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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-42637**

JONATHAN CLARK,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
David Murphy, District Court Judge

Raúl Torrez, Attorney General
Benjamin L. Lammons, Assistant Solicitor General
Santa Fe, NM

for Appellee

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Santa Fe, NM

for Appellant

MEMORANDUM OPINION

MEDINA, Chief Judge.

{1} Defendant Jonathan Clark appeals his four convictions of criminal sexual penetration of a minor (CSPM), first degree felonies, contrary to NMSA 1978, Section 30-9-11(D)(1) (2009); and one conviction of contributing to the delinquency of a minor, a fourth degree felony, contrary to NMSA 1978, Section 30-6-3 (1990). Defendant seeks reversal on the following grounds: the trial court erroneously (1)

allowed the examining nurse practitioner to read from her examination report while testifying, (2) admitted hearsay, and (3) permitted the nurse to vouch for witness credibility. Defendant further contends cumulative error warrants reversal of his convictions. We affirm.

BACKGROUND

{2} In April 2021, Victim, who was six years old, reported to her mother that Defendant inappropriately touched her. Defendant was engaged to Victim's Aunt Julia Perea (Aunt) at the time. Victim often visited Aunt and Defendant at their apartment, and she did so over that Easter weekend. Before the Easter visit, Mother noticed behavioral changes in Victim, including her telling lies, and asked Aunt to help correct that behavior. When Mother picked up Victim after the weekend, Aunt relayed to Mother that Victim told some lies during the visit. While driving home, Mother asked Victim why she lied and learned Victim had been "instructed to lie." When Mother pressed Victim, she disclosed to Mother that Defendant had been inappropriately touching her.

{3} Once home, Mother contacted police, triggering the medical examination at issue in this case. Lorine DeRusha, a nurse practitioner at Para Los Niños (PLN), medically examined Victim on referral after a Sexual Assault Nurse Examiner (SANE) forensic interview. During the exam, DeRusha interviewed Victim and Mother separately regarding Victim's medical history, during which each disclosed

circumstances of the alleged abuse. DeRusha then physically examined Victim. DeRusha recorded Victim's and Mother's statements and her diagnostic findings in an examination report.

{4} Prior to trial, Defendant filed a motion in limine seeking to exclude expert testimony "as to any hearsay statements made by . . . [Victim]—or for that matter any hearsay statements," and "any expert opinions concerning the elements of the charged offenses." The parties argued Defendant's motion pretrial. Defendant objected to DeRusha testifying "about any . . . findings in particular" and noted any hearsay statements would need to be examined separately for admissibility. In response, the State argued that DeRusha asked Victim questions for the purpose of her medical assessment and treatment, and provided the court and Defendant a copy of DeRusha's examination report with her anticipated testimony highlighted for preruling review.

{5} Prior to DeRusha's testimony, the court ruled on Defendant's motion, concluding that hearsay statements in DeRusha's report were made for the purpose of medical care and thus admissible. Later, when DeRusha testified as to Mother's statements about Victim's medical history, Defendant renewed his hearsay objection to "any statements made by [Mother] or [Victim] during the course" of the PLN exam. The court overruled on the grounds that the statements were made for the

purpose of Victim's medical evaluation. With the court's permission, DeRusha then read Victim's and Mother's statements directly from her report while testifying.

{6} Defendant now appeals. We will discuss additional facts as needed below.

DISCUSSION

{7} Defendant argues that the district court erroneously allowed DeRusha to read from her report while testifying without proper foundation, which he concedes is subject to plain error review. Defendant contends the alleged foundation error in turn led to two additional errors: the introduction of inadmissible hearsay and improper credibility vouching. Specifically, Defendant argues that Victim's and Mother's PLN exam statements, admitted through DeRusha's testimony, were not admissible under Rule 11-803(4) NMRA because those statements were not made for the purpose of medical diagnosis or treatment. Defendant also argues that repetition of those statements and her opining that Victim's medical history "support[ed] sexual abuse" improperly vouched for the witnesses' credibility and bolstered their testimony.

{8} Because Defendant's plain error argument as to the alleged foundation error hinges on whether the other alleged evidentiary errors caused prejudice, we first determine whether the court erroneously admitted hearsay and permitted improper credibility vouching and, if so, examine resulting prejudice, if any. We then consider

whether the court committed plain error by permitting DeRusha to read from her report while testifying.

I. Victim's and Mother's Hearsay Statements

{9} Defendant raises two challenges to the admission of the hearsay. First, Defendant contends the court erroneously admitted Victim's and Mother's statements through DeRusha without the "exacting scrutiny" required under *State v. Mendez*, 2010-NMSC-044, 148 N.M. 761, 242 P.3d 328. Second, Defendant contends Victim's and Mother's statements about Defendant's identity, the location and circumstances of the abuse, its secret nature, and Victim's eventual disclosure were not admissible under Rule 11-803(4), because they had no nexus to medical diagnosis or treatment.

{10} Despite the State's contrary argument, Defendant preserved his hearsay claim. Pretrial, Defendant sought exclusion of "any hearsay statements made by . . . [Victim]—or for that matter any hearsay statements." The court ruled on Defendant's motion in limine, allowing DeRusha's testimony about Victim's and Mother's statements under Rule 11-803(4). Defendant renewed his hearsay objection during DeRusha's testimony, which the court overruled, also on Rule 11-803(4) grounds. Though arguably broad, Defendant's motion in limine and contemporaneous trial objection were sufficiently specific to invoke an admissibility ruling and therefore preserved the hearsay issue for appellate review. *See State v.*

Montoya, 2015-NMSC-010, ¶ 45, 345 P.3d 1056. We review the district court's admissibility ruling for abuse of discretion. *State v. Balderama*, 2004-NMSC-008, ¶ 46, 135 N.M. 329, 88 P.3d 845.

A. *Mendez* Analysis

{11} Defendant claims the district court, contrary to *Mendez*, admitted all of Victim's and Mother's PLN exam statements under Rule 11-803(4)'s medical diagnosis or treatment hearsay exception without the required scrutiny. *Mendez* requires courts to closely scrutinize SANE forensic examiners' testimony under Rule 11-803(4) due to their dual investigatory and medical provider roles. *Mendez*, 2010-NMSC-044, ¶¶ 42-43, 46. As a threshold matter, DeRusha was not a SANE forensic examiner; Danielle Smith was the forensic interviewer in this case and her testimony is not at issue on appeal. Moreover, the record reflects that the district court considered the specific disputed testimony when it ruled on Defendant's motion in limine and in-court hearsay objection. At that time, the court had a copy of DeRusha's report with her anticipated testimony highlighted by the prosecutor and could thus scrutinize the substance of Victim's and Mother's statements prior to ruling. The court's preruling statement to the parties that it wanted "to make sure that what was highlighted" in DeRusha's report "matche[d] the stated purpose" indicates it did just that. To any extent that *Mendez* required the district court to

closely scrutinize nurse practitioner DeRusha's testimony, the court's inquiry was sufficient.

B. Disputed Hearsay Statements

{12} On appeal, Defendant identifies specific statements as inadmissible under Rule 11-803(4) because they were not made for the purpose of medical diagnosis or treatment. Defendant challenges Mother's statements to DeRusha that Victim

> told [Mother] that [Aunt]'s boyfriend had been touching [Victim]. [Defendant] would take [Victim] into the bedroom when [A]unt was busy and would call it a secret time and would touch [Victim] and [Defendant] would have [Victim] touch [Defendant].

Defendant also challenges Victim's statements to DeRusha that Victim's "uncle" touched her; Defendant touched her at "his house" in "his room" but also "in the living room"; the other adults in the home were "sometimes in the kitchen"; Defendant told Victim the touching "was [their] secret"; and Victim made the touching stop "by telling." The State argues these statements were admissible under Rule 11-803(4) and, if not, under Rule 11-803(5) as DeRusha's recorded recollections.

{13} We need not decide, however, whether Victim's and Mother's statements about Defendant's identity, the location and circumstances of the abuse, its secret nature, and Victim's eventual disclosure were admissible under Rule 11-803(4) or (5) because, even if they were not, there was no resulting prejudice. Evidentiary errors are reversible only if harmful and harmful only if "there is a reasonable

probability that the error affected the verdict." *State v. Salazar*, 2023-NMCA-026, ¶¶ 19-20, 527 P.3d 693. "To determine the likely effect of the error, we must evaluate all of the circumstances, including . . . the importance of the witness's testimony to the prosecution's case, other evidence of the defendant's guilt to understand the role of the error within the context of the trial, and the cumulative nature of the error." *Id.* ¶ 19; *see State v. Leyba*, 2012-NMSC-037, ¶¶ 23-24, 289 P.3d 1215.

{14} At trial, Mother testified that (1) Victim often stayed with Defendant and Aunt at their apartment, including over Easter weekend; (2) Victim's behavior was changing and Victim was lying "because she ha[d] been instructed to lie"; and (3) Victim disclosed to Mother she "had been having inappropriate interactions with [Defendant and] there was some touching going on between the two of them."

{15} Victim testified that (1) Defendant touched her "private parts" with "his hands" "on [her] skin" more than five times; (2) Victim could remember that Defendant was moving his hands when touching her but not how and could not demonstrate the movement; (3) Defendant touched Victim at his house, in his bedroom; (4) Victim was between four and six when Defendant first touched her and it "lasted a while"; (5) Defendant told Victim, "Don't tell anybody"; and (6) Victim eventually told Mother about the touching.

{16} Aunt testified that after Victim's disclosure, she confronted Defendant with Victim's allegations late that same night, packed some of her things, and left the apartment. After Aunt left, Defendant called 911 threatening suicide. Police officers responded. An officer's body camera footage was admitted into evidence and played for the jury. On the video, Defendant told the officers: (1) "I touched a child and I need to turn myself in"; (2) "[i]t's happened a couple of times and the last time was about a week ago"; (3) "[i]t's happened multiple times before but the last time was about a week ago but within this week"; (4) the touching happened at Defendant's apartment; (5) Defendant "didn't try to force anything" and "used [his] hands"; (6) "it kind of happened gradually" and Defendant could not "remember what happened the first time"; (7) when asked about "the [incident] a week ago," Defendant answered that Victim "asked [him] if [he] wanted to do that thing," meaning "[him] touching her inappropriately," which he initially resisted but then "eventually [he] said okay and . . . touched [Victim's] privates" "underneath her clothing" and "afterwards just tried to continue on [his] day"; (8) that incident happened "in the master bathroom at the back of the house"; (9) in total, this happened "four times"—all at the apartment, all "within a year, . . . probably within six months," and all involving "pretty much the same thing"; (10) the first time, Victim "was kind of sitting there and [she] grabbed [his] hand and put it between her legs" and "asked if

[he] could rub there where she put [his] hand"; and (11) they "might have been alone" for one time but "the other times [Aunt] was [there] but [Aunt] didn't know."

{17} Defendant testified on his own behalf. Defendant admitted he "touch[ed Victim] inappropriately" but denied ever sexually penetrating her. Defendant admitted telling police officers he touched Victim's "private intimate parts" "under the clothes" and did so "four times in total," but said he lied and told them that because he wanted to "put [himself] away" in prison as "protect[ion]" from Victim's family. Defendant testified that he inappropriately touched Victim on two separate occasions. The first time, Defendant and Victim were in the living room on the futon watching TV, while Aunt was in the bedroom napping. Defendant testified Victim pulled his hand onto her "genital area" and said she wanted him "to rub her" there. The second time, they were in the "master bedroom" while Aunt and her sister were in the kitchen area. Defendant claimed he was lying in bed when Victim approached, Victim "pull[ed] down her leggings again," asked Defendant to put his "hands on [Victim's] crotch," and Defendant put his hand "[over the] top of [Victim's] genitalia and rubbed them through her undergarments." Defendant testified "not much time passed before [he] stopped" and then went to take a shower. Defendant also described the circumstances of Victim's disclosure and the ensuing confrontation, which lead him to call 911 because he "was suicidal" and "needed to turn [himself] in for a crime."

{18} Based on the trial evidence as a whole, Victim's and Mother's hearsay statements about Defendant's identity, the location and circumstances of the abuse, its secret nature, or Victim's eventual disclosure were not the exclusive evidence on those points. Victim's, Mother's, Aunt's, and Defendant's trial testimony independently established those facts, making the disputed hearsay cumulative and any corroborative effect negligible. *See State v. Johnson*, 2004-NMSC-029, ¶¶ 38-40, 136 N.M. 348, 98 P.3d 998 ("The probative force—and therefore the possible prejudicial effect—of a particular piece of evidence tends to decrease the more redundant that evidence is in the context of other similar evidence."). We have previously recognized that where a defendant's "own testimony independently establishes the questioned out-of-court statements, the admission of such evidence is harmless." *State v. Martinez*, 1982-NMCA-137, ¶ 22, 99 N.M. 48, 653 P.2d 879; *see State v. La Madrid*, 1997-NMCA-057, ¶ 23, 123 N.M. 463, 943 P.2d 110 (holding hearsay error was harmless where the "essence of" victim's hearsay statements was "properly presented to the jury on several occasions," including during the victim's own trial testimony).

{19} Accordingly, Defendant has not shown a reasonable probability that allowing the disputed hearsay affected the verdict. *See Salazar*, 2023-NMCA-026, ¶¶ 19-20. Even if erroneously admitted, the error was harmless.

II. Improper Vouching

{20} Defendant argues that DeRusha improperly vouched for Victim's and Mother's credibility and the truthfulness of their accounts in two ways: she repeated their statements about Defendant's identity and the nature of the alleged abuse and opined that Victim's medical "history support[ed] sexual abuse." Defendant did not contemporaneously object to DeRusha's testimony on credibility vouching or bolstering grounds, and his generic pretrial objections to "any expert opinions concerning the elements of the charged offenses" and expert testimony "about any . . . findings" were insufficient to preserve the vouching error Defendant now asserts on appeal. *See State v. Carillo*, 2017-NMSC-023 ¶¶ 20, 23, 399 P.3d 367; *State v. Lucero* 1993-NMSC-064, ¶ 11, 116 N.M. 450, 863 P.2d 1071. This issue is therefore subject to plain error review. *See State v. Hill*, 2008-NMCA-117, ¶ 21, 144 N.M. 775, 192 P.3d 770; Rule 11-103(E) NMRA ("A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.").

{21} "Under the plain error rule, there must be (1) error, that is (2) plain, and (3) that affects substantial rights." *Hill*, 2008-NMCA-117, ¶ 21 (internal quotation marks and citation omitted). "Because plain error is an exception to the [preservation] rule . . . it is to be used sparingly." *State v. Chavez*, 2024-NMSC-023, ¶ 10, 562 P.3d 521 (internal quotation marks and citation omitted). To determine whether there has been plain error, "we must examine the alleged errors in the context of the testimony as a whole." *Montoya*, 2015-NMSC-010, ¶ 46 (internal

quotation marks and citation omitted). To find plain error, the Court "must be convinced that admission of the testimony constituted an injustice that created grave doubts concerning the validity of the verdict." *Id.* (internal quotation marks and citation omitted). For reasons explained below, we conclude that the district court did not erroneously permit DeRusha to vouch for any witness's credibility and that no plain error occurred.

{22} First, Defendant contends that DeRusha's repeating Victim's and Mother's statements about his identity and the nature and circumstances of the abuse impermissibly vouched for their credibility and bolstered their testimony. Specifically, Defendant claims repeating Victim's statements that he touched her with "his finger" "on [Victim's] skin" "inside" Victim's "private part" and "inside [Victim's] body" was especially prejudicial because those statements were the only evidence of sexual penetration, the PLN exam question-and-answer format was "leading," and he had "no meaningful ability to cross[-]examine."[1]

[1] Importantly, unlike Victim's and Mother's hearsay statements about Defendant's identity, the location and circumstances of the abuse, its secret nature, and Victim's eventual disclosure, Defendant does not argue that Victim's PLN exam statements about sexual penetration were inadmissible under Rule 11-803(4). Defendant claims only that "[e]ven where statements to a medical provider may be admissible under Rule 11-803(4)," allowing an expert to repeat them "is too prejudicial because it amounts to an indirect comment on [a victim's] credibility." In other words, Defendant challenges admission of Victim's penetration statements on vouching/bolstering grounds.

{23} Experts may not testify directly about a victim's credibility or truthfulness. *State v. Alberico*, 1993-NMSC-047, ¶ 85, 116 N.M. 156, 861 P.2d 192. Experts also generally may not testify as to the identity of the perpetrator, that symptoms were in fact caused by sexual abuse, or that sexual abuse in fact occurred. *Id.* ¶¶ 88, 91-92, 103. In testifying on these matters, the expert—who has no specialized expertise in determining perpetrator identity, causation, or whether an event in fact happened—must rely on the victim's account, which vouches for their credibility and thereby invades jury province. *Id.* ¶¶ 88, 91; *Lucero*, 1993-NMSC-064, ¶¶ 17-18. While expert testimony may incidentally verify a victim's story or indirectly bolster credibility, *Alberico*, 1993-NMSC-047, ¶ 89, testimony that opines on or suggests a conclusion about the victim's truthfulness is inadmissible. *State v. Smith*, 2026-NMCA-073, ¶ 23, 597 P.3d 38.

{24} Here, Defendant concedes DeRusha did not directly comment on Victim's or Mother's credibility. The record reflects that DeRusha also did not opine or conclude that the events described in fact happened. An expert may testify "as to what she was told at the time of her physical examination, so long as she does not improperly comment on the victim's credibility." *State v. Salazar*, 2006-NMCA-066, ¶¶ 11-12, 139 N.M. 603, 139 P.3d 1013 (citing *Alberico*, 1993-NMSC-047, and *Lucero*, 1993-NMSC-064). Though DeRusha relayed Victim's account as given during the PLN exam, she did not testify the alleged abuse, including the act of penetration, in fact

occurred when, where, or how Victim described. *Cf. Lucero*, 1993-NMSC-064, ¶ 21 (holding that the expert testifying that the victim "had in fact been molested" and that victim's statements were truthful was vouching); *State v. Garcia*, 2019-NMCA-056, ¶ 9, 450 P.3d 418 (holding that the expert testifying to what victim alleged "happened to her had, in fact, happened to her" was vouching); *State v. Smith*, 2024-NMCA-068, ¶ 5, 556 P.3d 988 (holding that the expert testifying that the alleged abuse "did happen" was vouching (internal quotation marks omitted)); *Smith*, 2026-NMCA-073, ¶ 29 (holding that the expert repeating to the jury as "settled fact" portion of victim's account was vouching). Further, despite Defendant's contrary assertions, because Victim and Mother testified at trial, Defendant also had full opportunity to cross-examine them as to their PLN exam statements. *See La Madrid*, 1997-NMCA-057, ¶ 23.

{25} Though DeRusha repeated Victim's and Mother's statements identifying Defendant, she did not opine or conclude that Defendant was in fact the perpetrator. *Cf. Alberico*, 1993-NMSC-047, ¶ 94 (holding that the expert "identif[ying] the defendant" as the abuser was vouching); *Lucero*, 1993-NMSC-064, ¶ 21 (holding that the expert testifying "it was the defendant who abused [the victim]" was vouching); *Garcia*, 2019-NMCA-056, ¶ 12 (holding that the expert "identif[ying] [the d]efendant as [the v]ictim's molester numerous times based solely on [the v]ictim's statement of events" was vouching); *Smith*, 2024-NMCA-068, ¶ 5 (holding

that the expert testifying that the defendant "did [the alleged] acts" was vouching); *Smith*, 2026-NMCA-073, ¶ 27 (holding that the expert "repeat[ing the v]ictim's identification of [the d]efendant as the person who perpetrated the abuse" was vouching). More importantly, unlike in the above cases, perpetrator identity was not at issue here, which Defendant concedes. Defendant admitted at trial that he "inappropriately touch[ed]" Victim on at least two occasions. He also told police he touched Victim under her clothes on her genitalia on four occasions, and the jury saw body camera footage of those admissions. With or without DeRusha's testimony, it was undisputed that Defendant was the alleged perpetrator in this case.

{26} Second, DeRusha's opinion testimony that Victim's medical "history support[ed] sexual abuse" was not improper vouching. This type of expert opinion is probative but not conclusive of whether a crime occurred and thus permissible, even if it incidentally verifies the victim's story. *See Alberico*, 1993-NMSC-047, ¶¶ 89, 91-93, 103; *Smith*, 2026-NMCA-073, ¶¶ 24, 30. While expert opinion testimony that symptoms are "consistent with" sexual abuse is preferred to avoid impermissible categorical causation testimony, *see Alberico*, 1993-NMSC-047, ¶¶ 84, 91-99, 103; *Lucero*, 1993-NMSC-064, ¶¶ 17-18, DeRusha's diagnostic opinion that Victim's history "support[ed]" sexual abuse was not improper vouching. Even if this portion of her testimony was improper, based on Defendant's

own admissions, it was undisputed Defendant had sexual contact with Victim, i.e., that some form of sexual abuse in fact occurred.

{27} DeRusha's repeating Victim's and Mother's statements about Defendant's identity and the nature of the abuse and opining that Victim's medical history supported sexual abuse was not improper credibility vouching and did not impermissibly bolster witness testimony. Hence, allowing it was not plain error.

III. Lack of Foundation

{28} We now turn to Defendant's argument that the district court erroneously allowed DeRusha to read from her report while testifying without proper foundation. Defendant's claim is two-fold: the State failed to lay foundation for DeRusha's reading portions of her report verbatim into evidence under either Rule 11-612 NMRA, refreshing a witness's present recollection, or Rule 11-803(5), the recorded recollection hearsay exception. The State answers it met the foundation requirements of Rule 11-803(5) and that, under *State v. Montoya*, 2026-NMCA-022, ¶¶ 18-19, 584 P.3d 1123, *cert. denied*, 2025-NMCERT-010, 583 P.3d 259 (S-1-SC-41106), it was not first required to try and fail to refresh DeRusha's recollection under Rule 11-612 for her testimony to be admissible under Rule 11-803(5).

{29} Defendant concedes he did not object to lack of foundation and that this unpreserved claim is therefore reviewed for plain error. *See State v. Dylan*, 2009-NMCA-027, ¶ 15, 145 N.M. 719, 204 P.3d 44. As previously observed, "[u]nder the

plain error rule, there must be (1) error, that is (2) plain, and (3) that affects substantial rights." *Hill*, 2008-NMCA-117, ¶ 21 (internal quotation marks and citation omitted). The plain error test requires this Court "to consider the role of the error in both the expert testimony as a whole and in the trial as a whole, looking both at whether the inadmissible evidence likely influenced the jury, and at whether that influence was so profound that the error affected the fairness and integrity of the trial." *Smith*, 2026-NMCA-073, ¶ 33; *see Dylan*, 2009-NMCA-027, ¶ 15.

{30} Though persuasive for a Rule 11-612 present recollection refreshed analysis, Defendant's cited authority does not resolve the evidentiary question presented.[2] *See State v. Bazan*, 1977-NMCA-011, ¶¶ 2-9, 15-20, 90 N.M. 209, 561 P.2d 482 (distinguishing present recollection refreshed and past recollection recorded and clarifying Rule 11-612); *State v. Orona*, 1979-NMSC-011, ¶¶ 22-27, 92 N.M. 450, 589 P.2d 1041 (describing and applying Rule 11-612 foundation requirements); *State v. Little*, 2020-NMCA-040, ¶¶ 12-14, 473 P.3d 1 (same). The State is correct that a failed attempt to refresh recollection under Rule 11-612 may establish lack of

[2]Rule 11-612 allows using a writing to refresh a witness's present recollection while testifying. To refresh recollection with an exhibit, the proponent must establish that the witness does not recall the matter and the exhibit will help them remember; if so, they may review the writing and then testify from their "restored memory, not from the exhibit." *State v. Little*, 2020-NMCA-040, ¶ 12, 473 P.3d 1 (internal quotation marks and citation omitted). Rule 11-612 was not at issue here because it is undisputed that DeRusha testified verbatim from her report, not her memory, about Victim's and Mother's PLN exam statements.

memory, but is not necessary under Rule 11-803(5), which has its own foundation requirements. *See Montoya*, 2026-NMCA-022, ¶¶ 3, 12-13, 18-19 (rejecting similar argument that proponent must first try and then fail to refresh witness recollection under Rule 11-612 and holding that recorded forensic interview admissible where foundation met under Rule 11-803(5)). However, the State is incorrect that it satisfied Rule 11-803(5)'s foundation requirements. We explain.

{31} Rule 11-803(5) provides an exception to the rule against hearsay for "[a] record that is (a) on a matter the witness once knew but now cannot recall well enough to testify fully and accurately, (b) was made or adopted by the witness when the matter was fresh in the witness's memory, and (c) accurately reflects the witness's knowledge. If admitted, the record may be read into evidence." Rule 11-803(5).[3]

{32} Here, prior to DeRusha's testimony, the prosecutor asserted that DeRusha was previously allowed to read from her report in other cases and would likewise need to in this case because "she's not going to be able to memorize all the statements." On these grounds alone, the court allowed DeRusha to read from her report while testifying. But, because the State did not elicit any testimony establishing that DeRusha could not recall the substance of Victim's PLN exam sufficiently to testify

[3]Rule 11-803(5) also provides that the recorded recollection "may be received as an exhibit," but "only if offered by an adverse party." No party offered DeRusha's report and it was not admitted as an exhibit.

fully and accurately without her recorded recollection, allowing her to do so was error.

{33} DeRusha's merely asking to "read from [her] notes" or generally "check[ing]," "turning to," or "looking to see" answers in her report was insufficient to meet Rule 11-803(5)'s foundation requirements. *See Montoya*, 2026-NMCA-022, ¶ 12 (holding that the Rule 11-803(5) foundation was met where the proponent "question[ed witness] directly about her recollection" and established that her memory was better when the interview recording was made). *Cf. State v. Macias*, 2009-NMSC-028, ¶ 34, 146 N.M. 378, 210 P.3d 804 (holding that the Rule 11-803(5) foundation was not met without evidence that the witnesses made or adopted the recording when the matter was fresh in their memories and the recording correctly reflected their knowledge). The State claims it was "clear" DeRusha could not testify fully and accurately from memory, but the record does not support this assertion. The State did not establish DeRusha's inability to recall details of the exam as Rule 11-803(5) requires. Even if, as the State contends, Rule 11-803(5)'s other two foundation requirements were later satisfied on cross-examination and redirect, this was insufficient to establish foundation where the first requirement was unmet.[4]

[4]The State relies in part on *McClusky v. State*, but this case confirms the result here: to be admissible, a recorded recollection requires proper foundation. 311 So. 3d 1016, 1017-18 (Fla. Dist. Ct. App. 2021) (affirming expert's reading from the report because she testified that she had no "independent recollection of the examination" but prepared a contemporaneous report to record what happened and

{34} Accordingly, the State did not lay proper foundation under Rule 11-803(5), and the district court therefore erred in allowing DeRusha to read verbatim portions of her report while testifying. This was not, however, plain error. *See Hill*, 2008-NMCA-117, ¶ 21. "[T]he focus of plain error review is on the fairness of the trial." *Chavez*, 2024-NMSC-023, ¶ 11. The doctrine therefore requires an examination of the evidence in context to determine whether prejudice resulted. *See Smith*, 2026-NMCA-073, ¶ 33.

{35} Here, Defendant claims the foundation error was prejudicial because it led to the introduction of inadmissible hearsay and improper credibility vouching. But, for reasons explained above, to any extent there was evidentiary error, it was not "so profound" as to "affect[] the fairness and integrity of the trial." *See Smith*, 2026-NMCA-073, ¶ 33.

CONCLUSION

{36} For the above reasons we affirm Defendant's convictions.

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

Jacqueline R. Medina

JACQUELINE R. MEDINA, Chief Judge

"needed to refer to the report to testify accurately" (internal quotation marks omitted)).

WE CONCUR:



JENNIFER L. ATTREP, Judge



GERALD E. BACA, Judge