IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v. **No. A-1-CA-41154**

JESSE DEHERRERA,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF CIBOLA COUNTY
Amanda S. Villalobos, District Court Judge

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

HANISEE, Judge.

{1} Following a jury trial, Defendant, Jesse Deherrera, was convicted of criminal sexual penetration in the second degree (CSP II), contrary to NMSA 1978, Section 30-9-11(E)(3) (2009), and false imprisonment, contrary to NMSA 1978, Section 30-4-3 (1963). Defendant argues on appeal that (1) his convictions for CSP II and false

imprisonment violate double jeopardy protections; (2) the district court impaired the defense by making incorrect evidentiary rulings; (3) the evidence was insufficient to support his convictions; and (4) trial counsel rendered ineffective assistance. We affirm.

BACKGROUND

{2} At trial, Victim testified as follows. She and Defendant had been romantically involved since 2019. Victim stated that in 2021 she finally took the opportunity to leave Defendant, following two years of what she described as emotional and physical abuse. Victim testified that prior to her leaving, Defendant had broken her cheek bone, prompting her to seek refuge with her then-friend Dillon. Victim sent Dillon photos of her face and explained to him that she was in an abusive relationship with Defendant and wanted to leave. Dillon offered to pick Victim up and give her a place to stay.

{3} Victim testified that soon thereafter, she left Dillon a note letting him know that she was walking to the park near his house and would return later. That same day, Defendant had a friend give him a ride to Dillon's house. Victim stated that on her way to the park, she felt uneasy about a white van that was driving near her, the driver of which eventually asked her if she needed a ride. Victim initially declined, but when she recognized the driver, agreed and got into the car. Seated in the

backseat, to her surprise, was Defendant. Victim was driven back to Defendant's home and told to go inside.

{4} That night, after Victim rejected several of his sexual physical advances, Defendant zip-tied Victim's hands behind her back and placed a sock into her mouth. Victim testified that she was restrained on his bed for "about [thirty] to [forty-five] minutes." While Victim was still restrained, Defendant inserted his penis into her vagina and then her anus without her consent, which she testified lasted about "three to five minutes." While this was happening, Victim noticed that police were outside Defendant's home and later learned they were there to perform a welfare check on her. Dillon had notified police that he believed Victim to be at Defendant's home. Police knocked on the door looking for Victim, but left after speaking with someone outside the home. After Defendant fell asleep, Victim was able to escape Defendant's house, walk to a nearby gas station, and contact Dillon. Victim went to the police to report what happened to her and was seen by a sexual assault nurse examiner (SANE). At trial, the SANE nurse testified as to the injuries she saw on Victim and corroborated that the injuries were consistent with the events that Victim had described to have occurred.

{5} Following a four-day trial, a jury found Defendant guilty of one count of CSP II and one count of false imprisonment, and acquitted him of two counts of aggravated battery and one count of kidnapping. This appeal followed.

DISCUSSION

I. Defendant's Conduct Was Not Unitary

{6} Defendant first argues that his convictions for CSP II and false imprisonment violate double jeopardy because they are based on the same conduct. Specifically, Defendant contends that his convictions were both based on the same continuous use of force and restraint during a single episode, therefore making the underlying conduct unitary. We disagree.

{7} The United States and New Mexico Constitutions safeguard a defendant's right to be free from double jeopardy violation, guaranteeing that no person shall be "twice put in jeopardy" for the same offense. U.S. Const. amend. V; N.M. Const. art. II, § 15. "Appellate courts classify multiple punishment cases in two ways, double[ ]description, a single act results in multiple charges under different criminal statutes; and unit of prosecution, conviction for multiple violations of the same criminal statute." *State v. Serrato*, 2021-NMCA-027, ¶ 11, 493 P.3d 383. Here, Defendant raises a double description claim, claiming he was convicted of more than one offense under different statutes for a single act or course of conduct. *See State v. Vigil*, 2021-NMCA-024, ¶ 17, 489 P.3d 974 ("There are two types of multiple punishment cases: (1) a unit-of-prosecution claim, where an individual is convicted for multiple violations under the same statute for a single course of conduct; and (2) a double[ ]description claim, where an individual is convicted for violating different

statutes for a single course of conduct."). We apply a de novo standard of review to a double jeopardy claim. *State v. Cummings*, 2018-NMCA-055, ¶ 6, 425 P.3d 745.

{8} We address double jeopardy claims involving double description under the two-part analysis set forth in *Swafford v. State*, 1991-NMSC-043, ¶ 25, 112 N.M. 3, 810 P.2d 1223. The first part of the analysis requires us to consider whether the conduct underlying the two convictions was unitary. *Id.* "The proper analytical framework [for determining unitary conduct] is whether the facts presented at trial establish that the jury reasonably could have inferred independent factual bases for the charged offenses." *State v. Franco*, 2005-NMSC-013, ¶ 7, 137 N.M. 447, 112 P.3d 1104 (internal quotation marks and citation omitted). The second part of the analysis examines "whether the [L]egislature intended to create separately punishable offenses" based on the same conduct. *State v. Sena*, 2020-NMSC-011, ¶ 45, 470 P.3d 227 (internal quotation marks and citation omitted). We only reach the second part of the analysis if we first find Defendant's conduct to be unitary. *See Swafford*, 1991-NMSC-043, ¶ 28 ("If it reasonably can be said that the conduct is unitary, then one must move to the second part of the inquiry. Otherwise, if the conduct is separate and distinct, inquiry is at an end.").

{9} "Conduct is not unitary if sufficient indicia of distinctness separate the [event] into several acts." *State v. Montoya*, 2011-NMCA-074, ¶ 31, 150 N.M. 415, 259 P.3d 820. In making the determination, "we evaluate separations in time and space

as well as the quality and nature of the acts or the results involved." *Id.* A defendant's conduct is not unitary if "sufficient indicia of distinctness separate the illegal acts"; this is so that a defendant "does not face conviction and punishment for the same factual event." *Sena*, 2020-NMSC-011, ¶ 46 (internal quotation marks and citation omitted). Sufficient indicia of distinctness exist "when one crime is completed before another," or "when the conviction is supported by at least two distinct acts or forces, one which completes the first crime and another which is used in conjunction with the subsequent crime." *State v. Armendariz*, 2006-NMCA-152, ¶ 7, 140 N.M. 712, 148 P.3d 798. "In both situations, the key inquiry is whether the same force was used to commit both crimes." *Id.*

{10} We begin with false imprisonment, which is complete when the defendant, with the requisite intent, restrains the victim, even if the restraint continues through the commission of a separate crime. *See* UJI 14-401 NMRA; *State v. Dominguez*, 2014-NMCA-064, ¶ 10, 327 P.3d 1092 (recognizing this principle in relation to the offense of kidnapping). "[T]he key to finding the restraint element . . . separate from that involved in criminal sexual [conduct], is to determine the point at which the physical association between the defendant and the victim [is] no longer voluntary." *State v. Jacobs*, 2000-NMSC-026, ¶ 24, 129 N.M. 448, 10 P.3d 127, *overruled on other grounds by State v. Martinez*, 2021-NMSC-002, ¶ 72, 478 P.3d 880. Force or coercion exerted prior to a sexual offense will support a conviction for false

imprisonment. *See State v. Corneau*, 1989-NMCA-040, ¶¶ 11-15, 109 N.M. 81, 781 P.2d 1159 (distinguishing restraint before or after criminal sexual penetration from the restraint necessarily involved in every act of criminal sexual conduct). On the other hand, Defendant's act of CSP II in this case was not a continuing offense, but rather begun and completed from the standpoint of criminal liability upon forcible penetration. *See* UJI 14-946 NMRA (defining CSP II); *Corneau*, 1989-NMCA-040, ¶ 16 (holding that the force or coercion preceding or after the completion of CSP may be separate from the force or coercion necessary to establish the act of CSP itself).

{11} The crime of false imprisonment "does not require physical restraint of the victim; it may also arise out of words, acts, gestures, or similar means." *Corneau*, 1989-NMCA-040, ¶ 12. There is evidence on the record to show that the false imprisonment of Victim could have begun at multiple points. As the State asserted at trial and also on appeal, the false imprisonment of Victim could have occurred when she was lured into a van by Defendant and the van's driver and was unable to contact anyone because she had no cellphone. It could also have taken place once Victim was taken to Defendant's home and told to go inside and be quiet. Each set of facts supports the notion that the false imprisonment of Victim was separated by sufficient indicia of distinctness, such as time and space, from the ensuing act of forcible CSP II.

{12} To the extent that the factual basis for Defendant's false imprisonment conviction was predicated on any of those previous instances or his ensuing act of zip-tying Victim's hands and leaving her restrained for roughly thirty to forty-five minutes, this offense occurred wholly before penetrating Victim and continued thereafter. *See, e.g.*, *State v. Garcia*, 2019-NMCA-056, ¶¶ 19-23, 450 P.3d 418 (concluding there was sufficient evidence of restraint and confinement to support a kidnapping conviction, independent from restraint used during a sexual assault, and stating that, despite "the short time period between [the d]efendant's initial acts and the sexual assault, as well as the confined space in which they occurred, [the d]efendant's actions constituted a completed kidnapping upon preventing [the v]ictim's escape, regardless of the sexual assault that followed" and noting that "[the d]efendant not only restrained [the v]ictim during the sexual assault, but also thwarted her attempt to escape"); *see also Corneau*, 1989-NMCA-040, ¶ 16 (holding that "the restraint which preceded the act of CSP was not the same 'force or coercion' necessary to establish CSP, or the same restraint inherent in CSP"). It was not until Defendant forcefully inserted his penis into Victim's vagina and anus that he committed CSP II. *See, e.g.*, *Garcia*, 2019-NMCA-056, ¶¶ 19-23 (arriving at a similar conclusion under analogous circumstances); *see also State v. Cordova*, 1999-NMCA-144, ¶¶ 21-23, 128 N.M. 390, 993 P.2d 104 (holding facts supporting convictions for criminal sexual contact of a minor (CSCM) and false imprisonment

were not unitary where the CSCM and false imprisonment were completed at different points in time, though each criminal offense occurred during the same encounter); *see also State v. Allen*, 2000-NMSC-002, ¶ 67, 128 N.M. 482, 994 P.2d 728 (noting that conduct would not be unitary if "the perpetrator forcibly abducted the victim before attempting sexual penetration or continued to use force or restraint after the sex act was completed").

{13} "The proper analytical framework is whether the facts presented at trial establish that the jury reasonably could have inferred independent factual bases for the charged offenses." *Franco*, 2005-NMSC-013, ¶ 7. In viewing the evidence and the facts as the jury was instructed to view it, we conclude that Defendant's conduct was not unitary and consequently that there is no double jeopardy violation. Because we conclude that Defendant's conduct was not unitary, we need not move to the second part of our double jeopardy analysis.

II. The District Court Did Not Abuse Its Discretion

{14} Defendant's next contention is that the district court abused its discretion in disallowing impeachment of Victim with text messages despite what he claims was sufficient foundational evidence, and also by excluding third-party statements offered to show effect on law enforcement conduct and provide investigative context. Seeing no abuse of discretion, we disagree.

{15} A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *State v. Johnson*, 2010-NMSC-016, ¶ 40, 148 N.M. 50, 229 P.3d 523. "An abuse of discretion occurs when the evidentiary ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say that the district court abused its discretion by its ruling unless we can characterize it as clearly untenable or not justified by reason." *State v. Jesenya O.*, 2022-NMSC-014, ¶ 10, 514 P.3d 445 (alterations, internal quotation marks, and citation omitted).

A. The Text Messages

{16} At trial, Defendant sought to introduce text messages that were retrieved from his cellphone that he asserted were sent to him from Victim. Victim denied writing those text messages to Defendant. Victim testified that these text messages, which were sent through the application "TextNow," were actually written by Defendant. Victim stated that Defendant used her email to create an account through this application and was "exchanging [text] messages acting like myself and it looked like I wanted to be there. It looked like I willingly left my apartment to go to his house."

{17} On appeal, Defendant argues that these text messages should have been admitted as extrinsic evidence of a prior inconsistent statement, and that the trial court erred by not initially letting them in during cross-examination of Victim simply because she denied authorship. Defendant is correct that when the proper foundation

has been established under Rule 11-901 NMRA, it is for the jury to decide whether a particular person or entity was the author or recipient of a given digital communication. *See Jesenya O.*, 2022-NMSC-014, ¶ 31. The text messages were eventually admitted into evidence during the cross-examination of Karl Ustupski, the police chief for the Village of Milan. However, as the State accurately points out, the district court's initial refusal to admit this evidence did not harm Defendant. *See State v. Astorga*, 2015-NMSC-007, ¶¶ 40, 43, 343 P.3d 1245 (explaining that to establish that nonconstitutional error is reversible, the defendant "bears the initial burden of demonstrating that he was prejudiced by the error"). That is because after Victim took the stand, she was still subject to being recalled as a witness and questioned regarding the text messages once they were independently admitted through the police chief. We cannot say that this decision was harmful to Defendant as there was still opportunity to question Victim following her testimony should Defendant have wished to do so. *See State v. Tollardo*, 2012-NMSC-008, ¶¶ 36, 43, 275 P.3d 110 (considering whether there is a "reasonable probability the error affected the verdict" under "all of the circumstances surrounding the error" (emphasis, internal quotation marks, and citation omitted)). We therefore conclude that the district court's delayed admission of the text messages was not reversible error.

B. Third-Party Statements

{18} Defendant also contends that the trial court erred in excluding statements by Ivan Lovato, who spoke to the police at Defendant's home during the welfare check. At trial, a video was introduced of an interaction between Milan Police Officers Salazar and Lovato in the driveway of Defendant's home, via Officer Salazar's body camera footage. The video was played without audio per the objection of the State, because it argued the audio would include statements from Officer Lovato as to the last time he had seen Victim. Defendant argues that the district court's exclusion of Officer Lovato's statements as hearsay deprived the jury of a critical bit of context.

{19} Defendant objected to this at trial and argued the audio was not hearsay because it was not offered for the truth of the matter asserted. Defendant asserts that "preventing the jury from hearing what was said and understanding why no further steps were taken weakened the defense's ability to show that law enforcement, presented with the chance to investigate, saw no signs of distress or cause for concern. . . . It deprived the defense of probative, exculpatory material essential to rebutting the State's core theory."

{20} When an error is preserved, we review for harmless error, and our inquiry depends on whether the error was constitutional. *See Tollardo*, 2012-NMSC-008, ¶ 36. The defendant bears the initial burden of demonstrating that he or she was prejudiced by the error. *State v. Holly*, 2009-NMSC-004, ¶ 28, 145 N.M. 513, 201

P.3d 844. In reviewing for harmless error, "a reviewing court should not be guided solely by the overwhelming evidence of the defendant's guilt." *State v. Stephen F.*, 2008-NMSC-037, ¶ 39, 144 N.M. 360, 188 P.3d 84 (internal quotation marks and citation omitted). Rather, "the central focus of the inquiry . . . is whether there is a reasonable possibility the erroneous (exclusion of) evidence might have affected the jury's verdict." *Id.* (internal quotation marks and citation omitted).

{21} Assuming without deciding that the video clip should have been played with audio, and there was no applicable hearsay prohibition, we again disagree that Defendant has established that he was prejudiced by the district court's decision. *See Astorga*, 2015-NMSC-007, ¶ 43 (looking to whether the defendant met the initial burden to demonstrate "a reasonable probability that the error affected the verdict"). Although Lovato's statements were determined by the district court as hearsay, Officer Salazar and another officer ultimately testified as to whether Lovato had seen Victim, essentially summarizing what the jury would have heard had the body camera footage been played with the three to four seconds of audio. With these facts established, Defendant does not explain how he was prejudiced to the extent that there was a reasonable probability that the error affected the verdict. *See, e.g.*, *State v. Serna*, 2013-NMSC-033, ¶ 23, 305 P.3d 936 (discussing factors bearing on prejudice, including "the source of the error, the emphasis placed on the error, evidence of the defendant's guilt apart from the error, the importance of the

erroneously admitted evidence to the prosecution's case, and whether the erroneously admitted evidence was merely cumulative"). Accordingly, we hold that Defendant did not meet his burden of showing that the redaction of audio from the body camera footage prejudiced him.

III. There Was Sufficient Evidence of CSP II and False Imprisonment

{22} Defendant's third contention is that the State failed to present sufficient evidence of both CSP II and false imprisonment to support his convictions. Defendant provides three reasons to support this contention: (1) the evidence consisted solely of Victim's "internally inconsistent and frequently contradictory testimony"; (2) the evidence relied on forensic findings that were "medically and legally inconclusive"; and (3) "surveillance footage and the text messages recovered from [Defendant]'s [cell]phone affirmatively contradicted parts of [Victim's] account."

{23} "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). We "view the evidence in the light most favorable to the state, resolving all conflicts therein and indulging all permissible inferences therefrom in favor of the verdict." *State v. Storey*, 2018-NMCA-009, ¶ 45, 410 P.3d 256 (internal

quotation marks and citation omitted). Next, we determine "whether the evidence, viewed in this manner, could justify a finding by any rational trier of fact that each element of the crime charged has been established beyond a reasonable doubt." *Id.* (internal quotation marks and citation omitted). "[W]e do not weigh the evidence or substitute our judgment for that of the fact[-]finder so long as there is sufficient evidence to support the verdict." *Montoya*, 2015-NMSC-010, ¶ 52 (alterations, internal quotation marks, and citation omitted).

{24} "Jury instructions become the law of the case against which the sufficiency of the evidence is to be measured." *State v. Garcia*, 2016-NMSC-034, ¶ 17, 384 P.3d 1076 (alteration, internal quotation marks, and citation omitted). In this case, the instruction given to the jury regarding criminal sexual penetration in the second degree required the State to prove beyond a reasonable doubt that

> 1. [D]efendant caused [Victim] to engage in sexual intercourse [or] caused the insertion, to any extent, of [D]efendant's penis into the anus of [Victim];
>
> 2. [D]efendant used physical force or physical violence;
>
> 3. [D]efendant's acts resulted in bodily injury to [Victim] including injuring her anus;
>
> 4. [D]efendant's act was unlawful;
>
> 5. This happened in New Mexico on or about the 26th day of November, 2021.

Further, the State had to prove beyond a reasonable doubt that "[i]n addition to the other elements of criminal sexual penetration causing personal injury, . . . the act was unlawful. For the act to have been unlawful it must have been done without the consent and with the intent to arouse or gratify sexual desire or to intrude on the bodily integrity or personal safety of [Victim]."

{25} The instruction given to the jury regarding false imprisonment required the State to prove beyond a reasonable doubt that

> 1. [D]efendant confined [Victim] against her will;
>
> 2. [D]efendant knew that he had no authority to confine [Victim];
>
> 3. This happened in New Mexico on or about the 26th day of November, 2021.

As to both offenses of conviction, the jury was presented conflicting narratives by Victim, who testified, and Defendant's attorneys. Ultimately the jury believed Victim's testimony and the evidence supporting it over Defendant's presentation suggesting that the charged criminal acts had not occurred. *See State v. Fierro*, 2014-NMCA-004, ¶ 40, 315 P.3d 319 ("We emphasize that the finder of fact, not an appellate court, must reconcile any conflicts in the evidence and determine where truth and credibility lies. The fact[-]finder can choose to believe the [s]tate's testimony and disbelieve [the d]efendant's version of events."); *see also State v. Hunter*, 1984-NMSC-017, ¶ 12, 101 N.M. 5, 677 P.2d 618 (reiterating that the appropriate formulation of the sufficiency of the evidence test in criminal sexual

penetration cases has been that "[t]he jury, as the trier of fact, was entitled to weigh this evidence"). Appellate courts "will not substitute its determination for that of the jury." *See id.* In this case, Defendant did not testify in his own defense, leaving no directly conflicting testimony for the jury to have considered. Consequently, the jury's verdict of guilty established that it found Victim's testimony credible.

{26} We disagree with Defendant's assertion that the evidence presented by the State was inadequate to prove his guilt beyond a reasonable doubt. Victim testified to every element of the offenses of false imprisonment and CSP II. Even if Defendant believes that Victim's testimony might have been uncorroborated or to some degree impeachable, it was up to the jury as the fact-finder to decide whether to believe Victim's testimony, and we will not disturb its determination of guilt. *See State v. Nichols*, 2006-NMCA-017, ¶ 10, 139 N.M. 72, 128 P.3d 500 ("In prosecutions for criminal sexual penetration, the testimony of the victim need not be corroborated and lack of corroboration has no bearing on weight to be given to the testimony." (alterations, internal quotation marks, and citation omitted)).

{27} Defendant's notion that the evidence presented from the SANE examination, the testimony by the SANE nurse, the surveillance footage from his home, and text messages recovered from his cellphone collectively did not provide an adequate record to provide the substantial evidence necessary to support his convictions is not only misplaced but meritless. It is enough that the jury believed Victim's testimony.

Id. We thus conclude that there was sufficient evidence to support Defendant's convictions for CSP II and false imprisonment.

IV. Ineffective Assistance of Counsel

{28} Lastly, Defendant argues that he received ineffective assistance of counsel. Specifically, Defendant asserts that his counsel failed to investigate and expose critical inconsistencies in Victim's testimony and failed to adequately investigate and prepare to impeach Victim with her own prior statements. Our review of this issue is de novo. *See Montoya*, 2015-NMSC-010, ¶ 57.

{29} This Court will only remand a case for an evidentiary hearing if the record on appeal supports a prima facie case of ineffective assistance of counsel. *See State v. Dylan J.*, 2009-NMCA-027, ¶ 42, 145 N.M. 719, 204 P.3d 44. When a defendant presents a prima facie case on appeal, "[r]emanding for a hearing is usually necessary because the claim of ineffective assistance [of counsel] is brought on appeal, and thus, the trial court did not have a chance to rule on the issue." *State v. Grogan*, 2007-NMSC-039, ¶ 18, 142 N.M. 107, 163 P.3d 494. In this case, Defendant asserts that the record is sufficient to establish a prima facie case of ineffective assistance of counsel on direct appeal and requests that, should this Court disagree, this Court preserve his ability to bring his claim through a future habeas corpus petition. *See State v. Paredez*, 2004-NMSC-036, ¶ 22, 136 N.M. 533, 101 P.3d 799 ("[W]e have held when the record does not contain all the facts necessary

for a full determination of the issue, an ineffective assistance of counsel claim is more properly brought through a habeas corpus petition." (internal quotation marks and citation omitted)). Accordingly, for the reasons that follow, we conclude that Defendant has failed to present a prima facie case of ineffective assistance of counsel.

{30} A prima facie case of ineffective assistance of counsel requires that a defendant establish that "(1) counsel's performance fell below that of a reasonably competent attorney; (2) no plausible, rational strategy or tactic explains counsel's conduct; and (3) counsel's apparent failings were prejudicial to the defense." *State v. Bahney*, 2012-NMCA-039, ¶ 48, 274 P.3d 134; *accord State v. Bernal*, 2006-NMSC-050, ¶ 32, 140 N.M. 644, 146 P.3d 289 ("For a successful ineffective assistance of counsel claim, a defendant must first demonstrate error on the part of counsel, and then show that the error resulted in prejudice."). To satisfy the prejudice prong, a defendant must show that there is a reasonable probability that the outcome of the proceeding would have been different "but for" the errors of counsel. *See State v. Hernandez*, 1993-NMSC-007, ¶ 28, 115 N.M. 6, 846 P.2d 312 (internal quotation marks and citation omitted). We review counsel's performance in a "highly deferential" manner, and "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable

professional judgment." *Lytle v. Jordan*, 2001-NMSC-016, ¶ 50, 130 N.M. 198, 22 P.3d 666 (internal quotation marks and citation omitted).

{31} "A general claim of failure to investigate is not sufficient to establish a prima facie case if there is no evidence in the record indicating what information would have been discovered." *State v. Cordova*, 2014-NMCA-081, ¶ 10, 331 P.3d 980. Defendant claims that his counsel's reasonable performance required (1) securing contemporaneous impeachment of Victim with text messages during her testimony; and (2) ensuring the jury heard the interaction between the police and a third party during the welfare check via body camera footage. Defendant contends that "timely impeachment and the missing [body camera footage] create a reasonable probability of a different outcome."

{32} Defendant claims that the text messages to Dillon regarding her broken cheek bone are internally inconsistent with her claim that Defendant took or destroyed her cellphone. Defendant argues that if it were true that he did not allow her to have a cellphone, it would be implausible that she contacted Dillon with a picture of her broken cheek bone. Defendant contends that this message to Dillon was specifically central to the State's case because "it prompted Dillon's involvement and directly implicated facts relevant to the defense theory of consent and [Victim]'s ability to leave freely."

{33} "To establish prejudice arising from defense counsel's failure to investigate, [the d]efendant must demonstrate that the result of the proceeding would have been different." *State v. Pate*, 2023-NMCA-088, ¶ 31, 538 P.3d 450. Apart from Victim's testimony, what remains in the record is the testimony from the SANE nurse who examined Victim; the exhibits that provided photos of Victim's injuries, which included her wrists, the top of her hands, her vagina, and her anus; the surveillance footage from a camera located at Defendant's home showing evidence of the welfare check; and the audio from Defendant's prison phone call in which he thanked Victim for "not screaming or anything" during the welfare check. Stated succinctly, nothing about the trial record provides any indication that the outcome of the trial would have been different if Defendant's trial counsel had acted differently. *See State v. Allen*, 2014-NMCA-047, ¶ 19, 323 P.3d 925. We conclude that even had Victim been impeached about Defendant taking her phone and the jury had rejected her testimony in this regard, "we cannot say that but for counsel's performance, there is a reasonable probability that the outcome would have been different." *See Cordova*, 2014-NMCA-081, ¶ 10. The jury's acquittal of Defendant on some charges is evidence that the jury was able to "carefully apply the facts to the law" and weigh Victim's testimony as it saw fit. *See State v. Lacey*, 2002-NMCA-032, ¶ 21, 131 N.M. 684, 41 P.3d 952; *cf. State v. Orgain*, 1993-NMCA-006, ¶ 11, 115 N.M. 123, 847 P.2d 1377 (considering whether multiple charges enhance the possibility of

conviction and concluding that "it does not appear to us that [the] defendant was unduly prejudiced. The jury did, after all, acquit [the] defendant of two charges submitted to it.").

{34} The same is true of Defendant's second notion. There is no evidence in the record suggesting what additional information could have been provided by showing the jury the body camera footage between the police and a third party during the welfare check with audio, with a reasonable probability, that could have changed the outcome of the proceedings. *See State v. Dartez*, 1998-NMCA-009, ¶ 27, 124 N.M. 455, 952 P.2d 450.

{35} Defendant has failed to establish that any of the claimed actions or inactions of his trial counsel prejudiced him, nor has he demonstrated any reasonable probability that the outcome of his trial would have been different. *See Allen*, 2014-NMCA-047, ¶ 19.

CONCLUSION

{36} For the foregoing reasons, we affirm.

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

J. MILES HANISEE, Judge

WE CONCUR:

JACQUELINE R. MEDINA, Chief Judge

KATHERINE A. WRAY, Judge