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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico
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No. A-1-CA-40454

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

ANDREW SANDOVAL,

Defendant-Appellant.

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

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OPINION

ATTREP, Judge.

{1} Following a jury trial, Defendant Andrew Sandoval appeals his judgment and sentence on ten counts related to repeated sexual abuse he committed against a child victim. We address three issues in this appeal. First is a threshold jurisdictional question—whether a judgment and sentence is final and appealable if formally severed charges remain pending in the trial court. Because there were severed charges awaiting trial in district court at the time Defendant filed this appeal, this Court sua sponte raised the issue of our jurisdiction. We conclude that this Court's decisions in *State v. Gutierrez*, 2011-NMCA-088, ¶¶ 3-10, 150 N.M. 505, 263 P.3d 282, and *State v. Catt*, 2019-NMCA-013, ¶¶ 33-36, 435 P.3d 1255—each of which held that the judgment and sentence in question was an appealable order, notwithstanding that there were charges pending retrial in district court—apply to formally severed charges like those at issue in this case and, as a result, jurisdiction is proper.

{2} The second issue we address is Defendant's ineffective assistance of counsel claim. Defendant argues that his trial counsel was "egregiously ineffective" by advancing a legal theory that Defendant contends was plainly unavailing as to the most severe charges he faced. Defendant's ineffective assistance claim rests on his contention that our Supreme Court's decision in *State v. Grogan*, 2007-NMSC-039,

¶¶ 9-19, 142 N.M. 107, 163 P.3d 494—which recognized a narrow exception to the ineffective assistance framework set forth in *Strickland v. Washington*, 466 U.S. 668, 687-96 (1984)—governs his claim, thereby relieving him of the burden to establish prejudice from his trial counsel's incompetence. We reject Defendant's premise and conclude that Defendant's ineffective assistance claim, relating to his trial counsel's misapprehension of law, is governed by *Strickland*, not *Grogan*. As a result, Defendant's ineffective assistance of counsel claim fails.

{3} The third issue we address is Defendant's double jeopardy challenge. Defendant argues that three of his convictions for criminal sexual contact of a minor resulted in multiple punishments for the same conduct as two of his convictions for criminal sexual penetration of a minor. Defendant's double jeopardy claim rests on his contention that, because of the way the charges were structured, he was only charged with, and could only be convicted of, a single "assaultive episode" or "course of conduct." We reject the premise underlying Defendant's double jeopardy challenge as unsupported. Because the evidence at trial established that Defendant subjected the child victim to repeated sexual abuse during the relevant charging period, and because the State's theory at trial did not narrow the jury's consideration of the evidence to a single assaultive episode or course of conduct, Defendant's double jeopardy claim fails. We affirm.

BACKGROUND

{4} We provide only a brief background and leave additional discussion of the relevant facts for our analysis of the issues. Defendant was charged in a twenty-count indictment with sexual offenses committed against two minors, V.M. and N.G. This appeal is taken from Defendant's trial on the eighteen charges related to V.M., which were formally severed from two charges related to N.G. As for the counts pertaining to V.M., Defendant was charged with four counts of criminal sexual contact of a minor (CSCM) in the second degree (unclothed intimate parts, child under thirteen years of age), NMSA 1978, § 30-9-13(B)(1) (2003); one count of CSCM in the third degree (child under thirteen years of age), § 30-9-13(C)(1); four counts of criminal sexual penetration of a minor (CSPM) in the first degree (child under thirteen years of age), NMSA 1978, § 30-9-11(D)(1) (2009); two counts of CSCM in the fourth degree (child thirteen to eighteen years of age), § 30-9-13(D)(1); two counts of CSPM in the second degree (use of force or coercion, child thirteen to eighteen years of age), § 30-9-11(E)(1); two counts of contributing to the delinquency of a minor (CDM), NMSA 1978, § 30-6-3 (1990); one count of child solicitation by electronic communication device, NMSA 1978, § 30-37-3.2(A) (2007); one count of enticement of a child, NMSA 1978, § 30-9-1 (1963); and one count of tampering with evidence, NMSA 1978, § 30-22-5 (2003).

{5} Evidence at trial established that V.M. was a close friend of Defendant's daughter (S.S.), and that V.M. frequently spent the night at Defendant's home. V.M. testified that Defendant would buy her and S.S. alcohol and marijuana. V.M. also testified that she, S.S., V.M.'s brother, and Defendant would all sleep in Defendant's bedroom. V.M. and S.S. slept in the bed, and V.M.'s brother and Defendant, who was either naked or in his underwear, slept on the floor. V.M. testified that, when she spent the night at Defendant's home, Defendant would wake her up and sexually abuse her when everyone else was asleep. V.M. testified that this abuse occurred when she was twelve and thirteen years old.

{6} The abuse came to light when S.S.'s mother contacted authorities after she found a concerning video on S.S.'s cell phone, in which Defendant was naked and V.M. was smearing a white paste on his chest and arms. On the same day that law enforcement recovered the video from S.S.'s phone, Defendant texted V.M., "don't say anything" and to "[e]rase everything." Police ultimately uncovered sexually-explicit text messages from Defendant on V.M.'s cell phone. When interviewed by law enforcement, Defendant said that his cell phone "fell off the bridge in the Rio Grande" the day before he spoke to police.

{7} The defense called S.S., as well as a number of Defendant's family members, as witnesses. Upon defense counsel's motion, the district court directed not guilty verdicts on four counts. The jury acquitted Defendant of three additional counts for

sexual offenses against V.M. when she was thirteen.[1] Defendant was convicted of three counts of CSCM in the second degree (unclothed intimate parts, child under thirteen years of age), § 30-9-13(B)(1); one count of CSCM in the third degree (child under thirteen years of age), § 30-9-13(C)(1); three counts of CSPM in the first degree (child under thirteen years of age), § 30-9-11(D)(1); two counts of CDM, § 30-6-3; and one count of tampering with evidence, § 30-22-5. For these convictions, Defendant was sentenced to sixty years in prison, with twenty-four years suspended. Defendant appeals.

DISCUSSION

{8} Before we address Defendant's arguments that he received egregious ineffective assistance of counsel and that some of his convictions violate the double jeopardy right to be free from multiple punishments, we resolve the jurisdictional issue of whether Defendant's judgment and sentence was final and appealable at the time Defendant filed this appeal.

I. Jurisdiction

{9} Upon the parties' stipulation, the district court entered an order severing the counts pertaining to V.M. from the counts pertaining to N.G., permitting the State to try Defendant in separate trials for each set of severed counts. *See generally* Rule

[1]Although the jury convicted Defendant of one count of CSPM in the second degree (use of force or coercion, child thirteen to eighteen years of age), the State later dismissed this charge.

5-203(C) NMRA (providing that "[i]f it appears that a defendant or the state is prejudiced by a joinder of offenses . . . , the court may order separate trials of offenses"). All counts remained under the same district court case number. Defendant proceeded to trial on the charges pertaining to V.M., was convicted and sentenced as described, and was immediately remanded into custody to begin serving his sentence. Defendant appealed the judgment and sentence for the convictions pertaining to V.M. The severed counts pertaining to N.G., however, remained pending before the district court at the time the present appeal was filed.

{10} This Court sua sponte directed the parties to brief the issue of whether these pending charges affected the finality of the judgment and sentence before us. *See Gates v. N.M. Tax'n & Revenue Dep't*, 2008-NMCA-023, ¶ 9, 143 N.M. 446, 176 P.3d 1178 ("Although neither party in this case advanced the issue of finality, we are able to raise jurisdictional issues sua sponte."). Defendant argued, and the State agreed, that the judgment and sentence before this Court is final and appealable and that this Court has jurisdiction. Although we are not bound by the State's concession, we agree that jurisdiction is proper. *See State v. Guerra*, 2012-NMSC-027, ¶ 9, 284 P.3d 1076 (observing that the appellate court is not bound by a party's concession but agreeing with the conceding party's position); *State v. Romero*, 2014-NMCA-063, ¶ 4, 327 P.3d 525 (explaining, parenthetically, that this Court would "analyz[e]

a jurisdictional issue relative to finality, despite the parties' agreement as to the matter").[2]

{11} Whether this Court has jurisdiction to hear an appeal is a legal question determined de novo. *See State v. Heinsen*, 2005-NMSC-035, ¶ 6, 138 N.M. 441, 121 P.3d 1040. In criminal cases, "an appeal may be taken by the defendant to the supreme court or court of appeals . . . within thirty days from the entry of any *final* judgment." NMSA 1978, § 39-3-3(A)(1) (1972) (emphasis added). "As a general rule, an order or judgment is not considered final unless it resolves all of the factual and legal issues before the court and completely disposes of the case." *Heinsen*, 2005-NMSC-035, ¶ 14; *see also id.* (providing that "[t]he purpose of finality is to prevent piecemeal appeals or appeals of issues that may be moot after further proceedings in the lower court"). This has been described as "the 'last act' rationale for the finality rule." *State v. Durant*, 2000-NMCA-066, ¶ 7, 129 N.M. 345, 7 P.3d

[2]Prior to briefing being completed in this case, a judgment and sentence as to the counts pertaining to N.G. was entered by the district court. Given this, the jurisdictional issue we identified in our briefing order is now moot. *See generally State v. Heinsen*, 2005-NMSC-035, ¶ 14, 138 N.M. 441, 121 P.3d 1040 (providing that an order that "completely disposes of the case" is a final order). Nevertheless, because this issue is capable of repetition yet evading review, as evidenced by this issue becoming moot prior to appellate briefing being completed, and the finality and appealability of criminal judgments is a matter of substantial public interest affecting the administration of justice, we exercise our discretion to decide the jurisdictional issue presented in this case. *See generally State v. Booth*, 2026-NMCA-062, ¶¶ 8-10, 590 P.3d 497 (exercising this Court's discretion to decide a moot sentencing issue because it was "an issue of substantial public interest that is also capable of repetition yet evading review").

495. In view of this construction of the finality rule, the severed charges pertaining to N.G., which remained pending before the district court at the time of Defendant's appeal, arguably rendered the appealed judgment and sentence non-final. However, this Court in *Gutierrez*, 2011-NMCA-088, ¶¶ 3-10, and *Catt*, 2019-NMCA-013, ¶¶ 33-36, rejected this result when addressing jurisdictional questions substantially similar to the one in this case. For the reasons that follow, we conclude *Gutierrez* and *Catt* control here.

{12} In *Gutierrez*, the defendant was convicted of one count in a multi-count indictment, with several counts resulting in a mistrial. 2011-NMCA-088, ¶ 1. The defendant appealed his judgment and sentence on the single count of conviction (first judgment); during the pendency of the appeal, the defendant was retried, convicted, and sentenced on the remaining convictions (second judgment). *Id.* ¶ 5. In his appeal of the second judgment, the defendant argued that the district court lacked jurisdiction to proceed with retrial of any of the remaining charges during the pendency of his appeal of the first judgment. *Id.* ¶¶ 2-10. In rejecting the defendant's position, this Court also opined on the issue of whether the first judgment was a final, appealable order. While acknowledging the "last act" rationale for the finality rule, this Court in *Gutierrez* determined that the defendant had a right to an immediate appeal of the first judgment. *See id.* ¶¶ 7, 10. The Court explained:

> As to [the original conviction], the criminal trial process was complete, and the judgment and sentence filed was a final order as to that charge.

> [The d]efendant thus had an appealable judgment with respect to that conviction . . . . As a matter of right, [the d]efendant could and did appeal the conviction on that single count.

Id. ¶ 10. Simply put, *Gutierrez* concluded that a defendant has an appeal as of right from a judgment and sentence even though other counts remain pending retrial.

{13} In *Catt*, this Court reached the same conclusion based on the "sufficiently aggrieved" exception to the "last act" rationale for the finality rule. 2019-NMCA-013, ¶¶ 35-36. Under that exception, this Court has "recognized that an appeal may be taken 'when the consequences of the order that is not the last contemplated order in the case are sufficiently severe that the aggrieved party should be granted a right to appeal to alleviate hardship that would otherwise accrue if the appeal were delayed.'" *Id.* ¶ 35 (quoting *Durant*, 2000-NMCA-066, ¶ 8). In *Catt*, the defendant was tried, convicted, sentenced, and immediately remanded to begin serving a four-year term of incarceration on a single felony count. *Id.* ¶ 36. The defendant appealed this judgment and sentence, but additional counts remained pending retrial in district court, due to jury disagreement at the defendant's first trial. *See id.* ¶¶ 2-4, 36. The state in *Catt* argued that "even though the district court entered a judgment and sentence on [one count], the judgment did not dispose of all issues of law and fact to the fullest extent possible and, thus, is non-final." *Id.* ¶ 34. This Court rejected the state's argument and, applying the "sufficiently aggrieved" rationale, concluded that the judgment and sentence in question was "sufficiently final to be appealable." *Id.*

¶¶ 35-36. This Court reasoned, "Given that [the d]efendant has been convicted of a felony and incarcerated, there are immediate and definite consequences—both direct and collateral. [The d]efendant is 'sufficiently aggrieved' to permit her immediate appeal from the judgment and sentence on [the one count]." *Id.* ¶ 36.

{14} We conclude that the reasoning from *Gutierrez* and *Catt* applies to Defendant's judgment and sentence that is the subject of this appeal. Even though the severed counts pertaining to N.G. were pending in district court when Defendant filed the instant appeal, Defendant had been convicted and sentenced on ten felony counts pertaining to V.M. and immediately remanded to begin serving his term of incarceration for these convictions. As with *Gutierrez*, "the criminal trial process was complete, and the judgment and sentence filed was a final order as to [the charges pertaining to V.M.]." *See* 2011-NMCA-088, ¶ 10. Likewise, the same "immediate and definite consequences—both direct and collateral"—at play in *Catt* are equally applicable to the judgment at issue in this appeal. *See* 2019-NMCA-013, ¶ 36.

{15} The distinguishing feature between this case and *Gutierrez* and *Catt*—that the pending counts here were the result of a formal severance order while the pending counts in *Gutierrez* and *Catt* were the result of mistrials—does not affect the applicability of these decisions. Indeed, because the district court formally severed the charges pertaining to N.G., two separate trials were explicitly contemplated, with

two separate judgments being likely.[3] *See generally* Rule 5-203(C). Under such circumstances, where charges have been formally severed, numerous courts have concluded that the imposition of a judgment and sentence on one set of severed charges is a final, appealable order, notwithstanding that the other set of severed charges remains pending. *See, e.g.*, *United States v. Powell*, 24 F.3d 28, 30-32 (9th Cir. 1994) (explaining that the federal equivalent to Rule 5-203(C) "contemplates the need for two separate trials when severance occurs[, and a]ccordingly, each conviction on severed counts should be separately appealable upon the imposition of sentence"; and concluding that "[w]hen sentence was imposed on the severed counts, [the defendant] was entitled to appeal because there was nothing left to be done but to enforce the sentence[, and t]he fact that he had not yet been tried on the remaining count did not preclude him from appealing the convictions after the first trial"); *State v. Smith*, 785 P.2d 1081 (Or. Ct. App. 1990) (concluding that "when

[3]Defendant requests this Court to provide guidance to the district courts and to direct them to avoid the approach to severance taken here—in which the district court severed charges under the same case number and proceeded with sentencing following trial on the first set of charges, rather than either assigning a new case number to the severed counts or waiting until all counts were resolved to issue a judgment and sentence. Defendant's brief does not discuss possible countervailing policy concerns—such as the inability of a convicted defendant to earn good time credit were the district court to postpone imposition of a judgment and sentence. *See generally State v. Swayne*, 2025-NMSC-047, ¶ 12, 580 P.3d 192. And the State did not respond to Defendant's request for guidance. In the absence of full briefing, we decline to opine on this issue. *See State v. Guerra*, 2012-NMSC-014, ¶ 21, 278 P.3d 1031 (providing that appellate courts are not obligated to review unclear or undeveloped arguments).

. . . charges [are] severed, they bec[o]me separate cases, so . . . the first trial resulted in a final judgment on the offenses that had been tried and left jurisdiction over the remaining charges in the [trial] court"); *State v. Tomlinson*, 938 N.W.2d 279, 284-85 (Minn. Ct. App. 2019) (observing that a final judgment and sentence resolving only one count was appealable despite not resolving severed charges that remained pending before the trial court); *People v. Barajas*, 2021 COA 98, ¶¶ 14-15, 497 P.3d 1078 (discussing the difference between a bifurcated trial and severed charges, and providing that severed charges "proceed on separate tracks and, in the event of a conviction, are subject to independent appeals"); *see also, e.g.*, *United States v. Abrams*, 137 F.3d 704, 706-07 (2d Cir. 1998) (concluding that a judgment and sentence was a final, appealable order because "[a]lthough the litigation as framed in the indictment may not yet have run its course, the counts of conviction have been resolved and the sentence is ready for execution[, and] . . . [t]he unresolved counts *have in effect been severed*, and will be resolved another time in a separate judgment" (emphasis added)), *cited approvingly in Catt*, 2019-NMCA-013, ¶ 36 n.7.

{16} In sum, we apply *Gutierrez* and *Catt* and conclude that Defendant's judgment and sentence on the counts pertaining to V.M. was a final, appealable order, notwithstanding the fact that the severed counts pertaining to N.G. remained pending at the time Defendant appealed.

II. Ineffective Assistance of Counsel

{17} We turn now to Defendant's contention that he received ineffective assistance of counsel. Specifically, Defendant argues that his trial counsel was "openly and flagrantly" incompetent by advancing legal arguments inconsistent with the law controlling CSPM of a child under thirteen, such that reversal is mandated without the usual showing of prejudice. In so arguing, Defendant contends his ineffective assistance of counsel claim is not governed by the framework set forth in *Strickland*, 466 U.S. at 687-96, which typically controls such claims, but instead is governed by our Supreme Court's decision in *Grogan*, 2007-NMSC-039, ¶¶ 9-19, which recognized a limited exception to the *Strickland* standard. Our review of this issue is de novo. *See State v. Montoya*, 2015-NMSC-010, ¶ 57, 345 P.3d 1056 ("Claims of ineffective assistance of counsel are reviewed de novo."). For the reasons that follow, we reject Defendant's premise that his ineffective assistance claim is not governed by *Strickland* and, in light of this, conclude reversal is not warranted.

A. The Law Governing Ineffective Assistance of Counsel Claims

{18} "In all criminal prosecutions, the accused has the right to the effective assistance of counsel." *Kerr v. Parsons*, 2016-NMSC-028, ¶ 2, 378 P.3d 1. This right is guaranteed by the Sixth Amendment to the United States Constitution and Article II, Section 14 of the New Mexico Constitution. The United States Supreme Court in *Strickland* set out a two-prong test to govern claims that "counsel's assistance was

so defective as to require reversal of a conviction." 466 U.S. at 687. To make out a claim of ineffective assistance of counsel under *Strickland,* a criminal defendant must establish that: (1) "counsel's representation fell below an objective standard of reasonableness," *id.* at 688; and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694. In adopting this two-prong test, the Supreme Court emphasized the purpose of "the constitutional requirement of effective assistance"—"to ensure a fair trial—as the guide." *Id.* at 686. Thus, the Court reasoned, "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* "Moreover, because we presume that the lawyer is competent to provide the guiding hand that the defendant needs, the burden rests on the accused to demonstrate a constitutional violation." *United States v. Cronic*, 466 U.S. 648, 658 (1984) (citation omitted); *see Lukens v. Franco*, 2019-NMSC-002, ¶ 17, 433 P.3d 288 ("It is the defendant's burden to show both incompetence and prejudice."); *see also Strickland*, 466 U.S. at 689 ("[T]he defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (internal quotation marks and citation omitted)). "Without proof of both deficient performance and prejudice to the defense," the Supreme Court concluded, "it could not be said that

the . . . conviction 'resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable,' and the . . . conviction should stand." *Bell v. Cone*, 535 U.S. 685, 695 (2002) (quoting *Strickland*, 466 U.S. at 687)).

{19} There are, however, narrow exceptions to the two-prong *Strickland* test that have been recognized by the United States Supreme Court and our Supreme Court. *See Florida v. Nixon*, 543 U.S. 175, 190 (2004) (citing, among other authorities, *Cronic*); *Grogan*, 2007-NMSC-039, ¶¶ 10-13 (same). In *Cronic*, which was issued the same day as *Strickland*, the United States Supreme Court explained, "There are . . . circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 U.S. at 658. The *Cronic* Court recognized three such circumstances: (1) "the complete denial of counsel . . . at a critical stage of [the] trial," *id.* at 659; (2) where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," *id.*; and (3) "where counsel is called upon to render assistance under circumstances where [even] competent counsel very likely could not," *Bell*, 535 U.S. at 696 (citing *Cronic*, 466 U.S. at 659-62).[4] *See also Grogan*, 2007-NMSC-039, ¶¶ 12-13 (setting out the exceptions to *Strickland* recognized in *Cronic*). "Apart from circumstances of that magnitude,

[4]A "more limited[] presumption of prejudice" was identified by the Supreme Court "if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance." *Strickland*, 466 U.S. at 692 (internal quotation marks and citation omitted); *see Cronic*, 466 U.S. at 662 n.31.

however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." *Cronic*, 466 U.S. at 659 n.26. Our Supreme Court, relying on *Cronic* as well as United States Supreme Court precedent involving conflicted counsel, recognized an additional exception to the *Strickland* standard—namely, that "when a trial court witnesses gross or obvious incompetence," the defendant is relieved of showing prejudice "because it is presumed." *Grogan*, 2007-NMSC-039, ¶ 15. It is *Grogan*'s exception to the *Strickland* standard on which Defendant rests his ineffective assistance of counsel claim.

B. Defendant's Ineffective Assistance of Counsel Claim Is Governed by *Strickland* and It Fails for Lack of Any Argument Under That Standard

{20} In this case, Defendant contends that his trial counsel "exhibited egregious ineffectiveness," as contemplated in *Grogan*, by advancing legal arguments inconsistent with the law controlling CSPM of a child under thirteen. Defendant's ineffective assistance claim is based primarily on his trial counsel's performance at the final pretrial hearing,[5] during which, Defendant argues, it became apparent that

[5] Defendant also briefly asserts that there were two other examples of "egregious ineffectiveness" that arose at trial: (1) it came to light that defense counsel had not reviewed the video of Defendant's interview with law enforcement, and (2) defense counsel appeared to be falling asleep at two points during the trial.

As for the first claim regarding defense counsel's failure to examine the interview, Defendant does not explain why trial counsel's performance in this regard should be evaluated under the *Grogan* standard, or provide any legal authority to support this approach. *See State v. Vigil-Giron*, 2014-NMCA-069, ¶ 60, 327 P.3d

his attorney was unaware of the applicable law for CSPM of a child under thirteen. Despite the fact that this offense imposes strict liability, defense counsel explained that he intended to argue at trial that V.M. initiated a sexual relationship with Defendant, and counsel sought a jury instruction on mistake of fact as to V.M.'s age. *But see Perez v. State*, 1990-NMSC-115, ¶ 11, 111 N.M. 160, 803 P.2d 249

1129 (providing that an appellate court "will not consider an issue if no authority is cited in support of the issue and that, given no cited authority, we assume no such authority exists"); *Guerra*, 2012-NMSC-014, ¶ 21. We, nevertheless, observe that ineffective assistance of counsel claims based on a defense attorney's failure to examine the state's evidence are of the type typically subject to the *Strickland* standard. *See Bell*, 535 U.S. at 697-98 (rejecting the petitioner's argument that his ineffective assistance of counsel claim was not governed by *Strickland* based on an observation that the petitioner's claim was "plainly of the same ilk as other specific attorney errors" that are "subject to *Strickland*'s performance and prejudice components"); *see also, e.g.*, *State v. Miera*, 2018-NMCA-020, ¶¶ 29-36, 41-44, 413 P.3d 491 (applying the *Strickland* standard where the defense counsel "never took steps to obtain a copy" of an evaluation the state intended to use at trial, "and did not even review it until moments before" the defendant testified, and the defense counsel failed, prior to trial, to investigate facts potentially suggesting that a victim's allegations were false); *State v. Martinez*, 2007-NMCA-160, ¶ 23, 143 N.M. 96, 173 P.3d 18 (rejecting, under the *Strickland* standard, the defendant's claim of ineffectiveness based on, inter alia, "counsel's failure to review" the victim's recorded safehouse interview because it "does not seem to have been prejudicial").

As for the second claim regarding defense counsel falling asleep at trial, we observe there is myriad case law on this topic and the circumstances under which this could warrant a presumption of prejudice. *See* 3 Wayne R. LaFave, *Criminal Procedure* § 11.10(d), n.315 (4th ed. 2025) (collecting cases on the "sleeping counsel situation" and setting out the general rule that prejudice will not be presumed unless counsel sleeps through a substantial portion of trial). Defendant fails to cite or discuss this case law or otherwise develop an argument why trial counsel's performance in this regard should be evaluated under the *Grogan* standard; we therefore give it no further consideration. *See Vigil-Giron*, 2014-NMCA-069, ¶ 60; *Guerra*, 2012-NMSC-014, ¶ 21.

(providing that criminal sexual penetration of a child under the age of thirteen is a strict liability crime); UJI 14-957 NMRA comm. cmt. ("Mistake of the defendant as to the age of the child is not a defense [to CSPM of a child under thirteen]."). Defendant's trial counsel also sought to have evidence of V.M.'s prior sexual experiences admitted to prove that she had an "attraction towards men's penises." *But see State v. Johnson*, 1997-NMSC-036, ¶¶ 11-12, 34, 40, 123 N.M. 640, 944 P.2d 869 (providing that in sexual assault cases, "evidence offered [of a victim's sexual proclivities] should be relevant to a defense theory other than a theory based on propensity," which "the rape shield law and the consistent rule of evidence were designed to restrict"). Even if we accept, as Defendant argues, that none of his trial counsel's theories provide a defense to CSPM of a child under thirteen,[6] we are not convinced that this is the type of ineffective assistance claim that is exempted by *Grogan* from the typical *Strickland* analysis.

[6]We observe that of the eighteen charges pertaining to V.M., several were not strict liability crimes. Four—two counts of CSCM of a child between the ages of thirteen and eighteen, and two counts of CSPM of a child between the ages of thirteen and eighteen—required the jury to find that Defendant forced or coerced V.M. to engage in sexual acts. *See* § 30-9-13(D)(1) (providing, in relevant part, that CSCM in the fourth degree must be "perpetrated with force or coercion"); § 30-9-11(E)(1) (providing that when a victim is between the age of thirteen and eighteen, CSPM in the second degree requires "the use of force or coercion"). Trial counsel's arguments about consent and V.M.'s alleged role in initiating a sexual relationship with Defendant sought to cast doubt on these elements of these crimes—with the jury ultimately acquitting Defendant on three of these four offenses. Given this, we cannot say defense counsel's arguments were not sound trial strategy, at least as to the non-strict-liability charges. *See Strickland*, 466 U.S. at 689.

1. Exceptions to the *Strickland* Framework Are Narrowly Construed

{21} Generally speaking, exceptions to the *Strickland* framework have been narrowly construed by both the United States Supreme Court and New Mexico appellate courts. *See generally* 3 Wayne R. LaFave, *Criminal Procedure* § 11.7(d) (4th ed. 2025) ("The Supreme Court has consistently adhered to the *Cronic* position that an ineffective-assistance claim ordinarily requires a case-specific showing of likely prejudicial impact, with presumed prejudice reserved for exceptional circumstances."); 3 Wayne R. LaFave, *Criminal Procedure* § 11.10(a) (4th ed. 2025) (explaining that "*Strickland* must be read in conjunction with *Cronic*, which recognized a small window for finding per se ineffectiveness," but that "in the absence of counsel's failure to participate in the proceedings, a claim of incompetency based on performance . . . will be judged by the *Strickland* standards"). As this Court explained, United States Supreme Court precedent "does not suggest that a presumption of prejudice should be common. . . . A presumption of ineffectiveness . . . is justified in a very limited class of cases[, presenting egregious circumstances]." *State v. Brazeal*, 1990-NMCA-010, ¶ 18, 109 N.M. 752, 790 P.2d 1033 (collecting cases). Similarly, the United States Supreme Court explained, "*Cronic* recognized a narrow exception to *Strickland*'s holding that a defendant who asserts ineffective assistance of counsel must demonstrate not only that [their] attorney's performance was deficient, but also that the deficiency

prejudiced the defense." *Nixon*, 543 U.S. at 190. The Supreme Court used the circumstances of *Cronic* itself, which "reversed a [c]ourt of [a]ppeals ruling that ranked as prejudicially inadequate the performance of an inexperienced, underprepared attorney in a complex mail fraud trial," to illustrate "just how infrequently the surrounding circumstances will justify a presumption of ineffectiveness." *Nixon*, 543 U.S. at 190 (alteration, internal quotation marks, and citation omitted).

{22} Furthermore, both the United States Supreme Court and our Supreme Court have rejected defendants' attempts to extend the reach of the circumstances in which prejudice is presumed. In *Bell*, the United States Supreme Court addressed a defendant's argument that his ineffective assistance of counsel claim fit within the second *Cronic* exception where counsel called no witnesses and gave no closing argument at the sentencing phase of a death penalty trial. *Bell*, 535 U.S. at 691-92, 696-97. In rejecting this argument, the Supreme Court explained,

> When we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete. We said "if counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing." Here, respondent's argument is not that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but that his counsel failed to do so at specific points.

Bell, 535 U.S. at 696-97 (quoting *Cronic*, 466 U.S. at 659). Similarly, in *Lukens*, our Supreme Court rejected a defendant's argument that prejudice should be presumed

where appellate counsel was ineffective in their briefing on direct appeal, explaining that a total failure in the adversarial process was required for such a presumption.

> [T]he determinative issue is whether the appellate court failed to conduct a merits review or, in other words, whether counsel's constitutional error caused a *total failure* in the relevant proceeding. . . . Because [a]ppellate [c]ounsel's failures [did not deny] a merits review, those failures do not offer a basis for a presumption of prejudice on a subsequent [ineffective assistance of appellate counsel] claim. Accordingly, under the facts presented here, we conclude that [the p]etitioner must prove how [a]ppellate [c]ounsel's deficient performance caused actual prejudice.

Lukens, 2019-NMSC-002, ¶ 28 (emphasis added) (alteration, omission, internal quotation marks, and citations omitted).

{23} As for *Grogan*, on which Defendant's claim of ineffectiveness rests, the circumstances of that case are, to say the least, unique. In *Grogan*, defense counsel "fail[ed] to secure and review his own expert's opinion before permitting the expert to write the report." 2007-NMSC-039, ¶¶ 3, 5, 17. The state then obtained and introduced the expert's report at trial and called the defense expert to testify for the prosecution. *Id.* ¶ 3. After the defendant was convicted on several counts, the trial court, on its own motion, granted the defendant a new trial on the basis of ineffective assistance of counsel. *Id.* ¶ 5. In affirming the district court, our Supreme Court explained the impact of defense counsel's incompetence:

> The report, and perhaps more importantly the expert's testimony at trial, were undoubtedly the *most damaging pieces of evidence* presented. The report quantified the amount of methamphetamine in [the d]efendant's urine, which neither of the [s]tate's reports had done,

> and the defense expert testified that because the report showed that such large amounts of the drug had been ingested very recently, [the d]efendant would have still been under the effects of the drug at the time of the accident.

Id. ¶ 17 (emphasis added). The Court concluded "this action constituted such obvious attorney incompetence, it cannot be rebutted," *id.*, and relieved the defendant of showing prejudice under *Strickland*, *see id.* ¶¶ 11-15.[7] The Court recognized the peculiarity of the circumstances in *Grogan*—where the defendant's own attorney was responsible for the *most damaging pieces of evidence* being presented against his client—noting the "case is *sui generis*." *Id.* ¶ 16; *see Sui Generis*, *Black's Law Dictionary* (12th ed. 2024) ("Of its own kind or class; unique or peculiar.").

2. We Decline to Extend *Grogan* to the Circumstances of This Case

{24} We turn now to Defendant's contention that the *Grogan* standard applies here. Defendant has not advanced a persuasive argument why *Grogan*, and not the typical *Strickland* standard, should apply to his ineffective assistance of counsel claim. Defendant cites no case law applying the *Grogan* standard to circumstances similar to those presented here. *See State v. Vigil-Giron*, 2014-NMCA-069, ¶ 60, 327 P.3d 1129 (providing that an appellate court "will not consider an issue if no authority is cited in support of the issue and that, given no cited authority, we assume no such

[7] Notwithstanding this, our Supreme Court found "the record provides a sufficient showing of prejudice." *Grogan*, 2007-NMSC-039, ¶ 18.

authority exists"). And, based on our own research, we have found no such cases. *See Lukens*, 2019-NMSC-002, ¶ 24 (noting, in rejecting the petitioner's argument that his ineffective assistance claim should not be governed by *Strickland*, that "[n]o New Mexico court has presumed prejudice based on the argument advanced by [the p]etitioner").

{25} Instead, "[t]he aspects of counsel's performance challenged by [Defendant]"—presenting defense theories that are inconsistent with existing law on some of Defendant's charges—"are plainly of the same ilk as other specific attorney errors" that are "subject to *Strickland*'s performance and prejudice components." *See Bell*, 535 U.S. at 697-98. Put simply, a defense attorney's alleged incompetence based on a misapprehension of law has been evaluated by New Mexico appellate courts using the *Strickland* framework. *See, e.g.*, *Garcia v. State*, 2010-NMSC-023, ¶¶ 30, 36-40, 148 N.M. 414, 237 P.3d 716 (evaluating, under *Strickland*, counsel's unawareness of the law pertaining to "negligent and intentional child abuse" offenses, which resulted in "manifestly false" legal advice to the defendant); *State v. Miera*, 2018-NMCA-020, ¶¶ 29-33, 41-44, 413 P.3d 491 (applying the *Strickland* framework to a claim of ineffective assistance where defense counsel "did no research" to "apprise himself of the law governing" the state's use of a psychological evaluation to impeach the defendant); *State v. Morgan*, 2016-NMCA-089, ¶¶ 18-27, 382 P.3d 981 (applying the *Strickland* framework to the defendant's claim that his

attorney's lack of awareness of a delay in the implementation of a revised sex-offender registration framework deprived him of an opportunity to avoid the registration requirement); *State v. Martinez*, 2007-NMCA-160, ¶ 22, 143 N.M. 96, 173 P.3d 18 (rejecting the defendant's ineffective assistance claim, under the *Strickland* standard, because, inter alia, the defendant did not "explain how his counsel's alleged misunderstanding of the charges prejudiced the defense").

{26} In sum, we see no reason to depart from the *Strickland* two-prong test in this case. This is not a case where defense counsel's incompetence resulted in the introduction of the most damning evidence of Defendant's guilt, or other such similarly "egregious" incompetence. *See Grogan*, 2007-NMSC-039, ¶¶ 15-17. Nor is this a case where defense counsel's alleged incompetence caused a "total failure" in the relevant proceeding. *See Lukens*, 2019-NMSC-002, ¶ 28; *see also Bell*, 535 U.S. at 697 (providing that "the attorney's failure must be complete"). We therefore conclude that Defendant's trial attorney's pursuit of a defense theory that was based on a misapprehension of the law relevant to a portion of the charges faced by Defendant is not the type of circumstance that is "so likely to prejudice the accused that the cost of litigating [its] effect in a particular case is unjustified." *See Cronic*, 466 U.S. at 658. For these reasons, we hold Defendant's ineffective assistance of counsel claim is governed by the *Strickland* standard. Because Defendant has not advanced an argument under this standard, he has not established reversible error

from ineffective assistance of counsel.[8] *See Brazeal*, 1990-NMCA-010, ¶ 22 ("There being no presumption of prejudice in this case, [the] defendant must establish his claim of prejudicial ineffective assistance of counsel in light of the actual conduct of his trial.").

III. Double Jeopardy

{27} Defendant argues that three of his CSCM convictions—Counts 1, 3, and 5—must be vacated on double jeopardy grounds because, according to him, the conduct underlying these convictions is the same course of conduct for which Defendant was convicted of two counts of CSPM—Counts 6 and 7. As relevant to this claim of error, Defendant committed the following offenses against V.M. when she was twelve: CSCM for touching V.M.'s unclothed breast (Count 1), CSCM for touching V.M.'s unclothed vagina (Count 3), CSCM for causing V.M. to touch Defendant's penis (Count 5), CSPM for performing cunnilingus on V.M. (Count 6), and CSPM for causing V.M. to perform fellatio on Defendant (Count 7). Of these, Defendant

[8]We express no opinion as to whether Defendant could successfully advance an ineffective assistance of counsel claim under the *Strickland* standard and leave the resolution of such matter for a habeas or post-conviction proceeding, if any. *Cf. State v. Bernal*, 2006-NMSC-050, ¶ 36, 140 N.M. 644, 146 P.3d 289 (explaining that the defendant's failure to make out a prima facie case of ineffective assistance of counsel on direct appeal did "not preclude [the d]efendant from pursuing habeas corpus proceedings on this issue should he be able to garner evidence to support his claims").

argues that only the CSPM convictions (Counts 6 and 7) can survive double jeopardy. For the reasons that follow, we disagree.

A. The Law Governing Double Description Double Jeopardy Challenges

{28} The double jeopardy clause "protects defendants from receiving multiple punishments for the same offense." *State v. Ramirez*, 2018-NMSC-003, ¶ 38, 409 P.3d 902. *See generally* U.S. Const. amend. V; N.M. Const. art. II, § 15. Multiple punishment problems arise in both unit of prosecution claims, "in which an individual is convicted of multiple violations of the same criminal statute," and double description claims, "in which a single act results in multiple charges under different criminal statutes." *State v. Bernal*, 2006-NMSC-050, ¶ 7, 140 N.M. 644, 146 P.3d 289. "The pivotal question in multiple punishment cases is whether the defendant is being punished twice for the same offense." *Swafford v. State*, 1991-NMSC-043, ¶ 8, 112 N.M. 3, 810 P.2d 1223 (emphasis omitted). To answer this question in a double description challenge, such as Defendant's, we employ the two-part test from *Swafford*, in which we examine: (1) whether the conduct is unitary, and, if so, (2) whether the Legislature intended to punish the offenses separately. *Id.* ¶¶ 9, 25. "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." *Id.* ¶ 25. "A double jeopardy challenge is a constitutional question

of law which we review de novo." *State v. Swick*, 2012-NMSC-018, ¶ 10, 279 P.3d 747.

{29} Because we conclude that the conduct underlying Defendant's convictions was not unitary, our analysis of the first prong is dispositive.[9] Our "unitary conduct analysis turns on whether the acts underlying the two offenses are separated by 'sufficient indicia of distinctness.'"[10] *State v. Lorenzo*, 2024-NMSC-003, ¶ 6, 545 P.3d 1156 (quoting *Swafford*, 1991-NMSC-043, ¶ 26). "The conduct question depends to a large degree on the elements of the charged offenses and the facts presented at trial." *Swafford*, 1991-NMSC-043, ¶ 27. "The proper analytical

[9] Even though we do not reach the second prong, we note Defendant's argument that this Court in *State v. Mora*, 2003-NMCA-072, ¶¶ 19-27, 133 N.M. 746, 69 P.3d 256, "has already determined that the [L]egislature did not intend to punish unitary conduct as both CSPM and CSCM" is well-taken. This Court recently confirmed the applicability of *Mora* to CSCM and CSPM convictions involving unitary conduct. *See State v. Guthrie*, 2026-NMCA-056, ¶¶ 39-42, 589 P.3d 115, *cert. denied* (S-1-SC-41379, May 5, 2026).

[10] Unit of prosecution challenges similarly require an analysis of "whether a defendant's acts are separated by sufficient 'indicia of distinctness' to justify multiple punishments under the same statute." *Bernal*, 2006-NMSC-050, ¶ 14 (citation omitted). Our Supreme Court has reiterated that this unit of prosecution inquiry is substantially the same as the unitary conduct analysis in the first step of a double description analysis. *See id.* ¶ 16 ("[W]e are doing a substantially similar analysis when we conduct a unitary conduct inquiry in double description cases as when we conduct a unit-of-prosecution inquiry. In each case, we attempt to determine, based upon the specific facts of each case, whether a defendant's activity is better characterized as one unitary act, or multiple, distinct acts, consistent with legislative intent."); *State v. Phillips*, 2024-NMSC-009, ¶ 13, 548 P.3d 51 (same). We accordingly rely on both double description and unit of prosecution cases in our unitary conduct analysis.

framework is whether the facts presented at trial establish that the jury reasonably could have inferred independent factual bases for the charged offenses." *State v. Franco*, 2005-NMSC-013, ¶ 7, 137 N.M. 447, 112 P.3d 1104 (internal quotation marks and citation omitted); *see also Lorenzo*, 2024-NMSC-003, ¶ 8 (same). As our Supreme Court has explained, "our primary concern in this context is to ensure that sufficient evidence exists to establish that each [offense] is distinct from the others. In reviewing the facts of the case to determine if each [offense] is distinct from the others, we must indulge in all presumptions in favor of the verdict." *State v. McClendon*, 2001-NMSC-023, ¶ 5, 130 N.M. 551, 28 P.3d 1092 (internal quotation marks and citation omitted).

{30} "If two events are sufficiently separated by either time or space (in the sense of physical distance between the places where the acts occurred), then it is a fairly simple task to distinguish the acts." *Swafford*, 1991-NMSC-043, ¶ 28; *see also State v. Neal*, ___-NMSC-___, ¶ 32, ___ P.3d ___ (S-1-SC-40407, Apr. 6, 2026) (recognizing that "time and space may be determinative in some cases"). "If [time and space] considerations do not suffice to make the determination, 'resort must be had to the quality and nature of the acts or to the objects and results involved.'" *State v. Sena*, 2020-NMSC-011, ¶ 46, 470 P.3d 227 (quoting *Swafford*, 1991-NMSC-043, ¶ 28); *see Swafford*, 1991-NMSC-043, ¶ 28 (citing *Herron v. State*, 1991-NMSC-012, ¶ 15, 111 N.M. 357, 805 P.2d 624, for factors used to determine whether

separate and distinct criminal acts occurred); *see also State v. Phillips*, 2024-NMSC-009, ¶ 12, 548 P.3d 51 (explaining that the *Herron* factors consider: "(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" (citing *Herron*, 1991-NMSC-012, ¶ 15)). To determine whether there is unitary conduct, we must understand the state's theory of the case at trial—looking to the charging documents, jury instructions, and the facts presented at trial, as well as the state's opening statements and closing arguments if necessary. *See, e.g.*, *State v. Silvas*, 2015-NMSC-006, ¶¶ 10, 19, 343 P.3d 616 (looking to the state's theory of the case based on the trial evidence and closing arguments to determine whether the defendant's conduct is unitary); *Sena*, 2020-NMSC-011, ¶ 46 ("look[ing] to the elements of the charged offenses, the facts presented at trial, and the instructions given to the jury" "in determining whether there are . . . sufficient indicia of distinctness").

B. Defendant's Right to be Free From Double Jeopardy Was Not Violated

{31} With these principles in mind, we turn to Defendant's double jeopardy challenge. Defendant raises two double description claims: (1) that his CSCM convictions in Counts 1 (V.M.'s breast) and 3 (V.M.'s vagina) punish the same conduct underlying his CSPM conviction in Count 6 (cunnilingus); and (2) that his

CSCM conviction in Count 5 (Defendant's penis) punishes the same conduct underlying his CSPM conviction in Count 7 (fellatio).

{32} As relevant to this claim of error, the grand jury indictment charged Defendant with committing three identical counts of CSCM in Counts 1, 3, and 5 and two identical counts of CSPM in Counts 6 and 7 during a three-month charging period when V.M. was twelve—"on, about, or between the 1st day of January, 2019, and the 30th day of March, 2019."[11] At trial, the jury instructions differentiated the charges in each count by sex act—i.e., only one type of sex act (i.e., "touched or applied force to the unclothed breast of V.M.," "touched or applied force to the unclothed vagina of V.M.," "[D]efendant caused V.M. to touch the penis of [D]efendant," "[D]efendant caused V.M. to engage in cunnilingus," and "[D]efendant caused V.M. to engage in fellatio") was identified in each count (i.e., Counts 1, 3, 5, 6, and 7, respectively). This charging structure—in which Defendant was charged, as he observes, with "one count for every type of act, no matter how many times the act occurred" during the three-month charging period when V.M.

[11] We observe that Defendant did not raise any pretrial objections to the structure of the charges in the indictment, thereby waiving notice, due process, and multiplicity challenges. *See State v. Lente*, 2019-NMSC-020, ¶¶ 16, 26, 453 P.3d 416. Furthermore, by the time of trial, the charges were differentiated by act, which appears to have removed any such concerns. *See id.* ¶¶ 25-30, 36-47 (explaining, where the defendant was charged with specific acts of sexual abuse during a given timeframe and "[n]o specific form of sexual abuse was alleged to have occurred more than once in any given interval," this charging practice eliminates due process, notice, and multiplicity concerns).

was twelve—was within the State's discretion. *See, e.g.*, *State v. Altgilbers*, 1989-NMCA-106, ¶¶ 38-39, 42-43, 109 N.M. 453, 786 P.2d 680 (deferring to prosecutors' discretion in terms of charging patterns and rejecting the defendant's contention "that the state has split one course of conduct into too many counts" because there is "no reason why the choice for the prosecution must be between either one count in toto or one count for each act").

{33} In support of his double challenge, Defendant interprets this charging structure to mean that the State chose to charge "a single course of conduct." That is, Defendant's double jeopardy challenge rests on the premise that the ongoing sexual abuse he perpetrated against V.M. for months should be evaluated as if Counts 1, 3, and 6 involved "the same assaultive episode" and as if Counts 5 and 7 involved a second assaultive episode. Relying on *Herron* and other cases involving such "single assaultive episodes," Defendant then contends that the conduct is unitary because V.M.'s testimony did not adequately distinguish Counts 1 and 3 from Count 6, nor Count 5 from Count 7.[12] We reject this argument. Defendant

[12]As the State observes, a similar argument was addressed and rejected by our Supreme Court in *Lente*, 2019-NMSC-020. *Lente* involved a habeas challenge to multiple convictions for sexual abuse in a "resident child molester" case. *Id.* ¶¶ 1-3. The *Lente* Court variously discussed notice, double jeopardy, and multiplicity issues related to "carbon copy" counts in the defendant's indictment, *id.* ¶¶ 14-49, and sufficiency of the evidence, *id.* ¶¶ 50-84, and multiple punishment double jeopardy, *id.* ¶¶ 50-52, 84, challenges, in "resident child molester" cases. The State contends the three-part sufficiency analysis adopted by *Lente* for resident child molester cases applies to multiple punishment double jeopardy challenges like Defendant's.

offers no citation to the record, citation to legal authority, or reasoned argument in support of his contention that because of the way the charges were structured, he was only charged with (and the evidence could only support) a "single course of conduct" or a "single assaultive episode"—as if the abuse only happened once—even though V.M. testified to the abuse occurring repeatedly over the relevant three-month charging period. And, we observe, there is authority to the contrary. *See State v. Guthrie*, 2026-NMCA-056, ¶¶ 17-20, 589 P.3d 115 (rejecting the defendant's broad argument that CSPM convictions were based on unitary conduct because,

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Defendant, in contrast, contends *Lente* has no applicability here, and his conduct should instead be evaluated utilizing the *Herron* factors as if he committed a single sexual assault. Because, as we discuss, we reject the premise that Defendant's ongoing abuse of V.M. should be analyzed as one assaultive episode—and we further conclude that Defendant's conduct was not unitary—we find it unnecessary to resolve the reach of *Lente*'s sufficiency analysis or the question of whether it might displace or supplement the *Herron* factors in resident child molester cases, like this one. We thus leave the definitive resolution of this matter for another day or for our Supreme Court to take up, should it so choose. We nonetheless find portions of *Lente* instructive in our double jeopardy analysis, as this Court has done in the past, and cite *Lente* accordingly. *See, e.g.*, *Guthrie*, 2026-NMCA-056, ¶¶ 17-20 (citing *Lente*, 2019-NMSC-020, ¶ 30, as persuasive authority for proposition that "different acts of criminal sexual penetration and contact perpetrated against a child on different and discrete dates constitute discrete violations of CSPM and CSCM" (text only) (citation omitted)); *State v. Bitakis*, A-1-CA-41889, mem. op. ¶¶ 2-6 (N.M. Ct. App. Oct. 24, 2024) (nonprecedential) (applying *Lente*'s three-part sufficiency analysis, 2019-NMSC-020, ¶¶ 67-70, to the defendant's multiple punishment double jeopardy challenge), *cert. denied*, 2024-NMCERT-012 (S-1-SC-40680); *State v. Begay*, A-1-CA-40575, mem. op. ¶ 6 (N.M. Ct. App. Dec. 30, 2024) (nonprecedential) (citing *Lente*, 2019-NMSC-020, ¶¶ 52-53, 63-64, 84, as persuasive authority in rejecting the defendant's argument that "[the v]ictim's testimony lack[ed] sufficient detail to determine his conduct was not unitary as a matter of law").

according to the defendant, the state treated the multiple CSPM counts "as if they took place on a single occasion," and instead looking to the trial record to determine if there was evidence of multiple sexual assaults on different dates (internal quotation marks omitted)), *cert. denied* (S-1-SC-41379, May 5, 2026); *cf. State v. Lente*, 2019-NMSC-020, ¶¶ 28-29, 453 P.3d 416 (summarily rejecting, when discussing multiplicity and unitary conduct, the defendant's argument that sexual abuse ongoing over years should be evaluated as "one assaultive episode" under *Herron* because the case bore "no resemblance to *Herron*"). Defendant's failure to support his unitary conduct approach in itself provides sufficient grounds for this Court to disregard it. *See Vigil-Giron*, 2014-NMCA-069, ¶ 60; *State v. Guerra*, 2012-NMSC-014, ¶ 21, 278 P.3d 1031 (providing that appellate courts are not obligated to review unclear or undeveloped arguments); *Muse v. Muse*, 2009-NMCA-003, ¶ 72, 145 N.M. 451, 200 P.3d 104 ("We will not search the record for facts, arguments, and rulings in order to support generalized arguments."). Nevertheless, we have reviewed the State's theory of the case—looking to the charges, the trial evidence, and the State's arguments to the jury—and conclude it supplies no support for Defendant's position that his conduct should be evaluated as a "single assaultive episode" or, more generally, that Defendant's CSCM convictions were the result of conduct unitary with his CSPM convictions.

{34} Nothing in the jury instructions, or in the State's charging structure more generally, directed the jury to consider the evidence as a single assaultive episode, pointed the jury to any specific episode of abuse during the relevant three-month charging period, or otherwise narrowed the jury's consideration of the evidence. We accordingly turn to the evidence presented at trial and the State's arguments to the jury to determine if the jury reasonably could have based Defendant's convictions on separate conduct. *See Guthrie*, 2026-NMCA-056, ¶ 19 (examining "the record to see if the [s]tate introduced sufficient evidence to support the jury's conviction for [CSPM] based on sexual intercourse on a different date than the [other CSPM convictions]" where the jury instruction did not identify "which of the sexual assaults . . . [was] at issue"); *see also State v. Gonzales*, 2019-NMCA-036, ¶¶ 15-21, 444 P.3d 1064 (looking to the evidence at trial and the state's arguments to the jury to resolve the unitary conduct question where the charges and the jury instructions did not direct the jury to specific conduct).

1. Counts 1, 3, and 6 Did Not Result From Unitary Conduct

{35} V.M. provided the sole testimony describing the sexual abuse committed by Defendant. As for Counts 1 (CSCM breasts), 3 (CSCM vagina), and 6 (CSPM cunnilingus), which Defendant contends were the result of unitary conduct, V.M. testified as follows. V.M. explained that Defendant touched V.M.'s breasts with his hands both over and under her clothing, Defendant touched V.M.'s vagina with his

hands both over and under her clothing, and Defendant would use his mouth on V.M.'s breasts and vagina. These acts, V.M. testified, happened at night when everyone else was asleep and occurred on the bed in Defendant's bedroom, on the floor of Defendant's bedroom, and in Defendant's bathroom. V.M. testified these acts occurred every time she went to Defendant's home—which was every weekend and some weekdays during the relevant three-month charging period.

{36} In support of his argument that the conduct underlying Counts 1 and 3 is unitary with the conduct underlying Count 6, Defendant complains about the specificity of V.M.'s testimony:

> V.M.'s testimony treated these three crimes as a single, repeated act of sexual abuse, not as three distinct occurrences. She testified that they happened in the same locations. She did not testify about a sequence in which they occurred, nor about any intervening events between the acts, nor about any time when [Defendant] touched her breasts or vagina without also performing oral sex. She specifically testified that all three acts happened every time she was there.

While we do not disagree with Defendant that V.M.'s testimony was fairly generic, to agree with Defendant that Counts 1, 3, and 6 were the result of unitary conduct would require us to ignore critical portions of V.M.'s testimony, which we will not do. *See McClendon*, 2001-NMSC-023, ¶ 5 (providing that, when determining whether conduct is unitary, the appellate court "must indulge in all presumptions in favor of the verdict" (internal quotation marks and citation omitted)); *cf. Lente*, 2019-NMSC-020, ¶ 64 ("Generic testimony (e.g., an act of intercourse 'once a

month for three years') outlines a series of *specific*, albeit undifferentiated, incidents each of which amounts to a separate offense, and *each* of which could support a separate criminal sanction." (text only) (citation omitted)).

{37} For instance, we would have to ignore V.M.'s testimony that each of the acts of sexual abuse charged in Counts 1, 3, and 6 happened in three locations (on the bed, on the floor, and in the bathroom).[13] *See State v. Montoya*, 2026-NMCA-022, ¶ 47, 584 P.3d 1123 (concluding that because "the record shows three distinct acts of vaginal licking by [the d]efendant in different locations at different times during the same charging period," "[t]he jury could reasonably have convicted [the d]efendant of [one count of cunnilingus] based on this third instance of cunnilingus that is plainly not unitary with the [other two counts of] cunnilingus"), *cert. denied*, 2025-NMCERT-010 (S-1-SC-41106). Moreover, Defendant would have us ignore V.M.'s clear testimony that these acts of sexual abuse happened repeatedly—every weekend and some weekdays—during the three-month charging period. Even if we

[13]V.M. supplied detail on cross-examination about how the abuse on the floor and in the bathroom unfolded, making it apparent that the conduct that happened in these locations was distinct. As for the encounters on the floor, V.M. testified that Defendant would wake her up in the middle of the night and tell her to move from the bed to the floor. If she said no, Defendant would pull her to the floor. Defendant would get on top of her and start touching her with his hands. If she tried to move his hands away, he would force himself on her. At some point during the encounters, Defendant would take off V.M.'s clothes. As for the encounters in the bathroom, V.M. testified that sometimes they would go to the bathroom together. Other times, V.M. testified, she would go to the bathroom by herself, Defendant would follow her in, and lock the door.

disregard that this pattern of abuse occurred on some weekdays, V.M.'s testimony establishes that the abuse happened every weekend from January 1, 2019, to March 30, 2019. That is, Defendant touched V.M.'s unclothed breast (Count 1) on approximately a dozen dates, Defendant touched V.M.'s vagina (Count 3) on approximately a dozen dates, and Defendant performed cunnilingus on V.M. (Count 6) on approximately a dozen dates. *See Guthrie*, 2026-NMCA-056, ¶ 18 ("If the evidence supports a jury verdict based on three entirely separate sexual assaults on different dates, the convictions are based on separate and distinct conduct and we need not consider the *Herron* factors further to conclude that there is no double jeopardy violation."); *State v. Vigil*, 2021-NMCA-024, ¶¶ 18, 20-23, 489 P.3d 974 (rejecting the defendant's double jeopardy argument that his convictions were impermissibly based on a "single course of conduct" and concluding there was no unitary conduct where the jury reasonably could have based each conviction on conduct occurring on separate dates); *cf. Lente*, 2019-NMSC-020, ¶ 30 ("There can be no question that our Legislature did indeed intend for different acts of criminal sexual penetration and contact perpetrated against a child on different and discrete dates over a course of years to constitute discrete violations of the statutes here implicated." (citing, among other authorities, *Herron*, 1991-NMSC-012, ¶ 15 ("[T]he greater the interval between acts the greater the likelihood of separate offenses.")).

{38} Lastly, as to Counts 1, 3, and 6, the State in opening statements and closing arguments did not refer to these acts of sexual abuse as a single course of conduct, did not direct the jury to the same assaultive episode to support these counts, and did not otherwise narrow the jury's consideration of the evidence. Stated differently, this is not a case where the State narrowed its legal theory at trial by relying on unitary conduct to obtain multiple convictions against Defendant such that double jeopardy was violated. *See Lorenzo*, 2024-NMSC-003, ¶ 11 (explaining that where the state's legal theory at trial, as set out in closing arguments, relies on unitary conduct, the state is bound by that theory on appeal when faced with a double jeopardy challenge); *Gonzales*, 2019-NMCA-036, ¶ 21 (explaining that "our Supreme Court has indicated that, even where there was ample evidence of non-unitary conduct, we should presume unitary conduct where the [s]tate's theory at trial relied on the same conduct to prove the two offenses at issue"); *see also State v. Contreras*, 2007-NMCA-045, ¶ 23, 141 N.M. 434, 156 P.3d 725 (declining to presume unitary conduct where the state had not limited its legal theory to a single factual basis for multiple charges, but had instead "provided the jury with sufficiently distinct factual bases upon which it could base [the d]efendant's conviction")).

{39} In light of V.M.'s testimony about the frequency of the abuse and the distinct locations in which the abuse occurred—and given the State's trial theory did not narrow the jury's evaluation of this testimony—we conclude the jury reasonably

could have found independent factual bases for Counts 1, 3, and 6. *See generally Herron*, 1991-NMSC-012, ¶ 15 ("[T]he greater the interval between acts the greater the likelihood of separate offenses."); *Neal*, ___-NMSC-___, ¶ 32 (affirming that none of the *Herron* factors alone is "a panacea," but "recognizing that time and space may be determinative in some cases" (internal quotation marks and citation omitted)); *Phillips*, 2024-NMSC-009, ¶ 13 (same). In sum, Defendant was charged and convicted of only one count of each sex act, even though the record supports that these sex acts occurred on multiple dates and in multiple locations during the charging period. Under these circumstances, there is no unitary conduct problem. *See, e.g.*, *Guthrie*, 2026-NMCA-056, ¶ 18; *Montoya*, 2026-NMCA-022, ¶¶ 46-47; *see also, e.g.*, *State v. Dombos*, 2008-NMCA-035, ¶ 20, 143 N.M. 668, 180 P.3d 675 (concluding that the conduct underlying two identical counts of attempted fellatio was not unitary where the victim testified, inter alia, that, during the two-and-a-half week charging period, "[the d]efendant attempted to force her to perform fellatio 'at least four times'").

2. Counts 5 and 7 Did Not Result From Unitary Conduct

{40} As for Counts 5 (CSCM Defendant's penis) and 7 (CSPM fellatio), which Defendant separately contends were the result of unitary conduct, V.M. testified as follows. V.M. stated that Defendant would move her hand onto his penis and that this happened mostly on the floor of Defendant's bedroom at night. This abuse, V.M.

testified, happened "mostly all the time, like the same as the rest"—meaning every weekend and some weekdays during the relevant three-month charging period. V.M. also testified that Defendant would put his penis in her mouth. V.M. said this abuse happened on the floor of Defendant's bedroom at night, but it did not happen every weekend.

{41} As with Counts 1, 3, and 6, the State in opening statements and closing arguments did not refer to the acts of sexual abuse in Counts 5 and 7 as a single course of conduct, did not direct the jury to the same assaultive episode to support these counts, and did not otherwise narrow the jury's consideration of the evidence. *See supra* Part III.B.1, ¶ 38. And, as with Counts 1, 3, and 6, given the State's arguments to the jury and V.M.'s testimony about the frequency of the abuse, we conclude the jury reasonably could have found independent factual bases for Counts 5 and 7. *See supra* Part III.B.1, ¶ 39. Although Defendant again complains about the lack of detail in V.M.'s testimony, he acknowledges that V.M. differentiated the sex acts in terms of frequency. Indeed, V.M.'s testimony that the conduct charged in Count 5 occurred more frequently than the conduct charged in Count 7 provides an additional basis to determine that the conduct was not unitary. *See generally Sena*, 2020-NMSC-011, ¶ 46 ("Sufficient indicia of distinctness are present when the illegal acts are sufficiently separated by either time or space." (internal quotation marks and citation omitted)).

{42} Having determined that Defendant's convictions for Counts 1, 3, and 6, as well as his convictions for Counts 5 and 7, were not the result of unitary conduct, we conclude that Defendant's right to be free from double jeopardy was not violated. *See Swick*, 2012-NMSC-018, ¶ 11 (concluding that if the conduct underlying the convictions is not unitary, "there is no double jeopardy violation").

CONCLUSION

{43} For the foregoing reasons, we affirm.

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

JENNIFER L. ATTREP, Judge

WE CONCUR:

MEGAN P. DUFFY, Judge

JANE B. YOHALEM, Judge