Corrections to this opinion/decision not affecting the outcome, at the Court's discretion, can occur up to the time of publication with NM Compilation Commission. The Court will ensure that the electronic version of this opinion/decision is updated accordingly in Odyssey.

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico
Filed 5/11/2026 11:43 AM

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v. **No. A-1-CA-41873**

ROBERT BUSTOS,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF RIO ARRIBA COUNTY
Jason Lidyard, District Court Judge

Raúl Torrez, Attorney General
Santa Fe, NM
Lawrence M. Marcus, Assistant Solicitor General
Albuquerque, NM

for Appellee

Bennett J. Baur, Chief Public Defender
Kathleen T. Baldridge, Assistant Appellate Defender
Santa Fe, NM

for Appellant

MEMORANDUM OPINION

BACA, Judge.

{1} Following a jury trial, Defendant Robert Bustos was convicted of one count of criminal sexual penetration of a minor (CSP-II (felony)), contrary to NMSA 1978, Section 30-9-11(E)(5) (2009); two counts of criminal sexual contact of a minor (CSCM), contrary to NMSA 1978, Section 30-9-13(D)(1) (2004); one count of

enticement of a child, contrary to NMSA 1978, Section 30-9-1 (1963); and two counts of contributing to the delinquency of a minor (CDM), contrary to NMSA 1978, Section 30-6-3 (1990), for incidents involving his niece (Victim). Defendant appeals, claiming that his double jeopardy rights were violated and that there was insufficient evidence to support the CSP-II (felony) conviction. For the reasons that follow, we conclude that Defendant's double jeopardy rights were violated, vacate some of the convictions, and remand for resentencing. We otherwise affirm.

DISCUSSION[1]

I. Double Jeopardy

{2} Defendant makes three arguments contending that his convictions violate his right to be free from double jeopardy. First, as to his convictions for CSP-II (felony) and CDM, Defendant raises a double description double jeopardy claim. Defendant also raises a double description claim as to his convictions for CSP-II (felony) and CSCM. In the alternative, Defendant raises a unit of prosecution claim as to his two CSCM convictions. As detailed below we conclude that Defendant's convictions for CDM and CSP-II (felony), as well as his convictions for CSP-II (felony) and CSCM, violate double jeopardy. Accordingly, we remand to the district court with

[1]Because this is a memorandum opinion and the parties are familiar with the facts and procedural history of this case, we omit a background section and discuss the facts as necessary for our analysis.

instructions to (1) vacate Defendant's CDM conviction and his CSCM convictions, and (2) resentence Defendant.[2]

A. Standard of Review and Law Regarding Double Jeopardy

{3} "We generally apply a de novo standard of review to the constitutional question of whether there has been a double jeopardy violation." *State v. Elliott*, 2025-NMCA-022, ¶ 27, 576 P.3d 409 (internal quotation marks and citation omitted), *cert. denied* (S-1-SC-40707, Jan. 10, 2025).

{4} "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." *Id.* ¶ 28 (internal quotation marks and citation omitted); *see* U.S. Const. amend. V; N.M. Const. art. II, § 15. "Multiple punishment [challenges] can arise from both 'double description' claims, in which a single act results in multiple charges under different criminal statutes, and 'unit of prosecution' claims, in which an individual is convicted of multiple violations of the same criminal statute." *State v. Bernal*, 2006-NMSC-050, ¶ 7, 140 N.M. 644, 146 P.3d 289. "Although this question is one of constitutional dimension, we must ultimately inquire into legislative intent, because in the multiple punishment context, the Double Jeopardy Clause does no more than prevent the sentencing court

[2] Because we remand with instructions to vacate Defendant's CSCM convictions, we need not address Defendant's unit of prosecution claim as to his two CSCM convictions.

from prescribing greater punishment than the [L]egislature intended." *State v. Torres*, 2022-NMSC-024, ¶ 11, 521 P.3d 77 (internal quotation marks and citation omitted).

{5} "In analyzing double description challenges, we employ the two-part test, set out in *Swafford v. State*, [1991-NMSC-043, ¶ 25, 112 N.M. 3, 810 P.2d 1223], in which we examine: (1) whether the conduct is unitary, and, if so, (2) whether the Legislature intended to punish the offenses separately. 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 in the same trial." *State v. Gonzales*, 2019-NMCA-036, ¶ 14, 444 P.3d 1064 (internal quotation marks and citations omitted).

B. The CSP-II (felony) and CDM Convictions

{6} Defendant contends that his convictions for CSP-II (felony) and CDM violate his constitutional right to be free from double jeopardy. Defendant's challenge to these convictions is a double description challenge because he contends that a single act resulted in his conviction for CSP-II (felony) and CDM. Accordingly, we apply the *Swafford* two-part test to determine if Defendant's right to be free from double jeopardy was violated.

1. The Conduct Underlying Defendant's Convictions for CSP-II (felony) and CDM is Unitary

{7} We begin by considering the first part of the *Swafford* test—whether the conduct was unitary. Defendant contends that the conduct underlying the CSP-II (felony) and CDM was unitary.

{8} "A defendant's conduct is unitary if the acts are not separated by sufficient indicia of distinctness." *State v. Begaye*, 2023-NMSC-015, ¶ 20, 533 P.3d 1057 (internal quotation marks and citation omitted). "In *State v. Phillips*, 2024-NMSC-009, ¶ 38, 548 P.3d 51, our Supreme Court applied the factors from *State v. Herron*, 1991-NMSC-012, ¶ 15, 111 N.M. 357, 805 P.2d 624—the principal case examining whether distinct acts support multiple counts in a unit of prosecution double jeopardy challenge—to guide the determination of whether conduct is unitary in a double description case." *Elliott*, 2025-NMCA-022, ¶ 33. The *Herron* factors as articulated in *Phillips* are: "(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 his conduct and utterances, and (6) the number of victims." *Phillips*, 2024-NMSC-009, ¶ 12. "In determining whether there are sufficient indicia of distinctness, we look to the elements of the charged offenses, the facts presented at trial, and the instruction given to the jury." *Elliott*, 2025-NMCA-022, ¶ 33 (internal quotation marks and citation omitted). "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." *Id.* (internal quotation marks and citation omitted).

{9} In this case, Defendant was charged with CDM, which required proof, in relevant part, that Defendant (1) "gave [Victim] marijuana, methamphetamine, and/or cocaine"; and (2) "[t]his caused [Victim] to conduct herself in a manner injurious to the morals, health, or welfare of [Victim]." *See* § 30-6-3; *see also* UJI 14-601 NMRA (jury instruction for CDM). Defendant was also charged with CSP-II (felony), which required proof, in relevant part, that Defendant (1) "caused [Victim] to engage in sexual intercourse"; (2) "committed the act [of engaging in sexual intercourse] during the commission of [CDM]"; and (3) "[t]he commission of [CDM] assisted [D]efendant in causing [Victim] to engage in sexual intercourse." *See* § 30-9-11(E)(5); *see also* UJI 14-954 NMRA (jury instruction for CSP-II (felony)).

{10} The State maintains that the conduct was not unitary. In support of this position, the State points out that Victim testified about two separate episodes of drug use on the day of the incident; smoking methamphetamine first, and then later smoking a mixture of marijuana and cocaine. The State argues that, based on Victim's testimony, it is reasonable to conclude that the CDM conviction was based on the earlier smoking of methamphetamine, and the conduct associated with the CSP-II (felony) charge was based on Defendant providing Victim with marijuana

and cocaine. While it is true that Victim testified to separate occurrences of drug use on the day of the incident, the State's theory now on appeal does not match its presentation at trial. During closing arguments, the State told the jury that Defendant's commission of the CDM charged in Count 9—providing controlled substances to Victim on February 3, 2021—was the predicate felony relied on by the State to increase the CSP IV charge to CSP II (felony). The State claimed that the sexual assault of Victim charged in Count 1 was "assisted" by Defendant providing controlled substances to Victim on February 3, 2021, the day of the sexual assault as alleged in the CDM charge, Count 9. Specifically, the State told the jury: "Marijuana, methamphetamine and/or cocaine for a thirteen year old. Is that good for them? Does that cause them to make good life choices?" Later, while arguing the elements for the CSP-II (felony) charge, the State asked, "How did [Victim] describe she felt after she had the meth? [Victim] was numb, floating. I ask you to look at and determine did that help . . . Defendant? Did that cause [Victim] to maybe not make good life choices, or not say something she wanted to say, or not be able to leave?" In other words, the State's theory, as presented in the instructions and argued during closing arguments is that Defendant's conduct in giving Victim "marijuana, methamphetamine, and/or cocaine" contributed to Victim "conduct[ing] herself in a manner injurious to her morals, health, or welfare," in that Victim engaged in sexual

intercourse while still under the influence of the drugs Defendant provided to Victim.

{11} Moreover, the jury instruction for the CDM charge did not distinguish between the methamphetamine, marijuana or cocaine, nor did it identify two separate instances of drug use. *See* UJI 14-954 use note 7 ("Identify the felony, and give the essential elements unless they are covered in an essential element instruction for the substantive offense. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.").

{12} We note that, had the State distinguished the instances of drug use at trial, in the manner which it argues permits Defendant's conviction for a separate count of CDM on appeal, our analysis might be different. *See State v. Lorenzo*, 2024-NMSC-003, ¶ 11, 545 P.3d 1156; *see also State v. Serrato*, 2021-NMCA-027, ¶ 27, 493 P.3d 383 (acknowledging that "punishment for both the predicate and compound offenses is permissible when the [s]tate bases its theory for each offense through *non-unitary conduct*"). However, based on the elements of the charged offenses as specified in the jury instructions, the manner in which the facts were presented at trial, and the lack of facts that might otherwise indicate distinctness, a reasonable conclusion is that the jury relied on the same conduct to convict Defendant of CSP-II (felony) and CDM. *See Elliott*, 2025-NMCA-022, ¶ 34. We, therefore, conclude that the conduct underlying the CSP-II (felony) and CDM convictions was unitary.

2. The Legislature Did Not Intend Multiple Punishments for CSP-II (felony) and CDM under the State's Theory of the Case

{13} Having determined that the conduct relied on to convict Defendant of the two offenses was unitary, we proceed to consider "whether it was the Legislature's intent to punish the two crimes separately." *See State v. Swick*, 2012-NMSC-018, ¶ 11, 279 P.3d 747. We look first to the language of the statutes themselves to determine whether the Legislature has expressly authorized multiple punishments. *See Begaye*, 2023-NMSC-015, ¶ 21. Only if the plain language of one or both statutes expressly authorizes multiple punishments is this step dispositive as to legislative intent. *See id.*

{14} The State argues that the Legislature intended to punish the two crimes separately because the language of the CSP-II (felony) statute—"in the commission of another felony"—clearly contemplates a separate punishment for the predicate felony. We agree with the State generally that CSP-II (felony) is a compound crime and that "[t]he [L]egislature necessarily considered that one who commits the compound crime is always also guilty of another crime, the predicate felony." *See State v. Tsethlikai*, 1989-NMCA-107, ¶ 8, 109 N.M. 371, 785 P.2d 282. However, the question before this Court is whether the Legislature authorized multiple punishments under Sections 30-9-11(E)(5), *and* 30-6-3, where the convictions are based on unitary conduct. *See Swick*, 2012-NMS-018, ¶ 20 ("Thus, the question before this Court is whether the Legislature authorized multiple punishments under

the statutes for attempted murder and aggravated battery with a deadly weapon *for the same conduct*." (emphasis added)). The fact that the Legislature considered that one who commits the compound crime is also guilty of the predicate felony does not automatically mean that the Legislature intended multiple punishments for unitary conduct. *Cf. Tsethlikai*, 1989-NMCA-107, ¶ 9 ("Even though ordinarily consecutive sentences are permissible for a compound crime and a predicate crime . . . special circumstances in a particular case may require merger.").

{15} Here, neither the CSP-II (felony) statute, nor the CDM statute expressly authorize multiple punishments for convictions based on unitary conduct. We thus proceed to apply the rule of statutory construction from *Blockburger v. United States*, 284 U.S. 299 (1932), "to determine whether each provision requires proof of a fact that the other does not." *State v. Branch*, 2018-NMCA-031, ¶ 24, 417 P.3d 1141. If all elements of one statute are "subsumed within the other, then the analysis ends and the statutes are considered the same for double jeopardy purposes." *State v. Silvas*, 2015-NMSC-006, ¶ 12, 343 P.3d 616.

{16} We must first determine whether the modified *Blockburger* test or the strict-elements *Blockburger* test applies. *See Begaye*, 2023-NMSC-015, ¶ 23 (providing that the reviewing court must "examine the statutes at issue to discern whether the modified or strict-elements *Blockburger* test applies," and "should then apply either the modified or the strict-elements test—but not both"). Our Supreme Court has

stated that "it is improper to apply the strict-elements *Blockburger* test in a case where the statute is vague or written in the alternative and that such an application renders the conclusion unreliable." *Id.* (alteration, internal quotation marks, and citation omitted). In *Elliot*, we concluded that the CSP-II (felony) statute "adopts multiple alternatives, providing that CSP-II [(felony)] may be perpetrated in the commission of any other felony," and that the CDM statute "has been held by this Court to be both vague and unspecific in that it criminalizes *any* act or the omission of *any* duty when that act or omission results in a child's delinquency." 2025-NMCA-022, ¶ 37 (internal quotation marks and citations omitted). Accordingly, we apply the modified *Blockburger* test.

{17} In applying a modified *Blockburger* analysis, "we review the statutory language, charging documents, and jury instructions used at trial to ascertain the state's legal theory." *State v. Porter*, 2020-NMSC-020, ¶ 19, 476 P.3d 1201. "If the state's legal theory cannot be ascertained using the charging documents and jury instructions, we also review testimony, opening [statements], and closing arguments to establish whether the same evidence supported a defendant's convictions under both statutes." *Id.*

{18} The State contends the jury instructions clearly establish that Defendant's convictions are not supported by the same evidence because each instruction has distinct elements. But, "the focus in ascertaining the state's theory in any particular

case is not simply whether the elements differ, but whether the same evidence, that is, the same underlying conduct, is used to support both charges." *Begaye*, 2023-NMSC-015, ¶ 28.

{19} Here, the theory for the predicate to CSP-II (felony), as instructed to the jury and argued by the State, was that Defendant committed CDM by giving Victim "marijuana, methamphetamine, and/or cocaine" and, by doing so, "caused [Victim] to conduct herself in a manner injurious to the morals, health, or welfare of [Victim]." As mentioned, the jury was not instructed on either of the separate instances of drug use for the CDM or CSP-II (felony) charges. The jury was simply instructed that "[D]efendant gave [Victim] marijuana, methamphetamine, and/or cocaine" and that "[t]his happened . . . on or about February 3, 2021." To reiterate, during closing arguments, the State blurred the instances of drug use: "Marijuana, methamphetamine and/or cocaine for a thirteen year old. Is that good for them? Does that cause them to make good life choices?"

{20} Under the State's theory, as presented in the instructions and argued by the State, a reasonable conclusion is that the jury relied on the same conduct for the CDM offense as it did for the fifth element of the CSP-II (felony) conviction. The jury found that Defendant committed CDM by giving Victim "marijuana, methamphetamine, and/or cocaine," and, in doing so, caused Victim to "conduct herself in a manner injurious to her morals, health, or welfare" in that it caused her

to "maybe not make good life choices." That same conduct—giving Victim marijuana, methamphetamine, and/or cocaine—also "cause[d Victim] to maybe not make good life choices" in that it resulted in Victim being incapacitated, which assisted Defendant in having sexual intercourse with Victim. Consequently, under the State's theory, the elements of CDM were subsumed within the CSP-II (felony) elements.

{21} When a reviewing court determines "that one offense is subsumed within the other, the inquiry is over" *Id.* ¶ 35 (internal quotation marks and citation omitted), and "punishment cannot be had for both." *Porter*, 2020-NMSC-020, ¶ 20 (internal quotation marks and citation omitted). Thus, we conclude that conviction of Defendant for both the predicate offense of CDM as charged in Count 9 and CSP-II (felony) as charged in Count 1–based on the general provision of narcotics to Victim, as presented by the State at trial—violated Defendant's right to be free from double jeopardy. Consequently, the conviction for CDM as charged in Count 9 must be vacated. *See State v. Montoya*, 2013-NMSC-020, ¶ 55, 306 P.3d 426 (explaining 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"). *Compare* § 30-9-11(E)(5) (providing that CSP-II (felony) occurring during the commission of any other felony is a second degree felony), *and* NMSA 1978, § 31-1-15(A)(5) (2019, amended 2025) (providing the basic sentence of

fifteen years imprisonment for a second degree felony for a sexual offense against a child), *with* § 30-6-3 (providing that CDM is a fourth degree felony), *and* § 31-18-15(A)(13) (providing the basic sentence of eighteen months imprisonment for a fourth degree felony).

C. The CSP-II (felony) and CSCM Convictions

{22} Defendant next challenges the CSP-II (felony) and CSCM convictions, arguing that the evidence did not reflect a touching that was separate and distinct from the penetration, thus, his two CSCM convictions—Counts 4 and 5 for touching Victim's vulva and breast, respectively—violate double jeopardy because the conduct was unitary with the CSP-II (felony) conviction.

{23} Because Defendant's challenge to these convictions is a double description challenge, *see Bernal*, 2006-NMSC-050, ¶ 7, as is his challenge to his CSP-II (felony) and CDM convictions, discussed above, we apply the same standard of review and analysis to this challenge as we did to Defendant's challenge to those convictions and will not restate those standards here.

{24} With these standards in mind, we begin with step one of the *Swafford* test—determining whether the conduct is unitary. To do so we turn to the trial record, *Porter*, 2020-NMSC-020, ¶ 19, yet regrettably this case lacked detailed facts which might assist our inquiry as to the *Herron* factors. Victim—the only witness able to testify to the circumstances that led to the charges herein—testified that the CSP-II

(felony) and the CSCMs occurred in a relatively short time frame, but that she could not recall the order in which they occurred given her intoxication from having consumed the drugs provided to her by Defendant. Regarding Defendant's acts as alleged in the CSP-II (felony) and CSCM charges, Victim testified as follows:

Prosecutor: I want to go back to what you were telling us about. I'm sorry but I need to ask you for a little more detail. Can you explain to me exactly what happened?

Victim: After we did the meth we had smoked weed and he put the coke in the weed and after that, he got up to the kitchen and I tried to get up to go to the bathroom and I, my body felt weird. So, I felt like my legs were like Jello. And I fell down in the hallway.

Prosecutor: And I'm going to stop you there for a minute. When you say he put, you said he put coke in the weed?

Victim: In the weed pipe that he made, yeah.

Prosecutor: Okay. Who is he?

Victim: My uncle Bobby.

Prosecutor: Okay. And when you said that you, that he left the room, what room were you in?

Victim: His room? My uncle Bobby's room.

Prosecutor: Okay. I'm sorry for interrupting. Okay, so you're in the hallway.

Victim: Yes.

Prosecutor: Tell me what happened next.

Victim:	And I remember falling down. So, I go back to his room and sit down. And I remember him coming in and,
. . . .	
Prosecutor:	It's okay, take your time.
Victim:	I was sitting by the mirror.
Prosecutor:	That's okay.
Victim:	And.
Prosecutor:	So, you said you were sitting by the mirror.
Victim:	Yes.
Prosecutor:	Okay. And is that the mirror in his bedroom?
Victim:	Yes ma'am.
Prosecutor:	Bobby's bedroom, right?
Victim:	Yes.
Prosecutor:	Okay. So, tell me then when you're sitting by the mirror, what happens?
Victim:	He had came and sat by me and I was on his phone and I was texting my friends to please hurry up and call me because I was uncomfortable and everybody was busy. Nobody. So, then he started touching on me and everything is kind of blurry after that but I remember I felt like I couldn't move and I remember looking to the mirror and seeing him having sex with me.
Prosecutor:	Okay. You said he, tell me if I'm right and heard right. He started, he started touching you?
Victim:	Mm hmm.

. . . .

Prosecutor: Okay. And what do you mean by touching on you?

Victim: My leg, my thigh, my vagina, my breasts.

Prosecutor: Okay. Do you remember the order in which that occurred?

Victim: I do not know. I was very high.

Prosecutor: Okay, that's okay. And then you talked about looking in the mirror. Can you describe for me what you, what you remember seeing, just with a little more detail?

Victim: I remember seeing him put the condom on.

Prosecutor: Okay.

Victim: And by that time, I already had my pants off. I do not remember how they got off, but I remember I had them off and I seen him inserting his penis inside [inaudible] vagina.

. . . .

Prosecutor: And after you looked in the mirror and saw you were having sex, do you remember what happened after that?

Victim: I just laid there.

Prosecutor: Okay. When you say you just laid there, what do you mean?

Victim: I laid on the floor where I was already laying when he started having sex [inaudible]. And I just, it felt like I couldn't do nothing. I felt like I couldn't move, so I just laid there.

Prosecutor: Do you remember how you were laying?

Victim: I do not know.

Prosecutor: Okay. When, do you remember how long you laid there?

Victim: I do not remember.

Prosecutor: Did anything happen after that?

Victim: Yes . . . he was recording. First, he started recording and then he stopped and took the condom off.

. . . .

Prosecutor: And what do you mean by recording?

Victim: He had a digital camera. Not a phone one, like one of the ones you take pictures.

{25} Victim then testified that she did not remember whether Defendant had to get up to get the camera, but that "it was quick" and that she knew the camera was in the same room. Victim's testimony supplies information as to her location during the touchings and penetration—all of which occurred on the floor of Defendant's bedroom, with the touchings preceding the penetration—but the exact sequencing of Defendant's acts is not completely clear. We also have no information regarding the temporal proximity of the acts, the existence of an intervening event, or whether Defendant's goals for and mental state during the touchings and penetration were distinct. Thus, in light of this testimony we are hard-pressed to determine that the CSP-II (felony) and the CSCM charges are separated by sufficient indicia of distinctness.

{26} The dissent would hold that Victim's testimony provides sufficient detail to apply the *Herron* factors and conclude that Defendant committed two nonunitary and distinct sexual assaults, the first concluding before the second began. We respectfully disagree with the dissent for the reasons set forth in this opinion and more specifically as follows. First, because Defendant was convicted of only one count of CSP, not two, there is no need for this Court to determine whether there was more than one sexual assault committed by Defendant against Victim, and no need for this Court to determine whether the touchings applied to a first or second incidence of sexual assault. Second, neither Defendant nor the State argue on appeal that there was more than one sexual assault; and neither party, particularly the State, argue that the touchings apply to a second distinct sexual assault. Third, the dissent's analysis and conclusion that there were two sexual assaults goes to a determination of whether the State should have charged more than one sexual assault—which it did—but not to a determination of whether there was a double jeopardy violation under the circumstances of this case by Defendant's convictions for CSCM and the lone charge of CSP-II (felony). In other words, the removal of the condom and the recording distinguish between two separate acts of penetration, but not between the touching and penetration.

{27} We acknowledge that the lack of detail in these circumstances is directly a product of Defendant's decision to sexually assault an intoxicated, semi-conscious

victim. Yet, despite the unsurprising lack of facts that might distinguish the acts in this and similar such circumstances, we are not at liberty to depart from our established precedent that prohibits multiple punishments for indistinct conduct. *See State v. Valverde*, 2025-NMCA-024, ¶ 17 n.3, 576 P.3d 395. (observing the challenges in applying a technical application of law to facts in cases where a victim cannot address the separateness of violative contacts, but acknowledging that "[a]bsent concrete guidance from our Supreme Court that cases involving sexual assault are to be treated differently than other, more general cases when reviewed for alleged double jeopardy violations, and in applying the rule of lenity, we cannot now conclude that the victim's perception of distinct harms is alone sufficient to maintain multiple convictions for otherwise indistinct conduct").

{28} In short, the record before us in this case does not support a conclusion that the touchings and the penetration were legally distinct. Accordingly, we hold that Defendant's conduct during the commission of the CSP-II (felony) and the CSCMs was unitary.

{29} As a result, we proceed to the second step of the *Swafford* test, where we must again "determine whether the [L]egislature intended to create separately punishable offenses." 1991-NMSC-043, ¶ 25. If our answer is "in the negative, . . . the double jeopardy clause prohibit[s] multiple punishment in the same trial." *Id.* We conclude that the modified *Blockburger* test is appropriate for this step of the analysis. *See*

Porter, 2020-NMSC-020, ¶ 8 (explaining that the modified *Blockburger* test provides that if the relevant statutes, "can be violated in more than one way, by alternative conduct, . . . we compare the elements of the offense, looking at the [s]tate's legal theory of how the statutes were violated").

{30} Turning to the relevant statutes, neither the CSP-II (felony), nor the CSCM statutes explicitly provide for multiple punishments and each of these statutes can be violated in more than one way. *See* § 30-9-11(E)(5) (CSP-II (felony)); § 30-9-13(D)(1) (CSCM); *see also State v. Mora*, 2003-NMCA-072, ¶¶ 2, 19, 133 N.M. 746, 69 P.3d 256 (stating that the "[L]egislature has not clearly expressed an intention for multiple punishments for unitary conduct that violates [CSP-II (felony) and CSCM statutes]"). Thus, we must apply the modified *Blockburger* test to attempt to discern the State's legal theory as indicated above.

{31} We begin this inquiry by reviewing the charging documents and the jury instructions. *See Porter*, 2020-NMSC020, ¶ 19. Our review of the criminal information and relevant jury instructions does not assist us in determining the State's legal theory. Consequently, we next review the testimony, opening statements, and closing arguments to determine whether the same evidence supported Defendant's convictions under the relevant statutes. *See id.*

{32} Our review of the testimony, opening statements, and closing arguments reveal that during the State's presentation of the evidence of the sexual assault of

Victim, it did not separate or otherwise set apart Defendant's conduct in committing CSP-II (felony) from his conduct in committing the two counts of CSCM. Indeed, the only conclusion we can reach from the testimony, opening statements, and closing arguments is that the State's theory was that the CSCM and CSP-II (felony) occurred contemporaneously, in a short amount of time, in one location, with no intervening events. Thus, it appears that the CSP-II (felony) charge subsumes the CSCM charges and punishment cannot be had for both.

{33} Because the sentences for the CSCM charges, Counts 4 and 5, are shorter than the sentence for CSP-II (felony), Count 1, we remand to the district court to vacate the convictions for Counts 4 and 5 and resentence Defendant. *See Montoya*, 2013-NMSC-020, ¶ 55 (explaining 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"). *Compare* § 30-9-11(E)(5) (providing that CSP-II (felony) occurring during the commission of any other felony is a second degree felony), *and* § 31-18-15 (providing that the basic sentence of fifteen years imprisonment for a second degree felony for a sexual offense against a child), *with* § 30-9-13(D)(1) (providing that criminal sexual contact of a minor is a fourth degree felony), *and* § 31-18-15 (providing the basic sentence of eighteen months imprisonment for a fourth degree felony).

II. Sufficient Evidence Supports Defendant's CSP-II (felony) Conviction

{34} Lastly, Defendant argues that there is insufficient evidence to support his CSP-II (felony) conviction.

{35} "Our standard of review for sufficiency of the evidence is highly deferential to the jury's verdict." *State v. Chavez*, 2024-NMSC-023, ¶ 40, 562 P.3d 521. "In reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. "The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (alteration, internal quotation marks, and citation omitted). "The jury instructions become the law of the case against which the sufficiency of the evidence is to be measured." *State v. Holt*, 2016-NMSC-011, ¶ 20, 368 P.3d 409 (alterations, internal quotation marks, and citation omitted). Consequently, we consider the instruction given to the jury for the CSP-II (felony) charge.

{36} To convict Defendant of CSP-II (felony) the district court instructed the jury that the State had to prove each of the following elements beyond a reasonable doubt:

1. [D]efendant caused [Victim] to engage in sexual intercourse;
2. [D]efendant's act was unlawful;

3. [D]efendant committed the act during the commission of [CDM];

4. The commission of [CDM] was against [Victim];

5. The commission of [CDM] assisted [D]efendant in causing [Victim] to engage in sexual intercourse; and

6. This happened in New Mexico on or about February 3, 2021.

{37} At trial, the jury viewed several video recordings, which showed Defendant vaginally penetrating a female individual while wearing a condom. Defendant conceded that he recorded himself having sexual intercourse with someone, but denied that Victim was the individual in the video. On appeal, Defendant argues that the State did not provide sufficient evidence to establish that he caused Victim to engage in sexual intercourse because (1) the evidence did not sufficiently identify Victim as the individual in the video; and (2) the condoms that were tested for DNA were recovered from a trash can that also contained Victim's used menstrual pads.

{38} We do not review the sufficiency of the evidence by evaluating whether each piece of evidence, standing alone, was sufficient to prove an element of a crime. *See State v. Montoya*, 2005-NMCA-078, ¶ 3, 137 N.M. 713, 114 P.3d 393 (stating that "the evidence is not to be reviewed with a divide-and-conquer mentality"). Rather, we utilize a holistic approach, viewing the evidence in its entirety. *See State v. Graham*, 2005-NMSC-004, ¶ 13, 137 N.M. 197, 109 P.3d 285 (stating that "[appellate courts] view the evidence as a whole").

{39} Here, the evidence is sufficient to find that Defendant caused Victim to engage in sexual intercourse. Victim testified during trial that she remembered looking into the mirror and seeing Defendant "put his penis into [her] vagina." Although it is undisputed that Victim was under the influence of drugs at the time of the assault, concerns about the reliability of a victim's testimony is an issue of credibility, which is left to the province of the jury and not reconsidered on appeal. *Cf. State v. Bryant*, 2023-NMCA-016, ¶ 33, 525 P.3d 367 ("[The d]efendant's contention that his convictions are not supported by sufficient evidence because the eyewitness testimony is 'unreliable' is unavailing. The jury was free to accept or reject the eyewitness accounts."). Moreover, Victim testified that, on the day of the incident, she was wearing a "white and black checkered hoodie." Although the videos did not show either person's face, the female individual in the videos was wearing a black and white checkered top. For these reasons, we conclude that sufficient evidence supports Defendant's CSP-II (felony) conviction.

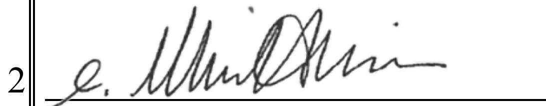
CONCLUSION

{40} We reverse in part and affirm in part. Accordingly, we remand to the district court with instructions to (1) vacate Defendant's CDM conviction and his CSCM convictions; and (2) resentence Defendant in a manner consistent with this opinion.

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

GERALD E. BACA, Judge

1 **WE CONCUR:**

2 

3 **J. MILES HANISEE, Judge**

4 **JANE B. YOHALEM, Judge, concurring in part and dissenting in part**

YOHALEM, Judge (concurring in part and dissenting in part).

{42} I respectfully dissent from the majority's conclusion that Defendant's conviction of both CSP-II (felony) and CSCM violate double jeopardy because the conduct was unitary. *Maj. op.* ¶ 29. I otherwise concur in the opinion.

{43} The majority finds that the evidence did not reflect a touching that was separate and distinct from the penetration of Victim, and therefore concludes that Defendant's two CSCM convictions (Counts 4 and 5) are for conduct that was unitary with the CSP-II (felony) conviction, requiring both counts of CSCM to be vacated. In arriving at this conclusion, the majority applies the *Herron* factors to Defendant's sexual assault of Victim. Due to Victim's intoxication at the time of the sexual assault—intoxication purposely induced by Defendant in order to incapacitate Victim and facilitate the sexual assault—the majority concludes that Victim's testimony did not provide sufficient evidence to support any of *Herron*'s six indicia of distinctness. *Maj. op.* ¶¶ 25-26. The majority notes that Victim's testimony identified a single location for the sexual assault—on the floor of Defendant's bedroom—and that Victim was unable to remember the sequence of the touchings and penetrations sufficiently to support a clear separation between the two types of criminal conduct. *Id.* ¶ 26. On this basis, the majority concludes that the double jeopardy clause requires this Court to vacate both of Defendant's convictions for CSCM, leaving the single conviction for CSP-II (felony).

{44} The majority opinion focuses solely on whether Victim's testimony shows a sufficient change in location or an intervening act between the touching and the sexual penetration. *Maj. op.* ¶ 26. Because the testimony describes both acts occurring together, and does not provide a basis for isolating the touching from sexual penetration, the majority concludes that Defendant's convictions of CSCM and CSP-II (felony) are based on a single, unified sexual assault. *Id.* ¶¶ 26, 29.

{45} I do not believe that the majority has applied the correct analysis given the evidence in this case. Even assuming that Defendant's conduct involved an inseparable mix of CSP-II (felony) and CSCM as the majority found, a conviction of CSCM and a second conviction of CSP-II (felony) do not violate double jeopardy if the testimony at trial established that there were two distinct sexual assaults. *See Phillips*, 2024-NMSC-009, ¶ 38 (holding that distinct conduct is supported by evidence in the record that "one crime is completed before another is committed," or "when the force used to commit a crime is separate from the force used to commit another crime" (internal quotation marks and citation omitted)).

{46} I believe that it is apparent from Victim's testimony that there was not a single sexual assault. There were at least two sexual assaults separated by sufficient indicia of distinctness. Defendant's two convictions of CSCM were based on conduct occurring during the first assault—conduct which was completed before the second sexual assault began. Here, Defendant's conviction of one count of CSCM for the first sexual assault and one count of CSP-II (felony) for the second sexual assault

does not violate double jeopardy. I agree that Defendant's conviction of *two* counts of CSCM for the first sexual assault violates double jeopardy and one of those counts must be vacated. I explain my reasoning.

{47} As the majority opinion states, Victim provided no testimony showing a change in the location of the sexual assault or a lapse in time between the CSCM and the CSP-II (felony); I therefore assume that the two were mixed together during the first sexual assault. After Victim described being sexually assaulted, with both touching and penetration, for a length of time she could not remember, Victim was asked by the State, "[W]hat happened next?" Victim described what happened next this way: "[Defendant] stopped. First, [Defendant] started recording and then he stopped and took the condom off." When asked to explain what she meant by "recording," Victim answered, "[Defendant] had a digital camera, like, like not a phone one." When asked, "Do you remember where the camera was?" Victim testified that she could not remember "if he got up to get it," or if Defendant was able to reach it on the nearby bed, but Victim remembered that the camera was "in the room."

{48} After this brief testimony, where Victim testified that she couldn't remember some of the details, she then returned to these events to testify in greater detail. A few minutes after her initial testimony, she told the prosecutor, "I'm sorry, I do remember." Victim then described the initial "recording" as Defendant filming her while holding the camera in front of his chest. Then "after everything was done,"

and "after he recorded," "he took the condom off and continued to have sex with me and recorded that also." This time, "[h]e was recording from different angles."

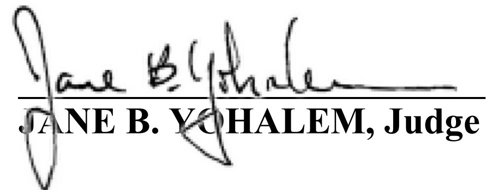
{49} Applying the *Herron* factors, this testimony is sufficient in my view to separate Defendant's conduct into two sexual assaults. First, Victim testified that the first sexual assault stopped while Defendant located the camera and began filming Victim, holding the camera at his chest. When he finished this initial filming, he presumably put the camera down, took off his condom, picked the camera back up, and began to penetrate Victim, this time while recording the sexual assault "from different angles." Victim's testimony supports an interval of time and several intervening events during that interval of time—while Defendant retrieved his camera; while he filmed Victim with the camera held at his chest; while he put down the camera and removed his condom; and while he picked up the camera and again began filming before sexually penetrating Victim.

{50} Moreover, when he resumed the sexual assault, there was a significant change in the nature of the assault—he was filming his penetration of Victim with his camera. The evidence that Defendant filmed the second sexual assault supports another *Herron* factor; a change in the nature of Defendant's conduct and in Defendant's intent from obtaining immediate sexual gratification to recording his performance for later viewing by himself or by others.

{51} In *State v. Neal*, our Supreme Court recently noted the importance of "a shift in intent or the nature of [the defendant's] actions," even if the intervening time

period between a first sexual assault and a second sexual assault was minimal. The Court held that these shifts can be sufficient to support a finding that there were two nonunitary sexual assaults, each supporting a criminal conviction for distinct conduct without violating double jeopardy. *See* ___-NMSC___, ¶ 39, ___ P.3d ___ (S-1-SC-40407, Apr. 6, 2026).

{52} Relying on the evidence described, I would conclude that there was sufficient evidence dividing what the majority views as a single sexual assault into two nonunitary and distinct sexual assaults, the first concluding before the second began. Because there were two distinct sexual assaults, Defendant in my view could properly be charged and convicted of one crime for each of these sexual assaults: CSCM for the first sexual assault, and CSPM II (felony) for the second, filmed sexual assault. So long as Defendant was convicted of only one offense for each sexual assault, the convictions were not based on unitary conduct, and there was no violation of the double jeopardy clause. I would, therefore, allow one of Defendant's convictions for CSCM to stand, vacating only one CSCM conviction. The majority deciding to the contrary, I respectfully dissent.



JANE B. YOHALEM, Judge