IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v. **No. A-1-CA-41695**

ALEXIS MURRAY SMITH,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY
Lisa B. Riley, District Court Judge

Raúl Torrez, Attorney General
Santa Fe, NM
Michael J. Thomas, Assistant Solicitor General
Albuquerque, NM

for Appellee

Bennett J. Baur, Chief Public Defender
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Santa Fe, NM

for Appellant

MEMORANDUM OPINION

HOUGHTON, Judge.

{1} Defendant Alexis Murray Smith appeals her convictions for one count of intentional abuse of a child age twelve to eighteen, resulting in death, contrary to NMSA 1978, Section 30-6-1(D), (G) (2009); and one count of abuse of a child, not resulting in death or great bodily harm, contrary to Section 30-6-1(D), (E).

Defendant asserts on appeal that (1) the district court abused its discretion when it allowed the State to play a witness's recorded interview to the jury pursuant to Rule 11-803(5) NMRA, and this admission violated the Confrontation Clause of the United States Constitution; (2) the district court abused its discretion by preventing Defendant from asking a State expert witness additional questions beyond those asked during cross-examination and unrelated to the State's redirect examination; and (3) the district court abused its discretion by allowing redacted logs of text messages exchanged between Defendant and others to be admitted. Defendant claims that these errors cumulatively deprived her of a fair trial. Finding no error warranting reversal, we affirm.

DISCUSSION

{2} This case arises from the tragic death of a twelve-year-old boy (Victim), who overdosed from a mixture of fentanyl and methamphetamine that he consumed on his grandmother's property. The day before he died, the boy's mother, Defendant, left him and her fifteen-month-old daughter, B.S., at the house of Kelli Smith (Smith), Defendant's mother and the children's grandmother. A grand jury indicted Defendant for leaving the children with Smith, alleging that Defendant knew Smith stored drugs at her house, and that Defendant knew Victim had previously consumed fentanyl and overdosed at Smith's house. A jury found Defendant guilty of both charged counts of child abuse. Because this is a memorandum opinion, we reserve

further factual discussion for our analysis of the three issues raised on appeal, which we address in turn. Although much of our discussion focuses—as did the trial—on Defendant's charge for Victim's overdose, it applies equally to the charge relating to B.S. because it too was predicated upon what Defendant knew or should have known about the availability of drugs at Smith's house before leaving her children there.

I. The District Court Did Not Err in Allowing the State to Play Witness Michael Ortiz's Recorded Interview

{3} On the third day of trial, the State called witness Michael Ortiz (Ortiz), Smith's live-in boyfriend, who discovered Victim's unresponsive body after his fatal overdose, and had—in the month before Victim's death—administered Narcan to Victim after a previous overdose at Smith's house. On direct examination, Ortiz struggled to recall details surrounding the event, which he attributed to his history of drug use. When the State tried to confront Ortiz with statements he gave police during an interview the day of Victim's overdose, Defendant objected on the grounds that the State had not properly tried to refresh Ortiz's memory. The district court was unable to resolve the objection immediately and, as it was late in the day, decided to recess until the next morning so both the State and Defendant could review caselaw and prepare for argument.

{4} Before the jury was brought into the court room the next morning, Ortiz took the stand and the State played him a portion of his interview. The State asked Ortiz

whether he remembered participating in the interview; whether his memory of events would have been fresher at the time of the interview; and whether he had answered officers' questions truthfully. After hearing Ortiz's answers, the district court ruled that the State had met the three prongs required by Rule 11-803(5) to play into evidence the recorded recollection if, upon further questioning, Ortiz's memory could not be refreshed.

{5} After the jury was called back and the State's questioning continued, Ortiz became increasingly unable to answer the State's questions. The State moved to play the recorded interview based on Ortiz's inability to recall and the foundation laid outside the presence of the jury, which the district court allowed. The district court explained to the jurors that:

> [U]nlike other exhibits that you'll be able to take back with you to the jury room when you deliberate, this is something that's just played for you in court, so it'll be just like live testimony and you just listen to it, and then you would go based on your memory of what you've heard today.

{6} The State played the entirety of the thirty-six minute recorded interview into the record. Defendant alleges that this "violated the proper procedure for refreshing [a witness's] recollection," and that the admission violated Defendant's right to confrontation under the Sixth Amendment to the United States Constitution.

A. The District Court Did Not Abuse Its Discretion in Admitting Ortiz's Interview with Police

{7} Although Defendant misapprehends the admission of Ortiz's recorded interview as a recollection refreshed, and cites caselaw regarding the proper procedures for refreshing a witness's recollection, the record shows that the recording of Ortiz's interview was admitted as a *recorded recollection* under Rule 11-803(5). Consequently, Defendant's arguments are largely unavailing. We note, however, that during trial the admission of the interview was properly objected to under the correct evidentiary rule, and specifically as to whether "this witness can honestly say that this was an accurate reflection of his knowledge at the time," which related to the third prong of the Rule 11-803(5) analysis.

{8} The State does not fault Defendant for relying on the wrong rule of evidence on appeal, and so we review the district court's decision to admit this evidence for an abuse of discretion. *See State v. Allen*, 2000-NMSC-002, ¶ 17, 128 N.M. 482, 994 P.2d 28. "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 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).

{9} The requirements for a recorded recollection to be read into evidence are that the record:

> (a) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;
>
> (b) was made or adopted by the witness when the matter was fresh in the witness's memory; and
>
> (c) accurately reflects the witness's knowledge.

Rule 11-803(5). The recording may then be read into evidence, or received as an exhibit if offered by an adverse party. *See id.*

{10} Defendant describes the admission of Ortiz's interview with law enforcement as "allow[ing] the prosecution to simply ask . . . Ortiz whether he remembered the interview, and then to play the interview in its entirety when he said he did not remember it." We disagree. Ortiz was unable to answer many of the State's questions on direct examination before the jury. Ortiz did, however, testify to remembering speaking to the police the day that Victim's body was discovered, although he stated that he could not recall what he had told them. When shown the recording outside the view of the jury, Ortiz affirmatively identified himself. When asked if he recalled speaking to law enforcement the day he found Victim's body, Ortiz replied, "I remember, now seeing [the video,] I remember a little bit." When asked if he had answered the officers' questions truthfully and to the best of his ability at the time, Ortiz answered that he had. Based on those answers, the district court was satisfied that Rule 11-803(5)'s foundational requirements had been laid.

{11} Once the jury was called back into the courtroom, the State continued questioning Ortiz and he remained unable to recall details about what happened that day and what he told officers. Only then did the State seek the district court's permission to play the interview to the jury, while Ortiz remained on the stand. Ortiz's lack of memory is apparent from the trial transcript, and the necessary foundation was properly established. Based on the foregoing, we see no abuse of discretion in allowing the State to play Ortiz's recorded interview for the jury pursuant to Rule 11-803(5).

B. Defendant's Confrontation Rights Were Not Violated by the Admission

{12} Defendant next argues that playing Ortiz's recorded interview for the jury violated his right to confrontation because it "substitut[ed] . . . Ortiz's testimony at trial with" a law enforcement interview during which "counsel had no opportunity to cross-examine." The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. "We review whether [the d]efendant's right to confront and cross-examine the witness was violated by the district court de novo." *State v. Smith*, 2013-NMCA-081, ¶ 3, 308 P.3d 135.

{13} Although Ortiz's statements to law enforcement were testimonial, Ortiz was present as a witness at trial and Defendant had the opportunity to cross-examine Ortiz about those statements, avoiding the principal concern addressed by the United

States Supreme Court in *Crawford v. Washington*, 541 U.S. 36 (2004). *See id.* at 59 (stating that the Confrontation Clause rule is applicable to "[t]estimonial statements of witnesses *absent* from trial" (emphasis added)).

{14} Defendant cross-examined Ortiz, at length, about his state of mind during the interview with police, whether he felt intimidated by the officers' questioning, and if any portion of his interview was "more truthful" than any other. The jury was free to weigh his answers to these questions against those he provided to the State on direct examination and to law enforcement on the day of Victim's death. Ortiz was not, by his own admission, the most reliable witness, but "it is the exclusive province of the jury to resolve inconsistencies or ambiguities in a witness's testimony." *State v. Vargas*, 2016-NMCA-038, ¶ 27, 368 P.3d 1232. Defendant cites no authority for why confrontation here was constitutionally deficient. We note that when the declarant of an out-of-court statement testifies at trial and is subject to cross-examination, the Confrontation Clause generally is satisfied. *See Crawford*, 541 U.S. at 59 n.9 ("[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements."); *United States v. Owens*, 484 U.S. 554, 557-60 (1988) (holding that the admission of a witness's prior out-of-court identification, despite the witness having memory loss and being unable to explain the basis for the identification at trial, does not violate the Confrontation Clause).

{15} Defendant did not cite any authority to the contrary, so "we assume no such authority exists." *See State v. Vigil-Giron*, 2014-NMCA-069, ¶ 60, 327 P.3d 1129. In sum, we are satisfied that playing Ortiz's recorded interview under Rule 11-803(5) did not violate Defendant's right to confrontation.

II. Any Error in Denying Defendant's Request to Question a State Witness on Matters Beyond Cross-Examination and Redirect Examination Was Harmless

{16} On day three of the trial, the State called Sarah Salameh, a forensic scientist supervisor employed by the New Mexico Department of Public Safety, who tested materials seized from Smith's house for the presence of controlled substances. After qualification as an expert, Salameh testified that several seized items contained either fentanyl or methamphetamine. Following the State's redirect examination, Defendant requested leave of the district court to ask one more question. The district court allowed Defendant to ask a question "based on a matter that was brought up on redirect." Defendant then asked if the lab ever tests aluminum foil for the presence of controlled substances. The State objected that the question was outside the scope of redirect, and the district court sustained the objection. Defendant did not attempt any further questioning and stated that she would hold the witness subject to recall.

{17} The State requested a bench conference during which counsel for the defense erroneously claimed that Defendant had filed a witness list that included all of the State's witnesses. In a subsequent bench conference, while the witness was still on

the stand, the district court determined that Defendant had not filed a witness list. The district court ruled that Salameh would not be subject to recall because the witness would be unavailable following that day's testimony, Defendant had not subpoenaed Salameh as a witness, and Defendant had not filed a witness list. The district court excused Salameh without answering Defendant's additional questions.

{18} Between these two bench conferences, defense counsel asked the district court if it "would . . . consider letting me call her as a witness out-of-order." The district court judge responded, "I don't think I can do that before the State has rested." It is this statement that Defendant challenges on appeal as a ruling based on an erroneous interpretation of Rule 5-607(J) NMRA (Order of Trial).

{19} Defendant and the State disagree as to whether this issue was preserved below. We assume without deciding that Defendant adequately preserved this issue. We further assume without deciding that the district court erred in preventing Defendant from asking Salameh the requested question, and we proceed with our harmless error analysis.

{20} "When an error is preserved, we review for harmless error. . . . Absent a constitutional violation, we look to whether there is a reasonable probability that the error affected the verdict." *State v. Astorga*, 2015-NMSC-007, ¶¶ 42-43, 343 P.3d 1245. "[The d]efendant bears the initial burden of demonstrating that he was prejudiced by the error." *Id.* ¶ 43. "For the court's error in excluding evidence to be

prejudicial against [the] defendant, improperly refused evidence must form an important part of [the] defendant's case. Moreover, to warrant reversible error in the exclusion of testimony, [the] defendant must show a reasonable probability that the court's failure to allow the testimony contributed to his conviction." *State v. Gonzales*, 1991-NMSC-075, ¶ 27, 112 N.M. 544, 817 P.2d 1186 (citation omitted).

{21} Even presuming error, we hold harmless the district court's refusal to allow Defendant to call the witness "out of order" to pursue an additional line of questioning. Defendant claims this error was not harmless because "[i]f the analyst had replied that there was no such test, or that the State did not typically conduct such tests, there is a real probability the jury would have rejected the evidence of burnt aluminum as indicative of how pervasive or serious the drug use at [Smith]'s house was." Assuming Defendant was able to pursue the line of questioning, the jury still would have heard that Victim's cause of death was due to the toxic effects of methamphetamine and fentanyl; would have seen and heard about the fentanyl and methamphetamine discovered during the execution of the search warrants at Smith's house and associated vehicles; would have heard testimony by multiple officers that foil—like that discovered near Victim's body—was commonly used to ingest fentanyl; and would have heard Defendant's and Ortiz's admissions that they were aware of the presence and use of fentanyl at Smith's house, including a prior overdose of Victim. We are unable to imagine an answer to the disallowed question

that would cast meaningful doubt on the State's theory that Defendant knew the dangers of leaving her children at Smith's house. We are, therefore, not convinced to "a reasonable probability" that denying this extra line of inquiry affected the jury's verdict.

III. The District Court's Admission of Smith's and Ortiz's Text Logs Was Not an Abuse of Discretion

{22} Near the close of trial, the State sought to introduce logs of text messages containing exchanges between Defendant, Ortiz, and Smith. The State initially sought to have the logs, which contained hearsay statements, submitted in full with the specific text conversations between Defendant, Ortiz, and Smith highlighted for the jury. However, on the final day of trial, the district court ruled that the texts constituting hearsay needed to be redacted and that the jury could take the redacted logs into its deliberations. After redaction, approximately 80 percent of the 120 pages of logs, which contained approximately 2,000 text messages, were blacked out.

{23} Defendant asserts on appeal that these redactions were prejudicial because "the extensive redact[ions] gave the impression that the redacted material was not necessarily merely irrelevant, but so inflammatory as to require extensive, thick blackout boxes," and that "jurors would likely entertain that redacted portions . . . contained prejudicial information, . . . [giving] the impression that there was a lot

more going on than the trial court was allowed to share." Defendant also asserts that this objection was preserved below.

{24} We review the admission of evidence, over objection, for abuse of discretion, *State v. Guerra*, 2012-NMSC-014, ¶ 36, 278 P.3d 1031, and we will not overturn the district court unless its decision is "clearly untenable or not justified by reason." *Rojo*, 1999-NMSC-001, ¶ 4 (internal quotation marks and citation omitted). We observe, as did the State, that Defendant's citation to the record does not support the proposition that this argument was preserved. Defendant's reply brief, made while on notice of this deficiency, does provide a proper citation. "We are not obligated to search the record on a party's behalf to locate support for propositions a party advances . . . as to what occurred in the proceedings." *Muse v. Muse*, 2009-NMCA-003, ¶ 42, 145 N.M. 451, 200 P.3d 104. However, even if we assume Defendant preserved this argument, under the less demanding abuse of discretion standard of review, Defendant's argument is unpersuasive.

{25} Jurors are instructed that their verdict may "not be based on speculation, guess, or conjecture." UJI 14-6006 NMRA. The jury in this case received the same instruction. Jurors in New Mexico "are presumed to have followed the written instructions," including those warning against speculation. *State v. Smith*, 2001-NMSC-004, ¶ 40, 130 N.M. 117, 19 P.3d 254. Here, Defendant asks us to treat an opportunity for impermissible speculation as proof of its occurrence. We will not do

so. Instead, we presume that the jurors in this case followed the instructions and did not speculate as to the contents of redacted texts.

{26} When the text logs were introduced, it was explained to the jury that "[these are] just text messages exchanged in that phone." Consistent with this, the text logs from Smith and Ortiz's phones simply show that these two phones were in contact with some unknown number of individuals other than Defendant, Ortiz, and Smith. We recognize that "jurors share common human experience, and they are entitled to draw upon that experience to make reasonable inferences at trial." *State v. Baldwin*, 2001-NMCA-063, ¶ 16, 130 N.M. 705, 30 P.3d 394. But Defendant's assertions of prejudice are purely speculative, and certainly do not substantially outweigh the logs' probative value for demonstrating Defendant's knowledge of the availability of drugs at Smith's house, which was the question at the core of the State's case.

{27} Defendant also claims "the admission of the reports was cumulative because the contents of the relevant messages had already been entered into evidence as screenshots." During the execution of a search warrant, a detective took screenshots of text messages sent from Defendant's phone. It is the text logs' duplication of these screenshots upon which Defendant bases her argument of cumulative evidence.

{28} Our Supreme Court has differentiated corroborative evidence from cumulative evidence by saying "corroborative evidence tends to corroborate or to confirm, whereas cumulative evidence merely augments or tends to establish a point

already proved by other evidence." *State v. Johnson*, 2004-NMSC-029, ¶ 39, 136 N.M. 348, 98 P.3d 998 (alteration omitted). "To the extent the evidence corroborates, and therefore strengthens, the prosecution's evidence, it cannot be deemed 'cumulative' as we understand that term." *Id.* ¶ 37.

{29} It is true that that there is some overlap between the content of the admitted screenshots and the text logs. It would be a misstatement, however, to say that these message logs "had already been entered into evidence." Although the screenshots show messages between Defendant and Smith, the redacted logs are more comprehensive, as the metadata depicted in the screenshots, such as the date and time of the messages, is either illegible or missing entirely. To the extent that the message logs from Smith's phone duplicate screenshots of Defendant's texts, they corroborate the State's claims that the logs are messages between those individuals by identifying both the sending and receiving devices. Because the text logs from Smith's phone are corroborative of the admitted screenshots, they cannot be cumulative. Further, none of the screenshots of Defendant's texts show messages between Defendant and Ortiz, and therefore cannot be cumulative in that respect.

IV. There Was No Cumulative Error

{30} Finally, Defendant claims that the alleged errors in the trial constitute cumulative error warranting reversal. "The doctrine of cumulative error applies when multiple errors, which by themselves do not constitute reversible error, are so

serious in the aggregate that they cumulatively deprive the defendant of a fair trial." *State v. Salas*, 2010-NMSC-028, ¶ 39, 148 N.M. 313, 236 P.3d 32 (internal quotation marks and citation omitted). Because we have concluded that no error occurred in the admission of Ortiz's recorded interview or in the admission of the redacted text logs, and because we have determined that any error in denying Defendant's request to question Salameh was harmless, we reject Defendant's cumulative error argument. *See State v. Carrillo*, 2017-NMSC-023, ¶ 53, 399 P.3d 367 ("Because we find only one error at trial, an error which was harmless, we reject [the d]efendant's cumulative error claim."); *see also State v. Samora*, 2013-NMSC-038, ¶ 28, 307 P.3d 328 ("Where there is no error to accumulate, there can be no cumulative error." (text only) (citation omitted)).

CONCLUSION

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

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

KRISTOPHER N. HOUGHTON, Judge

WE CONCUR:

JACQUELINE R. MEDINA, Chief Judge

JENNIFER L. ATTREP, Judge