IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v. **No. A-1-CA-41983**

DAVID ALBERTO AVALOS-SOLIS,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
Richard M. Jacquez, District Court Judge

Raúl Torrez, Attorney General
Santa Fe, NM
Christa Street, Assistant Solicitor General
Albuquerque, NM

for Appellee

Bennett J. Baur, Chief Public Defender
Tania Shahani, Assistant Appellate Defender
Santa Fe, NM

for Appellant

MEMORANDUM OPINION

MEDINA, Chief Judge.

{1} Defendant David Alberto Avalos-Solis challenges his conviction for one count of criminal sexual contact of a minor in the second-degree, contrary to NMSA 1978, Section 30-9-13(B)(1) (2003). Defendant raises four issues on appeal: (1) the State improperly refreshed the complaining witness's recollection; (2) the district

court abused its discretion by admitting the State's expert witness's testimony; (3) prosecutorial misconduct deprived him of a fair trial; and (4) cumulative error resulted in a fundamentally unfair trial. We affirm.

BACKGROUND

{2} The following facts were presented to the jury. Victim was living with her brother and wheelchair-bound mother in a home in Chaparral, New Mexico. One evening, when Victim was eleven years old, Defendant came to her house to fix a hole in her bedroom. At some point, after Victim had fallen asleep, she woke up because she felt a hand on her leg and "butt." Upon waking up, Victim noticed that her pants were down and underwear had been removed, and she saw Defendant walking out of her room. When she went to bed, her pants had been on. Victim was able to identify Defendant based on the gray shirt he was wearing and his body size.

{3} Shortly thereafter, Victim heard Defendant's voice coming from her mother's room. Victim used her cell phone to call her mother so that she could tell her what happened and to let her know that "the guy in the house is not safe." However, believing her mother had her on speaker, Victim told her mother that she would send her a text, which she did, telling her mother what had happened. Victim then saw her mother "kick [Defendant] out of the house."

{4} The following morning a caregiver who assisted Victim's mother called the police. Detective Eduardo Flores was among the officers that responded to Victim's

home. Once there, he interviewed Victim's mother and her caregiver. Based on his investigation, he determined that a forensic interview needed to be done. That same day, Victim was taken for a forensic interview, during which she told the interviewer what had happened.[1] Based on his investigation, Detective Flores sought a warrant for Defendant's arrest.

{5} At trial, Victim testified, as did Detective Flores. Over Defendant's objection, the State also introduced expert testimony from licensed clinical social worker Sueann Kenney-Noziska, a child and adolescent therapist who specializes in childhood abuse and trauma. Defendant stipulated to Ms. Kenney-Noziska's expertise and the court accepted her as an expert in childhood trauma and abuse, childhood sexual abuse, traumatic memories, ethics and treatment of childhood trauma and abuse. Despite agreeing with Ms. Kenney-Noziska's expertise, Defendant objected to the nature of her testimony at trial.

{6} The jury convicted Defendant of one count of criminal sexual contact of a minor. This appeal followed.

I. The Refreshing of Victim's Recollection Did Not Result in Plain Error

{7} Defendant argues that the manner in which the State refreshed Victim's recollection requires reversal because it occurred off the record, failed to follow the

[1] Throughout trial and within the parties' briefing, the term "forensic interview" and "safe house interview" are used interchangeably. For the sake of clarity and consistency, this Court uses only "forensic interview" in this opinion.

proper process provided by this Court's prior precedent, and compromised the integrity of Victim's testimony. Defendant acknowledges his arguments are unpreserved. We therefore examine this claim of error to determine whether plain error occurred. *See State v. Chavez*, 2024-NMSC-023, ¶ 10, 562 P.3d 521 ("Unpreserved evidentiary errors are reviewable on appeal under a plain error standard."). Plain error exists if a defendant's substantial rights are affected by the admission of the evidence, and that admission constitutes an injustice creating "grave doubts concerning the validity of the verdict." *Id.* ¶¶ 10-11 (internal quotation marks and citation omitted). "[W]e consider the error's effect on the overall fairness, integrity, or public reputation of judicial proceedings." *Id.* ¶ 11 (internal quotation marks and citation omitted).

{8} "[P]lain error is an exception to the general rule that parties must raise timely objections to improprieties at trial." *Id.* ¶ 10 (alteration, internal quotation marks, and citation omitted). As such, "it is to be used sparingly." *Id.* In reviewing for plain error, appellate courts "examine the alleged errors in the context of the testimony as a whole." *State v. Montoya*, 2015-NMSC-010, ¶ 46. 345 P.3d 1056. Under this standard, Defendant bears the burden of demonstrating prejudice. *See State v. Muller*, 2022-NMCA-024, ¶ 43, 508 P.3d 960.

{9} Generally at trial, "witnesses are expected to testify in their own words." *State v. Macias*, 2009-NMSC-028, ¶ 23, 146 N.M. 378, 210 P.3d 804, *overruled on other*

grounds by State v. Tollardo, 2012-NMSC-008, ¶ 37 n.6, 275 P.3d 110. In instances where there is a lapse in memory, however, the use of an exhibit may be permitted to refresh the witness's recollection. *Id.* ¶¶ 23-24.

{10} "In order to refresh a witness's recollection with an exhibit, the attorney must first establish that the witness does not recall the matter." *Id.* ¶ 23. Next, the attorney "must determine that the witness's memory will be refreshed by reference to a certain exhibit." *Id.* ¶ 24. Finally, if the exhibit refreshes the witness's memory, the witness may testify from their "restored memory, not from the exhibit, and certainly not from the questioning attorney." *Id.* ¶ 25 ("After the witness has considered the exhibit, the attorney must then ask the witness whether [their] memory has been refreshed. If the answer is yes, the exhibit is removed from the witness and the witness continues with [their] testimony."). The purpose of this process is to "prevent inadmissible evidence from being suggested to the jury." *Id.*

{11} Defendant relies heavily on *Macias* and *State v. Little*, 2020-NMCA-040, 473 P.3d 1, to support his position on appeal. In *Macias*, the state—while refreshing the witness's recollection—conveyed an inadmissible phone conversation directly to the jury through a recording and transcript. *Macias*, 2009-NMSC-028, ¶ 26. Similarly, in *Little*, the state conveyed the inadmissible contents of a police report to the jury through a "refreshed" witness's testimony to establish that the witness was twelve when the defendant abused her. *Little*, 2020-NMCA-040, ¶¶ 14-15. This was

improper because the witness gave no indication that she was struggling to remember her age. *Id.* ¶ 14. Indeed, the witness "unequivocally testified—on five occasions—that[the d]efendant had not abused her . . . until after she turned thirteen." *Id.* ¶ 2. In both of these cases, the improper process of refreshing the witnesses' recollection allowed the state to present inadmissible hearsay evidence to the jury. *Macias*, 2009-NMSC-028, ¶¶ 26-27, 36; *Little*, 2020-NMCA-040, ¶¶ 13-15 (determining that the state's process of refreshing a witness's recollection was not harmless error because it amounted to offering the witness's previously given statement to substitute for the witness's testimony under the guise of refreshing recollection). Such is not what happened here.

{12} Here, unlike *Macias* and *Little*, the district court took important precautions to ensure inadmissible evidence was not wrongly offered to the jury. Anticipating Victim's recollection might need to be refreshed, the State asked the district court to admit a portion of Victim's forensic interview as an exhibit or alternatively, to allow the State to use the video to refresh Victim's recollection. The district court denied the State's request to admit the forensic interview into evidence, but allowed the State to use a portion of the interview to refresh Victim's recollection if needed—in a manner that kept it from the jury. Defendant did not object.

{13} Moreover, unlike *Macias* and *Little*, Victim was notably struggling to remember specific details about the night of the incident. For example, when the

State asked Victim how long Defendant "stay[ed] at your house," she replied, "I don't remember." The State then asked Victim if Defendant was "still at your house when you went to sleep," Victim again replied, "I don't remember." At this point, the State sought permission to refresh Victim's recollection off the record, which the district court granted—again, without objection from Defendant. The district court recessed for approximately ten minutes to allow Victim to watch a seven-minute portion of her forensic interview outside the presence of the jury.

{14} Once back on the record, the State asked Victim "are you ready?" and Victim responded, "Yes." The question—though not explicitly phrased as such—implicitly asked whether Victim's memory had been refreshed. And while the State did not ask Victim the same question that prompted the need to refresh her memory—instead asking Victim about her brother and about what took place when Defendant arrived at her home and when she went to bed—the State's line of questioning nevertheless established that Defendant was still at her house when she went to sleep. Still, we acknowledge that the State did not follow the precise process laid out in *Macias* and *Little*. In particular, there is nothing in the record indicating that the prosecutors sought Victim's acknowledgement that the recorded interview would assist her recollection. *See Macias*, 2009-NMSC-028, ¶ 24 ("If the witness does not agree that the exhibit will be helpful, then the attorney may not attempt to refresh the witness's memory by calling the witness's attention to the exhibit."). Nonetheless, we are

convinced that the State's process and the district court's precautions prevented inadmissible evidence from being suggested to the jury.

{15} Defendant asserts that the State's improper process of refreshing Victim's memory prejudiced him for two reasons. First, he argues that it "influenced [Victim]'s testimony." But Defendant provides no evidence of this. Rather, he contends that allowing Victim to review her forensic interview "in private—without safeguards—heightened the risk of suggestive reinforcement rather than genuine memory recall." Defendant fails to explain this contention or how having Victim review the video in the presence of the jury would lessen the risk of "suggestive reinforcement." Indeed, as mentioned above, the district court's decision to allow Victim to refresh her recollection outside the presence of the jury did exactly what *Macias* and *Little* instruct: it prevented inadmissible evidence from reaching the jury.

{16} Second, Defendant asserts that the improper process of refreshing Victim's recollection deprived him of the opportunity to challenge her testimony on the ground that reviewing the forensic interview affected her memory. Defendant fails to explain this assertion. In fact, the record contradicts his position. On cross-examination, defense counsel repeatedly challenged Victim's memory by calling attention to the fact that Victim needed to watch a video to help her remember things.

{17} Given these facts, we decline to hold that the process the State used to refresh Victim's recollection amounted to plain error. To hold otherwise would put form

over function and reward Defendant for failing to raise a timely objection. Had Defendant objected, he would have given the district court an opportunity to correct the State's missteps. Moreover, it is Defendant's burden to show he was prejudiced. *Muller*, 2022-NMCA-024, ¶ 43. He has not.

II. Expert Witness Testimony

{18} Defendant next argues that the district court abused its discretion when it allowed expert witness Ms. Kenney-Noziska to testify. Ms. Kenney-Noziska provided general testimony about the process and rationale of using a forensic interview when children have disclosed sexual abuse. Ms. Kenney-Noziska explained, in part, that a neutral forensic interviewer asks "open-ended questions, and while they're interviewing the child, there[are] people from the multidisciplinary team watching [the] interview in another room." She also explained that the purpose of a forensic interview is to allow children to "answer questions . . . in an impartial way[,] . . . that way they don't have to repeat to other people" what they disclose during the forensic interview.

{19} Ms. Kenney-Noziska testified that she watched the forensic interview in this case and that "it looked like a standard forensic interview done within protocol." She further testified that it is common for children to remember things at different moments in time based on their language development and cognitive skills. When asked if she observed anything that would give her pause as to Victim's veracity,

Ms. Kenney-Noziska responded that "[t]he one thing I really can't comment [on] is whether or not what [Victim] was saying was true or not true. I simply don't know."

{20} Defendant argues Ms. Kenney-Noziska's testimony violated Rule 11-402 NMRA and Rule 11-702 NMRA and improperly bolstered Victim's testimony. As a preliminary matter, we first determine whether Defendant preserved the arguments he makes on appeal regarding Ms. Kenney-Noziska's testimony. *See State v. Carrillo*, 2017-NMSC-023, ¶ 20, 399 P.3d 367 (considering whether the defendant preserved issue for appeal when he filed a motion in limine and objected to witness's testimony at trial).

{21} "In order to preserve an issue for appeal, a defendant must make a timely objection that specifically apprises the trial court of the nature of the claimed error and invokes an intelligent ruling thereon." *Id.* (internal quotation marks and citation omitted); *see* Rule 11-103(A)(1) NMRA ("A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and . . . if the ruling admits evidence, the party, on the record . . . timely objects or moves to strike, and . . . states the specific ground, unless it was apparent from the context." It is the attorney's responsibility to "elicit a definitive ruling on an objection from the court." *Carrillo*, 2017-NMSC-023, ¶ 20 (internal quotation marks and citation omitted).

{22} Here, Defendant stipulated to Ms. Kenney-Noziska's expertise but nonetheless objected to Ms. Kenney-Noziska's testimony twice. On the morning of trial, Defendant argued that Ms. Kenney Noziska had not interviewed Victim and her testimony would be irrelevant and more prejudicial than probative because she had no direct knowledge. Defendant did not, however, argue that the expert's testimony would amount to improper bolstering of Victim's testimony, which he now argues on appeal. The district court denied Defendant's motion to preclude the expert's testimony and instructed Defendant as follows: "If there's a[n] item that you believe is not relevant material, . . . make the appropriate objection, and if there's another basis for the objection, make the objection."

{23} Prior to the State calling Ms. Kenney-Noziska to the stand Defendant stated, "I do want to renew my objection to this witness's testimony." Notably again, Defendant did not object to any specific testimony Ms. Kenney-Noziska gave while she was testifying, or at any time provide further clarity as to the specific impropriety of the expert testimony. This Court therefore concludes that Defendant's general objections failed to apprise the district court to any specific alleged error in Ms. Kenney-Noziska's testimony.

{24} As the Court in *Carrillo* explained, "it is often impossible to make definitive evidentiary rulings prior to trial because admissibility will depend on the state of the evidence at the time of the ruling. As the trial unfolds, it may be proper for the district

court to revisit, and modify or reverse its prior ruling." 2017-NMCA-023, ¶ 23 (text only) (citation omitted). The problem with seeking advance rulings on the admissibility of evidence is that such rulings are necessarily based on an alleged set of facts—not the actual testimony that the trial court would be considering to make its ruling. *See id.* Thus, although Defendant renewed his pretrial objection at trial, he failed to specify what portions of Ms. Kenney-Noziska's testimony he was objecting to and on what grounds.

{25} Such does not suffice to render a general objection sufficiently specific to garner a contemporaneous ruling by the district court or to permit meaningful appellate review of an admissibility determination. Such practice not only deprives the district court of the opportunity to intelligently rule on an objection, but if permitted would allow parties—as is the case here—to retrospectively cherry pick portions of testimony they believe should have been excluded. But as stated above, it is the attorney's responsibility to object to testimony itself and thereby prompt a specific ruling on the objection from the district court. A general objection cannot shift the responsibility to the district court to closely monitor a witness's testimony for possible error. Defendant's attempt to shoehorn his specific arguments on appeal into his general objections at trial is unavailing.

{26} Determining that Defendant failed to preserve the arguments he makes on appeal with regard to Ms. Kenney-Noziska's testimony, we review for plain error.

To constitute plain error, Ms. Kenney-Noziska's testimony must have given rise to an "injustice that created grave doubts concerning the validity of the verdict." *See Montoya*, 2015-NMSC-010, ¶ 46 (internal quotation marks and citation omitted).

{27} Defendant argues for the first time now that Ms. Kenney-Noziska's testimony was irrelevant and prejudicial because it improperly bolstered Victim's credibility. This Court disagrees. Although an expert witness may not comment directly on a victim's credibility, incidental testimony that verifies or indirectly bolsters a victim's credibility "is not by itself improper." *State v. Alberico*, 1993-NMSC-047, ¶ 89, 116 N.M. 156, 861 P.2d 192. Indeed, "[a]ll testimony in the prosecution's case will tend to corroborate and bolster the victim's story to some extent." *Id.*

{28} In support of his position that Ms. Kenney-Nosizka's testimony amounted to improper bolstering, Defendant directs this Court to *State v. Lucero*, 1993-NMSC-064, 116 N.M. 450, 863 P.2d 1071, and *State v. Garcia*, 2019-NMCA-056, 450 P.3d 418. In both *Lucero* and *Garcia*, the expert repeatedly commented on the victim's truthfulness, identified the defendant as the perpetrator numerous times based solely on the victim's statements of events, and repeated the victim's detailed statements describing the sexual abuse. *Lucero*, 1993-NMSC-064, ¶¶ 4-6, 15-17; *Garcia*, 2019-NMCA-056, ¶ 12.

{29} Defendant contends Ms. Kenney-Noziska improperly bolstered Victim's credibility based on the following two lines of questioning. First, the State asked if

"children tend to be more honest in [forensic] interviews?" Ms. Kenney-Noziska replied, "You know, I don't know the stats on that. Sometimes; I don't know." Second, the State asked Ms. Kenney-Noziska "did you notice anything with regards to how [Victim] interacted with the [forensic] interviewer—what her demeanor was like—that would give you any pause to her veracity, her honesty?" Unlike the facts in *Garcia* and *Lucero*, Ms. Kenney-Noziska did not comment on Victim's veracity. Instead, she replied, "The one thing I really can't comment [on] is whether or not what she was saying was true or not true. I simply don't know." Thus, although the State's questioning suggests a risky and improper attempt to elicit expert testimony bearing on Victim's credibility, Ms. Kenney-Noziska refused to offer such testimony. Nor does Defendant point to anywhere in the record where Ms. Kenney-Noziska impermissibly bolstered Victim's testimony by repeating Victim's statements or directly identifying Defendant as the perpetrator, as in *Garcia* and *Lucero*.

{30} The Court also determines that Ms. Kenney-Noziska provided relevant testimony. For example, she explained how it is "common for children to remember things at different timeframes," based on their language development and cognitive skills. This testimony was particularly relevant because defense counsel repeatedly pointed out how Victim had trouble remembering certain details. As such, we

conclude Ms. Kenney-Noziska's testimony was not improper and it did not deprive Defendant of a fair trial.

III. Prosecutorial Misconduct

{31} Defendant next argues that the State engaged in prosecutorial misconduct in its closing argument because it (1) improperly vouched for Victim's credibility, and (2) inflamed the juror's passions. Defendant did not object during the State's closing; therefore, we review this claim for fundamental error. *See State v. Lozoya*, 2017-NMCA-052, ¶ 36, 399 P.3d 410.

{32} "Fundamental error occurs when prosecutorial misconduct in closing statements compromises a defendant's right to a fair trial." *State v. Sosa*, 2009-NMSC-056, ¶ 35, 147 N.M. 351, 223 P.3d 348. To determine if a defendant received a fair trial, this Court considers the prosecutor's comment "in context with the closing argument as a whole." *Lozoya*, 2017-NMCA-052, ¶ 36 (internal quotation marks and citation omitted). Generally, an "isolated comment made during closing argument" is insufficient to "warrant reversal." *Sosa*, 2009-NMSC-056, ¶ 29 (internal quotation marks and citation omitted). The Court will only find fundamental error if it is convinced that "the prosecutor's conduct created a reasonable probability that the error was a significant factor in the jury's deliberations in relation to the rest of the evidence before them." *Id.* ¶ 35 (internal

quotation marks and citation omitted). Under this standard, the Court presumes the verdict was justified and then considers whether the error was fundamental. *Id.* ¶ 37.

{33} Three factors guide the Court's examination of prosecutorial misconduct within the context of closing argument. *See, e.g.*, *State v. Sena*, 2020-NMSC-011, ¶ 16, 470 P.3d 227. These factors include whether the prosecutor's statement (1) "'invade[d] some distinct constitutional protection,'" (2) was "'isolated and brief, or repeated and pervasive,'" and (3) was "'invited by the defense.'" *Id.* (quoting *Sosa*, 2009-NMSC-056, ¶ 26).

A. Vouching

{34} Defendant contends the prosecutors improperly vouched for Victim during closing argument three times. First, when a prosecutor stated during closing argument, "I've been practicing law for some time, and I'll tell you, that girl, she's not a liar." Second, during the State's rebuttal, when another prosecutor referenced Victim's forensic interview—which had not been admitted to evidence—and stated that Victim's identification of Defendant was consistent and that she "had not wavered in her accusations." Third, when the prosecutors "peppered [their] closing arguments with suggestions that [Victim] had no motivation to lie and would not 'make up this story.'" This Court addresses each claim in turn.

{35} The State concedes the prosecutor's statement, "I've been practicing law for some time, and I'll tell you, that girl, she's not a liar" was improper. *See State v.*

Dominguez, 2014-NMCA-064, ¶ 23, 327 P.3d 1092 ("[A] prosecutor cannot vouch for the credibility of a witness, either by invoking the authority and prestige of the prosecutor's office or by suggesting the prosecutor's special knowledge." (internal quotation marks and citation omitted)). Although we are not bound by the State's concession, we agree that the statement was improper. *See State v. Martinez*, 1999-NMSC-018, ¶ 26, 127 N.M. 207, 979 P.2d 718 (stating that appellate courts "are not bound by the [state]'s concession of an issue in a criminal appeal"). Despite the prosecutor's improper statement, we conclude it was not fundamental error.

{36} Addressing Defendant's first argument, we note that the *Sosa* factors do not weigh in his favor. As to the first factor, he does not argue nor do we find that the prosecutor's statement invaded a distinct constitutional protection. Next, the prosecutor's statement was isolated and brief—said once and lasting only five seconds. Further, just minutes before the prosecutor's comments, the district court instructed the jury on how to consider a witness's credibility, stating,

> You alone are the judges of the credibility of the witnesses and the weight to be given to the testimony of each of them. In determining the credit to be given any witness, you should take into account the witness's truthfulness or untruthfulness, ability and opportunity to observe, memory, manner while testifying, any interest, bias or prejudice the witness may have, and the reasonableness of the witness's testimony, considered in the light of all the evidence in the case.

And while the defense did not invite the prosecutor's vouching, given the district court's explicit instructions and the brevity of the prosecutor's statement, we are

unconvinced that the prosecutor's statement created a reasonable probability that it was a significant factor in the jury's deliberations in relation to the rest of the evidence before them. *See Sosa*, 2009-NMSC-056, ¶ 35.

{37} Defendant's second argument is that the prosecutor who handled the rebuttal closing "improperly bolstered" Victim's "'refreshed' testimony." Defendant identifies two comments the prosecutor made in rebuttal. First, after referring to defense statements in closing questioning Victim's memory, the prosecutor stated:

> That afternoon, she was in a [forensic] interview, it wasn't two days, three days, four days; it wasn't a year. It was fresh in her memory that day [when] she talked to the [forensic] interviewer. So today, three years later, she'd be able to help be reminded of what happened.

Several minutes later, after reviewing some of Ms. Kenney-Noziska's testimony regarding the purpose of forensic interviews, the prosecutor stated:

> And in that interview and today, guess who [Victim] identified as the one to pull down her pants and grope her butt?

Defendant argues that by referring to the forensic interview in this manner, the prosecutor introduced facts not in evidence. This, he argues, misled the jury into believing that Victim did not waver in her accusations. Although this Court agrees it was improper to refer to the content of the forensic interview because it was not admitted into evidence, these comments do not amount to fundamental error.

{38} As an initial matter, Defendant does not indicate how these comments misled the jury. Reviewing the record, there is no indication that Victim wavered in her

accusation that Defendant touched her while she was sleeping. As before, Defendant does not argue nor do we find that these comments invaded a distinct constitutional protection. Additionally, these comments were neither pronounced nor persistent. Our review of the transcript establishes that the prosecutor referenced the forensic interview only very briefly, and the district court gave the jury explicit instructions on how the jury should consider closing arguments stating, "[W]hat is said in argument is not evidence." Moreover, in context, it is evident that the prosecutor was responding to defense counsel's closing, in which counsel argued that the State had to refresh Victim's memory and that Victim repeatedly stated, "I don't remember, I don't remember." That said, the prosecutor should not have referred to content of the forensic interview because the interview had not been admitted as evidence. Still, there was other evidence suggesting Victim had identified Defendant in the forensic interview. Detective Flores, in his testimony, indicated that after Victim's forensic interview, he was able to identify Defendant.

{39} Finally, attorneys are afforded "reasonable latitude in their closing" because "[c]losing argument is unique," and "rebuttal argument in particular, is necessarily responsive and extemporaneous, not always capable of the precision that goes into prepared remarks." *Sosa*, 2009-NMSC-056, ¶¶ 24-25. Given this latitude, the district court's explicit instruction related to closing argument, the context in which the statement was made, and the fact that there is no evidence that Victim wavered in

her accusation against Defendant, this Court will not disturb the jury's verdict. *See id.* ¶ 25 ("Only in the most exceptional circumstances . . . should we reverse the verdict of a jury and the judgment of a trial court.").

{40} Defendant's third argument is that the State's suggestion that Victim had no motivation to lie was fundamental error. This Court disagrees. "Prosecutors are permitted to comment on the veracity of witnesses so long as the statements are based on the evidence." *Dominguez*, 2014-NMCA-064, ¶ 23. In *Dominguez*, the prosecutor stated that she would point out indicators to demonstrate the victim was not lying. *Id.* ¶ 21. These indicators included, among other things, the absence of a motivation to be untruthful. *Id.* This Court determined the prosecutor's statements did not constitute misconduct. *Id.* ¶ 25.

{41} Like the prosecutor in *Dominguez*, the prosecutor here pointed to the absence of any evidence that Victim had a motivation to lie. The prosecutor noted that Victim's only interaction with Defendant occurred on the day he groped her. Thus, the prosecutor's statements suggesting Victim had no motivation to lie were not error, let alone fundamental error.

B. Inflaming the Passions of the Jury

{42} Defendant next contends that he was deprived of a fair trial when the prosecutor referred to him as a "predator" and described the allegations in this case as "a parent's worst nightmare." This Court disagrees.

{43} This Court has previously held that seeking to depict a defendant as an evil person—while improper—did not deprive the defendant of a fair trial. *See State v. Dombos*, 2008-NMCA-035, ¶ 36, 143 N.M. 668, 180 P.3d 675; *see also State v. Armendariz*, 2006-NMCA-152, ¶ 24, 140 N.M. 712, 148 P.3d 798 (stating that prosecutor referring to the defendant as a "rapist" or "burglar" in closing does not fall into the categories of prosecutorial misconduct that comprise a defendant's right to a fair trial (internal quotation marks and citation omitted)). In closing, the prosecutor in *Dombos* referred to the defendant as "vile," a "sexual deviant," and "sick." *Id.* ¶¶ 35, 36 (internal quotation marks omitted). Here, Defendant points only to the State's comments that he was a "predator," and that groping an eleven-year-old while she slept is "a parent's worst nightmare." Although improper "inasmuch as they attempted to persuade the jury to reach a verdict based on biases or prejudices to which the jurors may have been susceptible because of their experiences as parents," this Court is unconvinced that these comments—which did not invade a constitutional protection and were brief and not repeated—deprived Defendant of a fair trial. *See State v. Allen*, 2000-NMSC-002, ¶¶ 109-10, 128 N.M. 482, 994 P.2d 728 (concluding that the prosecutor's improper statements, including that the alleged offenses were "the stuff that we, as parents, fear for our children" and that the jury should send a "stern message" that the conduct would not be tolerated, did not deprive the defendant of a fair trial (internal quotation marks omitted)).

{44} In sum, the prosecutor's comments during closing, to the extent they were erroneous, do not make Defendant's guilt so doubtful as to shock this Court's conscience, nor did they deprive Defendant of a fair trial. *See Sosa*, 2009-NMSC-056, ¶ 35 ("[W]e 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.").

IV. Cumulative Error

{45} Lastly, Defendant argues that under the cumulative error doctrine, the improprieties in this case—taken together—deprived him of a fair trial. The cumulative error doctrine 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). This doctrine is "strictly applied" and "cannot be invoked when the record as a whole demonstrates that the defendant received a fair trial." *Id.* (internal quotation marks and citation omitted).

{46} Defendant contends six errors deprived him of a fair trial: (1) misusing an expert, (2) refreshing Victim's recollection off the record, (3) playing inadmissible body camera footage from a nontestifying officer, (4) vouching for Victim's credibility, (5) calling Mr. Avalos-Solis a "predator," and (6) repeatedly

emphasizing the forensic interview—the contents of which the jury was not privy to—to support the complaining witness's credibility.

{47} This Court disagrees that the doctrine of cumulative error is applicable here. The district court did not err by allowing Ms. Kenney-Noziska's testimony. As stated above, Defendant failed to properly and timely object to her testimony and her testimony was relevant. In addition, although the State's process for refreshing Victim's recollection was procedurally improper, as stated above, Defendant fails to show he was prejudiced by this. As such, this error is of no help to Defendant's cumulative error claim. As for the State playing inadmissible body camera footage, the district court quickly corrected the mistake by instructing the jury to disregard the video. So, this, again, is of no help to Defendant's claim of cumulative error.

{48} That said, as discussed above, it was improper for the State to vouch for Victim's credibility, call Defendant a "predator," and to divulge any content included in Victim's forensic interview. However, as discussed, the improprieties in closing argument were isolated and brief, and we presume that the jurors followed the district court's instructions to reach a verdict based on the evidence rather than the arguments of counsel. We are therefore unconvinced that the cumulative impact of these errors deprived Defendant of a fair trial. *See State v. Gwynne*, 2018-NMCA-033, ¶ 41, 417 P.3d 1157 ("The mere fact that more than one error may have occurred

is insufficient, alone, to require reversal."); *see also Allen*, 2000-NMSC-002, ¶ 95 ("[A] fair trial is not necessarily a perfect one.").

CONCLUSION

{49} For the forgoing reasons we affirm Defendant's conviction of criminal sexual contact of a minor.

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

Jacqueline R. Medina

JACQUELINE R. MEDINA, Chief Judge

WE CONCUR:

J. Miles Hanisee

J. MILES HANISEE, Judge

Jennifer L. Attrep

JENNIFER L. ATTREP, Judge