

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico
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Mark Reynolds

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

No. A-1-CA-42502

KEVIN CABRAL,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY

Lucy Solimon, District Court Judge

Raúl Torrez, Attorney General

Santa Fe, NM

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Albuquerque, NM

for Appellee

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Albuquerque, NM

for Appellant

MEMORANDUM OPINION

HOUGHTON, Judge.

{1} Defendant Kevin Cabral appeals his conviction for child abuse resulting in
great bodily harm, in violation of NMSA 1978, Section 30-6-1(D) (2009). Defendant
claims that the district court committed reversible error by excluding his expert's
testimony as to a possible alternative causation for Victim's injuries, as well as

1 preventing his expert from attacking the validity of the medical diagnosis
2 foundational to the State’s case. We agree that the district court erred in limiting the
3 defense expert’s testimony in certain respects. We nonetheless affirm because the
4 defense expert testified in large part as Defendant intended and, as a result, we hold
5 there was no prejudice requiring reversal.

6 **BACKGROUND**

7 {2} On July 16, 2021, M.A. (Mother) left her nine-month-old son (Victim) and
8 six-year-old daughter in the care of Defendant, Mother’s then boyfriend, while she
9 was at work. This was not the first time Mother had left her children with Defendant.
10 Normally Victim would have gone to daycare, but he had been ill for the previous
11 few days, to include vomiting the night before, and was kept home. A few hours
12 after Mother left, Defendant attempted to call her multiple times. Once he was able
13 to reach Mother, he reported that Victim had “stiffened up.” Mother returned home
14 and called 911. When Emergency Medical Services (EMS) arrived, Victim was
15 “unresponsive with rapid, shallow, and irregular breathing,” had “unequal pupils and
16 a bulging fontanelle,” and had lowered indicators of responsiveness.

17 {3} EMS transported Victim to the University of New Mexico Hospital (UNMH).
18 Although Victim showed no external injuries, a CT scan revealed that Victim had
19 “bilateral subdural hemorrhages (bleeding between the skull and the dura) and [a]
20 subarachnoid hemorrhage (bleeding between the arachnoid mater and the brain).”

1 An ophthalmologic exam revealed “extensive retinal hemorrhages in all four
2 quadrants and in all three layers of the retina.” UNMH’s Child Abuse Response
3 Team diagnosed Victim with abusive head trauma (AHT) after ruling out “medical
4 conditions that could potentially cause his presentation [of symptoms].”

5 {4} The State brought charges against Defendant and based its case primarily on
6 expert witness testimony interpreting Victim’s internal injuries. There were no
7 witnesses who could testify to Defendant’s actions while Victim was in his care:
8 Victim was too young to verbalize and his six-year-old sister was born with severe
9 developmental disabilities, including blindness.

10 {5} Defendant obtained the services of Dr. Joseph Scheller as an expert to counter
11 the State’s theory that Victim’s internal injuries were the result of intentional abuse.
12 Dr. Scheller intended to testify that Victim’s injuries were instead caused by the
13 exacerbation of a preexisting condition that could have been triggered by a short fall
14 or other minor bump to the head. Dr. Scheller also intended to testify that he did not
15 believe “AHT to be a ‘worthwhile’ medical diagnosis” due, in part, to what he
16 described as its “lack of diagnostic criteria.”

17 {6} The State moved to exclude the proposed testimony of Dr. Scheller in its
18 entirety. Following a day-long hearing on the State’s motion to exclude, the district
19 court issued an order finding Dr. Scheller to be “qualified in the fields of pediatrics
20 and pediatric neurology” and that “the opinion that [Victim] may have suffered from

1 one or more chronic conditions as well as the general information regarding non-
2 abusive reasons for head trauma is relevant to challenge the assertion that [Victim]’s
3 injuries resulted from abuse and will be helpful to the jury.” However, the district
4 court also found that “Dr. Scheller’s intended testimony that [Victim]’s injuries *were*
5 *caused* by a minor head bump or other minor injury is without any support in the
6 record and based upon mere conjecture and will require speculation on behalf of the
7 jury in order to accept the conclusion.” The district court further found that the State
8 “adequately demonstrated [that] the diagnosis of abusive head trauma is widely
9 accepted in the medical community and Dr. Scheller’s opinions to the contrary lack
10 a reliable basis,” and would therefore not assist the jury.

11 {7} Accordingly, the district court allowed Dr. Scheller to testify that “based on
12 his review of the records in this case, [Victim] suffered from one or more chronic
13 conditions related to an accumulation of excess fluid between the brain and the inside
14 of the skull,” and allowed him to “testify generally about complications that may
15 arise from a chronic accumulation of excess fluid between the brain and the inside
16 of the skull.” The district court, however, prevented Dr. Scheller from: (1) “testifying
17 or offering an opinion as to the causation of [Victim]’s injuries in this matter,
18 including that [Victim] suffered from a complication from an accumulation of excess
19 fluid between the brain and the skull after suffering a minor head injury”; and (2)
20 testifying as to “the validity of the diagnosis of abusive head trauma, the lack of

1 diagnostic criteria for abusive head trauma, or . . . opinions about what findings
2 should or should not be present in cases of abuse.”

3 {8} The case proceeded to trial. After the State finished presenting its case in
4 chief, Defendant requested that the district court reconsider its order limiting Dr.
5 Scheller’s testimony. Defendant reasoned that the State’s experts had testified that
6 Victim’s injuries could have been caused by trauma or impact, and that Defendant’s
7 theory that a small bump to the head could have exacerbated a preexisting condition
8 was “no more speculative” than the State’s theory, as there was similarly “no
9 evidence that there was shaking; there’s been no evidence that there’s been trauma.”
10 The district court denied Defendant’s motion to reconsider.

11 {9} The defense called Dr. Scheller to testify in its case in chief and the district
12 court qualified him as an expert in “child neurology.” Dr. Scheller testified that,
13 based on his review of Victim’s medical records, Victim’s head circumference grew
14 at a much higher rate than normal, and that it was around the 97th percentile on
15 standard growth charts at the time of the injury. He testified that Victim had external
16 hydrocephalus from birth, which he explained is an accumulation of fluid outside
17 the brain but within the skull. Dr. Scheller also testified that “because [external
18 hydrocephalus is] a fluid that doesn’t belong there, it has the potential for causing
19 complications like it did in [Victim]’s case.” Dr. Scheller also testified that a person
20 with external hydrocephalus can suffer acute brain bleeds as a result of minor jostling

1 of the head, which can trigger seizures. After hearing both presentations, the jury
2 convicted Defendant of the single charged count of child abuse resulting in great
3 bodily harm.

4 **DISCUSSION**

5 **I. Qualification of Experts and Standard of Review**

6 {10} Rule 11-702 NMRA guides the admissibility of expert witnesses. An expert
7 witness is “qualified as an expert by knowledge, skill, experience, training, or
8 education” and “may testify in the form of an opinion or otherwise if the expert’s
9 scientific, technical, or other specialized knowledge will help the trier of fact to
10 understand the evidence or to determine a fact in issue.” Rule 11-702. *See generally*
11 *State v. Alberico*, 1993-NMSC-047, ¶¶ 38-55, 116 N.M. 156, 861 P.2d 192
12 (grounding expert witness admissibility in Rule 11-702). The three requirements for
13 the admission of expert testimony are “(1) that the expert be qualified; (2) that the
14 testimony be of assistance to the trier of fact; and (3) that the expert’s testimony be
15 about scientific, technical, or other specialized knowledge with a reliable basis.”
16 *Conception & Rosario Acosta v. Shell W. Expl. & Prod., Inc.*, 2016-NMSC-012,
17 ¶ 22, 370 P.3d 761 (internal quotation marks and citation omitted). Under our rules
18 of evidence, “any doubt regarding the admissibility of scientific evidence should be
19 resolved in favor of admission, rather than exclusion.” *State v. Fry*, 2006-NMSC-

001, ¶ 55, 138 N.M. 700, 126 P.3d 516 (internal quotation marks and citation omitted).

{11} We review the district court’s decision to exclude or admit expert testimony for an abuse of discretion. *See Alberico*, 1993-NMSC-047, ¶ 63. A district court abuses its discretion when its decision is “obviously erroneous, arbitrary, or unwarranted,” or when “clearly against the logic and effect of the facts and circumstances before the court.” *Id.* Further, “[w]here the evidence is offered in support of the defense’s theory of the case, we recognize ‘a presumption against exclusion of otherwise admissible defense evidence[, because n]o other approach adequately protects the right to present a defense.’” *State v. Campbell*, 2007-NMCA-051, ¶ 13, 141 N.M. 543, 157 P.3d 722 (quoting *McCarty v. State*, 1998-NMSC-079, ¶ 9, 107 N.M. 651, 763 P.2d 360). With those guiding principles in mind, we “conduct[] a meaningful analysis of the admission [of] scientific testimony to ensure that the trial judge’s decision was in accordance with the Rules of Evidence and the evidence in the case.” *Alberico*, 1993-NMSC-047, ¶ 63.

II. The District Court Abused Its Discretion by Limiting the Defense Expert’s Testimony That Supported an Alternative Theory of Causation

{12} The district court found that Dr. Scheller’s opinion as to causation would not assist the trier of fact because his “intended testimony that [Victim]’s injuries were caused by a minor head bump or other minor injury is without any support in the record and based upon mere conjecture.” *See State v. Downey*, 2008-NMSC-061,

¶ 34, 145 N.M. 232, 195 P.3d 1244 (“Experts may, and often do, base their opinions upon factual assumptions, but those assumptions in turn must find evidentiary foundation in the record.”).

{13} At the time of the pretrial exclusion hearing, there was no direct evidence that Victim had suffered a fall or other trauma to the head that could exacerbate Dr. Scheller’s theorized preexisting condition. But, as Defendant pointed out both during the trial and on appeal, there was similarly no direct evidence that Victim’s injuries were caused by abusive trauma at the hands of Defendant as alleged by the State. In the absence of an admission or eyewitness testimony, both the State and Defendant relied solely on their experts’ explanations for Victim’s internal injuries, which is typical for the charge faced by Defendant. *See State v. Consaul*, 2014-NMSC-030, ¶ 55, 332 P.3d 850 (“Child abuse prosecutions are unusual in that sometimes medical-opinion testimony provides the only evidence that a wrongful act occurred or that the accused committed a wrongful act.”); *State ex rel. Child., Youth & Fams. Dep’t v. Frank G.*, 2005-NMCA-026, ¶ 22, 137 N.M. 137, 108 P.3d 543 (recognizing that “child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim” (alteration, internal quotation marks, and citation omitted)). However, only Defendant’s expert’s opinion as to causation was limited.

1 {14} Defendant did not seek to exclude any of the State’s expected medical experts,
2 and we will not speculate as to how the district court would have ruled had Defendant
3 done so. But the effect of the district court’s order was to allow the State to present
4 an opinion as to causation, while preventing Defendant from doing so based on
5 identical circumstantial evidence. Under such circumstances, the credibility of the
6 parties’ experts is best left to the finder of fact. *See State v. Duran*, 1994-NMSC-
7 090, ¶ 9, 118 N.M. 303, 881 P.2d 48 (holding that a dispute over the accuracy of
8 DNA evidence “goes to the weight of the evidence, not its admissibility [and that
9 t]his ‘battle of the experts’ can properly take place before the jury[,] . . . [which]
10 should be allowed to make its own factual determination as to whether the evidence
11 is reliable” (internal quotation marks and citation omitted)).

12 {15} Defendant highlighted this double-standard to the district court in its motion
13 to reconsider, asking the district court to allow Dr. Scheller’s expected testimony
14 because it was “no more speculative” than the State’s theory of the case, pointing
15 out that the State’s experts opined that Victim’s injuries “would have been caused
16 by trauma . . . [or] potentially by shaking alone or shaking and/or impact” despite
17 the lack of evidence of trauma. The district court denied Defendant’s motion without
18 explanation. This disparate treatment, and specifically its handicapping of the
19 defense, cuts to the heart of the due process protections, which every criminal
20 defendant is entitled. *See Campbell*, 2007-NMCA-051, ¶ 17 (“[D]ue process

1 require[s] the district court to allow the defense to make its case.”). This unequal
2 treatment was “against the logic and effect of the facts and circumstances before the
3 court,” *Alberico*, 1993-NMSC-047, ¶ 63, and was therefore an abuse of discretion.

4 **III. Defendant Was Not Prejudiced by the District Court’s Erroneous Ruling**

5 {16} “When an error is preserved, we review for harmless error. . . . Absent a
6 constitutional violation, we look to whether there is a reasonable probability that the
7 error affected the verdict.” *State v. Astorga*, 2015-NMSC-007, ¶¶ 42-43, 343 P.3d
8 1245 (citation omitted). “For the court’s error in excluding evidence to be prejudicial
9 against [the] defendant, improperly refused evidence must form an important part of
10 [the] defendant’s case. Moreover, to warrant reversible error in the exclusion of
11 testimony, [the] defendant must show a reasonable probability that the court’s failure
12 to allow the testimony contributed to his conviction.” *State v. Gonzales*, 1991-
13 NMSC-075, ¶ 27, 112 N.M. 544, 817 P.2d 1186 (citation omitted).

14 {17} Defendant claims that the district court’s exclusion of Dr. Scheller’s testimony
15 prevented him from developing the theory that “[Victim] suffered from a
16 complication from an accumulation of excess fluid between the brain and the skull
17 after suffering a minor head injury.” Despite the district court’s order, our review of
18 the record demonstrates that this alternative theory was nonetheless advanced by Dr.
19 Scheller and presented to the jury.

1 {18} Dr. Scheller testified on direct examination that, based on his review, Victim's
2 head circumference was in the 97th percentile at the time of the injury, and that the
3 growth of his head was driven by the excess fluid between his brain and his skull.

4 His testimony continued as follows:

5 Dr. Scheller:[T]his is officially called a benign condition. . . . It's just
6 fluid that's just sitting there: okay, you got a big head and life
7 goes on. But because it's fluid that doesn't belong there, it has
8 the potential for causing complications *like it did in [Victim]'s*
9 *case*.

10 Defense Counsel: Again, speaking generally and not specifically about
11 [Victim], what kinds of consequences can occur?

12 Dr. Scheller: Irritation of the brain is the main consequence, and that
13 irritation comes from this chronic fluid causing acute recent
14 bleeding. So a minor, minor trauma: jostling the head, bouncing
15 a child on your knee, one child banging into another child, those
16 kind of things are enough to cause this excess fluid to bleed. And
17 that excess fluid . . . if it bleeds and just sits there, that's okay.
18 But if it irritates the brain and triggers a seizure, well, seizures
19 are dangerous and, and can, you know, put a child's life at risk.

20 {19} Then during redirect examination, Dr. Scheller again provided the following
21 opinion that external hydrocephalus was the cause of Victim's internal injuries:

22 If the external hydrocephalus, which is typically benign, if that does
23 cause some new bleeding *like it did in [Victim]'s case*, that new
24 bleeding will irritate the brain and when the brain is irritated, it has a
25 seizure. Seizures can cause a whole host of problems including cortical
26 visual impairment as was suggested. . . . External hydrocephalus can
27 cause a complication. That complication is the seizure and then seizures
28 can lead to brain compromise.

1 {20} This is not, therefore, a case in which “a potential avenue of defense [was
2 made] unavailable to the defendant.” *State v. Salazar*, 2007-NMSC-004, ¶ 16, 141
3 N.M. 148, 152 P.3d 135 (internal quotation marks and citation omitted); *cf. March*
4 *v. State*, 1987-NMSC-020, ¶¶ 9-10, 105 N.M. 453, 734 P.2d 231 (holding that the
5 defendant was prejudiced by the district court’s exclusion of any reference to his
6 schizophrenia, thereby “completely depriv[ing the] defendant of any potential
7 defense of incapacity”). Dr. Scheller actually testified during both direct and redirect
8 examination that Victim had a preexisting condition that could be exacerbated by
9 “minor trauma” and that it did “cause[] complications . . . in [Victim]’s case.”

10 {21} The State did not object to Dr. Scheller’s testimony that external
11 hydrocephalus was the cause of Victim’s internal injuries. Rather, the State itself
12 explored Defendant’s theory of alternate causation. First, it elicited testimony from
13 its own expert that Mother reported Victim suffered two incidents of head trauma:
14 the first incident a-week-and-a-half prior to July 16, 2021, and a second
15 approximately three months before. That expert dismissed the incidents as a possible
16 cause of Victim’s internal injuries, stating, “Based on the time lapse between them
17 and the lack of any symptoms of any significant injury at the time of either, . . . that
18 didn’t have anything to do with his presentation on July 16” and that, based on
19 Victim’s internal injuries, she “would [have expected Victim] to exhibit immediate
20 signs or symptoms of injury.”

1 {22} The State then directly addressed—and dismissed—Defendant’s alternate
2 theory twice in closing. The State argued that Victim’s injuries “could not have been
3 caused by a short fall from a mattress a week before,” and “Dr. Scheller brought you
4 that inaccurate opinion that [the injuries were] caused by something else. That fluid’s
5 always been there . . . brewin’ . . . waiting for the day that it can cause massive head
6 trauma.”

7 {23} Because the jury heard Dr. Scheller’s opinion as to the cause of Victim’s
8 injuries, as well as the State’s rebuttal of it, we cannot say that it is “reasonably
9 probable” that the outcome of the trial would have been different if Dr. Scheller was
10 able to testify in a more fulsome way. Accordingly, the district court’s pretrial order
11 limiting the defense expert, and its refusal to reconsider that order, did not prejudice
12 Defendant. *See State v. Martinez*, 2021-NMSC-002, ¶ 114, 478 P.3d 880 (holding
13 that the district court’s exclusion of certain witness statements was harmless because
14 “[the d]efendant was not deprived of the defense and, in fact, through his
15 examination of [the witness] and in closing argument, pursued his theory of the case
16 that individuals other than [the d]efendant [were responsible for the victim’s
17 death]”).

18 **IV. The District Court Did Not Abuse its Discretion by Preventing**
19 **Defendant’s Expert from Attacking the State’s Theory of the Case**

20 {24} Defendant also contends that the district court abused its discretion by
21 preventing Dr. Scheller from testifying “about the validity of the diagnosis of

1 abusive head trauma, the lack of diagnostic criteria for abusive head trauma, or his
2 opinions about what findings should or should not be present in cases of abuse.” *See*
3 *State v. Yepez*, 2021-NMSC-010, ¶¶ 22-27, 483 P.3d 576 (holding that it was not an
4 abuse of discretion to exclude a qualified expert’s testimony about the connection
5 between the defendant’s genetic profile and his propensity to commit the alleged
6 crime where “the mechanism . . . increas[ing] the risk for violence is unknown and
7 that there are ‘lots of different theories,’ some of which suggest the involvement of
8 impulse-control functions and some of which do not”).

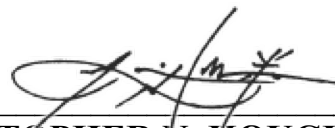
9 {25} During the hearing on the motion to suppress, the State elicited testimony
10 from Dr. Scheller that his assertion that AHT was not a valid diagnosis was
11 supported only by a single survey, which indicated that roughly 1 percent of medical
12 practitioners agreed with this viewpoint. The State called a rebuttal witness whose
13 testimony included that AHT “has been studied and published ad nauseam in the
14 medical literature” and that “to say it doesn’t exist is either a blatant
15 misunderstanding or intentional mischaracterization of the body of medical literature
16 and clinical experience.” Based on these facts, we conclude that the district court
17 “was within its discretion to exclude” Dr. Scheller’s opinion as to the nonviability
18 of a diagnosis of AHT “as lacking in scientific reliability.” *See id.* ¶ 27. Similarly,
19 the district court’s determination that Dr. Scheller’s “scientific theory or
20 methodology [was not] valid and reliable or founded and recognized in science,” *see*

1 *Alberico*, 1993-NMSC-047, ¶ 97, was not “clearly against the logic and effect of the
2 facts and circumstances before the court.” *Id.* ¶ 63.

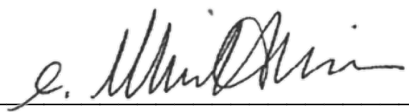
3 **CONCLUSION**

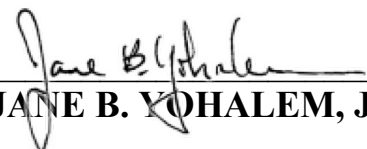
4 {26} First, we hold that the district court abused its discretion in initially limiting
5 the defense expert’s testimony in support of an alternative theory of causation for
6 Victim’s injuries. Nonetheless, we hold that Defendant was not prejudiced because
7 the defense expert was able to testify as intended and the alternative theory of
8 causation as to Victim’s injuries ultimately made its way to the jury. Finally, we hold
9 that the district court did not abuse its discretion in determining that there was
10 insufficient support for the expert’s intended testimony discrediting the diagnosis of
11 AHT. Therefore, we affirm the jury’s conviction of Defendant.

12 {27} **IT IS SO ORDERED.**

13
14 
KRISTOPHER N. HOUGHTON, Judge

15 **WE CONCUR:**

16 
17 **J. MILES HANISEE, Judge**

18 
19 **JANE B. YOHALEM, Judge**