IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v. **No. A-1-CA-42731**

BERNARDO CORNEJO,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF LINCOLN COUNTY
John P. Sugg, District Court Judge

Raúl Torrez, Attorney General
Santa Fe, NM

for Appellee

The Law Offices of Scott H. Davidson, Ph.D., Esq.
Scott M. Davidson
Albuquerque, NM

for Appellant

MEMORANDUM OPINION

WRAY, Judge.

{1} This matter was submitted to the Court on the amended brief in chief pursuant to the Administrative Order for Appeals in Criminal Cases from the Second, Eleventh, and Twelfth Judicial District Courts in *In re Pilot Project for Criminal Appeals*, No. 2022-002, effective November 1, 2022. Having considered the amended brief in chief, concluding the briefing submitted to the Court provides no

possibility for reversal, and determining that this case is appropriate for resolution on Track 1 as defined in that order, we affirm for the following reasons.

DISCUSSION

Jury Instructions

{2} Defendant appeals from a district court conviction of criminal sexual contact with a minor under the age of thirteen (unclothed), contrary to NMSA 1978, Section 30-9-13(B)(1) (2003). [3 RP 588-93] Defendant argues that Jury Instruction No. 3 [2 RP 449], which asked the jury to find if Defendant touched Victim's vulva or vagina, and Jury Instruction No. 5 [2 RP 451], which asked the jury to find if Defendant touched Victim's buttocks, were confusing to the jury and violated *State v. Taylor*, 2024-NMSC-011, ¶¶ 11-21, 548 P.3d 82, where our Supreme Court disapproved of an instruction that used the "and/or" connector when listing the essential elements of a crime. [Amd. BIC 9] Defendant further argues that Jury Instruction No. 3 improperly referred to contact with Victim's vagina, which would have come under criminal sexual penetration of a minor under NMSA 1978, Section 30-9-11 (2009), a crime that was not charged in this case. [Amd. BIC 9] We disagree on both points.

{3} As the district court explained, using "and/or" in the instructions could have caused confusion. [10-29-24 CD 11:48:54-11:50:42] *See Taylor*, 2024-NMSC-011, ¶ 16 (eschewing use of "and/or" in jury instruction because, where the state offers

multiple theories of how the child's injuries occurred, the jury must make "an informed and unanimous decision, guided by separate instructions, as to which culpable act the defendant committed and for which he is being punished" (internal quotation marks and citation omitted)). Neither Jury Instruction No. 3 or 5, however, contain "and/or." [2 RP 449, 451] In accordance with *Taylor*, the district court gave two separate instructions for the alternative conduct, one for contact with the vulva or vagina and an "[a]lternative" one for contact with the buttocks, thus instructing the jury to reach a guilty verdict by finding Defendant had contact with Victim's vulva or vagina or alternatively, by finding Defendant had contact with Victim's buttocks. Concluding the district court complied with the directives of *Taylor* in crafting these instructions, we hold it was not error to separate the charge into two instructions.

{4} With regard to the inclusion of "vagina" in Jury Instruction No. 3, the crime of which Defendant was charged—criminal sexual contact with a minor in the second degree—specifically includes contact with a victim's intimate parts, which by definition includes the vagina. Section 30-9-13(B) ("Criminal sexual contact of a minor in the second degree consists of all criminal sexual contact of the unclothed intimate parts of a minor."); § 30-9-13(A) (defining "intimate parts" to include the "primary genital area, groin, buttocks, anus or breast"); UJI 14-981 NMRA comm. cmt. (stating that "primary genital area" includes the vagina).

{5} Though Defendant contends Jury Instruction No. 3 was inappropriate because touching of the vagina would constitute the uncharged crime of criminal sexual penetration of a minor. As we have explained, however, evidence that Defendant touched Victim's vagina satisfied an element of the lesser offense of criminal sexual contact of a minor. *See State v. Lente*, 2005-NMCA-111, ¶ 15, 138 N.M. 312, 119 P.3d 737 (observing that criminal sexual contact of a minor is a lesser included offense of criminal sexual penetration of a minor). Defendant provides no authority demonstrating that instructing the jury on a lesser included offense is error if the evidence also supports the greater, but uncharged, offense. *See State v. Surratt*, 2016-NMSC-004, ¶ 14, 363 P.3d 1204 (explaining that "a district attorney has broad discretion in determining what charges to bring and what people to prosecute in the best interest of the people of the State of New Mexico" and cautioning that "courts must be wary not to infringe unnecessarily on the broad charging authority of district attorneys" (internal quotation marks and citations omitted)); *State v. Vigil-Giron*, 2014-NMCA-069, ¶ 60, 327 P.3d 1129 ("[A]ppellate courts will not consider an issue if no authority is cited in support of the issue and that, given no cited authority, we assume no such authority exists.").

Ineffective Assistance of Counsel

{6} Defendant argues he received ineffective assistance of counsel and asks us to remand the case for an evidentiary hearing on that issue. [Amd. BIC 10-23] To

establish a claim of ineffective assistance of counsel on direct appeal, Defendant must show that defense counsel's performance fell below the standard of a reasonably competent attorney and the deficient performance resulted in prejudice to Defendant. *See State v. Mosley*, 2014-NMCA-094, ¶ 19, 335 P.3d 244. "There is a general presumption that trial counsel provided effective assistance[,]" and this presumption remains "intact as long as there is a reasonable trial tactic explaining counsel's performance." *State v. Gonzales*, 2007-NMSC-059, ¶ 14, 143 N.M. 25, 172 P.3d 162. With regard to prejudice, Defendant must show that, absent the claimed errors, "there was a reasonable probability that the result of the trial would have been different." *See State v. Dylan J.*, 2009-NMCA-027, ¶ 38, 145 N.M.719, 204 P.3d 44 (omission, internal quotation marks, and citation omitted). Remand for an evidentiary hearing is appropriate when the record on appeal establishes a prima facie case of ineffective assistance of counsel. *Mosley*, 2014-NMCA-094, ¶ 19.

{7} Defendant claims many deficiencies in his trial counsel's performance: (1) undue delay due to his trial counsel's many requests for continuances for personal and professional reasons; (2) failure to object when the district court pressured both parties to comply with the trial schedule or face a mistrial; (3) omissions in the presentation of evidence and testimony; and (4) lack of proficiency with evidentiary objections. [Amd. BIC 10-23]

{8} On this record, we are not persuaded that any of the claimed deficiencies establish a prima facie case of ineffective assistance of counsel. Defendant himself agreed to at least some of the continuances and affirmatively waived his speedy trial rights with regard to the delay, knowing defense counsel's reasons for requesting the continuances. [Amd. BIC 13, 14, 15] The remaining claims of ineffectiveness all center on individual choices regarding litigation and trial strategy, which we will not generally second guess on direct appeal. *See State v. Pate*, 2023-NMCA-088, ¶ 27, 538 P.3d 450 ("[D]ecisions made by defense counsel that can be construed as rational, plausible trial strategies or tactics are insufficient to establish a prima facie case.").

{9} Defendant speculates about the prejudice that these claimed deficiencies caused. Defendant argues that delays in the trial allowed Victim to change or embellish her testimony and that defense counsel's performance at trial resulted in missed opportunities to challenge Victim's evidence and testimony. [BIC 17-18, 23] We have considered the trial record, however, and in that limited context, Defendant's scrutiny of specific aspects of defense counsel's performance does not show how the result would have been different had the trial happened sooner or had counsel chosen different tactics at trial. *See State v. Sloan*, 2019-NMSC-019, ¶ 34, 453 P.3d 401 ("[A]n assertion of prejudice is not sufficient to demonstrate that a choice caused actual prejudice." (internal quotation marks and citation omitted)); *see*

also State v. Aragon, 1999-NMCA-060, ¶ 10, 127 N.M. 393, 981 P.2d 1211 (stating that burden is on the appellant to demonstrate error).

{10} Accordingly, we hold that Defendant has not established a prima facie case of ineffective assistance of counsel on direct appeal, and any such claim would be more appropriately adjudicated in a habeas corpus proceeding. *See Duncan v. Kerby*, 1993-NMSC-011, ¶ 4, 115 N.M. 344, 851 P.2d 466 (noting the Supreme Court's preference that claims of ineffective assistance of counsel be raised in habeas proceedings).

Sufficiency of the Evidence

{11} Defendant argues there was insufficient evidence to support the element of unlawfulness. [Amd. BIC 24-27] "The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Montoya*, 2015-NMSC-010, ¶ 52, 345 P.3d 1056 (internal quotation marks and citation omitted). The reviewing court "view[s] the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. We disregard all evidence and inferences supporting a different result. *See State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829. "Jury instructions become the law of the case against

which the sufficiency of the evidence is to be measured." *State v. Smith*, 1986-NMCA-089, ¶ 7, 104 N.M. 729, 726 P.2d 883.

{12} Unlawfulness is an essential element of criminal sexual contact with a minor. *State v. Orosco*, 1992-NMSC-006, ¶ 5, 113 N.M. 780, 833 P.2d 1146. The jury was therefore instructed that, "[f]or the act to have been unlawful, it must have been done with the intent to arouse or gratify sexual desire or to intrude upon the bodily integrity or personal safety of [Victim]." [2 RP 452] Defendant contends the State provided no evidence to prove unlawfulness. [Amd. BIC 25] We disagree.

{13} Where unlawfulness is an element of a crime, the State does not have to prove the absence of lawfulness, which would require the State to prove a negative. *See State v. Osborne*, 1991-NMSC-032, ¶ 30, 111 N.M. 654, 808 P.2d 624. Instead, the element of unlawfulness may be established from the manner in which the act was perpetrated, regardless of Defendant's specific intent. *See id.* Defendant's recitation of Victim's testimony does not contain a summary of facts relevant to his sufficiency argument as required by our appellate rules. [Amd. BIC 1-2] *See* Rule 12-318(A)(3) NMRA (requiring that brief in chief contain "summary of the facts relevant to the issues presented for review"). Defendant seems to concede, however, that Victim testified at trial that Defendant committed the acts. [Amd. BIC 1-2] This concession is supported by the trial transcript, which shows that Victim testified that Defendant—who is the father of her younger brother—came into her bed, pulled

down her pants and underwear, and touched her unclothed buttocks and vagina with his hands and penis. [10-29-24 CD 9:43:06-9:47:52] In addition, Victim texted her mother following the incident to say Defendant raped her and she wanted to go home. [Amd. BIC 1-2; 10-29-24 CD 9:48:01-9:48:30, 9:52:15-9:54:15] These facts, showing where, when, and how Defendant touched Victim, permitted the jury to infer that he intended to arouse or gratify sexual desire or to intrude upon Victim's bodily integrity or safety. *See Osborne*, 1991-NMSC-032, ¶ 30 (explaining that proof of unlawfulness could "be made by proof of the impermissible nature of [the] defendant's conduct in connection with the other elements of the offense"); *see also Orosco*, 1992-NMSC-006, ¶ 20 (writing that, though the juries in the two cases on appeal were not instructed on unlawfulness, neither of the defendants placed in issue that touching of minor victims was lawful, and "no rational jury could have concluded that defendants had committed the acts without also determining that the acts were [unlawful]").

{14} Defendant asks us to overrule *Orosco* to the extent *Orosco* undermines his argument that the State must separately prove the absence of lawfulness. [Amd. BIC 27] This Court has no authority to overrule Supreme Court precedent and remains bound by *Orosco*. *See State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, ¶ 20, 135 N.M. 375, 89 P.3d 47 (stating that the Court of Appeals is bound by Supreme Court precedent).

Closing Arguments

{15} Defendant argues that the State shifted the burden of proving lawfulness onto Defendant by arguing in closing that there could have been no lawful purpose for touching Victim, and that the State's actions constituted prosecutorial misconduct. [Amd. BIC 27-29] Defendant did not preserve this issue with a contemporaneous objection. [10-31-24 CD 10:30:30-10:30:42, 10:31:54-10:32:12] We therefore review it for fundamental error. *See State v. Trujillo*, 2002-NMSC-005, ¶ 52, 131 N.M. 709, 42 P.3d 814 (stating that unpreserved claim of prosecutorial misconduct is reviewed for fundamental error). "Prosecutorial misconduct rises to the level of fundamental error when it is so egregious and had such a persuasive and prejudicial effect on the jury's verdict that the defendant was deprived of a fair trial." *State v. Allen*, 2000-NMSC-002, ¶ 95, 128 N.M. 482, 994 P.2d 728 (internal quotation marks and citation omitted). "As with any fundamental error inquiry, we will upset a jury verdict only (1) when guilt is so doubtful as to shock the conscience, or (2) when there has been an error in the process implicating the fundamental integrity of the judicial process." *State v. Sosa*, 2009-NMSC-056, ¶ 35, 147 N.M. 351, 223 P.3d 348.

{16} We conclude that the State's closing argument did not amount to fundamental error. First, the State's closing did not shift the burden onto Defendant to prove lawfulness. Rather, the circumstances established conduct, "which, under common

standards of law and morality, may be presumed criminal," *see Osborne*, 1991-NMSC-032, ¶ 29, and the State permissibly pointed out that Defendant had not established any justification or excuse by producing evidence that Defendant was, for example, giving Victim a bath or helping her get dressed, [10-31-24 CD 10:31:50-10:32:12] *see id.* ("There are any number of circumstances where such a touching is not merely excusable or justifiable but entirely innocent, such as a touching for the purpose of providing reasonable medical treatment, nonabusive parental or custodial care, or, in some circumstances, parental or custodial affection." (internal quotation marks omitted)). Second, even were the closing argument improper, it did not deprive Defendant of a fair trial. The evidence was such that no rational jury could have concluded Defendant committed the acts without also having concluded the acts were unlawful. *See Orosco*, 1992-NMSC-006, ¶ 20. We do not believe Defendant's guilt is so doubtful as to shock the conscience or that there was an error implicating the fundamental integrity of the judicial process and, consequently, we conclude that Defendant has failed to establish fundamental error on this point. *See Sosa*, 2009-NMSC-056, ¶ 35.

Victim's Use of a Facility Dog

{17} Defendant argues the district court abused its discretion when it permitted the State, over Defendant's objection, to allow Victim to testify with a facility dog present. [Amd. BIC 29-31] Specifically, Defendant argues the dog unfairly

engendered sympathy for Victim, likely prejudicing Defendant. In the district court, Defendant's trial counsel posited that the jurors might have seen the dog's paw while they were entering the courtroom. [Amd. BIC 31; 10-29-24 CD 9:26:12-9:26:50] Importantly, Defendant does not claim the dog was visible to the jury from the jury box or that the dog caused any disruptions. On appeal, Defendant further suggests, without any support from the record, that jurors likely would have noticed the prosecutor with the dog in the hallways of the courthouse. *See State v. Weber*, 1966-NMSC-164, ¶ 37, 76 N.M. 636, 417 P.2d 444 (discussing appellant's duty to cite to the record to support his claims and declining to search the record to find support for appellant's argument).

{18} District courts have discretion to control the questioning of witnesses. Rule 11-611 NMRA. Accordingly, "[t]he exercise of the [district] court's authority under Rule 11-611 is reviewed for an abuse of discretion." *State v. Marquez*, 1998-NMCA-010, ¶ 5, 124 N.M. 409, 951 P.2d 1070. "An abuse of discretion will be found only when the trial court's decision is clearly untenable or contrary to logic and reason." *Id.* ¶ 13.

{19} "The court should exercise reasonable control over the mode and order of questioning witnesses and presenting evidence so as to (1) make those procedures effective for determining the truth, (2) avoid wasting time, and (3) protect witnesses from harassment or undue embarrassment." Rule 11-611(A). In *Marquez*, we held

that a district court did not abuse its decision under Rule 11-611 by allowing a child victim to hold a teddy bear while testifying. *Marquez*, 1998-NMCA-010, ¶ 17. We concluded the district court's decision was supported by findings balancing the possible prejudicial effect of the teddy bear against its calming effect. *Id.* ¶¶ 14-17. We also noted that allowing a child victim to hold a teddy bear was a less stringent measure than is permitted by the rules, which allow certain child victims to provide videotaped dispositions in lieu of in-person testimony at trial. *Id.* ¶¶ 4, 17 (citing Rule 5-504 NMRA).

{20} In this case, the district court held a hearing and made written findings and conclusions that Victim's need for a facility dog while testifying outweighed any prejudice to Defendant. [1 RP 238-48] The district court also took steps to minimize the jury's ability to see the dog, including keeping the dog under the table outside the jury's view, stating the dog would be removed from the courtroom if he became a distraction, and having the jury exit the courtroom before Victim and the dog entered and exited the witness stand. [1 RP 247] After Victim took the stand, and before the jury entered, the district court confirmed the dog would not be visible to the seated jury, noting that only the paw would be visible while the jury entered the courtroom, and the district court had Victim stand up and sit down again to make sure the dog would not react to Victim's movement. [10-29-24 CD 9:24:20-9:28:25]

{21} On this record, we cannot conclude that the decision to allow the facility dog was clearly untenable or contrary to logic or reason. *See Marquez*, 1998-NMCA-010, ¶ 17. We therefore hold that the district court did not abuse its discretion by allowing Victim to testify with the facility dog.

Cumulative Error

{22} Finally, Defendant contends that his convictions should be reversed under a theory of cumulative error. [Amd. BIC 32-35] *See State v. Duffy*, 1998-NMSC-014, ¶ 29, 126 N.M. 132, 967 P.2d 807 ("The doctrine of cumulative error requires reversal when a series of lesser improprieties throughout a trial are found, in aggregate, to be so prejudicial that the defendant was deprived of the constitutional right to a fair trial."), *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, ¶ 37 n.6, 275 P.3d 110. Having previously concluded that Defendant has not demonstrated error in any of his prior issues, we similarly conclude that he has failed to demonstrate that the doctrine of cumulative error requires us to reverse his convictions. *See Aragon*, 1999-NMCA-060, ¶ 19 (explaining that when there is no error, "there is no cumulative error").

CONCLUSION

{23} Based on the foregoing, we affirm.

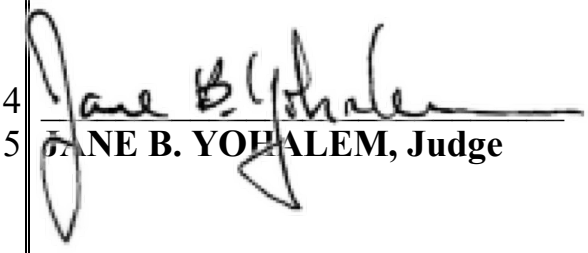
{24} **IT IS SO ORDERED**.

Katherine A. Wray

KATHERINE A. WRAY, Judge

WE CONCUR:

JENNIFER L. ATTREP, Judge



JANE B. YOHALEM, Judge