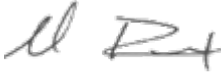


**IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

**STATE OF NEW MEXICO,**

Court of Appeals of New Mexico  
Filed 10/28/2026 12:07 PM

Plaintiff-Appellee,

  
Mark Reynolds

v.

**No. A-1-CA-42396**

**OSCAR VILLALOBOS,**

Defendant-Appellant.

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

**Bruce Fox, District Court Judge**

Raúl Torrez, Attorney General  
Teresa Ryan, Assistant Solicitor General  
Santa Fe, NM

for Appellee

Bennett J. Baur, Chief Public Defender  
Kimberly Chavez Cook, Appellate Defender  
Santa Fe, NM

for Appellant

**MEMORANDUM OPINION**

**HENDERSON, Judge.**

{1} Following a bench trial, Defendant Oscar Villalobos appeals his convictions for second-degree criminal sexual penetration (CSP) resulting in personal injury, contrary to NMSA 1978, Section 30-9-11(E)(3) (2009); and third-degree CSP, contrary to Section 30-9-11(F). Defendant contends that (1) statements he made during a police interview should have been suppressed for violation of his right to

counsel; (2) the district court erred in limiting the admission of certain evidence; and (3) there was insufficient evidence to support Defendant's convictions. We affirm.

### **BACKGROUND**

{2} Defendant's convictions arise from allegations that he sexually assaulted Victim in the early morning hours of September 23, 2018. The State dismissed the initial case against Defendant by nolle prosequi in 2019 due to "lack of victim cooperation," and the present case was brought again in 2023. At Defendant's bench trial in 2024, Victim testified about the circumstances of the sexual assault. Victim also testified that she "hooked up" with her then-boyfriend the day before the sexual assault, as agreed to by the parties in discussions related to a Rule 11-412 NMRA motion filed by Defendant on the eve of trial. As part of its case, the State also called the Sexual Assault Nurse Examiner (SANE) who examined Victim the day after the sexual assault, and testified about Victim's examination and bruising to her hymen; the forensic DNA lab analyst who analyzed swab samples taken from Victim that contained male sperm cells and DNA matching Defendant's; and the detective who investigated Victim's allegations and interviewed Defendant about the case in 2022. The detective's interview with Defendant was also admitted, in which Defendant admitted to kissing and digitally penetrating Victim.

{3} After the State rested its case, Defendant called an expert witness who testified about his review of the processes and procedures followed by forensic DNA lab

analysts in analyzing samples and, over the State’s objections, about sperm cell counts in an average male’s ejaculate. Finally, Defendant testified and denied sexually assaulting Victim.

{4} At a hearing on the parties’ proposed findings of fact and conclusions of law held in lieu of closing arguments following the bench trial, the district court orally found that the State established both counts of CSP beyond a reasonable doubt, and later issued written findings and conclusions. Defendant now appeals.

{5} We consider Defendant’s arguments on appeal in turn, further developing the factual background as necessary to the disposition of each issue.

## **DISCUSSION**

{6} Defendant contends that (1) statements he made during the interview with the detective should have been suppressed for violation of his right to counsel; (2) the district court erred in limiting the admission of certain evidence—specifically, evidence of an alleged prior sexual encounter between Victim and her then-boyfriend, and the testimony of Defendant’s expert; and (3) there was insufficient evidence to support Defendant’s convictions. We address each issue in turn.

### **I. Constitutional Right to Counsel**

{7} Defendant argues that the district court erred in admitting statements he made during his interview with the investigating detective because the statements should have been suppressed for violation of his constitutional right to counsel. First,

1 Defendant contends that “because he had not just been involuntarily appointed an  
2 attorney earlier that day” and “had a prior attorney-client relationship with [defense  
3 counsel] *on these very allegations* and was still represented by [defense counsel] in  
4 another case,” Defendant’s case is distinguishable from *Montejo v. Louisiana*, 556  
5 U.S. 778, 786 (2009), because he invoked his Sixth Amendment right to counsel  
6 such that his waiver of *Miranda* rights could not be knowing or voluntary without  
7 advisement from counsel.

8 {8} Second, Defendant appears to raise an argument pursuant to Article II, Section  
9 14 of the New Mexico Constitution,<sup>1</sup> that due to the confusion of previously having  
10 the criminal charges dismissed, Defendant’s mental state when he waived his right  
11 to counsel is similar to a juvenile’s waiver of right to counsel, and Defendant’s  
12 “ongoing attorney-client relationship presumptively negated his waiver,” such that  
13 Defendant’s waiver was not knowing or voluntary. Thus, Defendant argues his state  
14 constitutional protections are similar to the additional protections afforded to  
15 juveniles in *State v. Rivas*, 2017-NMSC-022, 398 P.3d 299. *See State v. Leyva*, 2011-

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<sup>1</sup>Defendant concedes that, as in *State v. Mares*, 2024-NMSC-002, ¶ 30, 543 P.3d 1198, where our Supreme Court declined to address whether New Mexico’s Constitution affords broader rights to counsel where the issue was unpreserved, Defendant’s claim “was not better preserved here.” However, we are not bound by party concessions, and choose not to accept Defendant’s concession here, as the record shows this issue was properly preserved in Defendant’s motion to suppress and at the corresponding hearing. *See State v. Montoya*, 2015-NMSC-010, ¶ 58, 345 P.3d 1056 (explaining that “we are not bound by [a party]’s concessions on appeal”).

1 NMSC-009, ¶ 49, 149 N.M. 435, 250 P.3d 861 (explaining that where a state  
2 constitution provision “has never before been addressed under our interstitial  
3 analysis, trial counsel additionally must argue that the state constitutional provision  
4 should provide greater protection, and suggest reasons as to why”). The State  
5 contends that the district court’s denial of Defendant’s suppression motion was  
6 proper, and regardless, the evidence sought to be suppressed was harmless.

7 {9} We review the district court’s ruling on Defendant’s suppression claim de  
8 novo. *See State v. Mares*, 2024-NMSC-002, ¶ 20, 543 P.3d 1198. In doing so, we  
9 examine whether the district court correctly applied the law to the facts as viewed in  
10 the light most favorable to the prevailing party. *Id.*

11 {10} At trial, the State played Defendant’s recorded interview with the detective.  
12 In the interview, the detective stated that he was with the special victims unit  
13 investigating sex crimes, he needed to read Defendant his *Miranda* rights, and  
14 Defendant was free to speak with him or not, “it’s totally up to you.” The detective  
15 then read the *Miranda* rights, including that Defendant had “the right to talk with an  
16 attorney for advisement before we ask any questions and to have an attorney with  
17 you during questioning” and that he “had the right to stop answering at any time to  
18 talk to an attorney.” Defendant stated that he did not have any questions and signed  
19 that he understood his rights. The detective then explained the waiver of rights, and  
20 that this was Defendant’s “chance to make a decision if you want to speak with me

1 now or have an attorney present with you.” Defendant responded that he had “no  
2 idea what’s going on” and the detective stated that he was investigating a “crime of  
3 criminal sexual penetration” but that he could not give any more detail until  
4 Defendant decided whether to waive his rights. When Defendant continued to seem  
5 confused, the detective then stated that “there’s been a little bit of time passed,” after  
6 which Defendant acknowledged he understood by saying “I know exactly what you  
7 are talking about” and he “can’t believe that you guys are still on that one.”  
8 Defendant then signed the waiver of his *Miranda* rights. The detective proceeded to  
9 explain the delay in prosecuting this case to Defendant, saying that he went on  
10 military leave for a year, he learned nothing had been investigated while he was  
11 gone, and he had a hard time locating Defendant when he returned. Defendant asked  
12 why they were questioning him about this case since it had been dismissed, and the  
13 detective explained that Victim still wanted to go forward with prosecution. The  
14 detective then continued to ask questions of Defendant who denied sexually  
15 assaulting Victim, but admitted that he kissed and “fingered” her.

16 {11} Contrary to Defendant’s Sixth Amendment argument, our Supreme Court has  
17 held that a “voluntary, knowing, and intelligent waiver may be given whether or not  
18 the defendant is already represented by counsel, and whether or not the defendant  
19 has discussed the waiver with counsel: the decision to waive need not itself be

1 counseled.” *Mares*, 2024-NMSC-002, ¶ 22 (alteration, internal quotation marks, and  
2 citation omitted). Our Supreme Court explained that

3 [a]s the United States Supreme Court made clear in *Montejo* . . . , police  
4 may initiate contact with a represented defendant and seek to obtain the  
5 defendant’s statement and waiver of counsel outside the presence of  
6 counsel. This is the rule even when the defendant previously asserted  
7 the right to counsel in open court and even when the defendant does not  
8 consult with counsel about the wisdom of waiver before deciding to  
9 waive. Under *Montejo*, the decision to waive the Sixth Amendment  
10 right to counsel need not itself be counseled. And when a defendant is  
11 read his *Miranda* rights (which include the right to have counsel  
12 present during interrogation) and agrees to waive those rights, that  
13 typically does the trick.

14 *Mares*, 2024-NMSC-002, ¶ 1 (alteration, internal quotation marks, and citations  
15 omitted). Thus, even if Defendant’s right to counsel attached at the time of the police  
16 interview,<sup>2</sup> Defendant affirmatively waived his *Miranda* rights, including his right

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<sup>2</sup> Defendant cites no authority to support the notion that representation continues after the dismissal of charges. *See State v. Guerra*, 2012-NMSC-014, ¶ 21, 278 P.3d 1031 (explaining that where a defendant cites no authority supportive of their argument, “we may conclude that no such authority exists”). Upon our own review, there does not seem to be a case directly on point. “Generally, the attorney-client relationship ceases when the contemplated legal service has been performed.” *Flores v. State*, 1968-NMCA-017, ¶ 13, 79 N.M. 47, 439 P.2d 565. And as related to this case, “a nolle prosequi is as final as any other dismissal with or without prejudice.” *State v. Ware*, 1993-NMCA-041, ¶ 9, 115 N.M. 339, 850 P.2d 1042. “[O]nce the [s]tate has filed a nolle prosequi, the charge cannot be reinstated, since there is nothing pending to reinstate.” *Id.* ¶ 11.

As Defendant’s briefing explains, Defendant “had a prior attorney-client relationship with [his defense attorney] on these very allegations and was still represented by [his attorney] in another case.” Even though Defendant is correct that “they had an active and ongoing attorney-client relationship,” it appears that the relationship is for the other case, not this case as this case was previously dismissed. *See State v. Coyazo*, 1997-NMCA-029, ¶ 20, 123 N.M.

1 to counsel regardless of any argument that he was already represented by counsel.  
2 *See Mares*, 2024-NMSC-002, ¶ 23 (explaining that when a defendant is given  
3 *Miranda* warnings and waives the right to counsel after receiving those warnings, a  
4 waiver on this basis is considered intelligent, knowing, and voluntary for both Fifth  
5 and Sixth Amendment purposes).

6 {12} On appeal and at the district court, Defendant also relies on *Rivas*, 2017-  
7 NMSC-022, ¶¶ 47-48, to contend that his procedural “confusion” about the original  
8 case being dismissed and then three years later being brought in for questioning  
9 demonstrates why we should depart from the United States Supreme Court Sixth  
10 Amendment precedent in *Montejo*, and adopt more expansive protections under the  
11 New Mexico Constitution. However, *Rivas* dealt with a juvenile defendant and  
12 reasoned that children are afforded greater protections given “[l]ags in neurological  
13 and psychosocial development related to reasoning, risk-taking, and impulse control  
14 render[ing] children less competent than adults in various ways that may be relevant  
15 in criminal proceeding[s],” 2017-NMSC-022, ¶ 42, and the greater statutory  
16 protections legislatively-afforded to juveniles under the Children’s Code, NMSA  
17 1978, §§ 32A-1-1 to -20 (1993, as amended through 2025). *See Rivas*, 2017-NMSC-

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200, 936 P.2d 882 (holding that where the right to counsel has attached to one  
offense, statements about uncharged crimes are admissible). We affirm the district  
court’s ruling that having counsel in an unrelated case is irrelevant. *See id.*

1 022, ¶ 46. *Rivas* made clear the “commonsense reality” that children “will  
2 experience police questioning in many ways distinct from an adult” such that they  
3 “have a unique need for the guidance of counsel every step of the way and a unique  
4 need for specific consideration of whether they might appropriately waive that  
5 guidance.” *Id.* ¶ 43 (internal quotation marks and citation omitted). Our Supreme  
6 Court had the opportunity to apply its holding regardless of age, but declined to  
7 apply it more broadly to adults. *Id.* ¶ 50 (considering the differences between  
8 juveniles and adults in the criminal process and concluding that juveniles should  
9 have greater protections). We decline to accord Defendant’s initial “confusion,”  
10 which the record confirms was cleared up before he waived his rights and  
11 questioning about this case began, with a juvenile’s vulnerabilities based on their  
12 physiological development and greater statutory protections afforded under the  
13 Children’s Code. Adopting Defendant’s argument would greatly restrict an adult  
14 defendant’s freedom of choice, *see Montejo*, 556 U.S. at 788 (reasoning that  
15 prohibiting a defendant from waiving the right to counsel outside of court and  
16 counsel’s presence would “imprison a [defendant] in [their] privileges and call it the  
17 Constitution” (internal quotation marks and citation omitted)), a restriction we will  
18 not approve based on the circumstances of this case and arguments before us. Thus,  
19 Defendant’s waiver of his *Miranda* rights foreclosed his claim, as Defendant has  
20 provided us no basis for concluding that Article II, Section 14 of the New Mexico

1 Constitution provides an adult defendant greater rights than the Sixth Amendment  
2 of the United States Constitution.<sup>3</sup>

3 {13} Therefore, we affirm and conclude that under *Mares* and *Montejo*,  
4 Defendant’s waiver was valid and his statements to police were not taken in violation  
5 of his Sixth Amendment right to counsel, nor his right to counsel under the New  
6 Mexico Constitution.

## 7 **II. Evidentiary Issues**

8 {14} Next, we address the evidentiary issues raised by Defendant that the district  
9 court abused its discretion in limiting (1) Rule 11-412 inquiry into an alleged sexual  
10 encounter between Victim and her then-boyfriend a day before the sexual assault by  
11 Defendant; and (2) the scope of the defense expert’s testimony.

12 {15} “We review the district court’s decision to admit or exclude evidence for an  
13 abuse of discretion.” *State v. Fernandez*, 2023-NMSC-005, ¶ 8, 528 P.3d 621  
14 (internal quotation marks and citation omitted). “An abuse of discretion occurs when  
15 a ruling is against logic and is clearly untenable or not justified by reason.” *State v.*

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<sup>3</sup>Defense counsel’s argument regarding Defendant’s right to counsel and greater state constitutional protections was not developed. We remind counsel of their briefing responsibilities and that “[w]hen a criminal conviction is being challenged, counsel should properly present this court with the issues, arguments, and proper authority. Mere reference in a conclusory statement will not suffice and is in violation of our rules of appellate procedure.” *State v. Clifford*, 1994-NMSC-048, ¶ 19, 117 N.M. 508, 873 P.2d 254; *see* Rule 12-318 NMRA.

1 *Sarracino*, 1998-NMSC-022, ¶ 20, 125 N.M. 511, 964 P.2d 72 (internal quotation  
2 marks and citation omitted).

3 **A. Rule 11-412 Inquiry**

4 {16} Defendant contends that the district court abused its discretion in limiting  
5 Defendant’s ability to inquire into Victim and her then-boyfriend’s “hook[] up” the  
6 day before the sexual assault as an alternative explanation for Victim’s hymen  
7 injury. The State contends that the district court did not err in accepting the parties’  
8 agreement as to the scope of Defendant’s inquiry. Accordingly, the State argues that  
9 Defendant invited any error and failed to preserve this issue by agreeing to the  
10 district court’s ruling, such that if we choose to review it, our review should be for  
11 plain error. We agree with the State that Defendant invited error and explain.

12 {17} “In order to preserve an issue for appeal, a defendant must make a timely  
13 objection that specifically apprises the [district] court of the nature of the claimed  
14 error and invokes an intelligent ruling thereon.” *State v. Montoya*, 2015-NMSC-010,  
15 ¶ 45, 345 P.3d 1056 (internal quotation marks and citation omitted); *see* Rule 12-  
16 321(A) NMRA (“To preserve an issue for review, it must appear that a ruling or  
17 decision by the [district] court was fairly invoked.”). When a defendant affirmatively  
18 encourages or explicitly requests that the court take a certain course of action, the  
19 defendant “is in no position to claim error.” *State v. Nguyen*, 2008-NMCA-073, ¶ 22,  
20 144 N.M. 197, 185 P.3d 368. “To allow a defendant to invite error and to

1 subsequently complain about that very error would subvert the orderly and equitable  
2 administration of justice.” *State v. Handa*, 1995-NMCA-042, ¶ 35, 120 N.M. 38,  
3 897 P.2d 225 (internal quotation marks and citation omitted).

4 {18} Admission of evidence of a victim’s past sexual conduct at trial is governed  
5 by Rule 11-412(A)(1), (B), which prohibits “evidence offered to prove that a victim  
6 engaged in other sexual behavior” unless it “is material and relevant to the case when  
7 the inflammatory or prejudicial nature does not outweigh its probative value.” *See*  
8 NMSA 1978, § 30-9-16(A) (1993). If a defendant intends to offer evidence of a  
9 victim’s past sexual conduct, “the court shall conduct an in camera hearing to  
10 determine whether such evidence is admissible” and, if admissible, “issue a written  
11 order stating what evidence may be introduced . . . and stating the specific questions  
12 to be permitted.” Rule 11-412(C)(2)-(3).

13 {19} Here, although Defendant asserted at a pretrial hearing that he was not  
14 planning to file a Rule 11-412 motion, Defendant filed a motion the day before trial  
15 to “admit evidence of a past sexual act” that Victim had “hooked up” with her then-  
16 boyfriend the night before the sexual assault to show “an alternative cause of  
17 [Victim’s hymenal] injury.” The district court heard arguments on the motion the  
18 morning of trial. During discussions, the State suggested that in order to avoid  
19 delaying trial it would be amenable to Defendant’s requested limited inquiry as to  
20 whether Victim and her then-boyfriend “hooked up” the day before the sexual

1 assault. Defense counsel stated that he thought the State's concession was  
2 "reasonable" and that "we're on the same page then" as he "wasn't anticipating  
3 going into a lot of detail about the encounter anyway." Defense counsel also  
4 explained that he anticipated the State would rebut this potential causation with  
5 evidence that Victim told the SANE that she did not have any genital pain prior to  
6 the sexual assault.

7 {20} The parties ultimately agreed that Defendant could ask whether Victim and  
8 her then-boyfriend "hooked up" the night before the events with Defendant. The  
9 district court accepted the parties' agreement, granted Defendant's motion, and  
10 allowed the limited inquiry at the bench trial.

11 {21} However, at trial Defendant did not inquire about the hook up during his cross-  
12 examination of Victim even after the State broached the subject without objection  
13 during its direct examination. Thus, the record reflects that Defendant failed to object  
14 to or raise any concerns about the scope of the limited inquiry agreed to at the  
15 hearing, but which he now complains of on appeal. *See Montoya*, 2015-NMSC-010,  
16 ¶ 45.

17 {22} Yet, Defendant now contends that the district court abused its discretion in  
18 limiting the scope of his inquiry based on the parties' agreement rather than assessing  
19 admissibility on its own. However, Defendant has provided no authority where a  
20 district court overrode a defendant's express agreement about the admission of such

1 evidence. *See State v. Guerra*, 2012-NMSC-014, ¶ 21, 278 P.3d 1031 (explaining  
2 that where a defendant cites no authority supportive of their argument, “we may  
3 conclude that no such authority exists”). We will not second-guess the tactics of  
4 Defendant’s trial counsel on appeal. *See State v. Hester*, 1999-NMSC-020, ¶ 11, 127  
5 N.M. 218, 979 P.2d 729 (“It is not the role of this Court on appeal to second guess  
6 trial tactics.”). Regardless, the record shows that the district court assessed  
7 admissibility of the evidence when it considered the parties’ arguments and  
8 expressed its concern about the prejudicial nature and probative value of the  
9 evidence, before the parties expressly agreed to the parameters of the inquiry. Even  
10 then, Defendant failed to cross-examine Victim after the State broached this issue  
11 during its direct examination. *See State v. Ervin*, 2008-NMCA-016, ¶ 30, 143 N.M.  
12 493, 177 P.3d 1067 (“When a defendant has an opportunity to cross-examine a  
13 witness, yet chooses not to do so, we cannot say that the defendant is prejudiced.”).  
14 Accordingly, we conclude that Defendant invited any claimed error of which he now  
15 complains by his express agreement to the scope of inquiry. *See Nguyen*, 2008-  
16 NMCA-073, ¶ 22; *State v. Ortega*, 2014-NMSC-017, ¶ 34, 327 P.3d 1076 (“A party  
17 may not be rewarded . . . when it invites . . . error and subsequently complains about  
18 that very error.”). Thus, we decline further review of this issue.

1 **B. Expert Testimony**

2 {23} Defendant next contends that the district court abused its discretion when it  
3 failed to admit particular testimony by Defendant’s expert and that even if admitted,  
4 the district court did not accord it proper weight based on the court’s misconception  
5 about the import of this evidence. The State contends that the district court did admit  
6 the evidence at issue, and by necessary implication, considered it in reaching the  
7 verdict. Upon review, we discern no error and explain.

8 {24} Defendant sought to have his expert testify about the typical number of sperm  
9 cells expected to be found in a sample of ejaculate from the average male compared  
10 to the amount found in the samples taken from Victim. The State objected for  
11 relevance and scope. At the conclusion of Defendant’s related offer of proof, the  
12 district court asserted:

13 I’m going to let you present your evidence through [the expert] . . . . It  
14 is a bench trial, so I’m going to allow [the testimony] and *I’ll go back*  
15 *to [Defendant’s] suggestion initially and basically consider it a weight*  
16 *of the evidence issue . . . so I’m going to allow [the expert] to testify as*  
17 *you’ve requested and I’ll look at it under those terms* because again,  
18 because this is a bench trial I’m hearing an offer of proof anyway, I’m  
19 going to hear that same evidence one way or the other.

20 {25} Contrary to Defendant’s contention, the district court admitted the evidence  
21 requested by Defendant—expressly stating that it was “going to allow [the witness]  
22 to testify as [the defense] requested” and then “consider it a weight of the evidence  
23 issue,” before later clarifying that the expert’s testimony was in evidence. In fact, in

1 its written order the district court found that “the Defense elicited information from  
2 [Defendant’s expert] about how much sperm is present in a drop of the *average*  
3 male’s ejaculate” but concluded that “[t]hese statements carried limited weight since  
4 [the witness] was not entered in as an expert in male fertility” and since he “did not  
5 review any medical records or information that related directly to [Defendant]’s  
6 sperm count.” *Cf. State v. Hernandez*, 1999-NMCA-105, ¶ 22, 127 N.M. 769, 987  
7 P.2d 1156 (“We presume that a judge is able to properly weigh the evidence, and  
8 thus the erroneous admission of evidence in a bench trial is harmless unless it  
9 appears that the judge must have relied upon the improper evidence in rendering a  
10 decision.”). Thus, Defendant has not demonstrated error as the evidence complained  
11 of was admitted and considered by the district court in reaching its verdict.

### 12 **III. Sufficiency**

13 {26} Finally, Defendant argues there was insufficient evidence to support his  
14 convictions. On appeal, we review sufficiency of the evidence “from a highly  
15 deferential standpoint,” determining “whether substantial evidence of either a direct  
16 or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt  
17 with respect to every element essential to a conviction.” *State v. Dowling*, 2011-  
18 NMSC-016, ¶ 20, 150 N.M. 110, 257 P.3d 930 (internal quotation marks and citation  
19 omitted). “Substantial evidence is relevant evidence that a reasonable mind might  
20 accept as adequate to support a conclusion.” *Montoya*, 2015-NMSC-010, ¶ 53

(alteration, internal quotation marks, and citation omitted). All evidence is viewed “in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict.” *Id.* ¶ 52 (internal quotation marks and citation omitted). “We do not weigh the evidence or substitute our judgment for that of the fact[-]finder so long as there is sufficient evidence to support the verdict.” *Id.* (alterations, internal quotation marks, and citation omitted).

{27} First, Defendant contends that the State failed to prove vaginal penetration as to the second-degree CSP charged in Count 1 because the evidence that Victim had “hooked up” with her then-boyfriend the day before the sexual assault provided an explanation for Victim’s hymen injury and the sperm cells observed by the SANE in Victim’s vaginal swab sample. For the district court to find Defendant guilty of second-degree CSP (resulting in personal injury) as charged in Count 1, the State had to prove beyond a reasonable doubt that:

1. [D]efendant caused [Victim] to engage in sexual intercourse;
2. [Victim] was unconscious or asleep;
3. [D]efendant knew or had reason to know of the condition of [Victim];
4. [D]efendant’s acts resulted in hymenal bruising;
5. [D]efendant’s act was unlawful; [and]
6. This happened in New Mexico on or about the 23rd day of September, 2018.

1 *See* UJI 14-948 NMRA. As used in the first element, sexual intercourse is defined  
2 as “the penetration of the vulva or vagina, the female sex organ, by the penis, the  
3 male sex organ, to any extent.” UJI 14-982 NMRA. Because Defendant does not  
4 deny that Victim was unconscious or asleep, he knew or had reason to know of  
5 Victim’s condition, his acts were unlawful, or that the event took place in New  
6 Mexico on or about September 23, 2018, we focus our review on whether there was  
7 substantial evidence of sexual intercourse and Defendant’s acts resulting in hymenal  
8 bruising. *See* Rule 12-318(A)(4) NMRA (requiring that a party’s “argument shall set  
9 forth a specific attack on any finding, or the finding shall be deemed conclusive”).

10 {28} At trial, Victim testified that at some point after sipping a drink given to her  
11 by Defendant’s friend, she passed out and the next thing she remembered was feeling  
12 penetration in her vagina as she came to with Defendant on top of her. Victim also  
13 testified that she was naked from the waist down and saw Defendant’s pants down  
14 and penis out. While Victim testified that she had no pain prior to the sexual assault,  
15 afterwards she was in pain as her vagina felt sore and swollen, and “stuff was coming  
16 out.” Victim’s pain was severe enough that the following day she told the SANE that  
17 it was a seven out of ten in severity. The SANE testified that the likely cause of the  
18 pain was bruising to the hymen that she observed during Victim’s physical  
19 examination, and explained that it is a painful injury that can be caused by pressure  
20 against the pelvic bone, which is “rare” to occur during a sexual assault and “very,

1 very rare” during a consensual encounter. Victim’s account was also supported by  
2 the forensic DNA lab analyst’s testimony that there were sperm cells observed in  
3 Victim’s vaginal swab sample.

4 {29} While Defendant suggests that inconsistencies between Victim’s trial  
5 testimony and what she had reported to the SANE three years earlier bring Victim’s  
6 “allegation of vaginal penetration” into dispute, we remind counsel that where  
7 evidence is in conflict or credibility is at issue, “we accept any interpretation of the  
8 evidence that supports the [district] court’s findings, provided that such a view of  
9 the evidence is not inherently improbable.” *See State v. Wynn*, 2001-NMCA-020,  
10 ¶ 5, 130 N.M. 381, 24 P.3d 816; *Montoya*, 2015-NMSC-010, ¶ 52. Additionally,  
11 although Defendant contends that Victim’s testimony about hooking up with her  
12 then-boyfriend provides an explanation for both the hymen injury and the presence  
13 of sperm cells observed in the vaginal swab sample, “[w]e do not evaluate the  
14 evidence to determine whether some hypothesis could be designed which is  
15 consistent with a finding of innocence.” *See Montoya*, 2015-NMSC-010, ¶ 52  
16 (internal quotation marks and citation omitted). Rather, indulging all inferences and  
17 viewing the evidence in the light most favorable to the verdict, there was substantial  
18 evidence for a reasonable fact-finder to have found beyond a reasonable doubt the  
19 elements required for conviction. *See Wynn*, 2001-NMCA-020, ¶ 5 (stating that the  
20 beyond a reasonable doubt standard means “near certitude” (internal quotation

marks and citation omitted)). Thus, sufficient evidence was presented to support Defendant's second-degree CSP conviction.

{30} Second, Defendant contends that the State failed to prove the anal penetration as to the third-degree CSP charged in Count 2, because it "relied entirely on circumstantial evidence of penetration." For the district court to find Defendant guilty of third-degree CSP as charged in Count 2, the State had to prove beyond a reasonable doubt that

1. [D]efendant caused [Victim] to engage in anal intercourse;
2. [Victim] was unconscious or asleep;
3. [D]efendant knew or had reason to know of the condition of [Victim];
4. [D]efendant's act was unlawful; [and]
5. This happened in New Mexico on the 23rd day of September, 2018.

*See* UJI 14-943 NMRA. On appeal, Defendant challenges only the first element so we focus our review on whether there was substantial evidence of anal intercourse. As used in the first element, anal intercourse is defined as "the penetration of the anus by the penis to any extent." UJI 14-982.

{31} At trial, Victim testified that while she had no pain prior to the sexual assault, afterwards her anus was sore and it was painful to use the restroom. This testimony was corroborated by the forensic DNA lab analyst's testing of an anal swab sample

1 taken from Victim, confirming DNA from the sample matching Defendant's DNA.  
2 Additionally, while the SANE did not observe injury to the anus, she testified that  
3 whether there is observable injury to the anus does not rule out whether anything  
4 consensual or nonconsensual occurred or not. The district court later found that  
5 Defendant caused Victim to engage in anal intercourse based on the DNA swab  
6 evidence and Victim's testimony that she felt discomfort and had trouble defecating.  
7 {32} Defendant readily acknowledges "[t]he circumstantial evidence of anal  
8 penetration includes soreness with difficulty defecating, and an anal swab containing  
9 [Defendant]'s DNA," which "suggests some anal penetration *might have happened*."  
10 Yet, he contends that the State failed "to provide 'near certitude' that anal  
11 penetration occurred at all" given inconsistencies between Victim's trial testimony  
12 and what she had reported to the SANE three years earlier, the lack of observable  
13 injury to the anus, and Defendant's alternative explanation as to how his DNA may  
14 have ended up on Victim's anal swab sample. We again remind Defendant that under  
15 the sufficiency standard, we accept the district court's inferences and interpretations  
16 supportive of its findings so long as they are "not inherently improbable," *see Wynn*,  
17 2001-NMCA-020, ¶ 5, and we do not reweigh evidence, substitute judgment, or  
18 examine alternative hypotheses of innocence. *See Montoya*, 2015-NMSC-010,  
19 ¶¶ 52-53. Accordingly, we accept the district court's determinations in resolving  
20 inconsistencies in Victim's testimony and decline to indulge Defendant's alternative

1 DNA transfer hypothesis. Viewing the evidence in the light most favorable to the  
2 verdict, there was substantial evidence for a reasonable fact-finder to have found  
3 beyond a reasonable doubt the anal penetration required for conviction. *See Wynn*,  
4 2001-NMCA-020, ¶ 5. Thus, sufficient evidence was presented to support  
5 Defendant's third-degree CSP conviction.

6 {33} Therefore, sufficient evidence supports both of Defendant's CSP convictions.

7 **CONCLUSION**

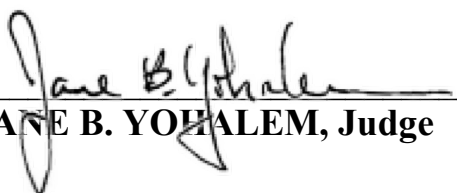
8 {34} For the foregoing reasons, we affirm.

9 {35} **IT IS SO ORDERED.**

10  
11   
SHAMMARA H. HENDERSON, Judge

12 **WE CONCUR:**

13   
14 JENNIFER L. ATTREP, Judge

15   
16 JANE B. YOHALEM, Judge