

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico
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Mark Reynolds

Opinion Number: _____

Filing Date: **September 29, 2026**

No. A-1-CA-42133

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

FIDEL HERNANDEZ MIRAMONTES,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF LUNA COUNTY

Jarod K. Hofacket, District Court Judge

Raúl Torrez, Attorney General

Santa Fe, NM

Charles J. Gutierrez, Senior Solicitor General

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for Appellee

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Las Cruces, NM

for Appellant

OPINION

MEDINA, Chief Judge.

{1} A jury convicted Defendant Fidel Hernandez Miramontes of criminal sexual contact of a minor (CSCM), a second degree felony, contrary to NMSA 1978, Section 30-9-13(B)(1) (2003). On appeal, Defendant argues he was constructively deprived of counsel and, in the alternative, that he received ineffective assistance of counsel. Defendant also challenges the sufficiency of the evidence supporting his conviction. We affirm.

BACKGROUND

{2} Sometime between August 1, 2019, and November 3, 2019, ten-year-old Y.Z. (Victim) went to her aunt's house to play with her cousin. While there, Victim and her cousin entered Defendant's trailer, which was located behind Victim's aunt's house. Defendant was inside the trailer. Victim and her cousin sat on the couch next to Defendant. While sitting on the couch, Defendant began grabbing and touching Victim around her stomach and then lowered his hand to touch Victim's "private part"—the part she uses "to pee"—under her sweatpants and underwear, skin-to-skin. Victim disclosed the touching to a counselor approximately two years later, with a police officer present.

{3} Later, an officer conducted a recorded interview with Defendant, during which Defendant told the officer that he remembered the incident but denied any

1 inappropriate touching, claiming that he only touched Victim with affection,
2 touching her “rolls of fat” and hugging her without “bad intention.”

3 {4} We review additional facts as needed in the applicable analysis below.

4 **DISCUSSION¹**

5 **I. Sixth Amendment to the United States Constitution Claims**

6 {5} The Sixth Amendment to the United States Constitution and Article II,
7 Section 14 of the New Mexico Constitution guarantee the right to effective
8 assistance of counsel for the accused. Defendant argues that his Sixth Amendment
9 right was violated in two respects. First, he contends that defense counsel failed to
10 subject the State’s case to meaningful adversarial testing, resulting in constructive
11 deprivation of counsel. Second, Defendant argues that counsel provided ineffective
12 assistance. Because Defendant’s claims implicate his constitutional rights, our

¹To the extent Defendant argues that the district court erred by not considering his motion to vacate judgment and sentence and set for a new trial, we disagree. The district court lacked jurisdiction to consider Defendant’s motion, because Defendant did not file it within ten days of the verdict, nor did he assert newly discovered evidence. *See* Rule 5-614(C) NMRA (“A motion for new trial based on any other grounds [besides newly discovered evidence] shall be made within ten (10) days after verdict or finding of guilty or within such further time as the court may fix during the ten (10) day period.”); *see also State v. Lucero*, 2001-NMSC-024, ¶¶ 5, 11, 130 N.M. 676, 30 P.3d 365 (determining that because “[the d]efendant did not file his motion for [a] new trial within ten days of the verdict” and “[the d]efendant’s motion for [a] new trial did not concern newly discovered evidence,” and the defendant failed to comply with Rule 5-614(C), holding that the district court lacked jurisdiction to rule on the defendant’s untimely motion for a new trial)). Accordingly, we will confine our review to facts properly developed in the record.

1 review is de novo. *See State v. Brown*, 2006-NMSC-023, ¶ 8, 139 N.M. 466, 134
2 P.3d 753.

3 **A. Constructive Deprivation of Counsel**

4 {6} Constructive deprivation of counsel was first recognized by the United States
5 Supreme Court in *United States v. Cronin*, 466 U.S. 648 (1984), which was decided
6 the same day as *Strickland v. Washington*, 466 U.S. 668 (1984). Although both
7 *Cronin* and *Strickland* address violations of the Sixth Amendment right to counsel,
8 they establish distinct legal standards. *Strickland* requires a case specific inquiry into
9 whether counsel’s deficient performance prejudiced the defense and affected the
10 outcome of the proceedings. *See* 466 U.S. at 692. By contrast, *Cronin* permits a
11 presumption of prejudice where the defendant is denied or constructively deprived
12 of the assistance of counsel. *See* 466 U.S. at 658-59 (stating that the defendants are
13 relieved of the burden of establishing prejudice when “circumstances . . . are so likely
14 to prejudice the accused that the cost of litigating their effect in a particular case is
15 unjustified”).

16 {7} At least one circuit applies the *Cronin* presumption of prejudice “only where
17 the constructive denial of counsel and the associated collapse of the adversarial
18 system is imminently clear.” *See Moss v. Hofbauer*, 286 F.3d 851, 861 (6th. Cir.
19 2002). Other circuits have understood *Cronin* to distinguish its analysis from
20 *Strickland* by establishing a per se rule considering “whether defense counsel

1 provided no representation at all” as opposed to “bad, even deplorable assistance,”
2 for which the *Strickland* two-pronged test applies. *Moss*, 286 F.3d at 861.² Our own
3 appellate courts recognize that this presumption is only “justified in a very limited”
4 set of circumstances. *State v. Brazeal*, 1990-NMCA-010, ¶ 18, 109 N.M. 752, 790
5 P.2d 1033. These circumstances are: “(1) denial of counsel altogether; (2) defense
6 counsel’s failure ‘to subject the prosecution’s case to meaningful adversarial
7 testing’; and (3) when the accused is ‘denied the right of effective cross-
8 examination.’” *State v. Grogan*, 2007-NMSC-039, ¶ 12, 142 N.M. 107, 163 P.3d
9 494 (quoting *Cronic*, 466 U.S. at 659).

10 {8} As to the second circumstance, raised by Defendant here, the attorney’s failure
11 to subject the prosecution’s case to meaningful adversarial testing “must be
12 complete.” *See Bell v. Cone*, 535 U.S. 685, 697 (2002); *see also Lukens v. Franco*,
13 2019-NMSC-002, ¶ 28, 433 P.3d 288 (considering whether a total failure in the
14 proceeding occurred in analyzing a defendant’s claim under *Cronic*). In *Bell*, the
15 United States Supreme Court explained that the application of the *Cronic*
16 presumption is appropriate only where there is a failure of counsel to oppose the
17 prosecution throughout a whole proceeding as opposed to opposing the prosecution
18 at specific points in a proceeding, describing that difference as “not of degree[,] but

²The United States Supreme Court has also applied a presumption of prejudice in conflict of interest cases. *See Holloway v. Arkansas*. 435 U.S. 475 (1978).

1 of kind.” 535 U.S. at 697. In other words, where a defendant criticizes aspects of
2 defense counsel’s conduct, rather than the absence of a defense throughout the
3 proceeding and in all respects, alleging, for example, “failure to adduce mitigating
4 evidence and the waiver of closing argument,” the challenge is “plainly of the same
5 ilk as other specific attorney errors [the Supreme Court has] held subject to
6 *Strickland*’s performance and prejudice components.” *Id.* at 697-98. In sum, the
7 presumption of prejudice applies when counsel fails to mount a defense or where
8 “the trial court witnesses obvious incompetence.” *Grogan*, 2007-NMSC-039, ¶ 15;
9 *see State v. Sandoval*, ___-NMCA-___, ¶ 26, ___ P.3d ___ (A-1-CA-40454, July
10 13, 2026) (declining to depart from *Strickland* absent “egregious” incompetence by
11 defense counsel).

12 {9} Defendant argues that he was constructively deprived of counsel because his
13 counsel failed to subject the State’s case to meaningful adversarial testing. In support
14 of his argument Defendant identifies the following instances of alleged deficient
15 performance: (1) defense counsel did not cross-examine the State’s witnesses;
16 (2) inconsistencies in the State’s case “remained unexplored”; (3) “[m]atters of law
17 were not addressed”; (4) “[e]very potential issue was conceded”; and (5) defense

1 counsel told the jury during closing argument that he did not believe Victim was
2 lying.³

3 {10} As noted above, to invoke the presumption of prejudice under the second
4 exception recognized in *Cronic*, a defendant must demonstrate that counsel’s failure
5 to subject the prosecution’s case to meaningful adversarial testing was *complete*. See
6 *Bell*, 535 U.S. at 697. We therefore first consider whether defense counsel took any
7 action to represent Defendant during the proceedings and, if so, whether counsel’s
8 actions constituted meaningful adversarial testing of the State’s case.

9 {11} Our review of the record confirms defense counsel subjected the State’s case
10 to meaningful adversarial testing. During the State’s opening argument, defense
11 counsel objected to the State appealing to the passion and sympathy of the jury by
12 accusing Defendant of “tak[ing] away the [Victim’s] innocence,” and the district
13 court sustained the objection. During the presentation of evidence, Defense
14 counsel’s objections (1) excluded the admission of a note Victim wrote related to
15 the CSCM; (2) curtailed Victim’s testimony regarding how the CSCM impacted her
16 life; (3) prevented Victim’s mother from explaining why Victim’s behavior changed
17 during the relevant time period; and (4) excluded the testimony of a forensic

³ Defendant also asserts that an alternative suspect was not investigated. Because the assertion of an alternative suspect is not supported by evidence in the record, we do not address this claim. See *Durham v. Guest*, 2009-NMSC-007, ¶ 10, 145 N.M. 694, 204 P.3d 19 (declining to consider facts not in the record).

1 examiner. Further, to be addressed in more detail below, defense counsel argued
2 during closing argument that Victim misunderstood the event, and highlighted the
3 consistency of Defendant's version of the event when he spoke to the officer and
4 argued that this supported Defendant's credibility. Defense counsel's advocacy on
5 behalf of Defendant precludes a determination that Defendant was constructively
6 deprived of counsel.⁴

7 {12} Because we hold that Defense counsel engaged in meaningful adversarial
8 testing, we consider Defendant's five claims of deficient performance under the
9 traditional *Strickland* analysis where a defendant must establish both the prejudice
10 and performance components of an ineffective assistance of counsel claim.

11 **B. Ineffective Assistance of Counsel**

12 {13} In addition to the five claims of deficient performance raised under *Cronic*,
13 Defendant raises other claims of ineffective assistance of counsel under *Strickland*.
14 Because Defendant's *Cronic* and *Strickland* arguments substantially overlap, we
15 identify each claim of deficient performance raised under both frameworks. Those

⁴To the extent Defendant relies on *Edwards v. Commissioner of Correction*, 194 A.3d 329 (Conn. App. Ct. 2018), to argue Defendant was constructively deprived of counsel, we find his reliance on *Edwards* unavailing. *Edwards* involved a developed habeas record establishing counsel's failure to meaningfully test the state's case. *Id.* at 330, 334-36. The record here does not show constructive deprivation of counsel. Rather, it demonstrates that the State's case was subjected to meaningful adversarial testing.

1 claims are as follows:⁵ defense counsel (1) did not cross-examine the State's
2 witnesses; (2) did not challenge Victim's credibility or support Defendant's
3 credibility; (3) told the jury during closing argument that he did not believe Victim
4 was lying; (4) agreed with the State that the inclusion of a voluntariness jury
5 instruction was unnecessary; (5) waived opening argument; (6) failed to advocate
6 for reasonable accommodations beyond the accessibility device provided by the
7 district court; and (7) only met with Defendant two or three times before his trial and
8 each time was for approximately ten minutes.⁶

⁵We do not include Defendant's blanket assertions that inconsistencies in the State's case "remained unexplored," "[m]atters of law were not addressed," and "[e]very potential issue was conceded." These arguments are either captured in essence in the specific allegations that we include in our summation of Defendant's argument or are not sufficiently developed for us to consider.

⁶Defendant also asserts that defense counsel's failure to object to the inclusion of the interview of Defendant by the police was "error" and that the interrogating officers' failure to record Defendant's Miranda warning or claimed waiver was a violation of NMSA 1978, Section 29-1-16 (2005). We will address defense counsel's concession to the lack of necessity for a voluntariness instruction below. As to the recording of the Miranda warning, the record before us is not sufficient to conclude the provision of the Miranda warning was not recorded. *See State v. Stenz*, 1990-NMCA-005, ¶ 7, 109 N.M. 536, 787 P.2d 455 ("A trial counsel is not incompetent for failing to make a motion when the record does not support the motion."). Further, Defendant offers no authority supporting the proposition that Section 29-1-16 requires the admission of an electronic recording of the police providing Miranda warnings into evidence. We will not further consider this claim. *See* Rule 12-318(A)-(C) NMRA (outlining the briefing requirements for appeals before this Court); *State v. Vigil-Giron*, 2014-NMCA-069, ¶ 60, 327 P.3d 1129 (noting that "appellate courts will not consider an issue if no authority is cited in support of the issue and . . . assum[ing] no such authority exists").

1 {14} When reviewing a claim of ineffective assistance of counsel, “there is a strong
2 presumption that . . . counsel’s conduct falls within the wide range of reasonable
3 professional assistance.” *State v. Garcia*, 2011-NMSC-003, ¶ 33, 149 N.M. 185, 246
4 P.3d 1057 (internal quotation marks and citation omitted). ““In order to establish a
5 prima facie case of ineffective assistance of counsel on direct appeal, a defendant
6 must demonstrate that: (1) counsel’s performance fell below that of a reasonably
7 competent attorney; (2) no plausible, rational strategy or tactic explains counsel’s
8 conduct; and (3) counsel’s apparent failings were prejudicial to the defense.”” *State*
9 *v. Pamphille*, 2021-NMCA-002, ¶ 37, 482 P.3d 1241 (quoting *State v. Bahney*, 2012-
10 NMCA-039, ¶ 48, 274 P.3d 134). It is rare for an ineffective assistance of counsel
11 claim to be successful on direct appeal because “the record is frequently insufficient
12 to establish whether an action taken by defense counsel was not reasonable or if an
13 error caused prejudice.” *Id.* Therefore, appellate courts strongly prefer that
14 ineffective assistance of counsel claims be brought in habeas corpus proceedings,
15 where a complete record can be made. *See, e.g., State v. Astorga*, 2015-NMSC-007,
16 ¶ 17, 343 P.3d 1245; *State v. Ortega*, 2014-NMSC-017, ¶ 60, 327 P.3d 1076.
17 However, if a defendant “presents a prima facie case on direct appeal, we will
18 remand the ineffective assistance of counsel claim to the district court.” *Astorga*,
19 2015-NMSC-007, ¶ 17. For the reasons set forth below, we hold Defendant has
20 failed to demonstrate a prima facie case.

1 {15} First, we address defense counsel’s decision not to cross-examine the State’s
2 witnesses, a fact undisputed by the parties. The State offered testimony from three
3 witnesses: Victim, Victim’s mother, and the police officer who investigated the
4 crime.⁷ We consider each of the State’s witnesses’ testimony.

5 {16} At the time of trial, Victim was fifteen years old and she testified about events
6 that took place when she was ten years old. Victim testified for approximately thirty-
7 five minutes, including time spent addressing objections and related matters at the
8 bench. Defendant contends that his trial counsel should have cross-examined Victim
9 because her testimony “lacked specificity and included several contradictions.”
10 Defendant cited to the entirety of Victim’s testimony without identifying where in
11 the record Victim’s testimony lacked specificity or contained contradictions. “It is
12 not the responsibility of . . . this Court . . . to search the record for evidence to support
13 a claim or assertion. That responsibility belongs to the attorney.” *State v. Maestas*,
14 2018-NMSC-010, ¶ 51, 412 P.3d 79 (Chávez, J. concurring in part, dissenting in
15 part). And while later in his brief Defendant contends, in conclusory statements, that
16 Victim could not remember when the incident occurred, seemed unaware of her
17 relationship to Defendant, could not remember when Victim told her mother or

⁷In asserting how Victim’s mother and the police officer could have been cross-examined, Defendant relies, in part, on facts not in the record, and we will not consider them. *See Durham*, 2009-NMSC-007, ¶ 10 (declining to consider facts not in the record).

1 teacher about what happened, provided no detail, and did not explain her cousin's
2 presence in the room, and whether her cousin would have been able to see what
3 happened or not, Defendant again neglects to cite to the record in support of these
4 allegations. *See id.*; *see also* Rule 12-318 (A)(3) NMRA (stating that a summary of
5 the facts relevant to the issues presented for review shall "contain citations to the
6 record proper" or "transcript of proceedings").

7 {17} Still, the record shows that Victim testified that sometime between August 1,
8 2019, and November 3, 2019, when she was ten years old, Victim and her cousin
9 entered Defendant's trailer, located behind her aunt's house, to get a soda. Victim
10 testified that, while she was there, Defendant grabbed her and touched her stomach
11 before lowering his hand underneath her underwear and touching her private part,
12 which Victim identified as the part she used to pee. Given Victim's young age both
13 at the time of the offense and at trial, defense counsel reasonably could have
14 determined that cross-examination of Victim risked alienating the jury without
15 advancing the defense. *See, e.g., Tucker v. State*, 468 S.W.3d 468, 474-75 (Mo. Ct.
16 App. 2015) (recognizing strategic reasons for not cross-examining child witnesses,
17 including counsel's concern about alienating the jury by upsetting the child victims);
18 *see also State v. Bernal*, 2006-NMSC-050, ¶ 32, 140 N.M. 644, 146 P.3d 289
19 (explaining that "[i]f any claimed error can be justified as a trial tactic or strategy,
20 then the error will not be unreasonable").

1 {18} That strategic decision was additionally reasonable given Defendant’s
2 recorded statement to the police. In that statement, Defendant did not dispute having
3 access to Victim, stated that he hugged Victim when she was with his granddaughter,
4 and acknowledged grabbing her “rolls of fat.” Given these facts, defense counsel
5 reasonably could have concluded that cross-examining Victim—particularly on
6 specific details such as the precise date of the incident—would have been futile.
7 Moreover, a jury might not fault Victim for not providing a precise date of the
8 offense, offering little benefit to the defense. Such questioning could have also
9 created “the potential risk of having the damaging testimony repeated during cross-
10 examination, a risk which could easily outweigh the possibility of identifying
11 weaknesses in [Victim]’s account.” *See Moss*, 286 F.3d at 865. The decision
12 therefore falls within the purview of reasonable trial strategy. *See State v. Hester*,
13 1999-NMSC-020, ¶ 11, 127 N.M. 218, 979 P.2d 729 (rejecting an ineffective
14 assistance of counsel claim based on alleged deficiencies in defense counsel’s cross-
15 examination).

16 {19} We turn next to Victim’s mother who testified for less than ten minutes,
17 confirmed Victim’s age, confirmed Defendant’s relationship to Victim, and testified
18 to where Defendant lived during the relevant time period. Mother further testified
19 that she could not remember if Victim saw Defendant again after the events at issue,
20 that mother had never spoken to Defendant about the events, and that Victim had

1 never gone to Defendant's home without mother's permission. Besides Victim's age
2 at the time of this incident and the location of Defendant's home—simple,
3 identifiable facts supported elsewhere in the record—this testimony is not directly
4 material to the charges. Moreover, Defendant identifies no adversarial benefit in
5 contesting this testimony.

6 {20} Victim's mother also testified that she spoke with Victim around the time of
7 the event and stated that Victim's behavior changed, exhibiting heightened emotions
8 resulting in Victim going to therapy. Defendant does not specifically address this
9 testimony, nor does he provide authority supporting that the failure to cross-examine
10 Victim's mother on this matter amounts to ineffective assistance of counsel. Without
11 a developed argument or authority to support that the failure to cross-examine
12 Victim's mother impaired the defense, we are not persuaded that competent counsel
13 would have cross-examined Victim's mother. *See State v. Vigil-Giron*, 2014-
14 NMCA-069, ¶ 60, 327 P.3d 1129 (noting that appellate courts will not consider an
15 issue if no authority is cited in support of the issue and assuming no such authority
16 exists); *see also United States v. Voight*, 877 F.2d 1465, 1468 (10th Cir. 1989)
17 (reasoning that the defendant "has not even shown how cross-examination might
18 have changed the outcome of the trial" and holding that "[t]he failure to cross-
19 examine a witness does not necessitate a finding of ineffective assistance of
20 counsel").

1 {21} The final witness, the police officer who interviewed Defendant during the
2 investigation, testified for approximately ten minutes before a twenty-minute video
3 recording of the interview itself was played for the jury. The primary purpose of the
4 officer's testimony was to establish the foundation for the introduction of the video
5 recording of his interview of Defendant. This testimony included information about
6 the officer's employment, training, the sequence of events leading up to the
7 interview with Defendant, and the officer's standard approach to interviews with
8 suspects including the giving of Miranda warnings.

9 {22} Defendant contends that the officer could have been cross-examined about the
10 eighteen-month delay in charging Defendant, but does not articulate how this
11 testimony would have meaningfully changed the outcome of the trial.⁸ Defendant
12 does not provide any further argument or authority supporting his contention that the
13 failure to cross-examine the officer amounts to ineffective assistance of counsel.
14 Consequently, we are unpersuaded that trial counsel's decision to forego cross-
15 examination of the investigating officer changed the outcome here and amounted to

⁸To the extent Defendant relies on *In re Padilla*, 2020-NMSC-003, 456 P.3d 1057, to suggest defense counsel's failure to question the officer about other allegations of sexual abuse, we are unpersuaded. There, our Supreme Court reviewed a recommendation by the disciplinary board following an investigation into professional misconduct. *Id.* ¶ 1. We benefit from no such developed record here, and therefore find Defendant's reliance on *In re Padilla* is unavailing.

ineffective assistance of counsel. *See Vigil-Giron*, 2014-NMCA-069, ¶ 60;
cf. Voight, 877 F.2d at 1468.

{23} Defendant also contends that defense counsel did not challenge Victim’s
credibility or support Defendant’s credibility and that defense counsel told the jury
during closing argument that he did not believe Victim was lying. We disagree with
Defendant’s characterization of the record and explain.

{24} During closing argument, defense counsel argued the following:

Do I think [Victim]’s lying? I don’t. Clearly, she’s distraught about
something. But something maybe that was misinterpreted. Something
that was, we tell our kids it’s a hard world out there. We tell our kids
over and over, . . . no one should be touching you. . . . And [Defendant]
sitting them on the lap tickling them, that is not a crime. Touching their
love handles, that is not a crime. And that’s not what [Defendant]’s
charged with. [Defendant]’s charged with putting his hand down
[Victim’s] pants. Now, when [Defendant] had his interview with the
[police], he was very adamant. I mean, [Defendant] didn’t change his
story. [Defendant] said, “No that didn’t happen. No that didn’t happen.”
There were some semantics but ultimately what [Defendant] said was
“I would tickle them.” They kept trying to get [Defendant] to say
something else. They kept trying to get him to say something extra.
“No. That’s all I would do, tickle them on their love handles.”

{25} The record indicates that defense counsel argued that Victim misunderstood
the event, and he implored the jury to accept the credibility of Defendant’s adamant
denial of Victim’s accusation during his interview. This is meaningfully
distinguishable from a concession of guilt, and it precludes a view of the record that
defense counsel conceded “[e]very potential issue” as Defendant suggests on appeal.
In contrast to Defendant’s characterization, this serves as an argument supporting

1 Defendant's credibility. Further, to the extent that a decision not to cross-examine a
2 victim may be considered indicative that defense counsel did not challenge the
3 victim's credibility, we are similarly unpersuaded. As discussed above, a decision
4 not to cross-examine any of the State's witnesses may be a reasonable trial strategy.
5 *See Voight*, 877 F.2d at 1468.

6 {26} Defendant also contends his counsel was ineffective because his counsel
7 informed the district court that instructing the jury with UJI 14-5040 NMRA was
8 not necessary. "[UJI 14-5040] was adopted by the New Mexico Supreme Court as a
9 protection for defendant[s] against statements made after [their] arrest." *State v.*
10 *Zamora*, 1978-NMCA-017, ¶ 10, 91 N.M. 470, 575 P.2d 1355. The instruction
11 relates to the use of "confession[s] or inculpatory admission[s of a defendant] out of
12 the hearing of the jury." UJI 14-5040 comm. cmt. It requires the jury to determine
13 whether a statement made by a defendant was given voluntarily prior to considering
14 the statement. The instruction must be submitted to the jury when the court has made
15 a determination that a statement by the defendant is voluntary and submits the
16 statement to the jury. UJI 14-5040 use note 1.

17 {27} Defense counsel informed the district court that this instruction was not
18 necessary because a recording apparently not admitted into evidence showed that
19 Defendant had, in fact, been Mirandized. The record reveals that defense counsel
20 was aware Defendant had been Mirandized at the outset of the police interview and

1 that defense counsel's theory—as asserted in his closing statement—was that
2 Defendant did not confess or admit to any criminal act during the prearrest interview.
3 Accordingly, defense counsel's decisions not to request the jury be provided with
4 UJI 14-5040, or challenge the voluntariness of Defendant's statement may be
5 considered a rational trial tactic. *Cf. State v. Sanchez*, 1982-NMCA-155, ¶ 10, 98
6 N.M. 781, 652 P.2d 1232 (“Failure to file a non[]meritorious motion cannot be
7 declared ineffective assistance.”). As a result, the district court was not called upon
8 to make a determination that Defendant's statement was voluntary. Based on the
9 foregoing, we conclude that defense counsel's decision not to request that the jury
10 be provided with UJI 14-5040 does not establish a prima facie case of ineffective
11 assistance of counsel.

12 {28} Defendant further asserts that he is hearing impaired and despite being
13 provided with a hearing device, defense counsel was ineffective because counsel
14 failed to advocate for reasonable accommodations that he was entitled to under the
15 Americans with Disabilities Act, 42 U.S.C. §§ 12101 to -213, or the New Mexico
16 Human Rights Act, NMSA 1978, § 28-1-1 to -14 (1969, as amended through 2024).
17 Defendant concedes that the facts surrounding his inability to hear during trial are
18 not developed and as a result any impact on his right of confrontation are unknown.
19 By his own admission this claim is unsupported by the record. Therefore, Defendant
20 has not presented a prima facie case of ineffective assistance of counsel resulting

1 from this claim. *See Bernal*, 2006-NMSC-050, ¶ 33 (stating that when the record is
2 inadequate for review, “[r]ather than remand the case to the trial court for further
3 hearings, this Court has a general preference that such claims be brought and
4 resolved through habeas corpus proceedings”).

5 {29} As to Defendant’s remaining assertions, we conclude, and Defendant
6 identifies, no authority that these claims necessitate a determination of ineffective
7 assistance of counsel on appeal. *See Vigil-Giron*, 2014-NMCA-069, ¶ 60. At the
8 conclusion of the State’s opening argument, defense counsel informed the district
9 court that he would reserve making an opening argument. *See* Rule 5-607(C) NMRA
10 (providing that a defendant “may reserve its opening statement until after the
11 conclusion of the state’s case”). At the conclusion of the State’s case the defense
12 called no witnesses and made no opening argument. Defendant argues that defense
13 counsel’s waiver of opening argument was unreasonable. In support thereof
14 Defendant offers a summary question asking whether “[i]t was reasonable to waive
15 opening argument” and offers no argument or authority in support of this claim. *See*
16 *id.*; *cf. Fox v. Ward*, 200 F.3d 1286, 1296 (10th Cir. 2000) (“While opening and
17 closing statements are not to be lightly waived in a capital case, it is well-settled that
18 the decision to waive an opening or closing statement is a commonly adopted
19 strategy, and without more, does not constitute ineffective assistance of counsel.”).
20 Further, Defendant’s claims related to a language barrier and minimal preparation

1 or limited or ineffective interviewing of Defendant supporting ineffective assistance
2 of counsel are similarly unsupported by the record. Defendant's claims are better
3 scrutinized, if at all, through habeas corpus proceedings. *See Astorga*, 2015-NMSC-
4 007, ¶ 17 (“[W]e prefer an ineffective assistance of counsel claim to be brought in a
5 habeas corpus proceeding, so that the defendant may actually develop the record
6 with respect to defense counsel's actions.” (internal quotation marks and citation
7 omitted)).

8 **II. Sufficiency of the Evidence**

9 {30} “The test for sufficiency of the evidence is whether substantial evidence of
10 either a direct or circumstantial nature exists to support a verdict of guilty beyond a
11 reasonable doubt with respect to every element essential to a conviction.” *State v.*
12 *Montoya*, 2015-NMSC-010, ¶ 52, 345 P.3d 1056 (internal quotation marks and
13 citation omitted). “[T]he reviewing court views the evidence in the light most
14 favorable to the guilty verdict, indulging all reasonable inferences and resolving all
15 conflicts in the evidence in favor of the verdict.” *State v. Cunningham*, 2000-NMSC-
16 009, ¶ 26, 128 N.M. 711, 998 P.2d 176 (alteration, internal quotation marks, and
17 citation omitted). We disregard all evidence and inferences that support a different
18 result. *See State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829. “Jury
19 instructions become the law of the case against which the sufficiency of the evidence

1 is to be measured.” *State v. Smith*, 1986-NMCA-089, ¶ 7, 104 N.M. 729, 726 P.2d
2 883.

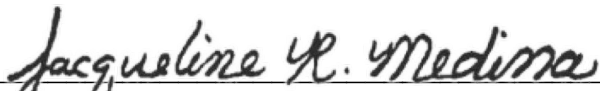
3 {31} To find Defendant guilty of CSCM the jury was instructed that the State must
4 prove beyond a reasonable doubt that: (1) “[D]efendant touched or applied force to
5 the unclothed vulva or mons veneris of [Victim]”; (2) “[Victim] was a child under
6 the age of thirteen”; and (3) “[t]his happened in New Mexico on or between August
7 01, 2019 through November 03, 2019.” With this in mind, we turn to the evidence
8 presented at trial. Victim testified to Defendant touching her “private part” skin-to-
9 skin under her sweatpants and underwear, specifying that Defendant touched the part
10 Victim used “to pee.” Further, Victim confirmed that she was ten years old at the
11 time and that the incident occurred between August 1, 2019, and November 3, 2019.
12 While Victim’s testimony alone supports the jury’s finding as to these elements, *see*
13 *State v. Notah*, 2022-NMCA-005, ¶ 11, 503 P.3d 418 (recognizing that a “[v]ictim’s
14 testimony alone provided sufficient evidence to support [the d]efendant’s
15 conviction”), Victim’s mother offered corroborating testimony. Mother testified that
16 she observed Victim’s behavior change around the time Defendant touched her,
17 leading to Victim requiring counseling. Viewing this evidence in the light most
18 favorable to the State, resolving all conflicts and making all permissible inferences
19 in favor of the jury’s verdict, we conclude sufficient evidence supports the jury’s
20 verdict that Defendant was guilty of CSCM. *See id.*

{32} To the extent Defendant contends the timeframe provided in the jury instructions is insufficiently specific, we disagree. Our Supreme Court has held a child's testimony as to a general timeframe of abuse, as was testified to here, is sufficient to support a CSCM conviction. *See State v. Lente*, 2019-NMSC-020, ¶¶ 78, 83-84, 453 P.3d 416 (reasoning that the victim's testimony supporting a general timeframe in which abuse occurred was sufficiently specific to support the defendant's convictions for CSCM and criminal sexual penetration). Regarding Defendant's challenges to the veracity of Victim's account, we are also unconvinced. "New Mexico appellate courts will not invade the jury's province as fact-finder by second-guessing the jury's decision concerning the credibility of witnesses, reweighing the evidence, or substituting its judgment for that of the jury." *Garcia*, 2011-NMSC-003, ¶ 5 (text only) (citation omitted).

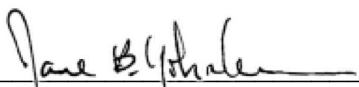
CONCLUSION

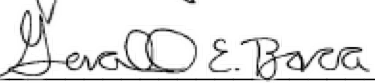
{33} For these reasons, we affirm.

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


JACQUELINE R. MEDINA, Chief Judge

WE CONCUR:


JANE B. YOHALEM, Judge


GERALD E. BACA, Judge