

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

Court of Appeals of New Mexico

Filed 6/29/2026 10:16 AM

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,



Mark Reynolds  
Clerk of the Court

4 v.

**No. A-1-CA-42273**

5 **JOHN GUADELUPE FIERRO,**

6 Defendant-Appellant.

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

8 **Stan Whitaker, District Court Judge**

9 Raúl Torrez, Attorney General

10 Santa Fe, NM

11 Eric Orona, Assistant Solicitor General

12 Albuquerque, NM

13 for Appellee

14 Bennett J. Baur, Chief Public Defender

15 Joelle N. Gonzales, Assistant Appellate Defender

16 Santa Fe, NM

17 for Appellant

18 **MEMORANDUM OPINION**

19 **BOHNHOFF, Judge Pro Tempore.**

20 {1} Defendant John Guadalupe Fierro was charged in November 2020 with nine

21 counts of criminal sexual penetration (CSP) in violation of NMSA 1978, Section 30-

22 9-11(E)(3), (F) (2009); four counts of aggravated battery against a household

23 member in violation of NMSA 1978, Section 30-3-16 (2018); and one count of

1 criminal damage to the property of a household member in violation of NMSA 1978,  
2 Section 30-3-18 (2009). The victim of all of the alleged crimes was a woman with  
3 whom Defendant had maintained a romantic but “toxic” relationship for several  
4 years (Victim). At a trial in May 2023, the district court directed a verdict in  
5 Defendant’s favor on four of the counts, the jury acquitted him on eight counts, and  
6 the jury failed to reach a verdict on one count of CSP in violation of Section 30-9-  
7 11(F), and the one count of criminal damage to property. At a second trial in January  
8 2024, the jury convicted Defendant of the two remaining counts. Defendant testified  
9 in the first trial, but did not testify in the second trial. Defendant now appeals,  
10 contending the evidence was not sufficient to establish the “force” element of the  
11 CSP charge as brought by the State, the State impermissibly commented on his  
12 decision not to testify, and the district court failed to instruct the members of the jury  
13 not to translate on their own the audio portion of a video recording that was shown  
14 during the trial. We affirm.

15 {2} Because this is a memorandum opinion and the parties are familiar with the  
16 background of the case, we reference only the facts and procedural history that we  
17 deem relevant to our analysis.

18 **I. The Jury’s Finding of CSP Was Supported by Substantial Evidence**

19 {3} In New Mexico, CSP is defined as “the unlawful and intentional causing of a  
20 person to engage in sexual intercourse . . . or the causing of penetration, to any extent

1 and with any object, of the genital . . . openings of another, whether or not there is  
2 any emission.” Section 30-9-11(A). Sections 30-9-11(C) through (E) define specific  
3 categories of CSP, and, as relevant to this case, Subsection (F) defines CSP in the  
4 third degree as “all criminal sexual penetration perpetrated through the use of force  
5 or coercion not otherwise specified in this section.” NMSA 1978, Section 30-9-  
6 10(A) (2005) provides several definitions of “force or coercion,” including “the use  
7 of physical force or physical violence,” and also states that “[p]hysical or verbal  
8 resistance of the victim is not an element of force or coercion.” The State’s theory  
9 of the case, as reflected in the jury instructions stating the facts that the jury had to  
10 find in order to convict Defendant, was that he caused the victim to engage in sexual  
11 intercourse by use of physical force or physical violence, and the sexual intercourse  
12 was unlawful in that it was nonconsensual.

13 {4} The State’s evidence of CSP consisted primarily of a video recording with  
14 audio of the incident taken by a camera that Victim had hidden in the bedroom of  
15 her residence, together with the testimony of Victim, including her translation of  
16 what she and Defendant were saying in Spanish during the incident. The video  
17 recording shows the following:

- 18 1. Defendant is holding Victim’s hand and talking as he leads her into the  
19 bedroom.
- 20 2. As they continue talking, now loudly, Defendant removes Victim’s  
21 pants and sits her on the edge of the bed, then he partially takes off his  
22 clothes. Defendant lifts Victim’s knees, which causes Victim to lay

1 down on her back. Victim reaches down to take her underwear off one  
2 leg, then grabs a pillow and puts it under her head. She keeps her knees  
3 together during this time.

4 3. While the two continue to talk, Defendant places his hands on Victim's  
5 knees and separates them and eventually penetrates her. Defendant  
6 acknowledges in his appellate briefing that, as he opened Victim's  
7 knees, she "seems to resist." They continue talking loudly and have  
8 sexual intercourse. At times, particularly after the intercourse has  
9 ended, Victim cries.

10 {5} Victim testified that she was afraid of Defendant, she did not want to have sex  
11 with Defendant that day, and she never told him that she wanted to have sex with  
12 him that day. Victim also translated into English what she had been saying in Spanish  
13 during the incident: among other statements, Victim told Defendant she "didn't want  
14 to have sex." Victim testified that she did not want Defendant to spread her legs.

15 {6} The Due Process Clause of the United States Constitution's Fourteenth  
16 Amendment requires "proof beyond a reasonable doubt of every fact necessary to  
17 constitute the crime with which [the accused] is charged." *State v. Radosevich*, 2018-  
18 NMSC-028, ¶ 14, 419 P.3d 176 (internal quotation marks and citation omitted).  
19 Thus, "the critical inquiry on review of the sufficiency of the evidence to support a  
20 criminal conviction must be . . . to determine whether the record evidence could  
21 reasonably support a finding of guilt beyond a reasonable doubt." *Jackson v.*  
22 *Virginia*, 443 U.S. 307, 318 (1979). An appellate court's duty on review of a criminal  
23 conviction is "to determine whether *any* rational jury could have found each element

1 of the crime to be established beyond a reasonable doubt.” *State v. Garcia*, 1992-  
2 NMSC-048, ¶ 27, 114 N.M. 269, 837 P.2d 862.

3 {7} In his substantial evidence argument, Defendant challenges the State’s  
4 evidence of “force.” In closing argument, the State had pointed to the force that  
5 Defendant used “putting his hands on [Victim], when he’s forcing her legs apart.”  
6 Defendant posits that not all physical acts amount to use of physical force. While  
7 acknowledging that *State v. Huff*, 1998-NMCA-075, ¶ 12, 125 N.M. 254, 960 P.2d  
8 342, states that criminal sexual contact “do[es] not require a particular quantum of  
9 force,” Defendant reasons that the force used for CSP must be sufficient to negate  
10 consent and must be more than de minimis force, and urges more generally that in  
11 this case the physical acts depicted in the video are “not the type of physical force  
12 the [L]egislature intended to be criminal.”

13 {8} We disagree. Defendant effectively is equating the minimum amount of force  
14 by a perpetrator required for CSP with that needed to overcome some measure of  
15 resistance by the victim. That is not the law in New Mexico. *See State v. Calderon*,  
16 2026-NMCA-026, ¶¶ 22-26, 545 P.3d 530 (explaining that New Mexico’s criminal  
17 sexual penetration statute was modified in 1975 to no longer require proof that a  
18 defendant overcame a victim’s physical resistance to penetration, and instead the  
19 required physical force need only be “minimal, even no more than that required for  
20 consensual sex, so long as the jury finds that, considering all of the circumstances,

1 the victim did not consent and the penetration was involuntary”). As well, Section  
2 30-9-10(A) makes clear, and without qualification, that “[p]hysical or verbal  
3 resistance of the victim is not an element of force or coercion” as those terms are  
4 used in the definition of CSP. Rather, the only force necessary to commit CSP is that  
5 which is used to overcome the victim’s lack of consent to engage in the sexual act.

6 ¶ Further, it is for the jury to decide whether a victim’s involvement in the  
7 sexual act was nonconsensual. “Because an appellate tribunal does not enjoy the  
8 same exposure to the evidence and witnesses as the jury at trial, our review for  
9 sufficiency of the evidence is deferential to the jury’s findings.” *State v. Garcia*,  
10 2011-NMSC-003, ¶ 5, 149 N.M. 185, 246 P.3d 1057. Therefore, while we must find  
11 substantial direct or circumstantial evidence to support a verdict of guilt beyond a  
12 reasonable doubt with respect to every element essential to a conviction, *see State v.*  
13 *Duran*, 2006-NMSC-035, ¶ 5, 140 N.M. 94, 140 P.3d 515, the evidence is viewed  
14 “in the light most favorable to the guilty verdict, indulging all reasonable inferences  
15 and resolving all conflicts in the evidence in favor of the verdict.” *Id.* Crucially here,  
16 a New Mexico court “will not invade the jury’s province as fact-finder by second-  
17 guessing the jury’s decision concerning the credibility of witnesses, reweighing the  
18 evidence, or substituting its judgment for that of the jury.” *Garcia*, 2011-NMSC-  
19 003, ¶ 5 (text only) (citation omitted). Stated another way, while the standard  
20 expressed in *Jackson*, quoted above, requires us to scrutinize the evidence “to ensure

1 that, indeed, a rational jury *could* have found beyond a reasonable doubt” the force  
2 or coercion required to convict Defendant of CSP, *Garcia*, 1992-NMSC-048, ¶ 27,  
3 “[t]his does not involve substituting [our] judgment for that of the jury in deciding  
4 the reasonable-doubt question.” *Id.*

5 {10} The jury saw a video that showed Defendant leading Victim into the bedroom,  
6 removing her clothes, placing her on the bed and on her back, and opening her legs  
7 before penetrating her. The jury also heard the audio on the video recording, which  
8 recorded victim weeping during the episode. As stated, Defendant acknowledges  
9 that Victim “seems to resist” as Defendant opened her legs. The jury also heard  
10 Victim’s testimony that she did not want to have sex and made that statement to  
11 Defendant. The video and testimony constitute substantial evidence that Victim did  
12 not consent to have sex with Defendant. Granted, the video also shows Victim  
13 walking into the bedroom with Defendant holding her hand, and then Victim, not  
14 Defendant, removing her underwear and then placing a pillow under her head after  
15 Defendant puts her on her back. Even if these actions *could* have been viewed by the  
16 jury as evidence of consent, that possibility does not establish that the jury *could not*  
17 have concluded beyond a reasonable doubt that Victim did not consent to have sex  
18 with Defendant. It was for the jury to weigh the conflicting evidence. *Id.* Because  
19 substantial evidence supports the jury’s finding that Defendant committed CSP, we  
20 reject Defendant’s argument.

1 **II. The Prosecution Did Not Impermissibly Comment on Defendant’s**  
2 **Silence**

3 {11} At the beginning of closing argument, following the district court’s instruction  
4 to the jury on the applicable law, the prosecutor showed portions of the video  
5 recording of the incident to the jury, adding as the video was playing commentary  
6 on what the jurors were seeing. The prosecutor then reviewed some of the  
7 instructions given to the jury by the district court. The prosecutor first addressed the  
8 burden of proof instruction, and then moved on to UJI 14-5020 NMRA, stating that  
9 the jurors were to be the judges of the credibility of the witnesses. The prosecutor  
10 then stated: “What I would point out to you is that [Victim’s] testimony is, is not  
11 contested. There’s been no contrary testimony offered.” Defense counsel  
12 immediately objected and, in the bench conference that followed, urged that the State  
13 was shifting the burden of proof and improperly commenting on the fact that the  
14 defense did not put on a case. The district court commented that the statement was  
15 “bordering on [inaudible],” cautioned the prosecutor to be careful, and stated, “I  
16 think the jury can surmise that the only evidence and testimony they have is from  
17 the victim and they’ve been instructed not to consider that [Defendant] did not  
18 testify.”<sup>1</sup> When the prosecutor resumed his closing argument, he reminded the jury

---

<sup>1</sup>The court had included UJI 14-5031 NMRA in its instructions: “You must not draw any inference of guilt from the fact that [D]efendant did not testify in this case, nor should this fact be discussed by you or enter into your deliberations in any way.”

1 that his argument was not evidence, and that the evidence instead was the witness  
2 testimony and the exhibits. He then returned to the topic of credibility, argued that  
3 credibility focused on the reasonableness of the testimony in the context of all the  
4 evidence in the case, pointed out that the Victim’s testimony was supported by the  
5 video recording, and discussed the evidence that bore on her lack of consent.

6 {12} After trial, Defendant filed a motion for new trial based upon the prosecutor’s  
7 comment. In the motion, Defendant argued that the prosecutor’s comment violated  
8 his constitutional right to remain silent. The district court denied the motion,  
9 summarily stating that “the State’s comment did not rise to the level of constitutional  
10 violation.”

11 {13} On appeal, Defendant renews his argument that the prosecutor’s comment  
12 during closing argument violated his right to remain silent.<sup>2</sup> We review the question  
13 de novo. *See State v. Costillo*, 2020-NMCA-051, ¶ 6, 475 P.3d 803.

14 {14} The initial question in our review is whether Defendant preserved his claim  
15 of error in the district court, given the State maintains he did not. “When a defendant  
16 fails to object at trial to comments made by the prosecution about [their] silence, we  
17 review only for fundamental error.” *State v. DeGraff*, 2006-NMSC-011, ¶ 21, 139  
18 N.M. 211, 131 P.3d 61. In either event, the reviewing court will then determine

---

<sup>2</sup>Defendant does not pursue on appeal his objection that the prosecutor’s argument improperly shifted the burden of proof.

1 whether the prosecution commented on the defendant’s protected silence. *See id.*  
2 ¶¶ 21-22. Assuming error occurred, if the claim of error was not preserved, the  
3 reviewing court then determines whether the error was fundamental, i.e., whether  
4 “there is a reasonable probability that the error was a significant factor in the jury’s  
5 deliberations in relation to the rest of the evidence before them.” *Id.* ¶ 21 (internal  
6 quotation marks and citation omitted). If the defendant made a proper objection at  
7 trial and the claim of error was preserved, the reviewing court determines whether  
8 “the error was harmless beyond a reasonable doubt,” *id.* ¶ 22 (internal quotation  
9 marks and citation omitted), i.e., whether there is no “reasonable possibility” that the  
10 comment might have contributed to the conviction. *State v. Johnson*, 2004-NMSC-  
11 029, ¶ 9, 136 N.M. 348, 98 P.3d 998.

12 **A. We Assume Without Deciding That Defendant Preserved His Claim That**  
13 **the State Improperly Commented on His Silence**

14 {15} At trial, defense counsel objected to the prosecutor’s comment that Victim’s  
15 testimony was not contested only on the basis that the comment attempted to shift  
16 the burden of proof and was a comment on the fact that Defendant had not presented  
17 any testimony or other evidence of his own. It was the district court, in the course of  
18 overruling the objection, that alluded to Defendant’s election not to testify. “In order  
19 to preserve an issue for appeal, it is essential that a party must make a timely  
20 objection that specifically apprises the trial court of the claimed error and invokes  
21 an intelligent ruling thereon.” *State v. Jacobs*, 2000-NMSC-026, ¶ 12, 129 N.M. 448,

1 10 P.3d 127, *overruled on other grounds by State v. Martinez*, 2021-NMSC-002,  
2 ¶ 72, 478 P.3d 880. Defendant argues that, in noting that the jury had been instructed  
3 not to consider that Defendant did not testify, the district court apparently understood  
4 that the objection encompassed the constitutional privilege. We question this  
5 inference: the district court may instead have thought of the additional possible  
6 argument on its own. In any event, and assuming the objection was ambiguous, by  
7 not clearly raising the specific objection regarding possible impact of the comment  
8 on Defendant’s right to silence, Defendant deprived the court of the opportunity  
9 immediately and more effectively to correct any possible error with a curative  
10 instruction stating simply that the prosecutor’s statement should be disregarded to  
11 the extent it was understood to be a comment on Defendant’s failure to testify.  
12 However, the question is academic, because we conclude on the merits that the  
13 prosecutor did not comment on Defendant’s protected silence.

14 **B. The State Did Not Violate Defendant’s Right to Silence**

15 {16} Based on the Fifth Amendment to the United States Constitution’s privilege  
16 against testimonial compulsion as well as the Fourteenth Amendment’s due process  
17 clause, “New Mexico courts have long held that a prosecutor is prohibited from  
18 commenting on a defendant’s right to remain silent.” *State v. McDowell*, 2018-  
19 NMSC-008, ¶ 4, 411 P.3d 337. This privilege prevents the state from “ask[ing] the  
20 jury to draw an adverse conclusion from the defendant’s failure to testify.” *DeGraff*,

1 2006-NMSC-011, ¶ 8. In resolving a claim of improper comment on a defendant’s  
2 silence, we focus on both the prosecutor’s intent and the impact of their statement.

3 Specifically, we consider

4       whether the language used was manifestly intended to be or was of such  
5       a character that the jury would naturally and necessarily take it to be a  
6       comment on the accused’s right to remain silent. We evaluate the  
7       statement in context to determine the manifest intention that prompted  
8       the remarks, as well as the natural and necessary impact upon the jury.

9 *Id.* ¶ 8 (internal quotation marks and citations omitted).

10 {17}       Several considerations lead us to conclude that the prosecutor’s comments  
11 during closing argument in this case did not meet this test. First, an appellate court  
12 will “review comments made in closing argument in the context in which they  
13 occurred so that we may gain a full understanding of the comments and their  
14 potential effect on the jury.” *State v. Smith*, 2001-NMSC-004, ¶ 38, 130 N.M. 117,  
15 19 P.3d 254 (internal quotation marks and citation omitted). The prosecutor made  
16 the comment in the context of addressing the Victim’s credibility, and appeared to  
17 be applying UJI 14-5020 (which provides that a witness’s credibility is to be  
18 “considered in the light of all the evidence in the case”) to the Victim’s testimony of  
19 the alleged CSP incident. The prosecutor’s point was that Victim’s testimony was  
20 not contradicted and instead was consistent with and corroborated by the other  
21 evidence presented to the jury, in particular, the video recording. The prosecutor’s

1 manifest intention thus was not to comment on, or suggest an inference from,  
2 Defendant's decision not to testify.

3 {18} Second, the comment was isolated. "The general rule is that an isolated  
4 comment made during closing argument is not sufficient to warrant reversal." *Id.*  
5 (internal quotation marks and citation omitted); accord *State v. Sosa*, 2009-NMSC-  
6 056, ¶¶ 26, 29, 147 N.M. 351, 223 P.3d 348. Third, similarly, any comment on  
7 Defendant's silence, if at all, was indirect. See *DeGraff*, 2006-NMSC-011, ¶ 8  
8 (stating that ambiguous and other indirect comments "are less likely to call a jury's  
9 attention to the defendant's exercise of [their] rights").

10 {19} Fourth, the district court had instructed the jurors immediately prior to closing  
11 arguments that they should not consider during their deliberations the fact that  
12 Defendant did not testify. See *Smith*, 2001-NMSC-004, ¶ 40 (noting that jury had  
13 been instructed not to "draw any inference of guilt from the fact that the defendant  
14 did not testify" and stating that "[j]uries are presumed to have followed the written  
15 instructions" (internal quotation marks and citation omitted)). Finally, in considering  
16 the impact of a claimed comment on a defendant's failure to testify, "We rely upon  
17 the judgment of the trial court because the trial judge is in a much better position to  
18 know whether a miscarriage of justice has taken place and [their] opinion is entitled  
19 to great weight in the absence of a clearly erroneous decision." *Id.* ¶ 32 (alteration,  
20 internal quotation marks, and citation omitted). For these reasons, we conclude that

1 the State did not impermissibly comment on Defendant’s constitutional right to  
2 remain silent.

3 **III. The District Court Did Not Err in Refusing Defendant’s Requested Jury**  
4 **Instruction**

5 {20} During the trial, a juror had submitted a note to the district court, asking  
6 whether the jury would be provided with an English translation of the audio portion  
7 of the video recording into English. After the defense had rested, and while the  
8 district court and counsel were settling jury instructions, defense counsel reminded  
9 the court of the note. Defense counsel expressed concern that jurors might try to  
10 translate on their own the audio portion of the video recording, in particular, the risk  
11 that a juror with minimal command of Spanish would translate poorly what  
12 Defendant and the Victim said in the bedroom, and then share that translation with  
13 other jurors. Counsel suggested that the underlying general purpose of UJI 14-101A  
14 NMRA is to keep jurors from trying to translate evidence in a foreign language on  
15 their own, proposed that the jurors in this case should be instructed with a modified  
16 version of the UJI not to try to translate what was said in the video recording, and  
17 offered to draft such an instruction.

18 {21} The district court declined to give the requested instruction. The court  
19 expressed doubt about what such an instruction would accomplish: as a practical  
20 matter it would be impossible to prevent a juror who is conversant in Spanish to a  
21 greater or lesser extent from hearing and forming an understanding, whether accurate

1 or not, of what was said on the audio; given the secrecy of the jury's deliberations,  
2 there also would be no way to enforce an instruction for such a juror not to discuss  
3 their understanding with other jurors. The court also agreed with the prosecutor's  
4 comment that UJI 14-101A addresses a different situation: where there is an  
5 interpreter, jurors should rely on that interpretation and not use their own translations  
6 to contradict that of the interpreter. Additionally, the court expressed its reluctance  
7 to give an instruction that had not been addressed by our Supreme Court and the  
8 Court's uniform jury instruction committee. However, the court allowed defense  
9 counsel to read the proposed instruction into the record:

10 No matter what language people speak, they have a right to have their  
11 testimony heard and understood. Some of you may speak or understand  
12 Spanish. What the witness may have said in Spanish without  
13 interpretation is not evidence and may not be used by you in any way  
14 in your deliberations. You must evaluate the interpreted testimony as  
15 you would any other testimony. That is, you must not give interpreted  
16 testimony any greater or lesser weight than you would if the witness  
17 had spoken English.

18 {22} Defendant does not contend that during Victim's direct exam, she improperly  
19 translated what was said while she was in the bedroom with Defendant, or more  
20 generally that she should not have been permitted to testify about what they said.  
21 Defendant also does not contend that error occurred because the audio portion was  
22 not translated into English, or alternatively that in the absence of an English

1 translation the audio should not have been played to the jury at all.<sup>3</sup> Therefore, we  
2 limit our consideration to Defendant’s argument that the jurors should have been  
3 instructed not to attempt to translate on their own what Defendant and Victim said  
4 to each other. *See State ex rel. Hum. Servs. Dep’t v. Staples (In re Doe)*, 1982-  
5 NMSC-099, ¶¶ 3, 5, 98 N.M. 540, 650 P.2d 824 (stating that an appellate court will  
6 not consider an argument that is not raised by the appellant). Defendant’s underlying  
7 legal theory is that, even if one or more jurors could translate what was said, their  
8 translation was not in evidence. Consequently, Defendant reasons, the district court  
9 had a duty to instruct the jury not to interpret the audio themselves. Defendant further  
10 argues that the error was not harmless because of the potential that one or more jurors  
11 will inaccurately translate a foreign-language recording.

12 {23} “The propriety of jury instructions given or denied is a mixed question of law  
13 and fact which we review de novo.” *State v. Taylor*, 2024-NMSC-011, ¶ 10, 548  
14 P.2d 82 (internal quotation marks and citation omitted). The State does not dispute

---

<sup>3</sup>This case originally had been assigned to a different district judge. Prior to the first trial, that judge had directed the State to translate the audio of the video recording into English, but due to the poor quality of the recording the State was unable to do so. Defendant at that time had argued that if the audio could not be translated, the video recording should be excluded as evidence. In a September 7, 2021 order, the judge expressed concern about the potential for jurors, in the absence of an authoritative translation, to misunderstand or speculate about what was being said in the video recording; the judge nevertheless found that the probative value of the video recording outweighed the potential for confusion, and therefore ruled that it was admissible. It does not appear that the replacement judge was aware of this procedural history when the issue was raised again during the second trial.

1 that, based on the colloquy between the court and counsel described above,  
2 Defendant preserved his claim of error on this issue. *See State v. Jernigan*, 2006-  
3 NMSC-003, ¶ 10, 139 N.M. 1, 127 P.3d 537 (stating that failure to give requested  
4 instruction is preserved where district court correctly understood the type of  
5 instruction the defendant wanted and that a tendered instruction needed to be  
6 modified to correctly state the law). Accordingly, we review the district court’s  
7 denial of the jury instruction for reversible error. *See State v. Benally*, 2001-NMSC-  
8 033, ¶ 12, 131 N.M. 258, 34 P.3d 1134.

9 {24} It is the duty of a court to properly instruct the jury on the law. *See UJI-*  
10 *Criminal General Use Note*. “Jury instructions must present the law fairly and  
11 accurately.” *State v. Doyal*, 2023-NMCA-015, ¶ 6, 525 P.3d 412. However, any  
12 claim of error in failing to give a jury instruction must be premised on the tender of  
13 a “proper,” that is, correct, statement of the law. *State v. Wilson*, 1973-NMSC-093,  
14 ¶ 20, 85 N.M. 552, 514 P.2d 603; *see State v. Soutar*, 2012-NMCA-024, ¶ 21, 272  
15 P.3d 154 (stating that the appellate court will review claimed error in denial of  
16 proposed jury instructions “to determine whether they correctly state the law”); *State*  
17 *v. Casteneda*, 1982-NMCA-046, ¶ 33, 97 N.M. 670, 642 P.2d 1129 (stating that “to  
18 premise error on the refusal” to give a proffered jury instruction, the defendant “must  
19 tender a legally correct statement of law”). Stated another way, “a defendant has no  
20 right to have a legally incorrect jury instruction read to the jury.” *State v. Nieto*,

1 2000-NMSC-031, ¶ 17, 129 N.M. 688, 12 P.3d 442. It follows that a district court  
2 does not err in denying a requested instruction that does not reflect existing law.

3 {25} Defendant points to language in UJI 14-101A, which provides in part that, if  
4 a court-certified interpreter is used at trial, jurors “must only consider the  
5 interpreter’s English translation, even if you . . . disagree with the interpreter’s  
6 interpretation. What the witness[es] may have said in [the foreign language], before  
7 the interpreter’s interpretation, is not evidence and may not be used by you in any  
8 way in your deliberations.” Defendant relies as well on *Flores v. State*, 299 S.W.3d  
9 843 (Tex. Ct. App. 2009). There, in addressing a court-approved interpreter’s  
10 interpretation and transcription of a murder defendant’s videotaped confession, the  
11 court wrote that:

12 [P]laying the audio in Spanish for the jury was unnecessary.

13 . . . .

14 The interpreter’s rendition of [the defendant’s] statement created the  
15 only permanent record of what was said. . . . It is the translation  
16 presented by the interpreter that creates the record and that ultimately  
17 serves as the basis for any potential appeal. In this case all the jurors  
18 should have been focused on the written translation and not on the  
19 Spanish audio.

20 *Id.* at 855-56. Defendant appears to contend UJI 14-101A and *Flores* reflect a  
21 generally applicable principle that jurors should be instructed not to translate  
22 foreign-language testimony, recordings or records on their own, even where there

1 has been no interpretation by a court-approved interpreter. We reject this argument  
2 for two reasons.

3 {26} First, Defendant provides no legal authority that applies such a rule where a  
4 court-approved interpreter has not translated the foreign language oral statements or  
5 written materials or interpretations that the jury hears or sees. “[A]bsent cited  
6 authority to support an argument, we assume no such authority exists.” *State v.*  
7 *Casares*, 2014-NMCA-024, ¶ 18, 318 P.3d 200. Further, it is not evident that such a  
8 rule should apply in that situation, because the rule’s apparent justification—jurors  
9 should rely on the authoritative interpretation of someone who is shown to have  
10 training and experience with the foreign language and not attempt potentially  
11 contradictory interpretations on their own—is not present. In any event, it is not error  
12 for the district court to decline to give an instruction that is not grounded in existing  
13 law.

14 {27} Second, UJI 14-101A is included in the group of UJIs that are identified as  
15 “Part A. General Explanatory Matters Before and During Trial.” The second  
16 sentence of UJI 14-101A indicates that it is to be read at the beginning of a trial, i.e.,  
17 before the jury hears or receives foreign-language testimony or other evidence: “You  
18 are about to hear a trial in which a court-certified interpreter will interpret for one or  
19 more of the [witnesses].” If Defendant was concerned about the potential for jurors  
20 drawing improper conclusions from, or otherwise improperly considering, the

1 Spanish-language exchange recorded on the video without a court-approved  
2 translation, Defendant should have requested, either at the beginning of the trial or  
3 before the video recording was first played, that the jurors be instructed not to  
4 translate the exchange on their own. This is particularly the case given that the risk  
5 of juror confusion and speculation had been raised prior to the first trial. *See supra*  
6 note 4. Once the jury heard the audio portion of the video recording without  
7 objection, the audio in fact *was* in evidence and the jury was entitled to consider it.  
8 Defendant waived any objection by waiting until after the close of evidence to raise  
9 the issue.<sup>4</sup>

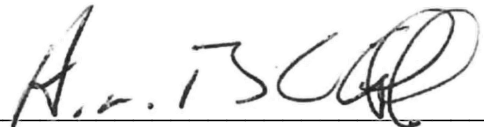
## 10 CONCLUSION

11 {28} For all of these reasons, we affirm Defendant’s convictions for criminal sexual  
12 penetration in violation of Section 30-9-11(F), and criminal damage to the property  
13 of a household member in violation of Section 30-3-18.

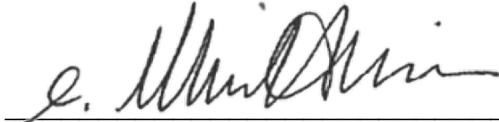
---

<sup>4</sup>The State argues that any error in refusing the requested jury instruction was harmless. The State notes that (1) Victim translated, without objection, the most relevant portions of the conversation in the bedroom—that she told Defendant that she did not want to have sex—and that Defendant does not contend that the translation was inaccurate; and (2) there is no evidence that any juror in fact translated, much less improperly translated, the conversation. Having found no error in the district court’s refusal to give Defendant’s requested jury instruction, it is unnecessary to address this argument further.

1 {29} IT IS SO ORDERED.

2   
3 \_\_\_\_\_  
4 HENRY M. BOHNHOFF, Judge  
Pro Tempore

5 WE CONCUR:

6   
7 \_\_\_\_\_  
8 J. MILES HANISEE, Judge

8   
9 \_\_\_\_\_  
10 KRISTOPHER N. HOUGHTON, Judge