IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico
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Opinion Number: _____

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No. A-1-CA-42341

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

JEREMY JAY GUTHRIE,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
David Murphy, 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
Thomas J. Lewis, Assistant Appellate Defender
Santa Fe, NM

for Appellant

OPINION

YOHALEM, Judge.

{1} Defendant was convicted, in relevant part, of four counts of criminal sexual penetration of a minor (CSPM) in the first degree (child under thirteen years of age), in violation of NMSA 1978, Section 30-9-11(D)(1) (2009); and three counts of criminal sexual contact of a minor (CSCM) in the third degree (child under thirteen years of age), in violation of NMSA 1978, Section 30-9-13(C)(1) (2003), based on multiple sexual assaults of twelve-year-old Victim between November 1, 2021 and April 25, 2022, when Victim turned thirteen.[1] On appeal, Defendant contends that his seven convictions of CSPM and CSCM based on three sexual assaults violate the double jeopardy guarantee against multiple punishment for the same conduct. For the reasons explained below, we vacate one count of CSPM and one count of CSCM. We otherwise affirm.

BACKGROUND

{2} All of the sexual assaults at issue on appeal occurred while Victim was twelve years old—between November 2021 and Victim's thirteenth birthday on April 25,

[1]Defendant does not appeal his convictions for attempted CSPM, in violation of Section 30-9-11(E)(1) and NMSA 1978, Section 30-28-1 (1963, amended 2024), or his conviction for contributing to the delinquency of a minor, in violation of NMSA 1978, Section 30-6-3 (1990).

2022. Victim's testimony was the only evidence at trial describing each of the sexual assaults. Victim testified at trial as follows.

{3} Defendant first contacted Victim by a text message on a social media messaging platform in November 2021. Victim agreed to meet Defendant. Defendant picked Victim up in his truck at an agreed meeting place and took Victim to a motel. Victim testified that she told Defendant that she was twelve years old.

{4} In the motel room, Defendant started by touching Victim's breasts. Then he touched what Victim referred to as her "lower parts," which she described as her "vagina" and "butt." Victim described the touching beginning over and ending under her clothes. The State asked Victim, "Was there anything else [Defendant] did after he was touching you?" Victim responded that Defendant "took his pants off" and then he put "his penis . . . [i]nside my vagina."

{5} Two or three months later, Defendant contacted Victim and again picked her up in his truck. This time he drove Victim to the mesa area on the outskirts of town, approximately an hour drive from her home. Victim testified that Defendant stopped at a remote location on the mesa. In the back seat of his truck, Defendant touched Victim's breasts and vagina area under her clothes. When asked if Defendant did anything else while they were in the truck, Victim testified that Defendant inserted his penis into her vagina.

{6} Victim was then asked by the prosecutor whether that was "the only time the Defendant took you out to this mesa." Victim responded, "No" and was then asked how many trips to the mesa occurred. Victim answered that Defendant took her out there "four more times."

{7} Victim was then asked, "Was there anything else [D]efendant did when he took you out to this mesa?" Victim answered, "He had a rope . . . and he tied me up [by] my legs . . . in the bed of his truck." She was then asked what body parts Defendant used on her. Victim answered, "He used his mouth. He used his penis and a toy." She testified that all three were used on or inside her vagina.

{8} As relevant to this appeal, Defendant was found guilty of four counts of CSPM and three counts of CSCM.[2] The parties agree that Count 1 (CSPM sexual intercourse), Count 3 (CSCM touching Victim's breasts), and Count 4 (CSCM touching Victim's vulva) were supported by Victim's testimony about Defendant's sexual assault at the motel in November 2021. The parties further agree that Count 2 (CSPM sexual intercourse), Count 7 (CSPM penetration with the sex toy), Count 8 (CSCM touching of Victim's "breast, vulva, or vagina"), and Count 11 (CSPM

[2]Because some of the counts set forth in the indictment were later revised or renumbered and were inaccurately reported in the judgment and sentence, we rely on the count numbers and statement of the elements of each count used in the jury instructions and on the verdict forms.

cunnilingus) were supported by Victim's testimony about Defendant's sexual assaults on the mesa.

{9} Defendant appeals, asking this Court to vacate on double jeopardy grounds all but one conviction for each of the sexual assaults—leaving in place his convictions of one count of CSPM at the motel, one count of CSPM during the first trip to the mesa, and one count of CSPM during the one later trip to the mesa fully described by Victim.

DISCUSSION

{10} "The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment, protects against multiple punishments for the same offense." *State v. Elliott*, 2025-NMCA-022, ¶ 28, 576 P.3d 409 (internal quotation marks and citation omitted). "The pivotal question in multiple punishment cases is whether the defendant is being punished twice for the same offense." *Swafford v. State*, 1991-NMSC-043, ¶ 8, 112 N.M. 3, 810 P.2d 1223 (emphasis omitted). "Multiple punishment challenges arise in both unit of prosecution claims, in which an individual is convicted of multiple violations of the same criminal statute, and double description claims, in which a single act results in multiple charges under different criminal statutes." *Elliott*, 2025-NMCA-022, ¶ 28 (internal quotation marks and citation omitted). Defendant alleges both types of double jeopardy violations.

{11} First, Defendant raises a unit of prosecution double jeopardy challenge. This challenge relates to his conviction of three counts of CSPM for his sexual assaults of Victim on the mesa. Defendant claims that all three of the CSPM convictions—Count 2 (sexual intercourse), Count 7 (penetration with a sex toy), and Count 11 (cunnilingus)—are based on a single sexual assault that amounts to unitary conduct, and that, therefore, two of the CSPM convictions must be vacated on double jeopardy grounds. Second, Defendant raises two double description challenges: (1) Defendant claims that his convictions for Count 1 (CSPM) and Counts 3 and 4 (CSCM), for his sexual assault of Victim at the motel, are based on unitary conduct; and (2) Defendant claims that his convictions for Count 2 (CSPM) and Count 8 (CSCM), for his sexual assault of Victim in the backseat of his truck on the first trip to the mesa, are based on unitary conduct.

{12} We address each of Defendant's double jeopardy challenges in turn under a de novo standard of review. *See State v. Cummings*, 2018-NMCA-055, ¶ 6, 425 P.3d 745 ("We generally apply a de novo standard of review to the constitutional question of whether there has been a double jeopardy violation."); *State v. Haskins*, 2008-NMCA-086, ¶ 15, 144 N.M. 287, 186 P.3d 916 (same).

I. Unit of Prosecution Double Jeopardy Challenge—CSPM Counts During Trips to the Mesa

{13} Defendant first raises a unit of prosecution double jeopardy challenge to his convictions of CSPM for his sexual assaults of Victim on the mesa. Defendant

argues that his convictions of Count 2 (CSPM sexual intercourse), Count 7 (CSPM penetration with a sex toy), and Count 11 (CSPM cunnilingus) are multiple convictions under the same statute for a single unitary act of sexual penetration, in violation of Section 30-9-11, the statute that criminalizes penetration of any of the protected orifices listed in the statute—here Victim's vagina—"with any object." *See Herron v. State*, 1991-NMSC-012, ¶ 13, 111 N.M. 357, 805 P.2d 624 (internal quotation marks omitted).

{14} The relevant inquiry in a double jeopardy unit of prosecution claim is "whether the [L]egislature intended punishment for the entire course of conduct or for each discrete act." *Swafford*, 1991-NMSC-043, ¶ 8. "Unit of prosecution cases are subject to a two-step analysis that courts utilize to discern legislative intent." *State v. Bernard*, 2015-NMCA-089, ¶ 17, 355 P.3d 831. "In the first step of [a unit of prosecution] analysis, we look to the language of the criminal statute to determine whether the Legislature has defined the unit of prosecution." *Id.* "Our inquiry is complete if the unit of prosecution is spelled out in the statute." *Id.* If the language of the statute does not clearly specify the unit of prosecution, we then move to the second step, where we must "determine whether a defendant's acts are separated by sufficient indicia of distinctness to justify multiple punishments under the same statute." *Id.* (internal quotation marks and citation omitted). In determining whether two crimes are proved by conduct separated by sufficient indicia of distinctness, we

are directed to look to "the elements of the charged offenses, the facts presented at trial, and the instructions given to the jury." *State v. Phillips*, 2024-NMSC-009, ¶ 38, 548 P.3d 51 (internal quotation marks and citation omitted).

{15} We start with the first step of the analysis: whether Section 30-9-11 clearly identifies the unit of prosecution intended by the Legislature. As the State concedes on appeal, it is well settled that "Section 30-9-11 cannot be said as a matter of law to evince a legislative intent to punish separately each penetration occurring during a continuous attack absent proof that each act of penetration is in some sense distinct from the others." *Herron*, 1991-NMSC-012, ¶ 15. We therefore, move to step two of the analysis: whether Defendant's conduct that supports his conviction for Count 2 (CSPM sexual intercourse), Count 7 (CSPM penetration with a sex toy), and Count 11 (CSPM cunnilingus) is separated by sufficient indicia of distinctness to justify multiple punishments under the same statute.

{16} "To determine whether a defendant's acts are sufficiently distinct," our Supreme Court instructs us to "consider the *Herron* factors: (1) temporal proximity of the acts, (2) location of the victim during each act, (3) the existence of intervening events, (4) the sequencing of the acts, (5) the defendant's intent as evidenced by [their] conduct and utterances, and (6) the number of victims." *Phillips*, 2024-NMSC-009, ¶ 12 (citing *Herron*, 1991-NMSC-012, ¶ 15). The Court has also made clear that, although these factors must be considered, no one factor alone is

dispositive. *Id.* ¶ 13. In determining whether each incident constitutes a separate definable criminal offense, we look to the evidence in the record to determine whether it is sufficient to support a finding of distinct conduct. *Id.*

{17} In his briefing on appeal, Defendant contends that his convictions of three counts of CSPM for the three penetrations of Victim that occurred during the sexual assaults on the mesa were based on unitary conduct. Defendant first attempts to establish that there is no support for finding separate conduct based on the penetrations occurring on different dates. Defendant argues that "[t]he State's theory of the case [at trial] did not attempt to break down the four or five trips to the mesa into distinct sets of actions," instead addressing Counts 2, 7 and 11 "as if they took place on a single occasion, with no attempt to characterize them as taking place on separate dates."

{18} We first address the State's contention in its answer brief that the three convictions of CSPM do indeed relate to three identical sexual assaults (each presumably involving intercourse, cunnilingus, and a sex toy) during every trip to the mesa Victim enumerated in her testimony. If the evidence supports a jury verdict based on three entirely separate sexual assaults on different dates, the convictions are based on separate and distinct conduct and we need not consider the *Herron* factors further to conclude that there is no double jeopardy violation. *See Herron*, 1991-NMSC-012, ¶ 15 ("[T]he greater the interval between acts the greater the

likelihood of separate offenses."); *cf. State v. Lente*, 2019-NMSC-020, ¶ 30, 453 P.3d 416 (citing *Herron*, 1991-NMSC-012, ¶ 15, among other authorities, and observing that "different acts of criminal sexual penetration and contact perpetrated against a child on different and discrete dates . . . constitute discrete violations" of CSPM and CSCM).

{19} We begin with Count 2 (CSPM), which the jury instruction simply describes as engaging in sexual intercourse, without including any information identifying which of the sexual assaults—the first trip to the mesa or one of the subsequent trips—is at issue. Getting no help from the jury instruction, we look to the record to see if the State introduced sufficient evidence to support the jury's conviction for Count 2 based on sexual intercourse on a different date than the penetration with a sex toy and cunnilingus.

{20} The record shows that Count 2 is supported by Victim's testimony about the first trip to the mesa in approximately January or February 2022. Victim testified that during that first trip to the mesa, there was a single act of vaginal penetration, which Victim described as occurring in the back seat of Defendant's truck. Because the jury could have reasonably found that this count of CSPM is supported by evidence of sexual intercourse on a different date from the penetration with a sex toy and cunnilingus, and because there is no other duplicate count of CSPM that relates to that first trip to the mesa, we conclude that the evidence in the record is sufficient

to support Defendant's conviction of Count 2 based on sexual intercourse on a different date from the CSPM charged in Counts 7 and 11. *See Phillips*, 2024-NMSC-009, ¶ 13 (noting that time and space may easily distinguish acts in some cases).

{21} We turn next to the remaining two convictions of CSPM on the mesa—Count 7 (CSPM with a sex toy), and Count 11 (CSPM cunnilingus). Defendant argues that the evidence established that these two counts of CSPM occurred during a single sexual assault of Victim in the bed of Defendant's truck. As to these two counts, we agree with Defendant that the evidence in the record does not support the State's argument that the penetration of Victim with a sex toy and cunnilingus happened repeatedly on three or four different trips to the mesa. Victim's reference to multiple trips to the mesa, without testimony about what happened on any trip but the first and a single later trip, is not evidence that Defendant committed CSPM with a sex toy and cunnilingus on each of the trips. Victim's testimony about penetration with a sex toy and cunnilingus in the bed of the truck plainly refers to a single incident.

{22} We look next to Victim's testimony about this single incident of sexual assault to determine whether sufficient indicia of distinctness separate the CSPM with a sex toy and the CSPM by cunnilingus to the degree necessary to support two convictions of CSPM without violating double jeopardy. The State relies primarily on its contention—which we already have rejected—that the CSPM with a sex toy and

CSPM by cunnilingus each occurred repeatedly on separate trips to the mesa. In a single sentence in its answer brief, the State argues additionally that, even if Defendant's penetration of Victim's vagina with a sex toy and cunnilingus occurred during a single sexual assault, there were sufficient indicia of distinctness under the *Herron* factors to support two separate convictions for CSPM. Citing *State v. Sena*, 2020-NMSC-011, ¶¶ 55-56, 470 P.3d 227, the State attempts to distinguish the two acts of penetration by arguing that Defendant used "different instruments and different forces." Although *Sena* suggests that different forces can be a consideration in distinguishing two acts in the context of multiple batteries, we find *Herron* to be controlling in this case. *Herron* concludes that penetration of the same orifice with different objects or different body parts during a single sexual assault does not by itself, without evidence of other *Herron* factors (such as intervening events, the passage of time, a change in the defendant's intent, movement to a different location, or a change in the position of the victim) support two convictions of CSPM without violating a defendant's right to be free of double jeopardy. *See* 1991-NMSC-012, ¶¶ 13, 15, 21. Although penetration of different orifices alone can be sufficient to support a finding of separate offenses, *Haskins*, 2008-NMCA-086, ¶ 19, the penetration of the same orifice with different body parts or objects is distinguished by *Herron* as insufficient to support two convictions of CSPM without evidence supporting other distinguishing factors. *See Herron*, 1991-NMSC-012, ¶ 15

("Except for penetrations of separate orifices with the same object, none of these factors alone is a panacea.").

{23} Because Victim's testimony describing a second sexual assault on the mesa fails to include any detail about the commission of the two acts of sexual penetration that would distinguish one from the other under the *Herron* factors, we conclude that the conduct underlying Count 7 (CSPM with a sex toy) and Count 11 (CSPM cunnilingus) is unitary and that Defendant's conviction of both counts violates his right to be free from double jeopardy. We leave it to the district court on remand to decide which offense to vacate. *See State v. Porter*, 2020-NMSC-020, ¶¶ 42-43, 476 P.3d 1201 (holding that when both offenses result in conviction of the same degree of felony, "the choice of which conviction to vacate lies in the sound discretion of the district court").

II. Double Description Double Jeopardy Challenges—the Motel and the First Trip to the Mesa

{24} We now turn to Defendant's two double description claims. Defendant contends first that his convictions of both Count 1 (CSPM sexual intercourse) and Counts 3 and 4 (CSCM touching breasts and vulva), for his sexual assault of Victim at the motel, violate double jeopardy because the CSCM was part of a single sexual assault and, therefore, is based on conduct unitary with his conviction for CSPM. Defendant makes the same double jeopardy argument about his convictions for touching Victim's "breasts, or vulva, or vagina" (Count 8 CSCM) and sexual

intercourse (Count 2 CSPM) during his first sexual assault of Victim on the mesa, in the backseat of Defendant's truck.

{25} "In reviewing a double[ ]description challenge, we follow the two-part test adopted in *Swafford*, 1991-NMSC-043, ¶ 25." *State v. Begaye*, 2023-NMSC-015, ¶ 13, 533 P.3d 1057. "First, we assess whether the conduct underlying the offenses is unitary, i.e., whether the same conduct violates both statutes." *Id.* (internal quotation marks and citation omitted). Our inquiry into unitary conduct under a double description claim is a "substantially similar analysis" as the second step of the unit of prosecution analysis. *Phillips*, 2024-NMSC-009, ¶ 13 (internal quotation marks and citation omitted). "If the conduct is not unitary, then the inquiry is at an end and there is no double jeopardy violation." *State v. Bernal*, 2006-NMSC-050, ¶ 9, 140 N.M. 644, 146 P.3d 289. If, however, the conduct is unitary, "we [next] examine the statutes at issue to determine whether the [L]egislature intended to create separately punishable offenses." *Begaye*, 2023-NMSC-015, ¶ 13 (internal quotation marks and citation omitted). "Only if the first part of the test is answered in the affirmative, and the second in the negative, will the double jeopardy clause prohibit multiple punishment." *Id.* (internal quotation marks and citation omitted).

{26} We note that Defendant argues only the first step of the analysis—unitary conduct, citing to this Court's decision in *State v. Mora*, 2003-NMCA-072, 133 N.M. 746, 69 P.3d 256, as conclusively resolving the second question concerning

legislative intent. The State disagrees with Defendant's reliance on *Mora*, and argues that our Legislature intended to address different evils in the two statutes, and that therefore the Legislature intended multiple punishments.

{27} We agree with Defendant that this Court's decision in *Mora*—that legislative intent does not support punishing a defendant separately for CSCM and CSPM if the conduct is unitary—controls.

A. Defendant's Convictions for CSCM and CSPM at the Motel Are Based on Distinct, Nonunitary Conduct and Do Not Violate Double Jeopardy

{28} Addressing first whether his conduct was unitary, Defendant argues that his convictions of both CSCM charges in Counts 3 and 4 and CSPM in Count 1 for the sexual assault of Victim at the motel were based on unitary conduct because there is insufficient detail in Victim's testimony to establish distinctness under the *Herron* factors. The State responds that Defendant's conduct was nonunitary based on evidence that the CSCM was completed before the CSPM began. The State argues that "it is clear from the evidence that Defendant touched [V]ictim's breasts and vaginal area first, and that those crimes were completed before Defendant took off his clothes and engaged in vaginal intercourse with [V]ictim." We agree with the State that Victim's testimony provides sufficient indicia of distinctness to support nonunitary conduct, thereby avoiding a double jeopardy violation.

{29} Regarding the sexual assault in the motel room, Victim testified that Defendant first started touching her clothed breasts and the area over her vagina, and

then reached under her clothes to touch her unclothed breasts and vagina. Victim was asked by the State whether "there was anything else he did *after* he was touching you?" Victim responded that defendant "took his pants off." She then stated that *after* he took his pants off, "[they] had sex," which she clarified was Defendant penetrating her vagina with his penis.

{30} Several indicia of distinctness included in *Herron* are apparent from Victim's testimony. First, Victim described Defendant *beginning* by touching her breasts and vagina over her clothes, progressing to touching those same areas under her clothes, and then only *after* the touching, removing his clothes and penetrating her vagina with his penis. Victim thus describes a sequence of events, with both acts of CSCM occurring first,[3] ending before Defendant removed his clothes, followed by the removal of Defendant's clothes, and only then by sexual penetration of Victim. This distinct sequence of events, the completion of one crime before the other begins, and the intervening act of Defendant removing his clothes are factors that *Herron* directs us to consider in determining whether a defendant's conduct constitutes separate acts or is a single, continuous offense. *See Haskins*, 2008-NMCA-086, ¶ 19 (considering the act of the victim getting dressed and relocating to another room between touchings to be a sufficient intervening event to support separate convictions for

[3]Defendant does not argue that the two convictions of CSCM violate his right to be free of double jeopardy, and we therefore do not address that issue.

criminal sexual contact). The completion of the CSCM while Defendant was clothed, followed by Defendant removing his pants, also indicates a change in Defendant's intent—from touching to the more serious crime of penetration—an important factor as to whether the CSCM and the CSPM at issue here are nonunitary, separate offenses. *See Phillips*, 2024-NMSC-009, ¶ 25 (stating that the defendant's change of intent to commit battery to then commit manslaughter evinced distinct conduct); *see also Herron*, 1991-NMSC-012, ¶ 15 (considering distinct conduct by assessing the defendant's intent as evidenced by their conduct).

{31} Defendant relies on *State v. Ervin*, 2008-NMCA-016, ¶¶ 45-47, 143 N.M. 493, 177 P.3d 1067, to support his argument that the CSCM and CSPM amounted to unitary conduct. In *Ervin*, the touching of different body parts of the victim over a short period of time during a massage, without any intervening event, was held to lack sufficient indicia of distinctness to support multiple convictions of CSCM. *See id.* ¶¶ 45-46. The facts here are distinguishable. In this case, Victim testified about the sequence of events and about a distinct intervening event, neither of which was present in *Erwin*, where the double jeopardy issue concerned multiple counts of CSCM for touching different body parts during a continuous massage. *See id.*

{32} Concluding that Defendant's conduct is nonunitary, our inquiry ends. *See Bernal*, 2006-NMSC-050, ¶ 9. Defendant's convictions for CSCM in Counts 3 and

4 and CSPM in Count 1 at the motel do not amount to a double description double jeopardy violation.

B. Defendant's Convictions of CSCM and CSPM for the Sexual Assault During the First Trip to the Mesa Violate His Right to Be Free of Double Jeopardy

{33} Defendant next argues that his convictions of CSPM in Count 2 and CSCM in Count 8 for his sexual assault of Victim during the first trip to the mesa violate his right to be free from double jeopardy. Defendant argues that Victim's testimony lacks sufficient detail to establish any of the *Herron* factors indicating distinct conduct.

{34} We agree with Defendant that Victim's testimony concerning the first trip to the mesa lacks the detail necessary to establish nonunitary conduct during the sexual assault in the back seat of Defendant's truck under the *Herron* factors. We therefore conclude that Defendant's convictions for CSPM in Count 2 and CSCM Count 8 punish unitary conduct. We then go on to address legislative intent. Concluding, based on this Court's decision in *Mora*, that our Legislature has not clearly expressed its intent to punish CSCM and CSPM separately when the defendant's conduct is unitary, the rule of lenity requires that we vacate one of these convictions on double jeopardy grounds. *See* 2003-NMCA-072, ¶ 23 ("[U]nless an intent to punish separately can be found through an examination of legislative intent, lenity is indicated.").

{35} We begin by examining whether the evidence supports distinct, nonunitary conduct under the *Herron* factors. To prove CSPM as charged in Count 2, the jury instructions required the State to prove Defendant "caused [Victim] to engage in sexual intercourse." To prove CSCM as charged in Count 8 during the same sexual encounter, the jury instructions required the State to prove that Defendant "touched . . . the unclothed breasts, or vulva, or vagina of [Victim]." Victim's testimony was the only evidence in the record describing what happened on this first trip to the mesa. Victim testified that Defendant "started touching [her]" on her "chest and vagina area," and that the touching was under her clothes. She then testified, "[Defendant] inserted his penis into me."

{36} Unlike Victim's testimony about the sexual assault in the motel, Victim's testimony about this sexual assault lacks any detail that separates the touching from the penetration. Although Victim testified that Defendant "started" with touching her "chest and vagina area," she provides no information about whether that touching was completed before the sexual intercourse began. Importantly, Victim does not describe any interval or intervening event between the touching and the penetration. There is no testimony about whether, for example, Defendant undressed or otherwise paused the sexual assault between the touching and the sexual intercourse. Both the CSCM and the CSPM were described as occurring in the same place—on the backseat of Defendant's truck—with no mention of a change in

location or position of Victim or Defendant during the sexual assault. This testimony simply does not provide sufficient evidence of distinct conduct to satisfy the standard set by our Supreme Court in *Herron*. *See* 1991-NMSC-012, ¶ 15.

{37} This Court must next determine whether the Legislature intended to permit multiple punishments for CSCM and CSPM when the culpable conduct for both convictions is unitary. *See Porter*, 2020-NMSC-020, ¶ 15. "[L]egislative intent is the touchstone for whether multiple punishments are permissible." *Id.*

{38} We look first to the plain language of the two statutes at issue here—CSCM and CSPM—to determine if the Legislature has explicitly authorized multiple punishments. *See id.* ¶ 16. Finding no such authorization on the face of either statute, we turn to other canons of statutory construction. *See id.* Generally, we would first apply the modified *Blockburger* test, where "we consider the state's legal theory of the case applied to the statutes at issue to determine the elements of each offense the defendant committed." *Porter*, 2020-NMSC-020, ¶¶ 17, 20. "[I]f the elements of the statutes are not subsumed one within the other, then the *Blockburger* test raises only a presumption that the statutes punish distinct offenses. That presumption, however, is not conclusive and it may be overcome by other indicia of legislative intent." *Swafford*, 1991-NMSC-043, ¶ 31.

{39} In examining other indicia of legislative intent, we look at "whether the offenses are substantially the same using other traditional canons of construction,

including identifying the particular evil sought to be addressed by each offense, determining the quantum of punishment for each statute, determining whether the statutes are typically violated together, the rule of lenity, and other relevant factors." *Porter*, 2020-NMSC-020, ¶ 20 (internal quotation marks and citation omitted). In this case, we find it unnecessary to engage in this statutory construction analysis because this Court previously determined in *Mora* that unitary conduct cannot support separate convictions under the CSCM and CSPM statutes, even where a *Blockburger* presumption exists. *See Mora*, 2003-NMCA-072, ¶¶ 22-27. "The principle of stare decisis dictates adherence to precedent." *Padilla v. State Farm Mut. Auto. Ins. Co.*, 2003-NMSC-011, ¶ 7, 133 N.M. 661, 68 P.3d 901. "When there is precedent construing statutory language to guide us, we rely on that precedent." *Henry v. Gauman*, 2023-NMCA-078, ¶ 10, 536 P.3d 498.

{40} *Mora* examined legislative intent where a defendant was convicted of both CSCM and attempted CSPM based on unitary conduct. *See* 2003-NMCA-072, ¶¶ 19-20. This Court assessed our Legislature's intent concerning multiple punishments for unitary conduct under our CSCM and CSPM statutes and determined that unitary conduct cannot support separate convictions for CSCM and attempted CSPM. *See id.* ¶¶ 22-27. The fact that *Mora* involved an *attempted* CSPM rather than *completed* CSPM, as is the case here, has created some uncertainty about whether *Mora*'s legislative intent analysis is controlling when CSCM and CSPM are

committed by unitary conduct. Because this Court's legislative intent analysis in *Mora* was based on the common purpose of the CSCM and CSPM statutes (to protect children's "bodily integrity and personal safety") and the significantly greater punishment our Legislature imposed for CSPM, we conclude that the legislative intent analysis in *Mora* is directly applicable to the CSCM and *completed* CSPM offenses at issue in this case. *See id.* ¶¶ 22, 24 (internal quotation marks and citation omitted).

{41} The distinction between an attempted and a completed crime played no meaningful role in this Court's legislative analysis in *Mora.* As this Court stated in *Mora*, "We do not believe the [L]egislature has manifested any clear intent that a defendant could be convicted for attempted CSPM and CSCM for unitary conduct. To the contrary, the canons of construction . . . demonstrate a legislative intent to disallow multiple punishment in this context." *Id.* ¶ 27.

{42} We agree as well with *Mora* that under these circumstances, "lenity is indicated." *Id.* ¶ 23. We must presume that "the [L]egislature did not intend pyramiding punishments for the same unitary conduct." *Id.* The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution, therefore, demands that Defendant's conviction for Count 8 (CSCM), the lesser offense, be vacated. *See State v. Montoya*, 2013-NMSC-020, ¶ 55, 306 P.3d 426 (holding that "where one of two otherwise valid convictions must be vacated to avoid violation of

double jeopardy protections, we must vacate the conviction carrying the shorter sentence").

III. Correction of the Judgment on Remand

{43} We note that the final judgment and sentence, entered on August 21, 2024, does not parallel the jury verdict. It appears that due to a clerical error at some stage involving preparation of the judgment and sentence, the convictions and the count numbers listed in the judgment came from the indictment, rather than the jury verdict forms. The count numbers and descriptions we have used throughout this opinion are those found in the jury instructions and verdict forms. In addition to vacating Count 8 (CSCM), and either Count 7 (CSPM) or Count 11 (CSPM), at the district court's discretion, the judgment must be corrected on remand to properly reflect the jury's verdict.[4]

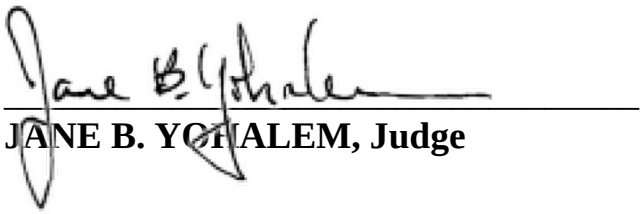
CONCLUSION

{44} We vacate Defendant's conviction of Count 8 (CSCM). We remand for the district court to vacate either Count 7 (CSPM) or Count 11 (CSPM), to correct the

[4]The unnecessary confusion of the counts charged in this case and lack of clarity in argument to the jury and in briefing about the evidentiary basis for each conviction has made review of the double jeopardy issues raised by Defendant on appeal difficult and time-consuming for this Court. We urge the State at the indictment and trial level to clearly identify the basis in the evidence for each count and to consider whether any of the counts as charged or argued violate the defendant's right to be free of double jeopardy. It is troubling that double jeopardy violations are often only discovered for the first time on appeal. Preferably, they should be avoided or corrected by the State before, during, or after trial.

judgment to properly reflect the counts described and numbered in the jury instructions and on the verdict forms, and to resentence Defendant in light of the two vacated convictions.

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



JANE B. YOHALEM, Judge

WE CONCUR:

J. MILES HANISEE, Judge

JENNIFER L. ATTREP, Judge