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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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Mark Reynolds

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v. **No. A-1-CA-42553**

CONCEPTION MORALES, III,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
Conrad F. Perea, District Court Judge

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for Appellant

MEMORANDUM OPINION

HENDERSON, Judge.

{1} Defendant Conception Morales, III appeals his convictions for two counts of criminal sexual contact of a minor (CSCM) in the fourth degree (force or coercion), contrary to NMSA 1978, Section 30-9-13(D)(1) (2003), for the sexual assault of M.M. Defendant was convicted upon retrial after his first trial ended in a mistrial.

On appeal, Defendant raises multiple evidentiary issues for review, arguing that he was denied the right to present a complete defense by the district court's (1) sanction of excluding a defense witness from testifying, and (2) prohibition of reference to a website name at trial. Defendant also argues that (3) a detective's testimony impermissibly vouched for M.M.'s credibility, and (4) the impact of these cumulative errors deprived Defendant of a fair trial. Concluding that the district court did not consider the required balancing test before excluding Defendant's witness, we reverse and remand on this issue and need not reach Defendant's remaining arguments.

BACKGROUND

{2} This case arose from allegations that Defendant sexually assaulted his daughter (M.M.), who was thirteen years old at the time, one night between September 1, 2022 and October 31, 2022, while she was staying at Defendant's house. M.M. told Defendant's girlfriend who lived with Defendant about the incident the night it occurred, but M.M. did not think the girlfriend believed her. Approximately six months later, M.M. told her mother who testified that she then confronted Defendant who apologized and did not deny the allegations. Afterward, M.M. and her mother filed a police report. The detective assigned to this case contacted M.M.'s mother and set up a forensic interview for M.M. Defendant was then charged with two counts of CSCM.

{3} This case involves two trials. At the first trial in June 2024, Defendant wished to call Defendant's girlfriend to testify, but the State objected as Defendant did not file a pretrial witness list. Defendant argued that the initial disclosure expressly reserved the right to call any and all of the State's listed witnesses, and the State's initial witness list included Defendant's girlfriend. The State responded that it was improper for Defendant to rely on the State's initial witness list and regardless, Defendant did not file a final trial witness list. Over Defendant's argument that there were other sanctions the court could impose, the district court excluded Defendant's girlfriend because Defendant did not file a final trial witness list as required by LR3-303(L)(1)(a) NMRA (2024).[1] Accordingly, Defendant's girlfriend did not testify in the June 2024 initial trial,

{4} Prior to the second trial, in July 2024 Defendant did submit a final trial witness list that included Defendant's girlfriend. However, the State made an oral motion in limine at the second trial asking the district court to again exclude Defendant's witnesses because an initial witness list was not filed within twenty-five days of Defendant's September 2023 arraignment, before the first trial, as required by LR3-

[1]LR3-303 was amended by Supreme Court Order No. S-1-RCR-2024-00070 in 2024, after Defendant had already been charged on August 17, 2023. However, the rule states that amendments are "effective for all cases pending or filed on or after July 1, 2024." Order, S-1-RCR-2024-00070 (N.M. May 17, 2024). Because this case was pending at the time and the amendments are not relevant to our analysis, we rely on the amended current version of the rule.

303(G). Defendant again argued that Defendant's girlfriend was on the State's initial witnesses list and that Defendant reserved the right to call any and all of the witnesses listed in the State's initial disclosure, and this time properly filed a final witness list that included her name. Unconvinced, the district court granted the State's motion to exclude Defendant's witnesses, and Defendant's girlfriend did not testify. Following the second trial, Defendant was convicted of both counts of CSCM.

{5} Defendant now appeals.

DISCUSSION

{6} On appeal, Defendant raises multiple issues arising from his second trial, including that the district court's exclusion of one of Defendant's witnesses—Defendant's girlfriend—denied him the right to present a complete defense. We conclude that this issue requires reversal and retrial is not barred by double jeopardy; we therefore we do not address Defendant's remaining claims.

I. Exclusion of Defendant's Proposed Witness

{7} Defendant first argues that it was an abuse of discretion for the district court to exclude Defendant's girlfriend from testifying as a witness in his case. Specifically, Defendant argues that he did not violate discovery rules and regardless, the district court violated Defendant's constitutional right to present a complete defense when it did not apply the presumption against exclusion of defense witnesses

and the balancing test required by *McCarty v. State*, 1988-NMSC-079, ¶¶ 9-10, 107 N.M. 651, 763 P.2d 360.[2] The State argues that Defendant violated LR3-303(G)'s timeline for filing an initial witness disclosure, and while conceding that the district court erred in not expressly considering the *McCarty* balancing test, any error was harmless. Concluding that it was an abuse of discretion for the district court to determine that Defendant violated LR3-303(G) and not analyze whether a defense witness should be excluded under the balancing test articulated in *McCarty*, we reverse and remand.

{8} "A district court's decision to exclude a witness is reviewed for abuse of discretion." *State v. Garcia*, 2025-NMSC-030, ¶ 33, 578 P.3d 1073. "A court abuses its discretion when its ruling is clearly against the logic and effect of the facts and circumstances of the case." *State v. Harper*, 2011-NMSC-044, ¶ 16, 150 N.M. 745, 266 P.3d 25 (internal quotation marks and citation omitted). "The remedy for the erroneous exclusion of a defense witness is reversal and remand." *Garcia*, 2025-NMSC-030, ¶ 54; *see, e.g.*, *McCarty*, 1988-NMSC-079, ¶¶ 17-18 (reversing the

[2]Defendant asserts that the right to present a complete defense by calling favorable witnesses is protected by both the Sixth Amendment of the United States Constitution and Article II, Section 14 of the New Mexico Constitution. However, because Defendant does not argue that the New Mexico Constitution affords any greater protections than the United States Constitution, we assume without deciding that both constitutions guarantee the same protections. *See State v. Ochoa*, 2004-NMSC-023, ¶ 6, 135 N.M. 781, 93 P.3d 1286.

district court's exclusion of defense witnesses after holding that it was an abuse of discretion).

{9} First, we consider whether Defendant violated discovery rules. LR3-303(G) requires that:

> Within twenty-five (25) days after arraignment or waiver of arraignment each party shall, subject to Rule 5-501(F) NMRA and Rule 5-502(C) NMRA, file a list of names and contact information for known witnesses the party intends to call at trial and that the party has verified is current as of the date of disclosure required under this subparagraph, including a brief statement of the expected testimony for each witness, to assist the court in assigning the case to a track as provided in this rule.

{10} Similarly, Rule 5-502(A)(3) requires defendants to disclose "a list of the names and addresses of the witnesses the defendant intends to call at the trial" within thirty days after the arraignment unless a shorter time period is ordered. LR3-303(L)(1)(a) then requires parties to submit final trial witness lists no later than three days before trial. The State argued during the second trial that although Defendant filed final trial witness lists including Defendant's girlfriend, Defendant did not file an initial witness disclosure within twenty-five days of the arraignment. Without providing explanation, the district court granted the State's motion to exclude Defendant's girlfriend as a witness. Defendant argued at both trials and asserts on appeal that he did not violate LR3-303(G) because Defendant gave notice of his intent to call any and all of the State's witnesses in the entry of appearance,

which was timely filed after arraignment, and the State initially disclosed Defendant's girlfriend as one of its witnesses. We agree with Defendant.

{11} Defendant was arraigned on September 7, 2023. Defendant filed an entry of appearance, notice of discovery demand, demand for speedy trial and initial disclosure of witnesses on September 21, 2023, which is well within LR3-303's twenty-five-day timeline. This filing stated that "Defendant intends to call any and all State's witnesses, co-defendants, and any witnesses listed in any of the discovery." The State filed its initial witness list naming Defendant's girlfriend on September 22, 2023. The State's initial witness list stated that Defendant's girlfriend "is expected to testify regarding . . . Defendant's actions which led to the filing of the charges herein." Although Defendant did not file a trial witness list before the first trial, Defendant's girlfriend was listed in his witness lists filed before the second trial on July 8, 2024 and July 9, 2024, and again in a final trial witness list filed on July 11, 2024. Defendant's second trial was held on July 23-24, 2024, more than three days and nearly two weeks after Defendant's final witness list was filed.

{12} While the State argues that Defendant never filed an initial witness list disclosing Defendant's girlfriend, Defendant's initial disclosure of witnesses clearly reserved the right to call "any and all State's witnesses" and the State listed Defendant's girlfriend on its first witness list. Our Supreme Court recently explained that "a party provides adequate notice of intent to call an opposing party's witnesses

by including a general statement reserving the right to call the opposing party's witnesses" and need not relist the state's witnesses on its witness list. *Garcia*, 2025-NMSC-030, ¶ 38. The rationale expressed by *Garcia* is that such a general reservation of intention to call a state's witness satisfies the purpose of witness disclosure under Rule 5-502. *See Garcia*, 2025-NMSC-030, ¶¶ 35-38 (holding that a defendant's witness list including a general reservation was sufficient to satisfy discovery rules). In this case, like in *Garcia*, Defendant's initial disclosure provided the State notice of their intent to call any of the State's witnesses, including Defendant's girlfriend, and met the requirements of LR3-303 and Rule 5-502. *See Garcia*, 2025-NMSC-030, ¶ 38 (holding that the district court abused its discretion when it incorrectly determined that the defense violated discovery rules). Therefore, the district court erred by determining that Defendant violated LR3-303(G).

{13} Additionally, regardless of whether Defendant violated LR3-303, the district court was required to consider the *McCarty* balancing test before excluding a defense witness. *See Garcia*, 2025-NMSC-030, ¶ 39 (holding that "the defense did not violate Rule 5-502. But even if it had, the district court erred when it failed to analyze whether the defense witness should be excluded under the factors articulated in *McCarty*"). The State concedes that the district court did not clearly conduct a balancing test, but argues any error was harmless. While we are "not bound by the [State's] concession of an issue in a criminal appeal," *see State v. Martinez*, 1999-

NMSC-018, ¶ 26, 127 N.M. 207, 979 P.2d 718, we agree that the district court did not consider the *McCarty* balancing test before ordering exclusion. However, we conclude that this is reversible error.

{14} "[District] courts possess broad discretionary authority to decide what sanction to impose when a discovery order is violated," *State v. Le Mier*, 2017-NMSC-017, ¶ 22, 394 P.3d 959, and "[i]t is clear that a [district] court does have the discretion to preclude defense testimony as a sanction for failure to comply." *McCarty*, 1988-NMSC-079, ¶ 15. However, preclusion of a defense witness "constitutes a conscious mandatory distortion of the fact-finding process," and impacts a defendant's sixth amendment rights. *Id.*; *see Garcia*, 2025-NMSC-030, ¶ 41 ("The exclusion of a defense witness may deprive a defendant of [their] constitutional right to present a defense."). In fact, even where discovery rules are violated, our courts have "long recognized that when a court rule conflicts with a defendant's right to present a defense, we presume that the court rule must yield." *Garcia*, 2025-NMSC-030, ¶ 42. Therefore, exclusion of a defense witness "should not be imposed except in extreme cases, and only after an adequate hearing to determine the reasons for the violation and the prejudicial effect on the opposing party." *Harper*, 2011-NMSC-044, ¶ 21. In *McCarty*, our Supreme Court adopted a balancing test that courts must apply before excluding a defense witness. *See* 1988-NMSC-079, ¶¶ 9-10; *Garcia*, 2025-NMSC-030, ¶¶ 43-44 (reaffirming that courts

must apply the *McCarty* balancing test before excluding defense witnesses). The test requires courts to balance "a presumption against exclusion of otherwise admissible defense evidence," with the following factors: "(1) the effectiveness of less severe sanctions, (2) the impact of preclusion on the evidence at trial and the outcome of the case, (3) the extent of prosecutorial surprise or prejudice, and (4) whether the violation was willful." *McCarty*, 1988-NMSC-079, ¶¶ 9-10 (internal quotation marks and citation omitted).

{15} During Defendant's second trial in this case, the district court orally ruled to exclude Defendant's girlfriend as a witness without providing analysis or explanation. Directly after the parties presented their arguments on the State's motion in limine, the district court stated, "I'm going to rule regarding the . . . State's motion to exclude Defendant's witness list filed on [July 11, 2024]. The motion is granted, witnesses for the defense are excluded." Defendant asked whether Defendant's girlfriend was excluded since she was listed on the State's initial witness list while the other defense witnesses were not, and the district court clarified that she too was excluded. Nothing in the record indicates that the district court considered the *McCarty* balancing test before excluding Defendant's girlfriend from testifying. *See State v. Lewis*, 2018-NMCA-019, ¶ 16, 413 P.3d 484 ("[W]e remind our district courts that any decision to impose severe sanctions requires an adequately developed record."). The district court instead moved to the most

extreme sanction of exclusion without considering lesser sanctions, the effects of its decision, prejudice, or culpability. *See Garcia*, 2025-NMSC-030, ¶ 52 (concluding that the district court abused its discretion when it excluded a defense witness without considering the *McCarty* balancing test). Because the district court did not consider the required balancing test under *McCarty* before excluding Defendant's witness, the exclusion was an abuse of discretion.

{16} Despite the State's argument that any error due to the district court not considering the *McCarty* balancing test on the record is harmless, we cannot meaningfully review the decision or determine whether exclusion was proper for the first time on appeal. *See Lewis*, 2018-NMCA-019, ¶ 16 (reversing without determining whether the chosen sanction was proper because "without an adequate record explaining the district court's ruling and reasoning, we cannot properly perform our role as an appellate court"); *see also State v. Dirickson*, 2024-NMCA-038, ¶ 28, 547 P.3d 781 (declining to analyze witness exclusion factors for the first time on appeal when the district court did not consider them since fact-finding and the weighing of facts plainly fall within the district court's discretion). Therefore, we must reverse and remand. *See Garcia*, 2025-NMSC-030, ¶ 54.

II. Retrial

{17} Because we conclude that error in this case requires reversal, "to avoid double jeopardy concerns, we must examine whether sufficient evidence in this case

supports retrying [Defendant].” *See State v. Suazo*, 2017-NMSC-011, ¶ 32, 390 P.3d 674. When examining sufficient evidence, “we view the evidence in the light most favorable to the verdict and draw all inferences in favor of the verdict,” while determining “whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction.” *Id.* ¶ 32 (internal quotation marks and citation omitted).

{18} In this case, Defendant was charged with two counts of CSCM. The jury was instructed that it could find Defendant guilty of count one if “[D]efendant touched or applied force to the breasts of M.M.,” and guilty of count two if “[D]efendant caused M.M. to touch his penis.” For each count, the State also had to prove that “M.M. was asleep; AND [D]efendant knew or had reason to know of the condition of M.M.”; “M.M. was at least thirteen (13) but less than eighteen (18) years old”; and “[t]his happened in New Mexico on or between the 1st day of September, 2022, and the 31st day of October, 2022.”

{19} The evidence supporting these elements at trial consisted of M.M.’s testimony that while she was asleep on a couch at Defendant’s house, Defendant laid next to her, and she woke up to Defendant kissing her, touching her breast under her shirt, and humping her such that she could feel Defendant’s clothed penis against her side. M.M. explained that she was thirteen years old at the time, and this incident occurred

in New Mexico between September 1, 2022 and October 31, 2022, because it was cold outside and Halloween was coming up. While, "the testimony of a single witness is sufficient evidence for a conviction," *State v. Soliz*, 1969-NMCA-043, ¶ 8, 80 N.M. 297, 454 P.2d 779, M.M.'s mother also testified that M.M. disclosed to her what had happened and they filed a police report, she confronted Defendant who apologized and did not deny her allegations, and M.M.'s demeanor had changed from fun and loving to quiet and isolated since the incident.

{20} This evidence is sufficient for a reasonable jury to find Defendant guilty of two counts of CSCM. *See State v. Notah*, 2022-NMCA-005, ¶ 11, 503 P.3d 418 (holding that a "[v]ictim's testimony alone provided sufficient evidence to support [the d]efendant's conviction" for CSCM). Therefore, retrial does not violate Defendant's right to be free from double jeopardy.

III. Defendant's Remaining Arguments

{21} Defendant raises three additional arguments on appeal: (1) the district court erred in prohibiting reference to a specific website, Omegle; (2) the detective's testimony improperly vouched for M.M.'s credibility; and (3) the impact of the claimed errors deprived Defendant of a fair trial such that his convictions should be reversed for cumulative error. However, "[w]ere [the d]efendant to prevail on [any] of these issues, [they] would be entitled to no more relief than [they] already ha[ve] received." *State v. Prieto-Lozoya*, 2021-NMCA-019, ¶ 51, 488 P.3d 715; *see State*

v. Marquez, 2021-NMCA-046, ¶ 35, 495 P.3d 1150 (declining to reach a defendant's remaining arguments on appeal after concluding that an evidentiary issue required reversal), *aff'd*, 2023-NMSC-029, 539 P.3d 303. Therefore, because we reverse on Defendant's first evidentiary issue, we do not address Defendant's remaining arguments on appeal.

CONCLUSION

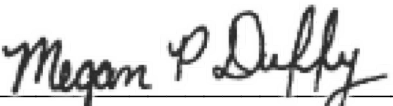
{22} Concluding that the district court abused its discretion by excluding Defendant's witness, we reverse Defendant's convictions and remand for proceedings consistent with this opinion.

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

SHAMMARA H. HENDERSON, Judge

WE CONCUR:

J. MILES HANISEE, Judge



MEGAN P. DUFFY, Judge