 NMRA provides that
10 “[e]vidence is relevant if . . . it has any tendency to make a fact more or less probable
11 than it would be without the evidence, and . . . the fact is of consequence in
12 determining the action.” If evidence of a victim’s sexual conduct does not make a
13 “fact . . . of consequence in determining the action” (a material fact) any “more or
14 less probable,” it can be excluded at trial without implicating the defendant’s right
15 to confrontation. *Id.* Importantly, the Confrontation Clause does not afford a
16 defendant a right to cross-examine a witness, or present affirmative evidence if the
17 evidence the defendant seeks to introduce is not relevant to a defense that might
18 determine the outcome.

19 {21} The rape shield law provides as follows:

20 As a matter of substantive right, in prosecutions pursuant to the
21 provisions of [NMSA 1978,] Sections 30-9-11 through 30-9-15 [(1975,

1 as amended through 2009)], evidence of the victim’s past sexual
2 conduct,¹ opinion evidence of the victim’s past sexual conduct or of
3 reputation for past sexual conduct, shall not be admitted unless, and
4 only to the extent that the court finds that, the evidence is material to
5 the case and that its inflammatory or prejudicial nature does not
6 outweigh its probative value.

7 Section 30-9-16(A). Rule 11-412 provides, in Subsection A:

8 The following evidence is not admissible in a civil or criminal
9 proceeding involving alleged sexual misconduct:

10 (1) evidence offered to prove that a victim engaged in other
11 sexual behavior, or
12 (2) evidence offered to prove a victim’s sexual predisposition.

13 Subsection B of Rule 11-412 adopts limited exceptions that protect a defendant’s
14 right to present a complete defense under the Confrontation Clause. Subsection B
15 allows the court to admit evidence of a victim’s sexual behavior when that behavior
16 “is material and relevant to the case [and] when the inflammatory or prejudicial
17 nature does not outweigh its probative value.”

18 {22} For evidence of other sexual behavior by a victim to be admissible, a
19 defendant must present to the district court “sufficient facts to support a particular
20 theory of relevance to enable the trial court to competently assess the constitutional

¹Unlike our rape shield statute, Rule 11-412(A) does not limit the exclusion of evidence of a victim’s sexual conduct to “past sexual conduct.” The rule effectively extends the protections of the rape shield statute to other sexual conduct of a victim, regardless of whether it occurs prior to or after the charged offense. *Compare* Rule 11-412(A), *with* Rule 11-412(B) (using the term “past sexual conduct”).

1 significance of that theory.” *Montoya*, 2014-NMSC-032, ¶ 29 (internal quotation
2 marks and citation omitted); *see* Rule 11-412(C)(1)-(2) (requiring a written motion
3 pretrial and an in camera hearing to allow the district court to determine whether the
4 evidence is admissible).

5 **II. The District Court Erred in Excluding Evidence of Victim’s Sexual
6 Encounter With Neighbor Pursuant to the Rape Shield Statute and Rule
7 11-412**

8 **A. Standard of Review**

9 {23} “Our statute, rule, and cases rely on the trial court judge to identify theories
10 of relevance as well as to exercise discretion, balance prejudicial effect against
11 probative value, and thus determine admissibility on a case by case basis.” *Montoya*,
12 2014-NMSC-032, ¶ 25 (alteration, internal quotation marks, and citation omitted).

13 Generally, we review evidentiary rulings by the district court for an abuse of
14 discretion. *See id.* ¶ 15. “This standard of review, however, is different when a
15 defendant’s evidentiary challenge is based on constitutional rights to confrontation,”
16 as Defendant’s challenge is here. *See id.* Accordingly, we review *de novo* whether
17 exclusion of the evidence of Victim’s sexual encounter with Neighbor, pursuant to
18 our rape shield statute and Rule 11-412, violates Defendant’s Sixth Amendment
19 right to mount a defense and to confront and cross-examine the witnesses against
20 him. *See id.* ¶ 16.

1 **B. Defendant Presented a Theory of Relevance of Victim's Sexual**
2 **Encounter Implicating His Constitutional Right to Confrontation**

3 {24} We must first determine whether Defendant made an adequate showing that
4 the evidence Defendant sought to admit concerning Victim's sexual encounter with
5 Neighbor was "material and relevant to the case." *See* Rule 11-412(B). "Evidence is
6 relevant if . . . it has any tendency to make a fact [in issue] more or less probable
7 than it would be without the evidence." Rule 11-401(A). Evidence is material if the
8 evidence is relevant to "[a] fact . . . of consequence in determining the action." Rule
9 11-401(B). In other words, the evidence of a victim's sexual behavior must be
10 relevant to a defense that, if believed by the jury, creates a reasonable doubt about
11 the defendant's guilt of the crime. Our Supreme Court in *Johnson* found that
12 evidence that serves to "test [the victim's] credibility, detect bias, and otherwise
13 challenge an opposing version of facts," satisfies the requirement that the evidence
14 of a victim's sexual behavior must be relevant to a material defense. 1997-NMSC-
15 036, ¶ 23. If, on the other hand, the evidence of the victim's sexual behavior is
16 relevant only to a collateral issue that is not central to determining the defendant's
17 guilt or innocence, its admission is not required by the Confrontation Clause. *Cf. id.*
18 ¶ 29.

19 {25} Defendant here explained to the district court the two related defense theories
20 he wanted to rely on at trial, each of which he claimed was relevant and material to
21 his guilt or innocence, and each of which depended on evidence of Victim's sexual

1 encounter with Neighbor. Defendant claimed that he did not commit a sexual offense
2 against Victim that night. Defendant argued that the fact that Victim was subject to
3 a sexual assault by Neighbor that same night, immediately after leaving Defendant's
4 house, and the fact that Victim could not remember that assault, (1) created a
5 reasonable doubt about whether Victim had confused what happened later in the
6 night with Neighbor with what had happened earlier with Defendant, putting in
7 doubt the credibility of Victim's account of a sexual assault by Defendant; and (2)
8 suggested a reasonable alternative explanation for her injuries. Defendant contends
9 it was necessary to explore the events that occurred only minutes after Victim left
10 sometime after 2:00 a.m., and which Victim did not remember, to put in doubt the
11 accuracy of her memory about what happened *before* she left Defendant's house.
12 We note, the evidence showed that with the exception of hitting her head on the
13 concrete, the major events that impaired Victim's memory—drinking what Victim
14 described as a lot of alcohol and being hit so hard she was rendered unconscious—
15 had happened before Victim left Defendant's house, yet she claimed to remember
16 the events just prior to leaving Defendant's house clearly, with only a few gaps.
17 Defendant intended to use evidence suggesting a sexual assault by Neighbor
18 (including evidence of a large new dent on the hood of Victim's car the next
19 morning) to raise questions concerning whether Victim had confused in her mind a
20 sexual assault, altercation, and injury *after* leaving Defendant's house with events

1 that happened just *before* leaving Defendant's house. Defendant would have
2 bolstered this defense with the evidence of Victim's confusion a few hours later, first
3 telling medical personnel that she had been raped by vaginal penetration, then later
4 that same morning telling a SANE nurse that she had been forced to perform oral
5 sex on Defendant. Defendant also intended to highlight contradictions between
6 Victim's trial testimony and prior versions of her story and between Victim's
7 description of being injured and forced out in her underwear with Neighbor's
8 testimony that Victim was fully dressed and that he did not approach her until she
9 stopped her car at the end of the street, as well as arguing that the large, unexplained
10 dent Victim discovered on the hood of her car the next morning suggested an
11 altercation with Neighbor. Defendant intended with these contradictions to create
12 doubt about the accuracy of Victim's memory of Defendant sexually assaulting her.
13 As the sole witness actually present at the sexual assault, impeaching Victim's
14 ability to accurately remember what transpired that night would alone be sufficient
15 to put in question whether the State proved Defendant's guilt beyond a reasonable
16 doubt.

17 {26} The district court found the defense argument "speculative," and excluded the
18 evidence on this basis. But the defense does not need to establish the alternative
19 inferences it argues with even a preponderance of the evidence; the evidence and the
20 reasonable inferences from that evidence need only be sufficient to raise a reasonable

1 doubt in the mind of the fact-finder—a doubt that the fact-finder can explain with a
2 reason. A defendant has a right to confront the witnesses against them with cross-
3 examination that undermines the credibility and accuracy of the witness’s account
4 of the relevant events and thereby creates doubt about whether what that witness
5 describes actually happened the way the witness testifies. It is not necessary to show
6 that the witness is biased or has a motive to lie. It is well established that a witness’s
7 credibility can be impeached by questioning the witness’s “powers of discernment,
8 memory, and description.” *State v. Bent*, 2013-NMCA-108, ¶ 10, 328 P.3d 677
9 (internal quotation marks and citation omitted). Cross-examination that tests the
10 credibility of the central witness’s testimony and the accuracy and completeness of
11 that testimony is recognized as “one of the safeguards essential to a fair trial.”
12 *Montoya*, 2014-NMSC-032, ¶ 39 (internal quotation marks and citation omitted).

13 {27} We, therefore, conclude that the evidence of Victim’s sexual encounter with
14 Neighbor meets the first part of the two-prong test found in Rule 11-412(A): the
15 evidence was both relevant and material.

16 **C. The Inflammatory or Prejudicial Nature of Defendant’s Proffered
17 Evidence Does Not Outweigh Its Probative Value**

18 {28} Having concluded that Defendant presented an adequate theory of relevance
19 and materiality to support admission of his proffered evidence, we must now
20 examine whether the district court accorded the proper weight to Defendant’s
21 confrontation rights. The prejudice that must be weighed against the probative value

1 of the evidence to the defense is specifically the prejudice the rape shield law was
2 enacted to prevent: the harm caused to victims and the judicial process itself by
3 intrusion into sexual history of the victim that is not relevant or material to the guilt
4 or innocence of the accused. *See Montoya*, 2014-NMSC-032, ¶ 42.

5 {29} The rape shield law recognizes that evidence of the victim's sexual conduct is
6 often likely to mislead the jury into improperly relying on the character of the victim
7 for promiscuity, rather than on the facts and circumstances presented by the
8 evidence. *See id.* Such evidence thus both invades the victim's privacy and can
9 improperly prejudice the fact-finder, tilting the decision away from the relevant
10 facts.

11 {30} These concerns do not appear to be prominent in this case. Defendant was not
12 seeking to introduce the evidence of Victim's sexual encounter with Neighbor to
13 show that Victim was promiscuous, or to suggest that she must have consented to
14 sex with Defendant. The defense focused solely on Victim's inability to remember
15 a significant part of events of that night that were related to her claims against
16 Defendant. The questions Defendant wanted to ask Victim in his cross-examination
17 focused on her inability to remember a major event, and her confusion about the
18 events of that night, and not on details of her sexual behavior with Neighbor. With
19 Neighbor, cross-examination on his sexual encounter with Victim would have put in
20 doubt whether Victim correctly remembered a sexual assault by Defendant.

1 Questioning Neighbor about Victim's condition when she left Defendant's house
2 and about his not approaching Victim until she had entered her car and driven to the
3 end of the street, would put in doubt Victim's testimony about being injured by
4 Defendant and needing Neighbor's help to get to her car when she left his house.
5 Defendant's intent to elicit Victim's statement that she would not have consented to
6 sex with Neighbor undercut the implication of a propensity by Victim to engage in
7 sex with strangers, an implication the rape shield law is designed to avoid.
8 Defendant's proffered evidence and his proffered cross-examination of Victim and
9 Neighbor based on that evidence neither exposed Victim's private sex life nor
10 suggested a verdict based on Victim's character. There was, therefore, little
11 prejudicial impact of the type the rape shield law and rule are designed to avoid.

12 {31} We conclude that the district court failed to give the proper weight to the
13 probative value of evidence to a relevant and material defense when performing the
14 required balancing. *See, e.g., State v. Stephen F.*, 2008-NMSC-037, ¶ 37, 144 N.M.
15 360, 188 P.3d 84. By excluding evidence and cross-examination probative of the
16 events of that night, the district court denied Defendant his right to present a full and
17 fair defense by effectively cross-examining Victim and Neighbor, the two central
18 witnesses.

1 **III. The Error in Excluding Defendant’s Proffered Evidence Was Not**
2 **Harmless**

3 {32} Confrontation Clause violations are subject to harmless error review. We will
4 reverse only if we conclude the error was not harmless. It is the State’s burden to
5 prove that a “constitutional error was harmless beyond a reasonable doubt.” *See*
6 *State v. Tollardo*, 2012-NMSC-008, ¶ 25, 275 P.3d 110 (internal quotation marks
7 and citation omitted). Constitutional errors are harmless “only if we conclude that
8 there is no reasonable possibility the error contributed to the [fact-finder]’s decision
9 to convict [the d]efendant.” *Id.* ¶ 45.

10 {33} We understand the State’s argument to be that, regardless of error, we should
11 affirm because substantial evidence supports Defendant’s conviction. The State’s
12 argument misstates our standard of review. In *Stephen F.*, our Supreme Court stated
13 that when reviewing for harmless error, “a reviewing court should not be guided
14 solely by the overwhelming evidence of the defendant’s guilt.” 2008-NMSC-037,
15 ¶ 39 (internal quotation marks and citation omitted). Instead, “the central focus of
16 the inquiry . . . is whether there is a reasonable possibility the erroneous [exclusion
17 of] evidence might have affected the jury’s verdict.” *Id.* (internal quotation marks
18 and citation omitted). We believe that Defendant’s eliciting on cross-examination
19 Victim’s inability to remember Neighbor’s sexual conduct that night is effective
20 impeachment of Victim’s testimony to the point where the trier of fact could have a
21 reasonable doubt about what happened that night.

1 {34} The State also argues that because this was a bench trial, and not a jury trial,
2 we must affirm because the judge was aware of the excluded evidence and still found
3 Defendant guilty. We do not agree. Our case law is clear that we presume a district
4 court judge, sitting as a fact-finder, disregards excluded evidence when determining
5 guilt or innocence. *See State v. Hernandez*, 1999-NMCA-105, ¶ 22, 127 N.M. 769,
6 987 P.2d 1156 (holding that during a bench trial “the judge often hears evidence or
7 argument that [they] must subsequently disregard when functioning as fact-finder”);
8 *id.* (“We presume that a judge is able to properly weigh the evidence, and thus the
9 erroneous admission of evidence in a bench trial is harmless unless it appears that
10 the judge must have relied upon the improper evidence in rendering a decision.”).
11 We will not presume that the district court judge acted improperly in this case.

12 {35} The State has not met its burden of showing harmless error.

13 CONCLUSION

14 {36} We reverse Defendant’s convictions and remand for a new trial consistent
15 with this opinion. Because our decision under the rape shield law and Rule 11-412
16 is dispositive, we need not address Defendant’s other points of error on appeal.

17 {37} **IT IS SO ORDERED.**

18
19 

JANE B. YOHALEM, Judge

1 WE CONCUR:

2 Jacqueline R. Medina

3 JACQUELINE R. MEDINA, Chief Judge

4 Megan P. Duffy

5 MEGAN P. DUFFY, Judge