

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.

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

Court of Appeals of New Mexico
Filed 5/29/2026 9:47 AM

2 Opinion Number: _____

3 Filing Date: May 29, 2026



Mark Reynolds

4 **No. A-1-CA-42274**

5 **STATE OF NEW MEXICO,**

6 Plaintiff-Appellant,

7 v.

8 **ERIC REVELS,**

9 Defendant-Appellee.

10 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

11 **Joseph A. Montaña, District Court Judge**

12 Raúl Torrez, Attorney General

13 Santa Fe, NM

14 Charles J. Gutierrez, Supervising Assistant Solicitor General

15 Albuquerque, NM

16 for Appellant

17 Bennett J. Baur, Chief Public Defender

18 Santa Fe, NM

19 Steven J. Forsberg, Assistant Appellate Defender

20 Albuquerque, NM

21 for Appellee

1 **OPINION**

2 **BACA, Judge.**

3 {1} In Count 1 of the indictment, Defendant Eric Revels was charged with
4 sexually assaulting B.O. for performing fellatio on B.O. while Defendant provided
5 massage therapy to B.O., contrary to NMSA 1978, Section 30-9-11(F) (2009).¹ In
6 this interlocutory appeal, the State challenges two adverse evidentiary rulings from
7 the district court. The first is an order admitting evidence regarding the prior sexual
8 conduct of B.O., and the second is an order excluding certain testimony about B.O.’s
9 motivation for filing a civil lawsuit against Defendant’s employer. Concluding that
10 the State has the right to appeal both orders, we reverse the district court’s order
11 admitting evidence regarding B.O.’s prior sexual conduct and remand with
12 instructions to conduct an in camera hearing and issue a written order as to the
13 admissibility of the evidence. We also reverse the district court’s order excluding
14 B.O.’s motivation for filing a civil lawsuit against Defendant’s employer.

15 **BACKGROUND**

16 {2} Defendant was employed as a licensed massage therapist. On or about March
17 8, 2022, Defendant was performing a massage on B.O. After the massage, B.O.

¹In Count 2 of the indictment Defendant was also charged with unlawfully and intentionally causing a different victim, P.A., to engage in fellatio, through the use of force or coercion, contrary to Section 30-9-11(F). The district court severed Counts 1 and 2, pursuant to Defendant’s stipulated motion. This appeal relates to the facts alleged in Count 1 only.

1 contacted law enforcement to report that he had been sexually assaulted by
2 Defendant during the massage. Law enforcement interviewed Defendant as part of
3 their investigation. During the interview, Defendant stated that he was giving B.O.
4 a massage, and toward the end of the massage B.O. was aroused and had an erection.
5 Defendant stated that he asked B.O. if it was okay to touch his penis and then began
6 performing oral sex on B.O. Defendant stated that B.O. then “freaked out” and said,
7 “I can’t believe you’re doing this,” and got up and left. Defendant also stated that he
8 had performed oral sex on B.O. at least four or five times during prior massages.
9 Defendant was subsequently indicted and charged with unlawfully and intentionally
10 causing B.O. to engage in fellatio, through the use of force or coercion, contrary to
11 Section 30-9-11(F). The district court made two pretrial evidentiary rulings from
12 which the State appeals. We reserve further discussion of the factual and procedural
13 background of these rulings for our analysis.

14 **DISCUSSION**

15 {3} We first discuss the issues raised in this case concerning the district court’s
16 order admitting the rape shield evidence, and then discuss the issues concerning the
17 district court’s order excluding testimony from B.O. that he was motivated to file a
18 civil lawsuit against Defendant’s employer because B.O. knew of other alleged
19 victims. For each order being appealed, we set out the relevant facts before
20 discussing whether the State has a right to appeal the relevant order.

1 {4} Before proceeding to a discussion of the orders on appeal, we begin with a
2 general discussion of when the State can appeal in a criminal case. “The [s]tate may
3 appeal a decision in a criminal case only when the right to appeal is granted by
4 constitutional provision or by statute.” *State v. Grossetete*, 2008-NMCA-088, ¶ 4,
5 144 N.M. 346, 187 P.3d 692. “Under Article VI, Section 2 of the New Mexico
6 Constitution, the [s]tate, being a party to every criminal proceeding in the district
7 court, is an aggrieved party if it makes a valid claim that the district court’s
8 disposition is contrary to law.” *Grossetete*, 2008-NMCA-088, ¶ 4. Further, “[u]nder
9 [NMSA 1978,] Section 39-3-3(B) [(1972)], the [s]tate may appeal from a decision,
10 judgment or order dismissing a complaint, indictment or information as to any one
11 or more counts or from a decision or order of a district court suppressing or excluding
12 evidence or requiring the return of seized property.” *Grossetete*, 2008-NMCA-088,
13 ¶ 4 (internal quotation marks omitted). With this in mind, we turn to each of the
14 orders being appealed by the State, beginning with the order admitting the rape
15 shield evidence.

16 **I. The Rape Shield Evidence**

17 **A. The Relevant Facts**

18 {5} Before trial, Defendant filed a “Motion to Admit Sexual Conduct of the
19 Complaining Witness Pursuant to Rule 11-412 [NMRA]” (motion to admit) seeking
20 to introduce evidence that B.O. consensually engaged in oral sex with Defendant

1 four or five times prior to the date of the alleged incident (the rape shield evidence).
2 In the motion to admit, Defendant sought to introduce testimony on direct
3 examination about the alleged previous sexual encounters he had with B.O. The
4 State opposed the motion, arguing that evidence about the alleged prior encounters
5 was barred by New Mexico's rape shield statute, NMSA 1978, Section 30-9-16(A)
6 (1993) and Rule 11-412.

7 {6} The district court held hearings on the motion to admit. During the hearings,
8 the State argued that, if the district court believed the evidence was subject to the
9 rape shield requirements established in Rule 11-412 or the rape shield statute, it
10 should conduct an in camera hearing before ruling on admissibility. Defense counsel
11 argued that an in camera hearing was not necessary because B.O. was expected to
12 deny the alleged conduct, but suggested that the appropriate time to conduct an in
13 camera review would be after the State's case in chief, if, at which time, Defendant
14 elected to testify. Following the hearings, the district court issued a written order
15 granting the motion to admit, which stated, in relevant part:

16 The [c]ourt does not find that testimony by . . . Defendant . . . that he
17 and [B.O.] . . . had engaged in four or five prior sexual encounters is
18 evidence subject to Rule 11-412 because this fact is contested by [B.O.]
19 Further, pursuant to Rule 11-412, the [c]ourt finds the testimony from
20 [B.O.] that this kind of contact between him and [Defendant] has never
21 happened before is not evidence subject to Rule 11-412 (A)(1) or (2) as
22 it is not offered to prove [B.O.] engaged in other sexual behavior nor is
23 it evidence offered to prove [B.O.]'s sexual disposition, as it is a
24 contested fact.

1 **B. The State’s Right to Appeal**

2 {7} Article VI, Section 2 of the New Mexico Constitution permits the State to
3 appeal from a disposition contrary to law. *See Grossetete*, 2008-NMCA-088, ¶ 4.
4 “Our cases have limited the construction of ‘disposition contrary to law’ to situations
5 in which a mandatory statute was being violated; dispositions in which the [s]tate
6 has a strong interest in enforcing its statutes, rules of court, or lawful jury verdicts;
7 or dispositions in which a district court’s decision affects matters of grave
8 importance.” *State v. Horton*, 2008-NMCA-061, ¶ 9, 144 N.M. 71, 183 P.3d 956.

9 {8} The State argues that the district court erroneously concluded that testimony
10 about Defendant and B.O.’s allegedly engaging in four or five prior sexual
11 encounters is not rape shield evidence, and that this erroneous conclusion resulted
12 in the district court failing to hold a pretrial in camera hearing as required by the rape
13 shield statute and Rule 11-412. The State further argues that, by admitting the rape
14 shield evidence without having an in camera hearing, the district court rendered a
15 disposition contrary to law by violating a mandatory statute and rule, thereby giving
16 the State a constitutional right to appeal the ruling.

17 {9} Because the district court’s conclusion regarding Defendant and B.O.’s
18 expected testimonies is tied to the question of whether the State has a constitutional
19 right to appeal the order, we turn to the question of whether the district court
20 correctly determined that both Defendant and B.O.’s expected testimonies regarding

1 the alleged prior consensual encounters constitute rape shield evidence. As more
2 fully discussed below, we conclude that Defendant and B.O.’s testimony is rape
3 shield evidence and is therefore subject to the requirements set forth in the rape
4 shield statute and Rule 11-412. We further conclude that the district court rendered
5 a disposition contrary to law by admitting rape shield evidence without adhering to
6 the mandatory requirements outlined in Section 30-9-16 and Rule 11-412, thereby
7 giving the State a constitutional right to appeal the order admitting the rape shield
8 evidence. *See Horton*, 2008-NMCA-061, ¶ 9.

9 **C. Defendant’s and B.O.’s Testimony Regarding Alleged Prior Consensual**
10 **Sexual Encounters Is Evidence That Is Subject to the Requirements of**
11 **Section 30-9-16 and Rule 11-412**

12 {10} To answer whether the proffered evidence is subject to the rape shield
13 requirements outlined in Section 30-9-16 and Rule 11-412, we turn to the language
14 of the statute.² “Statutory interpretation is an issue of law, which we review de
15 novo.” *State v. Duhon*, 2005-NMCA-120, ¶ 10, 138 N.M. 466, 122 P.3d 50. “Our
16 primary goal in interpreting a statute is to give effect to the Legislature’s intent. We
17 look first to the words chosen by the Legislature and the plain meaning of the
18 Legislature’s language.” *Id.* (internal quotation marks and citation omitted). “When
19 the language in a statute is clear and unambiguous, we give effect to that language

² Because the requirements in Section 30-9-16 and Rule 11-412 are substantially the same, we do not separately analyze the district court’s ruling under Rule 11-412.

1 and refrain from further statutory interpretation,” *id.*, “unless this leads to an absurd
2 or unreasonable result.” *State v. Marshall*, 2004-NMCA-104, ¶ 7, 136 N.M. 240, 96
3 P.3d 801.

4 {11} Section 30-9-16(A) governs the admission of evidence of a victim’s past
5 sexual conduct at trial, and provides:

6 As a matter of substantive right, in prosecutions pursuant to the
7 provisions of [NMSA 1978,] Sections 30-9-11 through 30-9-15
8 [(1975, as amended through 2009)] evidence of the victim’s past
9 sexual conduct, opinion evidence of the victim’s past sexual
10 conduct or of reputation for past sexual conduct, shall not be
11 admitted unless, and only to the extent that the court finds that,
12 the evidence is material to the case and that its inflammatory or
13 prejudicial nature does not outweigh its probative value.

14 *See generally State v. Gonzales*, 1996-NMCA-026, ¶ 11, 121 N.M. 421, 912 P.2d
15 297 (stating that Section 30-9-16 “clearly governs only the admission of evidence at
16 trial and not pretrial discovery”).

17 {12} Here, the district court concluded that (1) Defendant’s testimony that he and
18 B.O. had engaged in four or five prior sexual encounters is not rape shield evidence
19 because B.O. denied that he and Defendant had ever engaged in prior consensual
20 sexual conduct; and (2) B.O.’s testimony denying any prior consensual sexual
21 encounters with Defendant is not rape shield evidence because it is not offered to
22 prove that B.O. engaged in other sexual behavior and is not evidence offered to prove
23 B.O.’s sexual disposition.

1 {13} As to testimony by Defendant, if Defendant elects to take the stand at trial, he
2 is expected to testify that B.O. consented to oral sex with Defendant four or five
3 times prior to March 8, 2022. Evidence that B.O. engaged in consensual oral sex
4 with Defendant four or five times prior to the date of the alleged criminal conduct is
5 clearly “evidence of [B.O.’s] past sexual conduct.” *See* § 30-9-16(A); *see also State*
6 *v. Johnson*, 1997-NMSC-036, ¶ 19, 123 N.M. 640, 944 P.2d 869 (explaining that the
7 rape shield statute is “not limited to sex by consent, rather, its unlimited wording
8 applies to all sexual conduct.” (internal quotation marks and citation omitted)). And,
9 because Defendant is arguing that the alleged consensual encounters led him to
10 believe that the March 8, 2022, incident was consensual, the evidence is clearly
11 “offered to prove that [B.O.] engaged in other sexual behavior.” *See* Rule 11-
12 412(A)(1). Accordingly, Defendant’s expected testimony is subject to the
13 requirements outlined in Section 30-9-16.

14 {14} As to testimony by B.O., we understand the district court’s reasoning to be
15 that, since B.O. is expected to deny any prior sexual conduct with Defendant, there
16 is no evidence about B.O.’s prior sexual conduct to admit. We disagree with this
17 reasoning. Section 30-9-16 is “intended to encourage the reporting of rapes by
18 minimizing intrusive inquiry into the personal affairs of the victim.” *State v. Romero*,
19 1980-NMCA-011, ¶ 15, 94 N.M. 22, 606 P.2d 1116, *overruled on other grounds by*
20 *Johnson*, 1997-NMSC-036, ¶ 34. Regardless of whether a victim denies instances of

1 alleged past sexual conduct, inquiring into a victim’s sexual past encroaches upon
2 the victim’s privacy. Thus, while the statute is technically silent as to the significance
3 of whether a victim denies or admits to alleged past sexual conduct, it would
4 undercut the purpose of the statute to create such a distinction. *See id.*

5 **D. The District Court Rendered a Disposition Contrary to Law by**
6 **Admitting Rape Shield Evidence Without First Conducting an In**
7 **Camera Hearing**

8 {15} Having concluded that testimony by B.O. and Defendant about the alleged
9 prior sexual encounters is rape shield evidence, we next evaluate whether the district
10 court rendered a disposition contrary to law in admitting that evidence. The State
11 argues that the district court violated the mandatory requirements outlined in Section
12 30-9-16(C) by admitting rape shield evidence without having an in camera hearing
13 and without issuing a written order stating what evidence may be introduced. We
14 agree and explain. Section 30-9-16(C) provides:

15 If the evidence referred to in Subsection A or B of this section is
16 proposed to be offered, the defendant shall file a written motion prior
17 to trial. The court *shall* hear the pretrial motion prior to trial at an in
18 camera hearing to determine whether the evidence is admissible
19 pursuant to the provisions of Subsection A or B of this section. If new
20 information, which the defendant proposes to offer pursuant to the
21 provisions of Subsection A or B of this section, is discovered prior to
22 or during the trial, the judge shall order an in camera hearing to
23 determine whether the proposed evidence is admissible. If the proposed
24 evidence is deemed admissible, the court shall issue a written order
25 stating what evidence may be introduced by the defendant and stating
26 the specific questions to be permitted.

27 (Emphasis added.)

1 {16} Section 30-9-16(C) does not allow any discretion as to the procedure to be
2 followed when a defendant seeks to introduce evidence of a victim’s past sexual
3 conduct. Where a defendant has filed a written motion prior to trial seeking to
4 introduce evidence of a victim’s past sexual conduct, the statute is clear and
5 unequivocal: the district court *shall* conduct an in camera hearing to determine
6 whether the proposed evidence is admissible. And, if the district court determines
7 that the proposed evidence is admissible, the court *shall* issue a written order stating
8 what evidence may be introduced by the defendant and stating the specific questions
9 to be permitted.

10 {17} In *Autovest, L.L.C. v. Agosto*, 2025-NMSC-001, ¶ 21, 563 P.3d 811, our
11 Supreme Court made clear the meaning of the word “shall” vis à vis statutory
12 interpretation stating,

13 The word shall is ordinarily the language of command. And when a law
14 uses shall, the normal inference is that it is used in its usual sense—that
15 being mandatory. Our Legislature has recognized that shall expresses a
16 duty, obligation, or requirement. As the [United States] Supreme Court
17 has noted, this obligation is normally impervious to judicial discretion.
18 Thus, ‘[s]hall’ will be given its mandatory meaning, unless there are
19 indications in the statute that the mandatory reading is repugnant to the
20 manifest intent of the Legislature.

21 (alterations, omission, internal quotation marks, and citations omitted).

22 Here, Defendant filed a written motion to admit prior to trial seeking to introduce
23 evidence that B.O. consensually engaged in oral sex with Defendant four or five
24 times prior to the date of the alleged incident. Having already concluded that the

1 evidence is subject to the rape shield requirements outlined in Section 30-9-16, we
2 further conclude that the district court rendered a disposition contrary to law by
3 admitting rape shield evidence without adhering to the mandatory requirements
4 outlined in Section 30-9-16. Accordingly, the State has a constitutional right to
5 appeal the order admitting the rape shield evidence in this case. *See Horton*, 2008-
6 NMCA-061, ¶ 9.

7 **E. The Appropriate Remedy Is Remand for an In Camera Hearing**

8 {18} Having concluded that the State has a constitutional right to appeal in this
9 matter, our focus now shifts to the appropriate remedy. For the reasons that follow,
10 we conclude that the appropriate remedy for the statutory violation is to reverse the
11 district court’s order and remand with instructions to conduct the in camera hearing
12 and issue a written order as to the admissibility of the evidence as required by Section
13 30-9-16.

14 {19} As mentioned, Section 30-9-16 is intended to “encourage the reporting of
15 [sexual assaults] by minimizing intrusive inquiry into the personal affairs of the
16 victim.” *Romero*, 1980-NMCA-011, ¶ 15. At the same time, “[i]f application of the
17 rape shield [statute] or rule would conflict with the accused’s confrontation right, if
18 it operates to preclude the defendant from presenting a full and fair defense, the
19 statute and rule must yield.” *Johnson*, 1997-NMSC-036, ¶ 24. As our Supreme Court
20 stated in *Johnson*:

1 The balance that must be achieved in implementing the [rape shield]
2 statute and rule and protecting the rights of a defendant is
3 delicate. . . . [T]he [district] court plays an important role in preserving
4 th[at] delicate balance [and] . . . often plays that role following an in
5 camera hearing. In that role, the court must consider probative value
6 not only in order to identify a theory of relevance, but also in order to
7 evaluate the consequences of either admitting the evidence or excluding
8 it. The prejudice to which the rule speaks most directly is prejudice to
9 the necessary factfinding.

10 *Id.* ¶ 25 (internal quotation marks and citations omitted).

11 {20} An in camera hearing enables the district court to fulfill its role in preserving
12 the balance between minimizing intrusive inquiry into the personal affairs of the
13 victim and protecting the rights of a defendant. In a criminal proceeding, the victim
14 of an alleged crime is not represented by the prosecution or the defendant. While the
15 prosecution certainly has reason to advocate for victims of alleged crimes and is
16 required to protect victim’s rights in a criminal proceeding under the Victims of
17 Crime Act, *see, e.g.*, NMSA 1978, § 31-26-2(C) (1994), ultimately, the prosecution
18 represents the interests of the State of New Mexico, and the interests of the state may
19 not always perfectly align with the interests of a victim of an alleged crime. Thus,
20 the party seeking to introduce evidence of a victim’s past sexual conduct must
21 provide the district court with the evidence the party wishes to introduce, and make
22 cogent arguments as to its admissibility. *See generally Gonzales*, 1996-NMCA-026,
23 ¶ 11 (“Indeed, the statutory language [of Section 30-9-16] presupposes the party
24 seeking to introduce evidence of the victim’s sexual past already possesses such

1 evidence.”). This, in turn, allows the district court to weigh the proffered evidence
2 and make an intelligent ruling as to its admissibility, while minimizing intrusive
3 inquiries into the victim’s personal affairs by narrowly tailoring the questions that
4 may be asked as to any admissible evidence of a victim’s past sexual conduct.

5 {21} For these reasons, we conclude that the appropriate remedy for the statutory
6 violation is for the district court to conduct an in camera hearing to determine the
7 admissibility of any proffered evidence regarding B.O.’s past sexual conduct.
8 Accordingly, we reverse the district court’s order and remand for proceedings
9 consistent with the requirements outlined in the rape shield statute and Rule 11-412.

10 **II. The Order Excluding Civil Lawsuit Evidence**

11 {22} The State also appeals the district court’s order excluding evidence pursuant
12 to Section 39-3-3(B) and argues that the district court abused its discretion by
13 excluding B.O.’s testimony, during cross-examination, about the existence of other
14 victims as his motivation for filing a civil lawsuit against Defendant’s employer. We
15 first set out the relevant facts relating to this issue. Next, we explain why (1) the
16 State has a statutory right to appeal this order; and (2) the district court abused its
17 discretion. Accordingly, we reverse the district court’s order excluding civil lawsuit
18 evidence.

1 **A. The Relevant Facts**

2 {23} At some point after the alleged incident, B.O. filed a civil suit against
3 Defendant’s employer, a public entity. In the civil suit, B.O. alleged that Defendant’s
4 employer knew or should have known that Defendant was inflicting injury and harm
5 to his clients during massage therapy sessions because “[an] earlier incident
6 involving [Defendant] causing harm and injury to another patient . . . was also
7 reported to [Defendant’s employer] prior to the March 8, 2022[,] incident with
8 [B.O.]”

9 {24} In the criminal proceedings, the State filed a motion in limine to exclude any
10 reference to civil actions taken against Defendant’s employer, arguing that
11 information about the civil lawsuit “would be confusing to the jury, would be a waste
12 of time and would cause the introduction of evidence already agreed upon by the
13 parties as being irrelevant and prejudicial.” Defendant opposed this motion and
14 sought to elicit testimony from B.O. that he stood to gain financially from the civil
15 lawsuit. During hearings on the motion in limine, Defendant argued that he should
16 be permitted to ask B.O. on cross-examination about the civil lawsuit and that this
17 evidence “goes to [B.O.’s] credibility [and] goes to motive.”

18 {25} The State explained that, if Defendant asked B.O. “why did you file the
19 lawsuit,” B.O.’s truthful testimony at trial would be that he filed the lawsuit “to
20 protect the other victims as well.” This answer differed slightly from B.O.’s pretrial

1 interviews in which B.O. indicated, in part, that he filed the lawsuit because he
2 wanted to ensure “that this never happens to anyone else.” The district court pointed
3 out that there is a difference between those answers, and directed the State to instruct
4 B.O. that he could not reference the existence of any other victims during his
5 testimony.

6 {26} B.O., through counsel, filed a motion to recuse the district court judge. Among
7 other things, B.O. took issue with the district court restricting B.O.’s testimony about
8 his motivation for filing the civil lawsuit. B.O. explained, “[T]he ‘reason’ or
9 ‘motive’ why [he] could bring a claim against [Defendant’s employer] under
10 [NMSA 1978,] Section 41-4-6[(2007), the building waiver of the Tort Claims Act,]
11 is precisely because the [employer] was on notice prior to March 8, 2022[,], that
12 Defendant . . . had harmed another person during a massage therapy session.” In
13 B.O.’s motion to recuse the district court judge, he described the effect of the district
14 court’s ruling as follows:

15 To permit Defendant . . . to ask about [B.O.’s] motives for filing his
16 civil lawsuit, but then prohibit . . . B.O. from telling the truth about his
17 motives as alleged in the lawsuit concerning other victims would
18 require . . . B.O. to lie—not only a violation of his dignity before the
19 same [c]ourt where he filed his civil lawsuit but also subjecting himself
20 to perjury.

21 In a subsequent hearing before the district court, both the State and B.O.’s counsel
22 explained that B.O. had a sole motivation for filing the civil lawsuit: to protect other
23 victims. They argued that if defense counsel posed an open-ended question to B.O.,

1 for which his truthful answer related to his knowledge of other victims, the district
2 court would be placing B.O. in the impossible circumstance of either having to lie
3 or not answer. They further argued that the defense was on notice of what B.O.'s
4 answer would be, and that if defense counsel elicited the answer through imprecise
5 questioning, Defendant would have opened the door to the testimony and it should
6 be admissible.

7 {27} The district court reiterated its previous order, ruling that B.O. could not give
8 any testimony regarding his knowledge of other victims. The district court issued a
9 written order (the order excluding civil lawsuit evidence) two days later to the same
10 effect stating:

11 [A]ny evidence about how B.O.'s knowledge about the existence of
12 other victims fueled his decision to file a civil lawsuit . . . is suppressed,
13 pursuant to Rules 11-403 and 11-404 NMRA. . . . Though the [c]ourt
14 finds that . . . Defendant can inquire about the motivations of B.O. as it
15 relates to creditability [sic], this [c]ourt finds that the probative value of
16 this additional information related to previous victims is substantially
17 outweighed by the unfairly prejudicial effect to . . . Defendant, and is
18 therefore suppressed.

19 **B. The State's Right to Appeal**

20 {28} The State argues that, pursuant to Section 39-3-3(B), it has a statutory right to
21 appeal the order excluding civil lawsuit evidence. Section 39-3-3(B)(2) permits the
22 State to take an interlocutory appeal from the suppression of evidence that
23 constitutes substantial proof of a material fact. Section 39-3-3(B)(2) states:

1 In any criminal proceeding in district court an appeal may be taken by
2 the state to the supreme court or court of appeals, as appellate
3 jurisdiction may be vested by law in these courts . . . within ten days
4 from a decision or order of a district court suppressing or excluding
5 evidence . . . if the district attorney certifies to the district court that the
6 appeal is not taken for purpose of delay and that the evidence is a
7 substantial proof of a fact material in the proceeding.

8 Our Supreme Court has previously held that Section 39-3-3(B)

9 provides the [s]tate with a statutory right to file an interlocutory appeal
10 from a district court's suppression or exclusion of evidence, a decision
11 that would otherwise be unappealable. If (1) the appeal is filed within
12 ten days of the decision, (2) the decision suppresses or excludes
13 evidence, and (3) the district attorney certifies *to the district court* that
14 the appeal is not taken to delay the trial and that the evidence is
15 substantial proof of a material fact, then the [s]tate has the right to an
16 interlocutory appeal.

17 *State v. Vasquez*, 2014-NMSC-010, ¶ 18, 326 P.3d 447 (citation omitted).

18 {29} Defendant concedes that the State has a statutory right to appeal the order
19 excluding the civil lawsuit evidence, pursuant to Section 39-3-3(B). Although we
20 are not bound by Defendant's concession, we accept it. *See State v. Harrison*, 2010-
21 NMSC-038, ¶ 15, 148 N.M. 500, 238 P.3d 869 (stating that appellate courts are not
22 bound by a party's concessions). Here, the district court's order excluded the
23 introduction of evidence about alleged other victims, the district attorney certified
24 that the appeal is not taken for the purpose of delay and that the evidence that is the
25 subject of this appeal is substantial proof of a fact material in the proceeding.
26 Therefore, we conclude that the State's appeal of the order excluding civil lawsuit

1 evidence is proper under Section 39-3-3(B)(2). *See State v. Sanchez*, 2008-NMSC-
2 066, ¶ 11, 145 N.M. 311, 198 P.3d 337.

3 **C. The District Court Abused Its Discretion by Excluding B.O.’s Testimony**
4 **About the Existence of Other Alleged Victims as His Motivation for Filing**
5 **the Civil Lawsuit**

6 {30} “We review the trial court’s evidentiary rulings for abuse of discretion.” *State*
7 *v. Rojo*, 1999-NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829. “However, our role is
8 not to simply ‘rubber stamp’ the trial court’s determination.” *State v. Torrez*, 2009-
9 NMSC-029, ¶ 9, 146 N.M. 331, 210 P.3d 228. “An abuse of discretion occurs when
10 the ruling is clearly against the logic and effect of the facts and circumstances of the
11 case. We cannot say the [district] court abused its discretion by its ruling unless we
12 can characterize it as clearly untenable or not justified by reason.” *Rojo*, 1999-
13 NMSC-001, ¶ 41 (internal quotation marks and citation omitted).

14 {31} The State asks us to determine that, if Defendant asks B.O. about his motive
15 for filing a civil lawsuit against Defendant’s employer, B.O. should be allowed to
16 truthfully answer that “he filed his lawsuit after learning of ‘other victims’ and
17 wanted ‘to protect the other victims.’” The scope of the State’s requested relief is
18 limited. As explained in the brief in chief, “the State is not arguing in this appeal that
19 it was entitled to introduce any evidence of ‘other victims’ in its case[]in[]chief
20 without invitation. Nor is the State’s position in this appeal that a general question
21 establishing the mere existence of the lawsuit opens the door to an answer about

1 ‘other victims.’” Instead, “[t]he State’s position is, if Defendant chooses to open the
2 door and offer evidence on B.O.’s motive for filing the lawsuit in cross-examination,
3 the district cannot restrict B.O. from responding with his subjective motive.” For the
4 reasons that follow, we find the State’s arguments persuasive.³

5 {32} During hearings on the issue, defense counsel indicated that he could ask
6 open-ended questions during cross-examination of B.O. regarding B.O.’s motive for
7 filing the civil lawsuit, specifically: “Did you [B.O.] file a lawsuit in response to this
8 incident?” and then asking, “What are you trying to get out of it?” In this scenario,
9 the State contends that the district court’s order effectively permits Defendant, with
10 full knowledge of the potential risk of inviting and eliciting harmful testimony, to

³ Defendant’s answer brief is largely nonresponsive to the brief in chief, contending instead that “[t]he fact that [B.O.] has filed a civil suit is relevant to credibility and is admissible . . . [and] does not kick open a barn door permitting every aspect of that suit to be put into evidence”—matters, we observe, the State does not contest on appeal. Defendant otherwise suggests that the district court’s order prohibiting evidence is not appropriate for review before trial because whether the district court errs depends on the actual questions and answers during trial and the district court can revisit its order during trial. We are cognizant of the challenge of ruling on an evidentiary issue that, given its pretrial nature, may or may not actually result in error at the trial itself. However, the State argues that this is the only opportunity for it to seek review of the district court’s order. *See State v. Mendez*, 2009-NMCA-060, ¶ 15, 146 N.M. 409, 211 P.3d 206 (“[I]f the state’s evidence is excluded and the trial proceeds to a verdict that the state loses (i.e., the defendant is acquitted, or it obtains fewer or lesser convictions than it believes is warranted), the state may not appeal.”), *rev’d on other grounds*, 2010-NMSC-044, 148 N.M. 761, ¶ 56, 242 P.3d 328. We agree with the State and reiterate that because the district court’s order suppresses the admission of evidence, it is appropriately before this Court for review. *See* § 39-3-3(B).

1 elicit testimony of B.O.’s potential bias (i.e., that B.O had a motive to lie in order to
2 gain financially from the civil lawsuit), without suffering the risk that B.O. would
3 respond to such questions with what B.O. maintains is his true reason for filing the
4 civil lawsuit (i.e., that B.O. sought to protect other victims). We understand the State
5 to make two broad arguments.

6 {33} First, the State contends, if Defendant asks about B.O.’s motive for filing the
7 civil lawsuit during cross-examination, then evidence about other victims is “of
8 utmost importance” because it rebuts any negative inferences that may be drawn
9 about B.O.’s motive for filing the civil lawsuit—specifically the inference that B.O.
10 is “a money grubber who made false sexual assault allegations so that he could
11 receive compensation.” Evidence of other victims, the State argues, is thus
12 admissible to rehabilitate B.O. and has a nonpropensity purpose (explaining B.O.’s
13 motives)—bringing it outside the prohibitions of Rules 11-404(B) and 11-403. We
14 agree. Given the circumstances in which this evidence might be brought forward by
15 the State, as the State persuasively argues, “Rule 11-404 does not provide a proper
16 basis for the district court’s ruling,” nor is this evidence “unfairly prejudicial.” *See*
17 *State v. Bailey*, 2017-NMSC-001, ¶ 19, 386 P.3d 1007 (observing that “while a
18 propensity inference can arguably be drawn in this case from the [Rule 11-404(B)
19 evidence], the law does not ban admission of potential propensity evidence that also
20 goes to proving something other than [the d]efendant’s propensity to act in a certain

1 way”); *State v. Gallegos*, 2007-NMSC-007, ¶ 21, 141 N.M. 185, 152 P.3d 828
2 (clarifying that “evidence of how a person acted on a particular occasion is not
3 legally relevant when it *solely* shows propensity” (emphasis added)); *State v. Otto*,
4 2007-NMSC-012, ¶ 16, 141 N.M. 443, 157 P.3d 8 (“Evidence is not unfairly
5 prejudicial simply because it inculcates the defendant. Rather, prejudice is
6 considered unfair when it goes *only* to character or propensity.” (internal quotation
7 marks and citations omitted)).

8 {34} Second, the State argues that if Defendant asks an imprecise, subjective
9 question regarding B.O.’s motivations, he has opened the door and is thereby
10 inviting error, especially in light of the fact that Defendant is fully aware that B.O.
11 will say that he filed the civil action to protect other victims. There is little authority
12 in New Mexico on this issue, but there is ample case law from other states supporting
13 the conclusion that a defendant is not prejudiced when their own imprecise
14 questioning elicits harmful testimony from a witness, especially when they have
15 prior knowledge of the danger in their line of questioning. *Cf., e.g., State v.*
16 *Lawrence*, 599 P.2d 754, 756-57 (Ariz. 1979) (In Banc) (finding that a defendant
17 invites error and is not prejudiced when they pose an open-ended question to a
18 witness of the state on cross-examination that elicits harmful testimony, when the
19 defendant had ample warning that such outcome was likely); *Chadwick v. State*, 546
20 P.3d 215, 226 (Nev. Ct. App. 2024) (finding that when a defendant “directly elicited

1 the testimony [of other bad acts] . . . on cross-examination by asking [a witness] an
2 open-ended question about why she did not report the accident” then the defendant
3 “invited any error from the admission of the [bad acts evidence]”). Although these
4 cases involve defendants’ challenges to admitted trial testimony, as opposed to the
5 prosecution’s challenge of a pretrial suppression order, we find these authorities
6 persuasive and the State’s argument on this point well-taken.

7 {35} Given the potential impact of this evidence at trial, we understand the parties’
8 desire for clear guidance on this tricky evidentiary issue. Undoubtedly, Defendant
9 walks a fine line if he decides to ask B.O. about his motivation for filing the civil
10 lawsuit, and, as the district court noted, the manner in which the questions are asked
11 (if asked at all) significantly influences the outcome of the admissibility of this
12 evidence. Ultimately, however, Defendant, during his cross-examination of B.O.
13 should not be permitted to elicit favorable evidence of B.O.’s bias as to why B.O.
14 brought the civil lawsuit without risking opening the door to prejudicial or harmful
15 evidence regarding B.O.’s true motives—his wish to protect other victims. To the
16 extent the district court’s order excluding civil lawsuit evidence ruled otherwise, it
17 was error.

18 {36} For these reasons, we reverse the district court’s order regarding civil lawsuit
19 evidence.

1 **CONCLUSION**

2 {37} We reverse the district court’s order admitting the rape shield evidence and
3 remand with instructions to conduct an in camera hearing and issue a written order
4 as to the admissibility of the evidence as required by Section 30-9-16(C). We further
5 reverse the district court’s order excluding civil lawsuit evidence.

6 {38} **IT IS SO ORDERED.**

7 
8 **GERALD E. BACA, Judge**

9 **WE CONCUR:**

10 
11 **JENNIFER L. ATTREP, Judge**

12 
13 **SHAMMARA H. HENDERSON, Judge**