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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

Court of Appeals of New Mexico
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2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,

4 v. **No. A-1-CA-42152**

5 **GIOVANI RUIZ,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**
8 **David A. Murphy, District Court Judge**

9 Raúl Torrez, Attorney General
10 Felicity Strachan, Assistant Solicitor General
11 Santa Fe, NM

12 for Appellee

13 The Law Office of Scott M. Davidson, Ph.D., Esq.
14 Scott M. Davidson
15 Albuquerque, NM

16 for Appellant

17 **MEMORANDUM OPINION**

18 **DUFFY, Judge.**

19 {1} Defendant Giovani Ruiz was convicted of one count of first degree
20 kidnapping (Count 1), contrary to NMSA 1978, Section 30-4-1 (2003), four counts
21 of second degree criminal sexual penetration resulting in personal injury (Counts 2-
22 5), contrary to NMSA 1978, Section 30-9-11(E)(3) (2009), and one count of fourth
23 degree criminal sexual contact resulting in personal injury (Count 6), contrary to

NMSA 1978, Section 30-9-12(C) (1993). Defendant appeals, arguing (1) error in two of the jury instructions, (2) hearsay testimony was improperly admitted, (3) prosecutorial misconduct occurred during voir dire and closing argument, and (4) the cumulative impact of multiple errors resulted in the deprivation of a fair trial. Due to error in the jury instruction for criminal sexual contact resulting in personal injury, we reverse Defendant's conviction on that count (Count 6). We otherwise affirm on all remaining matters.

DISCUSSION

I. Jury Instructions

{2} Defendant argues that error occurred with respect to two of the given jury instructions: (1) the instruction defining unlawfulness as an element of criminal sexual penetration and criminal sexual contact, and (2) the instruction on criminal sexual contact in the fourth degree. Because Defendant did not object to either instruction at trial, our review is for fundamental error. *See State v. Benally*, 2001-NMSC-033, ¶ 12, 131 N.M. 258, 34 P.3d 1134.

{3} "As it pertains to jury instructions, fundamental error analysis follows two steps." *State v. Sivils*, 2023-NMCA-080, ¶ 10, 538 P.3d 126. The first is to determine whether error occurred by asking "whether a reasonable juror would have been confused or misdirected by the jury instruction." *Id.* (internal quotation marks and citation omitted). "[J]uror confusion or misdirection may stem not only from

instructions that are facially contradictory or ambiguous, but from instructions which, through omission or misstatement, fail to provide the juror with an accurate rendition of the relevant law." *Id.* (internal quotation marks and citation omitted). "If we conclude that the jury instruction was erroneous, we move to step two, asking whether that error was fundamental." *Id.* ¶ 11. Fundamental error exists "if it would shock the court's conscience to affirm the conviction, either because of the obvious innocence of the defendant, or because a mistake in the process makes a conviction fundamentally unfair notwithstanding the apparent guilt of the accused." *Id.* ¶ 9 (alteration, internal quotation marks, and citations omitted). "Fundamental-error analysis . . . requires a higher level of scrutiny." *State v. Barber*, 2004-NMSC-019, ¶ 19, 135 N.M. 621, 92 P.3d 633. "If we find error, our obligation is to review the entire record, placing the jury instructions in the context of the individual facts and circumstances of the case, to determine whether the [d]efendant's conviction was the result of a plain miscarriage of justice." *Id.* (internal quotation marks and citations omitted).

A. Unlawfulness Instruction

{4} Defendant argues the unlawfulness instruction was fundamentally flawed because, in Defendant's view, it deviated from the model instruction, UJI 14-132 NMRA, by omitting the phrase "without consent." This omission, according to Defendant, materially changed the definition of unlawfulness by removing lack of

consent—a contested issue at trial—from the list of required elements, thereby confusing or misleading the jurors on the law related to four of the counts on which he was convicted. We disagree with Defendant and conclude the given instruction adequately instructed the jury on the issue of consent.

{5} Unlawfulness is defined in UJI 14-132. The jury in this case received the following instruction based on UJI 14-132:

> In addition to the other elements of criminal sexual penetration and criminal sexual contact, the state must prove beyond a reasonable doubt that the act was unlawful. For the act to have been unlawful, it must have been done with the intent to arouse or gratify sexual desire or to intrude upon the bodily integrity or personal safety of [Victim]. Criminal sexual penetration and criminal sexual contact *does not include touching or penetration for purposes of* reasonable medical treatment or *a consensual encounter*.

{6} The given instruction differed from UJI 14-132 in that the uniform instruction contains three bracketed options within the second sentence, and only two were included in the instruction used at trial: "For the act to have been unlawful it must have been done [*without consent and*] [with the intent to arouse or gratify sexual desire] [or] [to intrude upon the bodily integrity or personal safety of [Victim]]." UJI 14-132 (emphasis added). Although this part of the given instruction did not mention consent, consent was specifically addressed in the final sentence. The uniform instruction contemplates this sort of modification; it contains blanks in the final sentence that can be filled in to provide the jury with examples of touching that would be lawful, based on the facts of the specific case. *See* UJI 14-132 use note 1

(stating that "[t]his instruction is not intended to be all inclusive" and "[a]ppropriate language should be tailored in specific cases"). In this case, the district court filled in the blanks to state that the crimes charged do not include "a consensual encounter." With this modification, the given instruction made clear to the jury that a consensual act is not unlawful and, therefore, a reasonable jury would not have been confused or misled by the given instruction. *See Sivils*, 2023-NMCA-080, ¶ 10.

{7} We are not persuaded that the inclusion of this language in the final sentence somehow failed to provide the jury "with an accurate rendition of the relevant law," as Defendant argues. *See id.* (internal quotation marks and citation omitted). Though Defendant claims that the language in the final sentence "did not cure" the matter because it appears to equate "a consensual encounter" with receiving medical treatment, the instruction differentiated the conduct with the disjunctive conjunction "or," which signals that "touching or penetration for purposes of reasonable medical treatment *or* a consensual encounter" are two independent examples of lawful conduct. For all of these reasons, we perceive no error in the unlawfulness instruction given at trial.

B. Criminal Sexual Contact Instruction

{8} Defendant also challenges the instruction given for Count 6, criminal sexual contact in the fourth degree resulting in personal injury. Defendant argues the instruction failed to include an essential element requiring the jury find that

Defendant's act resulted in Victim's personal injury. Defendant is correct, and as we explain, the error requires reversal.

{9} "Criminal sexual contact is a misdemeanor when perpetrated with the use of force or coercion," § 30-9-12(D), but becomes a fourth degree felony when "the use of force or coercion . . . results in personal injury to the victim," § 30-9-12(C)(1). Our Supreme Court has adopted two uniform jury instructions to reflect the difference between the misdemeanor and felony level of the offense. *Compare* UJI 14-902 NMRA (instructing on misdemeanor criminal sexual contact perpetrated with the use of force or coercion), *with* UJI 14-906 NMRA (instructing on fourth degree criminal sexual contact perpetrated by the use of force or coercion resulting in personal injury to the victim). The only material difference between these instructions is that UJI 14-906, the instruction on the fourth degree felony level charge, contains an additional element requiring the jury to find that the defendant's acts resulted in a personal injury to the victim. *See* UJI 14-906 NMRA use note 4.

{10} In this case, although Defendant was charged with fourth degree criminal sexual contact, the jury was instructed on misdemeanor criminal sexual contact:

> 1. [D]efendant touched or applied force to the unclothed breasts of [Victim] without [Victim's] consent;
>
> 2. [D]efendant used physical force or physical violence;
> 3. [D]efendant's act was unlawful;
>
> 4. [Victim] was eighteen (18) years of age or older;

5 This happened in New Mexico on or about the 7th day of June, 2015.

See UJI 14-902. As Defendant correctly points out, the given instruction did not contain an essential element of the felony-level charge, namely, that Defendant's acts resulted in a personal injury to Victim. *See* UJI 14-906.

{11} The State acknowledges that the personal injury element was omitted from the instruction, but claims there was no fundamental error because "the jury actually, albeit implicitly, found the missing element," and there is no doubt the jury would have found the missing element if properly instructed. *See State v. Ocon*, 2021-NMCA-032, ¶ 10, 493 P.3d 448 (observing New Mexico Supreme Court precedents in which the omission of an essential element did not amount to fundamental error when the facts and circumstances showed that the jury implicitly found the existence of the missing element or the jury's verdict leaves no doubt that the jury would have found the missing element if properly instructed); *Sivils*, 2023-NMCA-080, ¶¶ 19-21 (recognizing exceptions where the omission of an essential element does not amount to fundamental error because (1) the jury implicitly found the state has proven the omitted element, or (2) the jury's verdict leaves no doubt that it would have found the omitted element if properly instructed and the omitted element was not disputed at trial). The State contends that "[b]ased on the testimony given by [Victim] and the photographic evidence of her injuries, there was no question that Defendant caused [Victim] personal injuries in the course of using force or coercion

to inflict a sexual act." According to the State, there was no alternative version of the facts in which something else caused Victim's injuries. Therefore, because the jury found that Defendant used physical force or physical violence, the jury necessarily found that Defendant caused Victim's injury.

{12} Based on our review of the record, we do not believe that either of the exceptions apply. We cannot conclude solely from the jury's finding that Defendant used physical force or violence to perpetrate touching or applying force to Victim's unclothed breasts, that it also found such contact resulted in personal injury to Victim. The use of physical force or violence to perpetrate sexual contact is common to both the misdemeanor and the felony level of the offense, but in order to convict on the fourth degree level of the offense, the jury must make an additional finding that Defendant's acts also caused an injury. Simply put, the fact that a defendant used force or violence does not in every case mean a personal injury followed. *See State v. Calderon*, 2026-NMCA-026, ¶ 27, 583 P.3d 530 (noting that "'physical force' . . . describes the quality of a defendant's actions, but does not require a particular quantum of force; the issue is not how much force or violence is used, but whether the force or violence was sufficient to negate consent" (omission, alterations, internal quotation marks, and citation omitted)). Moreover, contrary to the State's position that the jury was presented with only one theory for the cause of Victim's injuries, Victim testified that, in addition to forced sexual contact,

Defendant "kept hitting [her] the whole time . . . in the body" during the incident, which left her unable to cough or sneeze for months afterward, and he "dragged [her] back" to his truck after she tried to run away. Based on this testimony, the jury could have concluded that Victim's injuries resulted from Defendant's conduct apart from his forced sexual contact. The State has not otherwise provided a basis for us to conclude the second exception would apply under the circumstances. For all these reasons, we cannot conclude that the jury implicitly found, or undoubtedly would have found if properly instructed, the omitted personal injury element. *See State v. Samora*, 2016-NMSC-031, ¶ 29, 387 P.3d 230 ("Fundamental error occurs when jury instructions fail to inform the jurors that the [s]tate has the burden of proving an essential element of a crime and we are left with no way of knowing whether the jury found that element beyond a reasonable doubt." (internal quotation marks and citation omitted)). Accordingly, we cannot affirm Defendant's conviction under an exception to the fundamental error doctrine. *See Sivils*, 2023-NMCA-080, ¶¶ 19-22.

{13} Finally, because "the direct-remand rule in New Mexico applies solely to cases involving an appellate reversal for insufficient evidence," *see State v. Revels*, 2025-NMSC-021, ¶ 47, 572 P.3d 974, we cannot remand the matter to the district court to amend the judgment and sentence to reflect the lesser included offense on which the jury was instructed and found Defendant guilty. *See id.* ¶ 42 ("The direct-remand rule . . . is that a court may order resentencing on an adequately proven

lesser included offense when reversing the defendant's conviction of a greater offense *for insufficient evidence*." (internal quotation marks and citation omitted)). The omission of an essential element in the instruction for Count 6, criminal sexual contact in the fourth degree, amounted to fundamental error in this case, and therefore, we must reverse Defendant's conviction.

II. Admission of Nurse Chavez's Testimony

{14} Defendant argues the district court erred by allowing Nurse MaryAnne Chavez, the sexual assault nurse examiner (SANE) who performed Victim's SANE examination just hours after the assault, to testify to inadmissible hearsay statements made by Victim during the exam. Because Defendant did not object to Nurse Chavez's testimony at trial, this evidentiary challenge is unpreserved and reviewed for plain error. *See State v. Garcia*, 2019-NMCA-056, ¶ 10, 450 P.3d 418 ("We review for plain error in cases raising evidentiary matters in which the asserted error affected substantial rights, though they were not brought to the attention of the trial judge." (internal quotation marks omitted)). "To find plain error, the Court must be convinced that admission of the testimony constituted an injustice that created grave doubts concerning the validity of the verdict." *State v. Montoya*, 2015-NMSC-010, ¶ 46, 345 P.3d 1056 (internal quotation marks and citation omitted). "Further, in determining whether there has been plain error, we must examine the alleged errors

in the context of the testimony as a whole." *Id.* (omission, alteration, internal quotation marks, and citation omitted).

{15} The State does not dispute that Nurse Chavez's testimony was hearsay under Rule 11-802 NMRA, but argues her testimony was admissible under a hearsay exception for statements made for "medical diagnosis or treatment." *See* Rule 11-803(4) NMRA; *State v. Mendez*, 2010-NMSC-044, ¶¶ 45-46, 148 N.M. 761, 242 P.3d 328 (holding that statements made to a SANE nurse are not categorically excluded and may be admissible under Rule 11-803(4) upon consideration of the declarant's help-seeking motivation and the pertinence of such statements to medical diagnosis and treatment). Even if we assume, without deciding, that none of Victim's statements to Nurse Chavez would be admissible under the medical diagnosis exception, we nevertheless conclude the admission of Nurse Chavez's testimony did not constitute plain error because the hearsay statements were substantively cumulative of Victim's own testimony and Defendant has not demonstrated that he was prejudiced by the admission. *Cf. State v. Tollardo*, 2012-NMSC-008, ¶ 43, 275 P.3d 110 (stating that when an evidentiary error is preserved, a relevant consideration in the harmless error analysis is "whether the error was cumulative or instead introduced new facts" (alteration, internal quotation marks, and citation omitted)).

{16} On the first day of trial, the jury heard testimony from Victim recounting the details of the sexual assault. Then, on the second day of trial, the jury heard testimony from Nurse Chavez, including Victim's SANE exam statements and a description of Victim's injuries. Although Defendant asserts Nurse "Chavez's hearsay testimony fill[ed] in many of the gaps in [Victim's] spotty memory [of the assault]," our review of the trial testimony showed significant overlap and consistency in Victim's description of the encounter with Victim's statements during the SANE exam, as read by Nurse Chavez. Likewise, no new material details of the encounter were introduced by Nurse Chavez's reading of Victim's statement. Accordingly, Nurse Chavez's reading of Victim's statements during the SANE exam was substantially cumulative of testimony the jury had already heard from Victim the day before. *See id.*

{17} It is Defendant's burden to demonstrate how he was prejudiced by the admission of these statements. *See State v. Muller*, 2022-NMCA-024, ¶ 43, 508 P.3d 960. Here, Defendant has done little more than assert that Victim stated a number of times during her testimony that she did not know or could not remember, and that "[w]ithout [Nurse] Chavez's gap-filling hearsay testimony, there is a high probability that the jury would have found that the State failed to prove beyond a reasonable doubt that [Victim] did not consent to the sexual acts she performed." But Defendant fails to address the trial testimony in full, acknowledge the

cumulative nature of the testimony, or even, at a minimum, identify *what* information Victim said she did not know or could not remember that Nurse Chavez's testimony purportedly clarified or "fill[ed] in." And, as we have discussed, the record does not support such a conclusion. Defendant also notes that the State relied on the hearsay testimony during closing, but again, the hearsay testimony was consistent with Victim's trial testimony and came from the same source. For all of these reasons, having "examine[d] the alleged errors in the context of the testimony as whole," we are not "convinced that the admission of the testimony constituted an injustice that created grave doubts concerning the validity of the verdict." *See Montoya*, 2015-NMSC-010, ¶ 46 (internal quotation marks and citations omitted).

III. Prosecutorial Misconduct

{18} Defendant claims the State made two misstatements of law that amounted to prosecutorial misconduct. Because the defense made no objections to the prosecutor's statements, our review is for fundamental error. *See State v. Trujillo*, 2002-NMSC-005, ¶ 52, 131 N.M. 709, 42 P.3d 814.

{19} "Prosecutorial misconduct rises to the level of fundamental error when it is so egregious and had such a persuasive and prejudicial effect on the jury's verdict that the defendant was deprived of a fair trial." *State v. Allen*, 2000-NMSC-002, ¶ 95, 128 N.M. 482, 994 P.2d 728 (internal quotation marks and citation omitted); *see State v. DeGraff*, 2006-NMSC-011, ¶ 21, 139 N.M. 211, 131 P.3d 61 ("An error is

fundamental if there is 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." (internal quotation marks and citation omitted)). However, "[a]n isolated, minor impropriety ordinarily is not sufficient to warrant reversal, because a fair trial is not necessarily a perfect one." *Allen*, 2000-NMSC-002, ¶ 95 (internal quotation marks and citation omitted).

A. Voir Dire

{20} During voir dire, the prosecutor opened her remarks to the venire by stating, "This system would not work without you all, and that is the biggest part of our system, not only to ensure [Defendant] receives a fair trial, but also the State receives a fair trial." Defendant claims this statement equated Defendant's constitutional right to a fair trial with a nonexistent constitutional right to a fair trial possessed by the State and "gave the jurors a false impression that they were presiding over a trial in which the two parties have equivalent rights, akin to a civil trial." The State maintains the prosecutor's statement was true—that the jury is there in part to ensure a fair process for everyone, not just a defendant—and that the prosecutor's purpose was not an attempt to improperly shift the jury's understanding of the burden of proof, but rather, to elicit candid responses from the venire.

{21} We are not persuaded that the prosecutor's statement amounts to error under the circumstances. *See id.* ¶¶ 101-102 (stating that prosecutors are allowed some

latitude in attempting to elicit the views of venire members). Even if it was error, however, Defendant has not demonstrated that the prosecutor's comment amounts to fundamental error—i.e., that the comment was "so egregious and had such a persuasive and prejudicial impact on the jury's verdict that the Defendant was deprived of a fair trial." *See id.* ¶ 95 (internal quotation marks and citation omitted). The comment was isolated and brief. *See State v. Lensegrav*, 2025-NMSC-016, ¶ 28, 572 P.3d 924 ("[W]e must be 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." (internal quotation marks and citation omitted)). Following the prosecutor's brief remark during voir dire, the jury received repeated instructions regarding the State's burden of proof, and we presume the jury followed those instructions. *See Benally*, 2001-NMSC-033, ¶ 21; *Allen*, 2000-NMSC-002, ¶ 102 ("Under these circumstances, we are not persuaded that reasonable jurors would construe the prosecutor's remarks [during voir dire] as an argument that they should find [the d]efendant guilty simply because the police and the district attorney's office think [they are] guilty, nor are we persuaded that reasonable jurors would adopt a construction of the prosecutor's remarks that would cause them to disregard the trial court's repeated instructions regarding the [s]tate's burden of proof."). For all of these reasons, we perceive no error in the prosecutor's remarks, much less fundamental error.

B. Closing Argument

{22} Defendant also claims the prosecutor misrepresented the law during rebuttal closing argument by stating, "There's been no evidence in this case whatsoever that this was consensual. However, there has been evidence that this wasn't consensual." According to Defendant, this statement would lead a reasonable juror to believe that Defendant had a burden to prove Victim consented. When evaluating the statement "objectively in the context of the prosecutor's broader argument and the trial as a whole," we cannot agree. *See State v. Sosa*, 2009-NMSC-056, ¶ 26, 147 N.M. 351, 223 P.3d 348 (stating that courts should consider 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").

{23} Applying the three factors identified in *Sosa* for evaluating claims of prosecutorial misconduct occurring during closing argument, *see id.*, we note first that Defendant does not expressly argue the prosecutor's statement invaded any constitutional protection. *See id.* Second, the prosecutor's statement was isolated and brief and not repeated throughout the closing argument. *See id.* Third, and most importantly, the prosecutor's statement appears to have been invited by the defense. *See id.* During Defendant's closing argument, defense counsel claimed, "This is a case about consent" and repeatedly impressed upon the jury that Defendant had no way of knowing Victim did not consent to the sexual encounter. The prosecutor

made the statements identified above in rebuttal closing argument in an apparent effort to respond to defense counsel's argument and to refute Defendant's claim that Victim consented to the encounter. The prosecution is permitted to comment on the evidence presented at trial and respond to the defense's arguments during closing arguments. *See State v. Montgomery*, 2017-NMCA-065, ¶ 13, 403 P.3d 707; *State v. Smith*, 2001-NMSC-004, ¶ 38, 130 N.M. 117, 19 P.3d 254; *cf. State v. Duffy*, 1998-NMSC-014, ¶ 56, 126 N.M. 132, 967 P.2d 807 ("It is misconduct for a prosecutor to make prejudicial statements not supported by evidence."), *overruled on other grounds by Tollardo*, 2012-NMSC-008, ¶ 37 n.6. Moreover, the jury was properly instructed on the State's burden to prove each element of the offenses beyond a reasonable doubt, and jurors are presumed to follow written instructions. *See Benally*, 2001-NMSC-033, ¶ 21. When viewed within this context, we conclude there was no error, much less fundamental error, in the prosecutor's statement—it was neither unsupported by the evidence nor a misstatement of the law. *See Sosa*, 2009-NMSC-056, ¶ 41 ("We conclude that there was no error at all, but more importantly, our obligation is to assume there was no error until Defendant satisfies his burden of persuasion by showing otherwise.").

IV. Cumulative Error

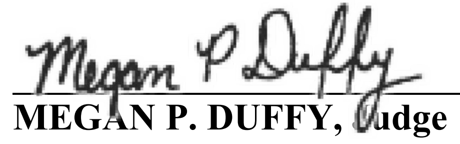
{24} Finally, Defendant claims that the alleged errors constitute cumulative error warranting reversal. "The doctrine of cumulative error requires reversal when a

series of lesser improprieties throughout a trial are found, in aggregate, to be so prejudicial that the defendant was deprived of the constitutional right to a fair trial." *State v. Guerra*, 2012-NMSC-014, ¶ 47, 278 P.3d 1031 (internal quotation marks and citation omitted). Although we recognize instructional error occurred with respect to Count 6, that error was cured by our reversal of Defendant's conviction for fourth degree criminal sexual contact, and Defendant has not argued that this instructional error had any further impact that deprived him of a fair trial. Because we have otherwise concluded that no error occurred with respect to the prosecutor's remarks and that any error resulting from the admission of Nurse Chavez's testimony was harmless, we reject Defendant's cumulative error argument. *See State v. Carrillo*, 2017-NMSC-023, ¶ 53, 399 P.3d 367 ("Because we find only one error at trial, an error which was harmless, we reject [the d]efendant's cumulative error claim."); *see also State v. Samora*, 2013-NMSC-038, ¶ 28, 307 P.3d 328 ("Where there is no error to accumulate, there can be no cumulative error." (text only) (citation omitted)).

CONCLUSION

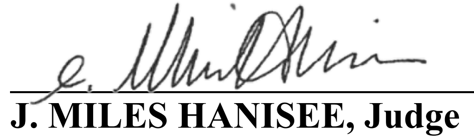
{25} We reverse Defendant's conviction for fourth degree criminal sexual contact resulting in personal injury (Count 6) and remand to the district court for resentencing. We otherwise affirm.

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



MEGAN P. DUFFY, Judge

WE CONCUR:



J. MILES HANISEE, Judge

ZACHARY A. IVES, Judge