IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

vs.

No. 33,697

OSCAR ARVISO,

Defendant-Appellant.

APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT
BERNALILLO COUNTY, NEW MEXICO
THE HONORABLE BRIANA ZAMORA, PRESIDING

STATE OF NEW MEXICO'S ANSWER BRIEF

ORAL ARGUMENT IS NOT REQUESTED

HECTOR H. BALDERAS
ATTORNEY GENERAL

Olga Serafimova

Anne Kelly
Assistant Attorney General

P. O. Drawer 1508
Santa Fe, New Mexico 87504-1508
(505) 827-6929

Attorneys for Plaintiff-Appellee

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CERTIFICATION OF COMPLIANCE WITH RULE 12-213(F)(3) NMRA

The State of New Mexico hereby certifies that this Answer Brief complies with the type-volume limitation contained in Rule 12-213(F)(3). The body of this Brief contains 9,038 words, and it was prepared by the use of proportionally-spaced typeface, *i.e.*, Times New Roman.

I. INTRODUCTION

Defendant Oscar Arvizo ("Defendant") appeals his convictions of Criminal Sexual Penetration of a Minor in the Second Degree (child 13 to 18 years old) (person in position of authority), Criminal Sexual Contact of a Minor in the Third Degree (person in position of authority), and Bribery of a Witness (threats or bribes – reporting). Defendant raises ten issues on appeal: (1) whether the district court erred in excluding evidence of prior sexual conduct; (2) whether the district erred in declining to treat denials of recollection as *per se* prior inconsistent statements; (3) whether the State presented sufficient evidence that Defendant was a person in position of authority vis-à-vis the victim; (4) whether the State presented sufficient evidence to support Defendant's conviction of bribery of a witness; (5) whether the district court erred in admitting certain expert testimony; (6) whether the district court erred in denying Defendant's motion to dismiss premised on lost evidence; (7) whether Defendant's right to speedy trial was violated; (8) whether any right of the Defendant's was violated by the trial judge's recusal post-verdict but pre-sentence; (9) whether prosecutorial misconduct occurred during rebuttal closing argument; and (10) whether Defendant's convictions should be reversed under the doctrine of cumulative error.

Each issue is insufficient to warrant reversal. The State of New Mexico respectfully requests that this Court affirm Defendant's convictions.

II. SUMMARY OF PROCEEDINGS

A. Nature of the Case

On July 16, 2010, the grand jury returned a true bill of indictment against Defendant on one count of Criminal Sexual Contact of a Minor in the Second Degree, one count of Attempted Criminal Sexual Penetration in the Second Degree, one count of Criminal Sexual Contact of a Minor in the Third Degree, and one count of Bribery of a Witness. [RP 1-2]. The case was tried before the Honorable Ross C. Sanchez. [RP 505].

B. Course of Proceedings and Disposition Below

An eight-day jury trial was held from July 15 to July 22, 2013. *Id.* The State presented the testimony of seven witnesses: (1) A.B., the minor victim, [Vol. 19, pp. 38-207]; (2) Detective Gerald Shelden with the Albuquerque Police Department ("APD"), [Vol. 20, pp. 20-103]; (3) Dr. Renee Ornelas, an expert in pediatrics and child abuse diagnosis and treatment, *id.*, 104-178; (4) APD Officer Scott Barnard, *id.*, 178-198; (5) Asher Willard, A.B.'s relative, *id.*, 198-210; (6) Valerie Barreras, A.B.'s mother, [Vol. 21, pp. 21-85]; and (7) Anthony Barreras, A.B.'s father, *id.*, 85-178.

In his case-in-chief, Defendant presented the testimony of Joseph Montano, A.B.'s relative, [Vol. 22, pp. 28-63], and Richard Abeyta, an investigator with the

New Mexico Public Defender's Office ("NMPD"), *id.*, 63-75. The jury returned a verdict of guilty on all counts. [RP 589-592].

Three days after the trial, Judge Sanchez filed a Notice of Recusal. [RP 594]. The case was eventually assigned to the Honorable Brianna H. Zamora. [RP 604]. On December 19, 2013, during a hearing on Defendant's several motions for a new trial, Judge Zamora vacated Count 2 on the grounds of double jeopardy. [Vol. 26, pp. 23-33]. Judge Zamora denied Defendant's remaining motions and proceeded to sentence him to a total of 24 years of imprisonment, 14 of which suspended. *Id.*, 88; [RP 697].

C. Summary of Facts[1]

On or about December 18, 2009, A.B.'s family went to dinner with her maternal aunt, her aunt's husband, Defendant, and their two sons. [Vol. 21, p. 24]. Everyone then returned to A.B.'s home for a sleepover. [Vol. 19, p. 46]. When it was still early in the evening, A.B., who was 13 at the time, had to take her little sister to the bathroom. *Id.*, 50. As the two of them walked in a line down the hallway, with the smaller child leading the way, they passed by Defendant who then grabbed A.B.'s left buttock with his hand. *Id.*, 50-51. In shock, A.B. pushed Defendant's hand away and continued to walk to the bathroom. *Id.* Defendant, who had never touched A.B. that way before, laughed and did not say anything. *Id.*, 51,

[1] Additional facts from the record on appeal are included in the Argument Section as necessary.

64. Not knowing what to do, A.B. decided to go back out and not say anything. *Id.*, 51-52.

Later that evening, after the grow-ups went to bed, the four children continued to play on the pull-out couch in the living room. *Id.*, 54-55. Eventually they all went to sleep on that couch as they had done many times before. *Id.* At one point, A.B. woke up to find Defendant hovering over her with his hand in her underwear, touching her genitals. *Id.*, 55-58. Defendant then whispered in her ear, "I'm looking for your pussy, so I can stick my finger in it." *Id.*, 58-59. A.B. immediately pushed him off, and Defendant went back into the room where his wife was sleeping. *Id.*, 59. A.B. ran to her own bedroom and locked the door behind her. *Id.* She felt so dirty, that she went into her closet and ripped up her pajama pants. *Id.* She then cried herself to sleep with the lights on, hugging a large tool for protection. *Id.*

The next morning, one of Defendant's sons came into A.B.'s room and asked her why she had moved. *Id.*, 61. While A.B. was giving a false explanation, Defendant walked in and casually asked, "Are you going to tell anybody?" *Id.*, 61. Because of the shape of the bedroom, Defendant could not see that his son was also in there. *Id.* A.B.'s father, who happened to be walking by, overheard Defendant and asked, "Tell anybody about what?" *Id.*, 62; [Vol. 21, p. 103]. Defendant then lied that he had tripped A.B. the previous night, causing her to hurt

her knee, and said that he did not want anyone to think that he had done it on purpose. *Id.*, 103. Intimidated by Defendant's calmness and confidence, when her father asked her if that was true, A.B. shook her head in agreement. [Vol. 19, pp. 62-64.]

It took A.B. more than six months to tell her father what really had happened. [Vol. 21, pp. 107, 114]. Even though her mother came from a big family, Defendant's wife was her closest sister, and the two families spent a lot of time together. [Vol. 19, pp. 52, 64-65]. A.B. did not want to ruin this relationship and was further afraid that no one would believe her. *Id.* Her secret led her to start cutting herself. *Id.*, 65. One day, when her father, out of helplessness and frustration, decided to take her to a psychiatric hospital, A.B. finally told him what Defendant had done to her. [Vol. 21, pp. 110-114].

III. ARGUMENT

A. THE EXCLUSION OF IRRELEVANT EVIDENCE OF PRIOR SEXUAL CONDUCT DID NOT VIOLATE THE CONFRONTATION CLAUSE.

i. Preservation and Standard of Review

Defendant's first argument on appeal is that his Sixth Amendment right to confrontation was violated because the district court prevented Defendant from presenting evidence that he allegedly observed A.B. perform oral sex on another

person. [BIC 15]. Defendant preserved this issue for appellate review by filing a motion pursuant to Rule 11-412 NMRA (previously Rule 11-413) and obtaining a ruling thereon. [RP 155-170, 294-295]. This Court reviews constitutional questions *de novo*. *State v. Montoya*, 2014-NMSC-032, ¶ 16, 333 P.3d 935.

ii. Defendant's Motive-to-Lie Theory Is Not Supported by Sufficient Evidence.

In reviewing Defendant's claim under the Confrontation Clause, this Court must perform a two-part inquiry: (1) whether Defendant presented sufficient facts to support a theory of relevance implicating his constitutional right to confrontation, and (2) if so, whether the district court properly weighed the probative value of the evidence of prior sexual conduct against the danger of unfair prejudice to A.B. *Montoya*, 2008-NMSC-032, ¶ 29.

Defendant's theory of relevance, both below and on appeal, is that A.B. had a motive to fabricate the allegations in this case. [Vol. 10, pp. 6-10; BIC 16]. Specifically, Defendant asserts that A.B. learned that he had observed her perform oral sex on a teenage male, D.B., and falsely accused Defendant in order to "preempt [him] from reporting her conduct to her strict parents." [BIC 16].

In his opening statement at the hearing on Defendant's Rule 11-412 motion, defense counsel asserted that Defendant had observed A.B. perform oral sex on D.B., and that afterwards, Defendant told A.B.'s relative, Joe Montano, what he had seen. *Id.*, 6-7. Defense counsel further asserted that Montano then told A.B.

that Defendant had not been asleep. *Id.* Defense counsel next stated that, "if you talk to Joe Montano, he will deny that[.]" *Id.*, 7.

Defendant presented the testimony of two NMPD investigators, Mr. Richard Abeyta and Ms. Tanya Dickinson. [Vol. 10, pp. 30-56, 56-102]. Both investigators testified that they had conducted a pre-trial interview with D.B., during which he had admitted that A.B. had performed oral sex on him in her living room while Defendant was asleep on the couch. *Id.*, 32-34, 57.[2] Mr. Abeyta further testified that during the interview, D.B. told him that Montano had subsequently told D.B. that Defendant had been awake at the time and had observed the sexual encounter. *Id.*, 53; [RP 167]. Mr. Abeyta did not testify, however, that D.B. said he had spoken to Montano prior to A.B. making the allegations in this case, and there was no testimony that D.B. relayed this information to A.B. at any time. Defendant did not present any other witnesses. [Vol. 10, p. 62].

Therefore, other than defense counsel's assertions in his opening statement, Defendant presented no evidence that, at the time A.B. made the allegedly fabricated accusations, she either *knew or suspected* that (i) Defendant had been

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[2] During the State's cross-examination, Mr. Abeyta admitted that, in a statement that he wrote and D.B. signed, D.B. only said that he and A.B. kissed; the statement made no reference to oral sex, euphemistic or otherwise. [Vol. 10, p. 49]. The State presented the testimony of a third investigator, Mr. David Nuckols, who stated that, during his pre-trial interview with D.B., D.B. denied receiving oral sex from A.B. or telling Mr. Abeyta and Ms. Dickinson that he had received oral sex from A.B. *Id.*, 62-82. No other witnesses testified at the hearing. *Id.*, 104.

awake when D.B. was at her house,[3] or (ii) that Defendant was claiming that she had performed oral sex on D.B. *Muse v. Muse*, 2008-NMCA-003, ¶ 51, 145 N.M. 451, 200 P.3d 104 ("The mere assertions and arguments of counsel are not evidence"). As one cannot be motivated by what one does not know or even suspect, this Court should hold that the district court properly concluded that "[t]he evidence Defendant seeks to admit is not relevant or material." [RP 294].[4]

In the Brief-in-Chief, Defendant argues that the district court used an incorrect standard when it applied the first of the five factors for judging relevance in this context announced in *State v. Johnson*, 1997-NMSC-036, ¶ 24, 123 N.M. 640, 944 P.2d 869.[5] [BIC 17-23]. Assuming *arguendo* that Defendant is correct, this Court should nevertheless hold that Defendant's right to confrontation was not violated. Defendant's failure to offer *any* evidence tending to establish that A.B.

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[3] At trial, Defendant impeached A.B. with the evidence of kissing, and A.B. testified that she heard for the first time that Defendant had been awake while she was on the stand. [Vol. 19, p. 131].

[4] In its order denying Defendant's Rule 11-412 motion, the district court did not explicitly address the lack of evidence to support a finding of knowledge on A.B.'s part. [RP 294]. However, the point was made during the hearing on the motion by the attorney representing A.B and ignored by Defendant. [Vol. 10, p. 27]. Also, the district court fully addressed this issue in its order denying Defendant's motion to reconsider. [RP 318].

[5] These five non-exhaustive factors are: (1) whether there is a clear showing that the victim committed the prior sexual acts; (2) whether the circumstances of the prior acts closely resemble those of the present case; (3) whether the prior acts are clearly relevant to a material issue, such as identity, intent, or bias; (4) whether the evidence is necessary to the defendant's case; and (5) whether the probative value of the evidence outweighs its prejudicial effect. *Johnson*, 1997-NMSC-036, ¶ 27.

knew or suspected that Defendant was a threat to her reputation defeats his theory that she had a motive to fabricate the allegations. In addition, this gap is Defendant's logical syllogism deprives the proffered evidence of prior sexual conduct of any probative value, necessitating the conclusion that its probative value is outweighed by its inflammatory and prejudicial nature. *Montoya*, 2008-NMSC-032, ¶ 29. As such, Defendant's convictions should be affirmed.

B. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WITH REGARD TO IMPEACHMENT.

i. Preservation and Standard of Review

Defendant's second argument on appeal is that "the trial court prevented impeachment of A.B. by requiring the defense to first refresh memory." [BIC 24]. Rulings affecting impeachment evidence are reviewed for abuse of discretion. *State v. Gomez*, 2001-NMCA-080, ¶ 12, 131 N.M. 118, 33 P.3d 669. "A trial court abuses its discretion when a ruling is clearly against the logic and effect of the facts and circumstances of the case, such that it can be characterized as clearly untenable or not justified by reason." *State v. Lopez*, 2011-NMSC-035, ¶ 15, 150 N.M. 179, 258 P.3d 458.

ii. The Denial of Recollection Is Not a *Per Se* Prior Inconsistent Statement.

At trial, prior to cross-examining A.B., Defendant argued to the court that he should be allowed to impeach A.B. with the video recording of her Safehouse interview if, when asked to accept or deny a statement made during that interview that was inconsistent with her testimony at trial, she responded that she did not recall the prior statement. [Vol. 19, p. 97]. The district court took the position that, if A.B. did not remember a previous answer, Defendant would first have to refresh her recollection by showing it to her. *Id.*, 97-105.

In support of his position, Defendant provided to the district court the holding of *State v. Gonzales*, 1992-NMSC-003, ¶¶ 24-25, 113 N.M. 221, 824 P.2d 1023, *overruled on other grounds in State v. Montoya*, 2013-NMSC-020, ¶ 2, 306 P.3d 426. *Id.*, 105-106. In *Gonzales*, our Supreme Court affirmed the lower court's admission of a witness's inconsistent testimony at a prior hearing under Rule 11-603 NMRA. *Id.*, ¶¶ 24-25. The Court held that, in light of the witness's insistence that she could not recall any of her prior inconsistent statements, and the State's attempt "to read the prior testimony to [the witness] without successful recollection," the district court had not erred in admitting the entire transcript of the previous hearing in the interest of economy. *Id.*, ¶ 25. After reviewing this ruling, the district court in the present matter restated its position that Defendant would have to refresh A.B.'s recollection before impeaching her with a prior inconsistent statement if, when asked to accept or deny that statement, she

responded that she did not remember what her prior statement had been. *Id.*, 106-107.

Because the State had attempted to refresh the witness' memory in *Gonzales*, the district court's ruling in this case was not contrary to that holding. The State's research failed to reveal additional New Mexico authority addressing this issue. Other jurisdictions have held that, for purposes of impeachment, "inconsistencies may be found in changes in position and they may also be found in denial of recollection." *State v. Whelan*, 513 A.2d 86, n. 4 (Conn. 1986); *see also William v. U.S.*, 310 F.2d 192, 199 (C.A. Cal. 1962) ("the answer of a witness that he does not remember having made a prior inconsistent statement is as adequate a foundation as a flat denial"). Even so, "[t]he trial court has considerable discretion to determine whether evasive answers are inconsistent with prior statements." *Whelan,* 513 A.2d 86, n. 4; *see also, e.g., State v. Salinal*, 698 N.W.2d 133, 133 (Wis. 2005) (applying abuse of discretion standard to issue whether witness's testimony was inconsistent with a prior statement); *Elmer v. Fessenden*, 28 N.E. 299 (Mass. 1891) (whether denial of recollection is genuine "must be left largely to the discretion of the presiding judge"). Therefore, to the extent Defendant's position is that refreshing a witness's recollection may never be required prior to impeachment with an inconsistent statement, it is contrary to the state of the law.

In this case, the district court was asked to rule on this issue prior to A.B.'s cross-examination. [Vol. 19, 97-105]. As such, it had no reason to conclude that A.B.'s future claims of lack of recollection, if any, would be anything but genuine.[6] Therefore, Defendant cannot establish that the district court's ruling was "clearly untenable or not justified by reason." *Lopez*, 2011-NMSC-035, ¶ 15.

Should this Court nevertheless conclude that an abuse of discretion occurred, it was harmless beyond a reasonable doubt as there is "no reasonable probability the error affected the verdict." *State v. Tollardo*, 2012-NMSC-008, ¶ 36, 275 P.3d 110 (quoted authority and internal quotation marks omitted). Contrary to Defendant's assertions in the Brief-in-Chief, the jury had to be excused only twice under the district court's ruling.[7] [Vol. 19, p. 118, 176-77; BIC 24]. In the context of Defendant's eight-day long trial, there is no reasonable probability that these two interruptions affected the jury's verdicts. [RP 505]. Also, there is no evidence in the record to support Defendant's assertions on appeal that A.B., who was questioned during these breaks, gained "additional time to tailor her answers[,]" or that the breaks "added confusion[.]" [BIC 24]. Lastly, Defendant's assertion of

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[6] During the cross-examination of A.B., Defendant asked the court to reconsider its ruling. [Vol. 19, p. 163-164]. However, this request was general, and it did not ask the court to evaluate a particular answer given by A.B. for inconsistency.

[7] The jury was excused one additional time for Defendant to conduct a regular refreshment of A.B.'s memory with the video. [Vol. 19, p. 162] (Defense counsel: "My only question was, everybody was in the house when he grabbed your butt?" A.B.: "I don't know"). The district court took this opportunity to give the jury a regular 10 minute break, so no disruption occurred.

"possible" prejudice against his trial attorney has no weight on appeal. *In re Ernesto M., Jr.*, 1996-NMCA-039, ¶ 10, 121 N.M. 562, 915 P.2d 318 ("An assertion of prejudice is not a showing of prejudice").

Defendant additionally argues that the district court's ruling was "a limitation on cross-examination[,]" citing *State v. Brown*, 1998-NMSC-037, 126 N.M. 338, 969 P.2d 313.[BIC 24]. Defendant's claim fails because the district court's ruling did not limit the *topics* which Defendant could explore while cross-examining A.B. *See id.*, ¶ 25 (analyzing whether cross-examination was limited impermissibly where the defendant was precluded from questioning a witness on certain topics and finding no error).

C. THE STATE PRESENTED SUFFICIENT EVIDENCE TO ESTABLISH EACH ELEMENT OF CRIMINAL SEXUAL CONTACT OF A MINOR.

i. Preservation and Standard of Review

Defendant's third argument on appeal is that, with regard to Counts 1 and 3, the State failed to present sufficient evidence to establish that he was a person in a position of authority, [BIC 27-28], or that he coerced A.B., *id.*, 24-26. This Court reviews the sufficiency of the evidence pursuant to a substantial evidence standard. *State v. Trujillo*, 2012-NMCA-092, ¶ 5, 287 P.3d 344. "The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime

beyond a reasonable doubt." *Id.* (quoted authority and internal quotation marks omitted).

The Brief-in-Chief further states that, "[t]o the extent this issue implicates the proper construction of New Mexico statutes the standard of review is *de novo.*" [BIC 25]. The latter is the full extent of Defendant's discussion of statutory construction. [BIC 25-28]. The Court should decline to address this undeveloped argument on appeal. *Headley v. Morgan Management Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 ("We will not review unclear arguments, or guess at what [appellant's] arguments might be").

ii. The Record Contains Sufficient Evidence to Establish that Defendant Was a Person in Position of Authority and Used that Authority to Coerce A.B. to Submit to Sexual Contact.

The sufficiency of the evidence must be judged against the instructions given to the jury. *State v. Smith*, 1986-NMCA-089, ¶ 7, 104 N.M. 729, 726 P.2d 883. Defendant's jury was instructed, in relevant part, that it had to find beyond a reasonable doubt the following elements:

Count 1:

> 1. The defendant touched or applied force to the unclothed vagina or vulva or groin of [A.B.];

2. The defendant was a relative who by reason of the defendant's relationship to [A.B.] was able to exercise undue influence over [A.B.] AND used this authority to coerce [A.B.] to submit to sexual contact.

[RP 510].

Count 3:

1. The defendant touched or applied force to the buttocks of [A.B.];
2. The defendant was a relative who by reason of the defendant's relationship with [A.B.] was able to exercise undue influence over [A.B.] AND used this authority to coerce [A.B.] to submit to sexual contact[.]

[R.P. 519].

Defendant argues that there is insufficient evidence that he was a person in a position of authority vis-à-vis A.B. [BIC 27]. "Position of authority" is statutorily defined as "that position occupied by a parent, relative, household member, teacher, employer, or other person who, by reason of that position, is able to exercise undue influence over a child." NMSA 1978, § 30-9-10 (2003). Defendant admits that he was A.B.'s relative, but argues that there was insufficient evidence that he was able to exercise undue influence over her. [BIC 27].

Contrary to Defendant's assertion on appeal, the State did not mislead the jury by stating that a relative qualifies as a person in position of authority. [BIC 28]. In *State v. Gibson*, this Court implicitly held that, if a defendant occupies one of the positions specified in the statute, that "status alone place[s] him in a position of authority." 2009-NMCA-053, ¶ 19, 146 N.M. 202, 207 P.3d 1179; *but see State*

v. Segura, 2002-NMCA-044, ¶ 15, 132 N.M. 114, 45 P.3d 54 (requiring evidence of actual exercise of undue influence over child).

In addition, the evidence in the record establishes that Defendant did in fact exercise undue influence over A.B. A.B. testified that Defendant had authority to tell her to be quiet, to tell her not to misbehave, and to ask her to help her little sister, and that she felt that she had to show him proper respect. [Vol. 19, pp. 44-45]. More importantly, after the first sexual contact, where Defendant touched A.B.'s buttocks, A.B. did not say anything to her parents, even though they were home at the time, which enabled Defendant to commit the more egregious sexual contact of touching her unclothed genitals later that night. *Id.*, 52-55. In and of itself, A.B.'s failure to report the first sexual contact to her parents is sufficient for a reasonable fact finder to conclude beyond a reasonable doubt that Defendant exercised undue influence over her.

Defendant also argues that "[n]o evidence was presented that [Defendant] 'coerced' A.B. ...[because] there was no allegation that A.B. was forced to act in an involuntary manner. She was merely a passive recipient of unasked for contact." [BIC 26]. "However, in the context of criminal sexual contact of a minor, the law does not define coercion in the terms used by Defendant." *State v. Gardner*, 2003-NMCA-107, ¶ 38, 134 N.M. 294, 76 P.3d 47. In *Gardner*, this court expressly rejected the position that such "coercion" requires "affirmative forceful acts." *Id.*, ¶

32. There, five female students had testified that the defendant, who was an assistant principal, had touched their breasts while hugging them from the side, and a sixth student had testified that the defendant had touched her buttocks while she stood on a chair working on a bulletin board. *Id.*, ¶ 2. This Court held that "[t]his evidence support[ed] the inference that [the d]efendant used his position of authority to gain the trust of the victims, to obtain the opportunity to touch the victims, and to cause them to submit to his unlawful touching." *Id.*, ¶ 38. Because this evidence "permitted the jury to reasonably infer a connection between [the d]efendant's position of authority and his sexual contact with the victims," the Court held that the State had presented sufficient evidence "to infer the existence of coercion." *Id.*, ¶ 38.

As in *Gardner*, the evidence presented at Defendant's trial supports the inference that he used his position of authority to gain the trust of A.B., to obtain the opportunity to grab her buttocks (Count 3), to obtain the opportunity to insert his hand in her underwear while she was asleep (Count 1), and to cause her to submit to his unlawful touching. A.B. testified that Defendant was the husband of her mother's closest sister and that, therefore, he was at her home very often. [Vol. 19, p. 52]. Defendant's frequent presence at her home, including at night, establishes that both A.B. and her parents had previously trusted Defendant completely. Because of this trust, he was able to grab A.B.'s buttocks in the

immediate presence of her little sister, and to insert his hand in her underwear while her parents were sleeping in the next room. *Id.*, 50-51, 54-59.

A.B. further testified that, both times Defendant committed sexual contact, she reacted by pushing him away, *id.*, 50, 58, whereas in *Gardner*, only one victim had testified that she had moved away from the defendant after he had placed his hand on her buttocks. 2008-NMCA-107, ¶ 35. Nevertheless, the focus in *Gardner* was not on the victims' reactions after the sexual contact, but on the defendant's access to them and ability to commit the contact in the first place. *Id.*, ¶¶ 32-38. Just as in *Gardner*, the victim in this case was unable to prevent the sexual contact, and thus Defendant "cause[d] [her] to submit to his unlawful touching." *Id.*, ¶ 38. Therefore, as in *Gardner*, the evidence here is sufficient for a reasonable fact finder to infer a connection between Defendant's position of authority and his sexual contact with A.B., and therefore "to infer the existence of coercion." *Id.*, ¶ 38.

Should this Court nevertheless conclude that the evidence is insufficient to support all elements of either Count 1 or Count 3, the proper remedy is to remand the case to the district court to enter judgment against Defendant on a respective count of battery. *Segura*, 2002-NMCA-044, ¶ 17 (remanding case to district court to enter judgment against the defendant on an instructed-upon lesser included offense supported by sufficient evidence in the record). The jury was instructed on

the elements of battery as a lesser included offense to both Count 1 and Count 3. [RP 512; 521]. A.B. testified that Defendant put his hand on her left cheek and grabbed it. [Vol. 19, pp. 50-51]. When she subsequently pushed him off, Defendant laughed and did not say anything. *Id.*, 63-64. This evidence is sufficient to establish beyond a reasonable doubt that Defendant "intentionally touched or applied force to [A.B.] by grabbing her buttock[,]" and that he did so in an "insolent ... manner[.]" [RP 521]. A.B. further testified that later that night she woke up to find Defendant hovering over her with his hand moving inside her underwear, touching "the outer lip," and that he told her that he was "looking for her pussy so [he could] stick [his] finger in it." [Vol. 19, pp. 57-58]. This evidence is sufficient to establish beyond a reasonable doubt that Defendant "intentionally touched or applied force to [A.B.] by touching her vagina or vulva or groin ... in a rude [or] insolent ... manner[.]" [BIC 512].

For the reasons stated above, Defendant's convictions of criminal sexual contact with a minor in the second and third degrees should be affirmed. Alternatively, should the Court conclude that the evidence is insufficient to support either conviction, the proper remedy is to remand the case for entry of judgment on the lesser included offense of battery.

D. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUPPORT DEFENDANT'S CONVICTION OF BRIBING A WITNESS.

i. Preservation and Standard of Review

Defendant's fourth contention is that the State failed to present sufficient evidence to support his conviction of bribing a witness. [BIC 28]. This Court must determine whether there is "substantial evidence" to support each element of the charge as stated in the instructions presented to the jury. *Trujillo*, 2012-NMCA-092, ¶ 5; *State v. Smith*, 1986-NMCA-089, ¶ 7.

ii. The State Presented Sufficient Evidence for a Reasonable Fact Finder to Infer that Defendant Intended to Prevent A.B. from Reporting His Crimes by Intimidation.

The jury below was instructed that, in order to convict Defendant of intimidating a witness as charged in Count 4, it had to find beyond a reasonable doubt, in relevant part, that Defendant "knowingly intimidated/threatened with the intent to keep [A.B.] from truthfully reporting to a law enforcement officer of any agency that is responsible for enforcing criminal laws information relating to: the commission or possible commission of Criminal Sexual Contact or Attempted Criminal Sexual Penetration." [RP 522]. A.B. testified that, the morning after Defendant put his hand in her underwear and touched her genitalia, Defendant walked into her room and asked, "Are you going to tell anybody?" [Vol. 19, p. 61]. A.B. further testified that, at the time Defendant did so, Defendant's son was in a part of the room not visible to Defendant. *Id.* Her father then also entered the room

and asked Defendant what he was talking about. *Id.*, 62. Defendant then stated, untruthfully, that he had tripped A.B. the night before, causing her to fall, and was asking if she would tell her parents about it. *Id.* A.B.'s father corroborated this testimony. [Vol. 20, p. 103-105]. A.B. further testified that Defendant acted in a nonchalant manner, which "freaked her out" and made her not want to tell anyone. [Vol. 19, 63].

Based on this evidence, a reasonable fact finder could conclude beyond a reasonable doubt that Defendant intended to intimidate A.B. into not reporting his crimes. A reasonable fact finder could infer that Defendant had no other reason to approach A.B. the morning after the incident - before she had had an opportunity to report and at a time when he believed that she was alone and vulnerable. His cool demeanor supports the reasonable inference that he wanted to intimidate A.B. by demonstrating to her that he was unafraid and in control, and his fabricated explanation to her father supports the reasonable inference that he in fact wanted to prevent A.B. from reporting the truth. Therefore, this Court should hold that Defendant's conviction is supported by sufficient evidence in the record and affirm it.

E. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING Dr. ORNELAS' LIMITED TESTIMONY.

i. Preservation and Standard of Review

Defendant next argues that the district court violated Rule 11-401 NMRA in permitting Dr. Ornelas to testify that the results of her physical examination of A.B. were consistent with the history that A.B. had given to her. [BIC 29-30]. Defendant preserved the issue for appellate review by raising it in the district court and obtaining a ruling thereon. [RP 451-452; Vol. 17, p. 44]. The district court's determination of what constitutes relevant evidence is reviewed for abuse of discretion. *Roark v. Farmenrs Group, Inc.*, 2007-NMCA-074, ¶ 37, 142 N.M. 59, 162 P.3d 896.

ii. Dr. Ornelas' Testimony Was Relevant and Not Unfairly Prejudicial.

Evidence is relevant if it has any tendency to make a fact of consequence more or less probable. Rule 11-401. "Any doubt whether the evidence is relevant should be resolved in favor of admissibility." *State v. Balderama*, 2004-NMSC-008, ¶ 23, 135 N.M. 329, 88 P.3d 845.

At trial, Dr. Ornelas testified that she performed a physical examination of A.B. in July of 2010, that the results were normal, and that these results were consistent with the history she had obtained from A.B. [Vol. 20, 104-126, 158-159]. Had the results of the examination been *inconsistent* with A.B.'s version of

the events, such results would have tended to disprove the charges against Defendant. It follow that the converse is also true – testimony of consistent results tends to prove the charges against Defendant, if only by establishing that the results were not *inconsistent* with these charges. Therefore, Dr. Ornelas' testimony was relevant and admissible.

Contrary to Defendant's assertions on appeal, Dr. Ornelas' testimony was not "vouching." [BIC 29]. Dr. Ornelas did not offer any opinion as to whether or not abuse had actually occurred. *United States v. Velarde*, 214 F.3d 1204, 1211 n.6 (10th Cir. 2000) (emphasizing that if a conclusion that abuse had occurred was based on the victim's allegations, the physician would be impermissibly vouching for the victim's credibility). Dr. Ornelas likewise did not testify as to (i) whether or not A.B. was telling the truth, (ii) the identity of the perpetrator, or (iii) the issue of causality. *State v. Alberico*, 1993-NMSC-047, ¶¶ 85-88, 116 N.M. 156, 861 P.2d 192 (prohibiting such testimony by a medical expert).

Defendant also asserts that Dr. Ornelas' testimony was "highly prejudicial." [BIC 31]. To the extent Defendant argues that the testimony should have been excluded under Rule 11-403 NMRA, because the testimony was not "vouching testimony," it did not result in *unfair* prejudice to Defendant. Rule 11-403 (relevant evidence may be excluded if unfairly prejudicial). In addition, Defendant fully informed the jury of the low probative value of the testimony by having Dr.

Ornelas state three times that the results were likewise consistent with no abuse having occurred, by reading her prior statement to that effect in front of the jury, and by repeating the same during closing argument. [Vol. 20, pp. 167-170; Vol. 23, pp. 51-52].

The record on appeal reveals that the district court was vigilant in its efforts to prevent any improper expert testimony from being admitted. It first instructed the parties to file detailed motions addressing Dr. Ornelas' testimony. [Vol. 16, pp. 104-106]. It then excluded several statements during the hearing on Defendant's motion *in limine*. [Vol. 17, 24-46]. Lastly, the court permitted additional *voir dire* outside of the presence of the jury during trial and further limited Dr. Ornelas' testimony. [Vol. 20, 104-126]. In the end, the testimony that was admitted was both relevant and fair to Defendant. Therefore, Defendant's conviction should be affirmed.

F. DEFENDANT'S MOTION TO DISMISS PREMISED ON THE DESTRUCTION OF EVIDENCE WAS PROPERLY DENIED.

i. Preservation and Standard of Review

Defendant next argues that the district court erred in denying his motion to dismiss premised on the loss of evidence by the State. [BIC 31-33]. "The denial of a motion to sanction by dismissal or suppression of evidence is reviewed for abuse

of discretion." *State v. Duarte*, 2007-NMCA-012, ¶ 3, 150 N.M. 930, 149 P.3d 1027 (cited authority omitted).

ii. The State's Inadvertent Loss of an Inadmissible Video Recording of Questionable Probative Value Is Insufficient to Warrant Reversal.

After Defendant was arrested, the lead detective on the case interviewed Defendant and recorded the interview digitally. [Vol. 20, p. 16]. When the video recording was produced in discovery, however, it turned out to be unreadable. *Id.* At trial, the detective testified that during the interview, which was 15 to 20 minutes long, Defendant both denied the allegations and agreed to take a lie detector test. *Id.* Defendant then fully cross-examined the detective on the importance of the video recording. *Id.*, 36-39. In addition, the jury was instructed as follows:

> Evidence videotaped [*sic*] of the defendant by Officer Gerald Shelden was destroyed reportedly due to equipment malfunction. This evidence was relevant, and would have shown the cooperation of the defendant, and the demeanor of the officer and the defendant.

[RP 532].

"When the loss [of evidence] is known prior to trial, there are two alternatives: Exclusion of all evidence which the lost evidence might have impeached, or admission with full disclosure of the loss and its relevance and import." *State v. Chouinard*, 1981-NMSC-096, ¶ 23, 96 N.M. 658, 634 P.2d 680. The choice between these options is within the discretion of the district court,

which must be guided by an assessment of the evidence's materiality and the prejudice caused to the defense by the loss. *Id.*

On appeal, Defendant merely states that "[t]he lost evidence was material as it was an impartial record[ing] of [Defendant's] demeanor and statements to the police[.]" [BIC 32]. Defendant fails to present a theory of admissibility, however, and such a recording is in fact inadmissible hearsay. [BIC 31-33]; Rule 11-802 NMRA ("Hearsay is not admissible except as provided by these rules..."); Rules 11-803 and 11-804 NMRA (listing all exceptions to the hearsay rule, none of which apply here); Rule 11-801 NMRA (listing all exemptions from the hearsay rule, none of which apply here). As to Defendant's demeanor, in the district court he argued that the video recording would have supported his credibility by demonstrating calmness and cooperation with the police. [Vol. 16, p. 5]. Had the recording been preserved and admitted, however, the State would have been able to counter any inference of credibility with evidence that Defendant fled the scene after the police were called to report A.B.'s allegations against him. [Vol. 10, p. 15] (the prosecutor states on the record that, when the incident was reported to the police, Defendant fled the scene and was subsequently arrested on a warrant; Defendant does not object). Because the admissibility and the probative value of the lost evidence are uncertain, this Court should find that both its materiality and the prejudice to Defendant caused by its loss are, at best, *de minimis*.

Defendant also asserts that, contrary to the detective's report, the video would have shown that Defendant told the detective that he had disclosed the fact that he had observed A.B. perform oral sex on D.B. to a particular friend. [BIC 32; Vol. 16, p. 9]. Assuming this is true, this portion of the video would have been excluded under the district court's ruling on Defendant's Rule 11-412 motion. This Court should hold that the video's potential remaining impeachment value with regard to the detective is insufficient to justify a finding of abuse of discretion and affirm Defendant's convictions.

G. DEFENDANT'S RIGHT TO SPEEDY TRIAL WAS NOT VIOLATED.

i. Preservation and Standard of Review

Defendant next argues that his Sixth Amendment right to speedy trial was violated. [BIC 33]. Defendant preserved this issue for appellate review by filing a motion to dismiss in the district court and obtaining a ruling thereon. *State v. Graham*, 2003-NMCA-127, ¶ 29, 134 N.M. 613, 81 P.3d 556 (preservation of speedy trial argument requires raising the issue in district court and invoking a ruling thereon); [RP 446] (Defendant's motion); [RP 457-469] (State's response); [Vol. 17, p. 24] (oral order denying Defendant's motion to dismiss on speedy trial grounds).

In reviewing the denial of a motion to dismiss based on a speedy trial right violation, this Court applies the four-part balancing test established in *Barker v. Wingo*, 407 U.S. 514 (1972). *State v. Garza*, 2009-NMSC-038, ¶ 13, 146 N.M. 499. "These four factors are length of delay, reasons for delay, the defendant's assertion of his right, and the prejudice to the defendant." *State v. Valencia*, 2010-NMCA-005, ¶ 11, 147 N.M. 432, 222 P.3d 659.

ii. Defendant Fails to Demonstrate Error by the District Court.

After stating the applicable law, Defendant spends less than one page of the Brief-in-Chief on his analysis of the four *Barker* factors. [BIC 35]. Defendant's motion to dismiss below was similarly brief. [BIC 446]. As Defendant fails to "set forth a specific attack on [the district court's] finding[s], [they should] be deemed conclusive." Rule 12-213(A)(4) NMRA; *see also In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 (New Mexico courts "have long held that to present an issue on appeal for review, an appellant must submit argument and authority as required by rule") (emphasis omitted).

The district court found that this case is complex for purposes of speedy trial analysis, with a total delay of 36 months. [Vol. 17, p. 22]. Therefore, the first *Barker* factor weighs moderately against the state. *See State v. Steinmetz*, 2014-NMCA-070, ¶ 6, 327 P.3d 1145 (holding that a delay of twenty-eight months

beyond the fifteen-month presumptive threshold for an intermediate case weighed "moderately" against the State).

The district court adopted as its findings of fact the procedural background and timeline contained in the State's response to Defendant's motion to dismiss. [Vol. 17, p. 21; BIC 457-459]. Thus, the Court found that Defendant stipulated to or requested more than 20 of the 36 months of delay. [RP 458-459].

On appeal, Defendant attributes most of the delay on the fact that the original prosecutor on his case retired in January of 2012. [BIC 35]. The district court found that the delay caused thereby was less than three months. *Id.*; [RP 352]. After the January 2012 trial date was reset, Defendant consented to more than nine months of additional delay. [RP 371, 383, 459]. Therefore, the district court properly held that the second *Barker* factor weighs against Defendant. [Vol. 17, p. 23].

With regard to the third *Barker* factor, the district court found that Defendant asserted his right to speedy trial twice – when defense counsel entered his appearance on August 27, 2010, and when Defendant filed his motion to dismiss on July 5, 2013, or less than two weeks before trial. *Id.*, 23. The court further found that, in between the *pro forma* pleading and the motion to dismiss, Defendant stipulated to a series of continuances. *Id.* Therefore, the district court properly gave little to no weight to this factor. *Id.*

With regard to prejudice, Defendant argues that his ability to defend was impaired because the delay caused the memories of A.B., Valerie Barreras, and Anthony Barreras to fade. [BIC 35]. The district court properly found that these witnesses were available early on in the litigation, and that Defendant had the opportunity to interview them and prevent any such prejudice. [Vol. 17, p. 24]. On appeal, Defendant fails to specify how the trial testimony of either Valerie Barreras or Anthony Barreras was deficient. *Id.* With respect to A.B., Defendant once again claims that the jury had to step out several times for him to refresh her memory. *Id.* As explained in a different section of this brief, *supra*, A.B.'s memory had to be refreshed only three times during her testimony, and the jury was excused for that purpose only twice; no major disruption was caused thereby.

For the reasons stated above, this Court should hold that, on balance, Defendant's right to speedy trial was not violated. While the total length of the delay weighs against the State, rather than assert his right to speedy trial in a meaningful way, Defendant caused most of the delay he now complains of. More importantly, Defendant has failed to show that he was prejudiced by this delay. *Garza*, 2009-NMSC-038, ¶ 12 ("The heart of the right to speedy trial is preventing prejudice to the accused"). Therefore, reversal is not warranted, and Defendant's claim to the contrary should be rejected.

H. THE STATE'S REBUTTAL CLOSING ARGUMENT DID NOT CONSTITUTE FUNDAMENTAL ERROR.

i. Preservation and Standard of Review

Defendant next argues that the State committed prosecutorial misconduct when, in its rebuttal, it stated twice that the defense strategy was to "blam[e] the victim." [BIC 36; Vol. 23, pp. 57, 68]. Defendant admits that the issue was not preserved and that review is limited to the doctrine of fundamental error. [BIC 36]. "To find fundamental error, [this Court] must be convinced that the prosecutor's conduct created a reasonable probability that the error was a significant factor in the jury's deliberations in relation to the rest of the evidence before them." *State v. Sosa*, 2009-NMSC-056, ¶ 35, 147, N.M. 351, 223 P.3d 348.

ii. No Error Occurred, Fundamental or Otherwise.

Defendant asserts that, in stating twice during its rebuttal closing argument that the defense was "blaming the victim," the State violated a pre-trial court order. [BIC 36]. On August 3, 2011, the district court heard Defendant's motion *in limine*, which sought, in relevant part, to "prohibit the prosecuting attorney and any prosecution witness from referring to the complaining witness as 'victim[.]'" [RP 103; Vol. 8]. At the hearing, the court granted Defendant's motion in part and denied it in part. [Vol. 8, pp. 71-72]. Specifically, the State was instructed to direct its witnesses to refer to A.B. by her name and to not "hammer on the word victim."

Id., 72. The court did not address closing arguments. Given this limited ruling, the State's mention of the word "victim" twice in its rebuttal argument did not violate the court's order.

In addition, in reviewing challenges to closing arguments, our Supreme Court has identified two relevant factors: (1) whether the statement invades some distinct constitutional protection; and (2) whether the statement is isolated and brief, or repeated and pervasive. *Sosa*, 2009-NMSC-056, ¶ 26 (the Court identified a third factor, not applicable in this case, namely "whether the statement is invited by the defense"). The use of the phrase "blaming the victim" does not invade a distinct constitutional protection, and its mention twice during the State's rebuttal closing argument at the end of an eight-day long trial renders it isolated and brief. Therefore, Defendant cannot meet the high burden of establishing fundamental error, and his convictions should be affirmed.

I. REMAND IS NOT WARRANTED BY THE RECUSAL OF THE TRIAL JUDGE.

Defendant next challenges the decision of Judge Sanchez, who presided over Defendant's trial, to recuse himself post-verdict but pre-sentencing. [BIC 37; RP 594]. "Recusal rests within the discretion of the trial judge." *Demers v. Gerety*, 1978-NMCA-019, ¶ 10, 92 N.M. 749, 595 P.2d 387, *reversed on other grounds in* 1978-NMSC-097, 92 N.M. 396, 589 P.2d 180. In *Demes*, this Court stated that, while a recusing judge must have valid reasons to recuse him or herself, the judge

need not disclose these reasons. *Id.* Defendant has presented no evidence on appeal that the reasons for the recusal here at issue were not valid. [BIC 37-38]. Instead, Defendant argues that he has a right to find out what these reasons were, which is directly contrary to *Demes*. *Id.*, 38.

Alternatively, Defendant argues that the case should be remanded for re-sentencing before Judge Sanchez. Defendant cites *Sims v. Ryan*, 1998-NMSC-019, ¶ 9, 125 N.M. 357, 961 P.2d 782, where our Supreme Court stated that "[g]enerally, an unusual or exigent circumstance must exist for a different judge to impose a sentence." [BIC 38]. Defendant makes no argument as to why Judge Sanchez's recusal does not constitute an "unusual or exigent circumstance."

Defendant has failed to provide authority supporting his request for re-sentencing or a record establishing the reasons behind Judge Sanchez's recusal. [RP 38]. This Court "assume[s] where arguments in briefs are unsupported by cited authority, counsel after diligent search, was unable to find any supporting authority." *In re Adoption of Doe*, 1984-NMCA-024, ¶ 2. As such, this Court should deny Defendant's request and affirm his convictions and sentence.

J. THE DOCTRINE OF CUMULATIVE ERROR IS INAPPLICABLE UNDER THE FACTS OF THIS CASE.

Defendant's final contention on appeal is that his convictions should be reversed under the doctrine of cumulative error. [BIC 38]. The doctrine of cumulative error has no application, however, "where no errors were committed

and where defendant has received a fair trial." *State v. Taylor*, 1986-NMCA-011, ¶ 33, 104 N.M. 88, 717 P.2d 64. As argued above, each claim of error is without merit; as such, Defendant's convictions should be affirmed.

IV. CONCLUSION

For the reasons stated above, the State of New Mexico respectfully requests that this Court affirm Defendant's convictions.

Respectfully submitted,

HECTOR H. BALDERAS
ATTORNEY GENERAL

Jacqueline R. Medina for
Olga Serafimova

Jacqueline R. Medina for
Anne Kelly
Assistant Attorney General

P. O. Drawer 1508
Santa Fe, New Mexico 87504-1508
(505) 827-6929

Attorneys for Plaintiff-Appellee

CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2015, a copy of this brief was mailed to defendant's counsel at the address listed below:

Steven F. Fordberg
505 Marquette Av NW #120
Albuquerque, New Mexico 87102

Jacqueline R. Medina
Assistant Attorney General