ORIGINAL

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff/Appellee,

vs.

Case No. 34,873

SHAROSKI JACKSON,

Defendant/Appellant.

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

DEFENDANT/APPELLANT'S BRIEF IN CHIEF

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TRANSCRIPT OF PROCEEDINGS

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New Mexico Cases

United States Supreme Court cases and out of state cases

I. Statement of the Case

Shoroski Jackson directly appeals convictions for human trafficking, promoting prostitution, accepting earnings from a prostitute, contributing to the delinquency of a minor, and conspiracy. He contends that the district court erred in its instruction to the jury on human trafficking and maintains that the instruction should have required the jury to make a finding as to whether he knew the age of the alleged minor victim: B.G. He further contends that the district court erred in not granting a new trial on the basis of newly discovered evidence and also in admitting an exhibit containing text messages where a proper foundation was not laid as to who authored those texts. Mr. Jackson also seeks review on the sufficiency of the evidence supporting his convictions. On all these bases, Mr. Jackson seeks reversal and, where appropriate, a new trial.

II. Summary of facts and course of proceedings.

A. Jury Trial evidence

Trial began on December 9, 2014. Bonnie Martinez testified to talking to Mr. Jackson on the telephone and accusing him of using B.G. as a prostitute. When she criticized him for using B.G. as a prostitute, she testified that Mr. Jackson responded "I didn't know that. I didn't know she was underage." (TR1/162). She stated he never denied administering a prostitution business. (TR1/164). However, while he

would apologize to her, she testified that, "he would never say about what." (TR1/181).

On March 19, 2013, Albuquerque vice unit police officer Christopher Maes received an anonymous tip regarding Mr. Jackson's activities. (TR1/229). B.G. was named in the tip. (TR1/233). At that time, B.G. was seventeen years old. (TR1/233). Officer Maes interviewed Tiffany McKnight, who he associated with the same phone number that was used to contact B.G. through an escort service. (TR1/253).

Officer Maes testified that in his conversations with Tiffany McKnight, she told him that Mr. Jackson was involved in the situation between Ms. McKnight and B.G. (TR2/61). But, Officer Maes also acknowledged that Ms. McKnight stated that Mr. Jackson would not accept money from B.G. He also acknowledged that Ms. McKnight stated that Mr. Jackson did not like what she was doing. She also insisted that nobody involved knew B.G. to be under eighteen years old. (TR2/61). However, Ms. McKnight also stated to Detective Maes that she gave half of the money she collected to Mr. Jackson. (TR2/69-70).

An expert witness, so qualified in digital forensic analysis, testified. (TR2/94). He found SMS and MMS text messages that appeared to be related to commercial sexual activity. (TR2/105). He located text messages referencing nicknames used by Mr. Jackson. (TR2/107). There were messages referencing B.G. as well. (TR2/114). He was also the witness through whom State's exhibit B was ultimately admitted: a

summary of numerous text messages sent and received by pertinent telephone numbers. He identified the exhibit as a timeline generated for cell phone activity. He testified that there was data therein referencing the names of Sharoski Jackson, Tiffany McKnight and Layla Redd. There was also "Backpage" web history relating to escort advertisements for Tiffany McKnight and B.G. (TR3/69). Several of the messages, he testified, appeared to relate to commercial sexual activity. Telephone numbers listed in the exhibit, 505-712-7204 and 505-804-4419, involved communications with Layla Redd, Mr. Jackson, Ms. McKnight, and B.G. (TR3/68-70). Personal documents belonging to Sharoski Jackson--his social security card, passport, and birth certificate--were also received on the cell phone numbered 505-712-7204. (TR3/41). A picture of B.G. was found within the data on one of the phones as well. (TR2/112).

Defense counsel objected to the exhibit's admission on the basis of lack of foundation to establish Mr. Jackson as the author of the texts. (TR2/10). The prosecutor argued to the district court that the witness, "has testified that many of the communications in the SMS messages were between those two devices that have been tied to both co-conspirator[, Ms. McKnight,] and defendant." (TR3/71). She further expressed that the pertinent individuals were referenced throughout the messages and that commercial sexual activity was involved. (TR3/71).

The defense did not dispute that the telephone numbers were tied to Mr. Jackson and Ms. McKnight but argued that the State had not established who sent the particular, individual texts. Defense counsel argued that "the document contains a lot of texting between individuals who we don't know who was texting." (TR3/71). Furthermore, he argued, "we don't know exactly who had the phone at the given times and whether or not those communications were between Sharoski and [B.G.] or Sharoski and Tiffany or Tiffany and [B.G.]. I mean, no one has come in and said, 'I was the one that was doing that texting.' All—what's happening now is we're just left with speculation as to who was actually doing the text, texting." (TR3/72). Defense counsel further argued that, "it's just like a written document. If you have a written document and you're trying to introduce it, you'll have to be able to know who the author of the document is. In this case, we don't know who the author of these text messages are." (TR3/73).

Defense counsel had also argued that, "[t]here's nothing, nothing to indicate that Mr. Jackson had that phone on that occasion when this text message was made. I mean, that's our objection throughout these[.]" (TR2/12). The State responded that the telephone had been linked to the defendant and that the communications were relevant to demonstrate conversations between Mr. Jackson and the co-conspirator discussing "the 17-year-old." (TR2/17).

The district court ruled that the State had met the foundational requirements. (TR3/75). The defense then clarified that, "My objection remains that if it's not identifiable by way of a name somewhere within the contents of the text, that it ought not be admitted because there's insufficient foundation as to its relevancy because it may have nothing to do with my client. It may simply be a texting between somebody else unrelated to this matter." (TR3/77).

B.G. began her trial testimony on December 11, 2014. (TR3/169). She stated that in March of 2013 she was seventeen years old. (TR3/169). She acknowledged that she knew Mr. Jackson. (TR3/170). She met him when she was sixteen years old. (TR3/171). She testified to having a sexual relationship with him. (TR3/172).

She testified that she engaged in prostitution. (TR3/173). She talked about making money with Mr. Jackson. (TR3/173). She identified photographs of herself and stated that an advertisement was posted of her. (TR3/176). She estimated that she engaged in sex for money on approximately fifteen occasions. (TR3/179). She would give the money she received for prostitution to Mr. Jackson. (TR3/179). She estimated giving him approximately $3,000.00. (TR3/181). She stated that the transactions for money took place in Albuquerque, and the ads were posted in Albuquerque as well. (TR3/182). She testified that she continued to speak with Mr. Jackson even after she was investigated about these incidents and that she was told to say she did not know him. (TR3/183;TR4/27;TR4/69). Otherwise, it was her

understanding that he would not talk to her any longer. (TR5/8). She testified that the telephone number 505-804-4419 belonged to Mr. Jackson and that was the telephone number on the advertisement for her prostitution services. (TR3/186).

She understood that the 'Backpage' advertisements were for prostitution solicitation purposes. (TR4/10). The cost of her services was $150.00 for a half-hour and $300.00 for an hour. The 505-804-4419 telephone number was the number listed in the ad. (TR4/11). She testified that she had engaged in a transaction together with Tiffany McKnight where each had sex with the same person for money. (TR5/16). She also testified that she had sent text messages in response to text messages she received regarding prostitution customers. (TR4/18-19). B.G. testified that, as to some text messages, she understood she was communicating with Ms. McKnight. (TR4/21;23).

During cross-examination, B.G. testified that that she told Officer Maes that she wanted to participate in prostitution and that Mr. Jackson had stated to her: "I'm not going to make you do something that you don't want to do." (TR4/41). She reiterated that that was true. (TR4/41). She acknowledged that there were arranged dates on which she did not have sex and that the customer was not soliciting sex and acknowledged that "there was never an occasion where [Mr. Jackson] would say, 'you're going to have sex with this guy'." (TR4/42). She also testified that she had told Officer Maes that she was not told that she had to give money to Mr. Jackson

and that she "just gave it to him[.]" (TR4/48). She was directed, however, to create the Backpage advertisement by Mr. Jackson, she testified. (TR4/77).

Tiffany McKnight testified during the Defendant's case in chief and stated that she did not know B.G. personally. (TR4/114). She testified that calls she received based on advertisements did not involve prostitution. (TR4/116). She testified that the 505-804-4419 telephone number belonged to her phone and that she was given the phone by a friend. (TR4/118). She kept the same phone number after the phone was given to her. (TR4/119). She acknowledged that she knows Mr. Jackson, but that he did not assist her in her escort service business. (TR4/126). Mr. Jackson only used the telephone when Ms. McKnight permitted him to do so. (TR4/127). She did give B.G. a ride at some point but that was the only contact they had. (TR4/131).

Mr. Jackson testified in his own defense. He stated that he never recruited or solicited or enticed or transported B.G. with the intention of her engaging in criminal sexual activity or commercial sexual activity. (TR4/153). He denied having sex with B.G.: "I never touched [B.G.] I never really dealt with [B.G.], period." (TR4/152). He also "never accepted any money from [B.G.]" (TR4/154). He also denied texting with B.G.: "I didn't even have a phone at the time this was going on[.]" (TR4/159). He also testified that he never told B.G. to lie about anything. (TR4/160). It was brought out on cross-examination that Mr. Jackson had had a text conversation with B.G., but he testified that he intended to convey that he had not ever dealt with her

regarding "human trafficking, accepting the earnings of a prostitute, prompting prostitution." (TR4/185).

Prior to trial, discussion was held as to the jury instruction on the elements of human trafficking. Defense counsel proposed that, "in order to satisfy the statute, that Mr. Jackson must have knowingly recruited [B.G.], knowing that she was under the age of 18, to do the things that the State is alleging that he had her do." (STR10/29). He argued that proof of Mr. Jackson's knowledge of B.G.'s age was crucial to assuring that the State proved the elements of the statute, adding, "that's why I've put in our proposed instruction that [D]efendant knowingly recruited: In order for you to find the defendant guilty of human trafficking as charged in Count 1 of the indictment, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime: The defendant knowingly recruited, enticed, transported, or obtained by any means [B.G.], knowing that [B.G.] was under the age of 18 years." (STR10/30).

The State responded that "just on basic statutory construction, the 'knowingly' only refers to the actions: Recruiting, soliciting, enticing, or transporting or obtaining. The 'knowingly' does not apply, under basic statutory construction, to the person being under the age of 18." (STR10/30). Defense counsel retorted that it would not make sense for the knowledge element to apply to the actions of recruitment, solicitation, or enticement but not to the age of the person recruited; "so what that

means is that Mr. Jackson must knowingly go to somebody, knowing that they're under 18 years old, of age, and soliciting or enticing or asking them to do something, to engage in misconduct, activity." (STR10/32). Defense counsel argued: "The 'knowingly' applies to the entire statute. I don't see how you can do it otherwise." (STR10/35).

At trial, defense counsel reiterated his argument, opposed the instruction submitted by the State, and argued the defense's proposed instruction on human trafficking would assure Mr. Jackson could receive a fair trial. (TR3/82). The district court ruled against Mr. Jackson as to the instruction and explained that, "I looked at all of the jury instructions for crimes against children and sex crimes against children, and then I looked through the statute book for crimes against children and sex crimes against children. And all of the UJI's do not require an intent related to the age and neither do the statutes, except for [NMSA 30-6A-3], and I think it's distinguishable from the trafficking statute." (TR4/4). Reasoning that that statute specified that a person distributing obscene materials depicting a person under eighteen years of age is required to know that the person depicted is under eighteen years old, the district court explained, "[t]hat is the only statute that I could find that had the distinction, but it indicates to me that the Legislature certainly knows when they want that additional element and when they don't." (TR4/5).

The difference between Defendant's submitted instruction and the instruction ultimately utilized by the district court was that Defendant added to the first element of the instruction that Defendant undertook the actions he did to compel B.G. into prostitution, "knowing [B.G.] was under the age of eighteen years[.]" (RP 486). Otherwise, the elements instruction submitted by Mr. Jackson was the same as that ultimately utilized by the district court. (*Compare* RP 430 *with* RP 486). No uniform jury instruction exists for human trafficking. (See RP 456). Mr. Jackson was convicted of human trafficking and all other counts as well. (RP 530-535; 547-551).

B. Hearing on motion for new trial

Mr. Jackson filed a motion for a new trial on January 26, 2015. (RP 512). The motion was essentially based on the assertion that B.G. "acknowledges that she lied during her trial testimony." (RP 513). The motion was filed in accordance with Rule 5-614 on the basis of newly discovered evidence. (RP 513). The State responded that the evidence at trial, even outside B.G's testimony "was voluminous and compelling." (RP 517). At the hearing on the motion, the State argued that the other evidence, such as text messages and independent witness testimony from Bonnie Martinez, constituted overwhelming evidence (STR14/14), so that, in the State's opinion, any future, under-oath recantations by B.G. would not create a different result from the first trial. The State also argued that the newly discovered evidence

asserted by the defense of B.G. acknowledging lying during Mr. Jackson's trial, "would merely be impeaching or contradictory[.]" (RP 518).

At the hearing, Mr. Jackson called Chante Bickam to testify. (STR14/19). Ms. Bickam spoke with B.G. by telephone after the conclusion of Mr. Jackson's trial. Ms. Bickam had received a facebook message to call a telephone number. When she did so, she recognized the voice on the other end as belonging to B.G., (STR14/22), and she recorded the telephone conversation, (STR14/25), the recording of which was entered into evidence for the hearing. (STR14/36). The district court was also given a copy of the transcript of the recording. (STR14/37).

With respect to the typewritten transcript of the audio-recording, the defense asked for it to be admitted as an accurate rendering of what was also stated on the audio recording. The State objected that it was cumulative to admit a typewritten transcript, and the prosecutor also believed there was a discrepancy between the transcript and the recording. The district court did not rule that there was a discrepancy but also did not admit the typewritten transcript into evidence but included it in the court record, stating that "we can still certainly keep it as part of the record, but I'll just admit Defendant's exhibit 1." (STR14/50).

Defense counsel argued that the recorded conversation was proof that B.G. had lied during her prior trial testimony. (STR14/63). Defense counsel explained

that, "[w]hen asked, Why did you lie during the hearing?, her statements were, I don't know. She acknowledges the fact that she lied." (STR14/63).

Referring to page four, line one of the typewritten transcript, defense counsel recited that Ms. Bickam asked, "You know you didn't have to say anything. You didn't have—those people made you say stuff, so—, to which B.G. responded, "Yeah, they did." (STR14/64). On the basis of that statement, the defense argued that "She's acknowledging that those people made her say stuff." (STR14/64). Defense counsel then recited more of the conversation, with B.G. stating, "Yeah they did. And they told me that if I didn't say anything, that I would have to stay in jail. Like, I can't be sitting in jail. I have a daughter to take care of." (STR14/64). Defense counsel reiterated that Ms. Bickam asked, "So why did you lie?" (STR14/64). "And [B.G.'s] response, 'I don't know.' Again, acknowledging that she lied." (STR14/65).

The district court denied the motion and "question[ed] whether the evidence presented at the hearing is newly discovered evidence." (RP 575). Furthermore, the district court found that "Defendant failed to show the claimed newly discovered evidence was not merely impeaching or contradictory. This was the same sort of evidence that the Defendant presented at trial in an attempt to impeach [B.G.]" and, "Defendant failed to show that this claimed newly discovered evidence would have likely changed the result if a new trial was granted. There was other evidence

presented at trial sufficient to establish Defendant's guilt beyond the testimony of [B.G.]" (RP 575-76).

III. Argument:

A. For Mr. Jackson to be convicted of human trafficking, the jury should be instructed that it has to find whether Mr. Jackson knew B.G. was under eighteen.

The defense preserved this issue when it requested that the human trafficking instruction include, as an element, that Mr. Jackson knew B.G. was under eighteen years of age. Therefore, with respect to the standard of review, where a jury instruction "error has been preserved we review the instructions for reversible error." ***State v. Benally***, 2001-NMSC-033, ¶ 12, 131 N.M. 258 (citation omitted). This Court "seek[s] to determine whether a reasonable juror would have been confused or misdirected' by the jury instruction." ***Id.*** (internal citations and quotations omitted).

The district court bears responsibility for instructing the jury on the correct law. **Rule 5-608(A) NMRA** ("The court must instruct the jury upon all questions of law essential for a conviction of any crime submitted to the jury."); ***Territory v. Baca***, 1903-NMSC-001, ¶ 4, 11 N.M. 559 ("The court must clearly instruct the jury as to the law of the case."). Therefore, defense counsel having tendered the instruction, this Court should reverse the district court and hold that the district court's error in not instructing as to Mr. Jackson's knowledge of B.G.'s age

constituted reversible error as to his human trafficking conviction.

This question turns on the "basis of legislative intent." ***State v. Nozie***, 2009-NMSC-018, ¶ 26, 146 N.M. 142. "A strict liability statute is one which imposes criminal sanction for an unlawful act without requiring a showing of criminal intent." ***State v. Lucero***, 1982-NMSC-069, ¶ 12, 98 N.M. 204, *abrogated on other grounds by* ***Santillanes v. State***, 1993-NMSC-012, 115 N.M. 215. "At common law, crimes involved a showing of criminal intent." ***Id.*** ¶ 13. "However, the Legislature may forbid the doing of an act and make its commission criminal without regard to the intent of the wrongdoer." ***Id.*** If the legislature intends to enact a strict liability crime, it must do so clearly. *See* ***Santillanes***, 1993-NMSC-012, ¶ 11 ("When a criminal statute is silent about whether a mens rea element is required, we do not assume that the [L]egislature intended to enact a no-fault or strict liability crime."); ***Reese v. State***, 1987-NMSC-079, ¶ 18, 106 N.M. 498 (Ransom, J., specially concurring) ("[L]egislative intent [to dispense with general criminal intent requirement] must clearly appear from the statute.").

This Court has previously held "the legislature did not intend that criminal intent be an element of the offense of contributing to the delinquency of a minor." ***State v. Gunter***, 1974-NMCA-132, ¶ 5, 87 N.M. 71. However, the law on crimes against children has evolved substantially since 1974, both doing away with strict liability for child abuse and further defining what is meant by criminal

negligence/reckless disregard. *See* ***Santillanes***, 1993-NMSC-012, ¶ 12 (noting that the Court did not have to consider whether child abuse was a strict liability crime because statute contained mens rea elements); ***State v. Consaul***, 2014-NMSC-030, ¶ 38, 332 P.3d 850 (holding that the Legislature intended to require proof of recklessness to sustain a conviction for negligent child abuse and requiring juries to be instructed using the reckless disregard standard).

In interpreting another section of the contributing to the delinquency of a minor (CDM) statute, this Court has held "it would be absurd and unjust to put someone in the penitentiary for a year-and-a-half on the bare bones of the UJI language in question without proof that the person charged knew or should have known of the lawful or reasonable command or direction he or she is charged with causing or encouraging the minor to disobey." ***State v. Romero***, 2000-NMCA-029, ¶ 29, 128 N.M. 806. This Court held "that CDM requires a degree of knowledge before conviction for causing or encouraging a minor to refuse to obey an order or command of a third party." ***Id.*** ¶ 27. *Accord* ***Elonis v. U.S.***, __ U.S. __, 135 S.Ct. 2001, 2009-10 (2015) ("[A] defendant generally must 'know the facts that make his conduct fit the definition of the offense,' [] even if he does not know that those facts give rise to a crime.").

Mr. Jackson asserts that the same should apply to the age element of the human trafficking statute. The State should have been required to prove that he

knew B.G. was under eighteen. **NMSA 1978 § 30-52-1(A)(2)**, under which Mr. Jackson was convicted, (see RP 530), expressly penalizes "recruiting, soliciting, enticing, transporting or obtaining by any means a person under the age of eighteen years with the intent or knowledge that the person will be caused to engage in commercial sexual activity[.]" While the statute specifies that the offender must know that the person solicited will be caused to engage in commercial sexual activity, Mr. Jackson maintains that a knowledge requirement as to that element of the statute does not dispel the knowledge requirement with respect to the victim's age. Otherwise, the mens rea of the crime would be no different for that of promoting prostitution, a fourth degree felony. *See* **NMSA 1978 § 30-9-4(D)** ("knowingly inducing another to become a prostitute"). Since a criminal statute's silence as to mens rea does not create an assumption of "a no-fault or strict liability crime", ***Santillanes***, 1993-NMSC-012, ¶ 11, Mr. Jackson contends that the element distinguishing the pertinent subsection of the human trafficking statute from the aforementioned subsection of the promoting prostitution statute should be construed to entail scienter. Thus, the jury instruction should have reflected the need for the jury to determine whether Mr. Jackson knew if B.G. were eighteen years old yet.

Furthermore, in ***Nozie***, 2009-NMSC-018, ¶ 1, the Supreme Court considered "whether knowledge of the victim's identity as a peace officer is an essential

element of the crime of aggravated battery upon a peace officer, which the State bears the burden to prove beyond a reasonable doubt." The Court concluded that "the Legislature intended knowledge of the victim's identity as a peace officer to be an essential element of the crime." ***Id.*** ¶ 30. The Court relied in part on the fact that these crimes carry a severe sentence, unlike most strict liability crimes "to which no 'moral condemnation and social opprobrium' typically attach and for which the penalties are 'relatively slight.'" ***Nozie***, ¶ 26 (quoting ***Santillanes***, 1993-NMSC-012, ¶ 27); *accord* ***State v. Ramos***, 2013-NMSC-031, ¶¶ 14-29, 305 P.3d 921. Here, Mr. Jackson was convicted of a third-degree felony without the jury having to find any proof that he knew B.G. was under the age of eighteen. He respectfully requests that this Court reverse his conviction. *See also,* ***Reese***, 1987-NMSC-079, ¶ 14. (Failure to instruct on a necessary element of a crime amounted to the deprivation of Reese's right to due process of law as guaranteed by the United States Constitution, art. XIV, and by the New Mexico Constitution, Art. II, Section 18.")

B. State's exhibit B was admitted without a proper foundation regarding the author(s) of the included texts, and the district court abused its discretion in admitting it.

The standard of review regarding challenges to the admission of evidence is for abuse of discretion by the trial court. ***State v. Allen***, 2000-NMSC-002, ¶ 17, 128 N.M. 482.

"A growing body of case law has developed concerning the admissibility of text messages. Generally, the foundation for the admissibility of text messages has two components: (1) whether the text messages were accurately transcribed and (2) who actually sent the text messages." ***State v. Henry***, 875 N.W.2d 373, 399 (Neb., 2016).

Mr. Jackson challenged the admission of text messages admitted by the State. Defense counsel consistently objected that, though the foundation had been laid to demonstrate that the telephone number at issue was used by Mr. Jackson, other testimony and evidence indicated that the phone was used by other persons and, thus, it could not be said which messages were actually sent to or from Mr. Jackson and which might have been sent by or intended for other individuals using the telephones.

In a Pennsylvania case, ***Commonwealth v. Koch***, 39 A.3d 996, 1006 (Pa. Super. Ct., 2011), an appellate Court held that there was not a hearsay exception under which the texts in that case could be admitted and that they were otherwise hearsay; "[a]rguably, the text messages could have been admitted under the exception to the Pennsylvania hearsay rule for admissions of a party opponent. However, they are not party admissions because the Commonwealth was unable to prove that Appellant was the author. Thus, on the basis of hearsay as well [as other bases], the admission of the text messages constituted an abuse of

discretion." (internal citations omitted).

Likewise, in ***Rodriguez v. State***, 273 P.3d 845, 850 (Nev., 2012), the Nevada Supreme Court recognized that, "the record [was] devoid of any evidence that Rodriguez authored or participated in authoring the ten text messages that were sent after he and Sanders exited the bus around 1:36 A.M. In fact, the evidence suggests that it was Sanders, not Rodriguez, who had possession of the cell phone before they were arrested. Because those ten text messages were not sufficiently authenticated, we conclude that the district court abused its discretion in admitting them."

Mr. Jackson asks this Court to adopt the logic of this out-of-state authority and contends that because the State could not verify that it was necessarily Mr. Jackson who wrote each text included in State's exhibit B, the district court erred in admitting the exhibit into evidence. He asks this Court to utilize the reasoning of the Courts in Pennsylvania and Nevada and to find that the district court abused its discretion in permitting the large group of texts to go before the jury without the State having to provide a better foundation that the texts were actually authored by Mr. Jackson or his co-conspirator. Without such foundation, the texts constituted hearsay as they were out of court statements offered against Mr. Jackson that were not admissions by a party opponent where the State failed to prove that Mr. Jackson or a co-conspirator were definitively the authors of all the texts admitted.

This abuse of discretion was not harmless. Instead, it had a probable effect on the jury's consideration in this matter where the jury was led to believe that Mr. Jackson was the author of texts included in the exhibit. The exhibit included these text messages: "He got 150 for u right now." (sic.) (Ex B, [from 5058044419] p. 246), and "Don't let that white slut sit in that room all night make that ho get sum money..Check her calls and watch her". (sic.) (Ex B [from 5058044419], 276). Also, *inter alia,* Officer Maes testified that, "a message sent to 4419 on February 17, 2013, at 4:47:28: message reads: 'This girl call restricted, but she want me to surprise her man with a three some. Do I do the same price or charge double?'." (TR3/108).

These texts were emphasized as evidence that Mr. Jackson and Ms. McKnight were operating a prostitution business that involved B.G. As such, they were certainly not harmless to Mr. Jackson where they were used to persuade the jury that he ran the business and was involved in the sending of these texts, despite an absence of foundation that he or Ms. McKnight sent the actual texts. Therefore, the admission of this evidence was error and not harmless error. *See* ***State v. Tollardo***, 2012-NMSC-008, ¶ 2, 275 P.3d 110 ("[A] review of the particular circumstances of each case, rather than a mechanical application of a multi-factor test, must guide the inquiry into whether a given trial error requires reversal.") ***Id.***, ¶ 36 ("[N]on-constitutional error is harmless when there is no reasonable

probability the error affected the verdict.") (internal quotations and citations omitted.); ***State v. Serna***, 2013-NMSC-033, ¶ 23, 305 P.3d 936. (While not exhaustive, important factors to consider regarding harmless error include 1) the source of and emphasis placed on the erroneously admitted evidence, 2) whether the evidence was cumulative, 3) other evidence of the defendant's guilt apart from the error, and 4) the importance of the evidence to the prosecutor's case.)

C. Mr. Jackson's convictions were not supported by sufficient evidence.

This Court reviews whether sufficient evidence supports a conviction according to well-settled law: "[t]he test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to conviction." ***State v. Duran***, 2006-NMSC-035, ¶ 5, 140 N.M. 94. This Court's review, when a defendant claims his conviction is not supported by sufficient evidence, "involves a two-step process: deference to the [fact-finder]'s resolution of factual conflicts and inferences derived therefrom, and a legal determination of whether the evidence viewed in this manner could support the conviction." ***State v. Orgain***, 1993-NMCA-006, ¶ 14, 115 N.M. 123 (*citing* ***State v. Garcia***, 1992-NMSC-048, ¶¶ 23-27, 114 N.M. 269).

When, however, "the evidence must be buttressed by surmise and conjecture, rather than logical inference in order to support a conviction," an

appellate court, as protector of the accused's civil liberties, cannot allow the conviction to stand. ***State v. Vigil***, 1975-NMSC-013, ¶ 12, 87 N.M. 345. However, an appellate court does not substitute its "judgment for that of the factfinder concerning the credibility of witnesses or the weight to be given their testimony." ***State v. Riggs***, 1992-NMSC-057, ¶ 17, 114 N.M. 358.

Jury instructions become the law of the case against which the sufficiency of the evidence is measured. ***State v. Smith***, 1986-NMCA-089, ¶ 7, 104 N.M. 729; ***State v. Segura***, 2002-NMCA-044, ¶ 13, 32 N.M. 114. If the State failed to prove its case through sufficient evidence, re-trial is barred based on Mr. Jackson's right to be free from double jeopardy. *Cf.* ***State v. Cabazuela***, 2011-NMSC-041, ¶ 40, 150 N.M. 654.

Mr. Jackson contends, pursuant to ***State v. Franklin***, 1967-NMSC-151, ¶ 9, 78 N.M. 127 (an indigent criminal defendant has a right to have all issues raised by appointed appellate counsel), and ***State v. Boyer***, 1985-NMCA-029, ¶¶ 17-24, 103 N.M. 655 (same), that the State failed in its proof as to all five of his convictions in this matter: human trafficking, promoting prostitution, accepting earnings of a prostitute, contributing to the delinquency of a minor, and conspiracy to commit the aforementioned crimes (except that the State did not proceed on a theory of conspiracy to commit accepting earnings of a prostitute (see RP 438-440)).

With respect to human trafficking, Mr. Jackson contends that the evidence at

trial did not establish proof on which a rational jury could find that he recruited, solicited, enticed, transported or obtained B.G. to commit prostitution. (See RP 430). As argued at directed verdict, the testimony indicated that, "[B.G.] did not feel as though she was forced or coerced or otherwise recruited, solicited, enticed, or—but this is something that she wanted to do. So I don't think there's sufficient evidence as to that." (TR4/86-87).

With respect to promoting prostitution, Mr. Jackson contends that the evidence at trial did not establish proof on which a rational jury could find that he solicited a patron for B.G. in her role as a prostitute. (See RP 433). Mr. Jackson maintains his contention from his directed verdict argument that "there's no information that he solicited any particular individual for . . . that purpose [of utilizing B.G. as a prostitute]." (TR4/87).

With respect to accepting earnings of a prostitute, Mr. Jackson contends that the evidence at trial did not establish proof on which a rational jury could find that he knew that the money he accepted was "derived from the proceeds of the earnings of [B.G.'s] engaging in prostitution[.]" (RP 435). At directed verdict, defense counsel conceded that the jury would decide whether it believed B.G.'s testimony regarding giving Mr. Jackson money. (TR4/88). Nevertheless, Mr. Jackson maintains, pursuant to ***Franklin*** and ***Boyer***, *supra*, that this conflicting evidence did not support the verdict.

With respect to contributing to the delinquency of a minor, Mr. Jackson contends that the evidence at trial did not establish proof on which a rational jury could find that he "caused or encouraged [B.G.] to: a. commit the offense of prostitution, which consists of knowingly engaging in or offering to engage in a sexual act for hire; or b. conduct herself in a manner injurious to her morals, health or welfare[.]" (RP 436). Similar to his argument with respect to human trafficking, Mr. Jackson contended to the jury, with respect to the contributing charge, that he "didn't contribute to her delinquency by encouraging her to commit the act of prostitution[.] . . . . What [B.G.] did was what [B.G.] wanted to do." (TR4/239). As such, where the evidence indicated that B.G. wanted to engage in prostitution, Mr. Jackson maintains that the evidence failed to establish that it was he who was her source of encouragement. Consequently, he maintains, pursuant to ***Franklin*** and ***Boyer***, *supra*, that there was insufficient evidence on which a rational jury could find he committed contributing to the delinquency of a minor.

With respect to the conspiracy conviction, Mr. Jackson contends that the evidence at trial did not establish proof on which a rational jury could find that he formed an agreement to commit any of the target crimes at issue. (See RP 438-440). He conceded at directed verdict that there was an agreement to establish an escort service but contended, and maintains here, that the agreement did not establish a conspiratorial interest in creating a prostitution service, as would be

necessary to prove conspiracy to commit human trafficking, promoting prostitution, and contributing to the delinquency of a minor. (See TR4/88).

For these reasons, pursuant to ***Franklin*** and ***Boyer***, *supra*, Mr. Jackson contends that there was insufficient evidence as to each of his convictions, maintaining that he did not commit the crimes at issue and that the State did not meet its burden of proving otherwise. *But see*, ***Riggs***, 1992-NMSC-057, ¶ 17 (An appellate court does not re-weigh evidence or substitute its judgment for that of the factfinder.)

D. The district court abused its discretion by denying Ms. Jackson a new trial based on newly discovered evidence.

With respect to the standard of review on this issue, "[t]he general rule is that a motion for a new trial is not favored and this Court will only reverse a denial of a motion for new trial upon a showing of a clear abuse of discretion by the trial court." ***State v. Curry***, 2002-NMCA-092, ¶ 18, 132 N.M. 602.

Also pursuant to ***Franklin***, 1967-NMSC-151, ¶ 9 (an indigent criminal defendant has a right to have all issues raised by appointed appellate counsel), and ***Boyer***, 1985-NMCA-029, ¶¶ 17-24 (same), Mr. Jackson contends that a new trial should have been granted by the district court upon the discovery of new evidence that B.G. was untruthful in her testimony, acknowledging that she felt that she was made to testify to facts that were not true. In the evidence before the district court during the hearing on the motion for a new trial, B.G. stated, in response to a

question from Ms. Bickam, as to the reason for her having made misstatements, that she did not know why. (STR14/64).

Furthermore, a material witness warrant was issued for B.G., and so she was picked up by police officers, detained, and delivered to court in custody in order to give testimony. (TR3/167-68). Moreover, she was understood by her aunt, a frequent caregiver, (TR1/150), to be of below average intelligence for her age. (TR1/162). And, she indicated to Ms. Bickam that she was concerned for the wellbeing of her child and the belief that she would be held in jail if she did not testify. She even stated to Ms. Bickam, in response to the assertion that the State made her provide testimony, "Yeah, they did. And they told me that if I didn't say anything that I would have to stay in jail. I have a daughter to take care of." (New Trial Hearing, Defendant's Exhibit 2, page 4).

Thus, B.G. likely believed that her freedom depended on whether or not she was able to help the State convict Mr. Jackson. Regardless of whether she was actually instructed that she was to testify truthfully, her statements to Ms. Bickam convey that she more likely thought that the State held the keys to her freedom and, so, she needed to say what she believed would satisfy the State: namely, statements that would help convict Mr. Jackson. Therefore, to her, as she expressed to Ms. Bickam, she was made to say certain things. As such, her testimony was not trustworthy, and her statements to Ms. Bickam show that a new

trial was necessary for Mr. Jackson's due process rights, so that the defense could potentially adduce testimony from B.G. that she had previously fabricated her account of being solicited for prostitution purposes by Mr. Jackson and that she did not work for him in that capacity.

A motion for a new trial based on an allegation of newly discovered evidence must meet six requirements to be granted: "(1) it[, the newly discovered evidence,] will probably change the result if a new trial is granted; (2) it must have been discovered since the trial; (3) it could not have been discovered before the trial by the exercise of due diligence; (4) it must be material; (5) it must not be merely cumulative; and (6) it must not be merely impeaching or contradictory." ***State v. Garcia***, 2005-NMSC-038, ¶ 8, 138 N.M. 659 (internal quotation marks and citation omitted); *and see also*, ***State v. Moreland***, 2008-NMSC-031, ¶ 17, 144 N.M. 192 (A motion for new trial in New Mexico on the basis of newly-discovered evidence is governed by the rule established in territorial days and enunciated more recently in ***State v. Volpato***[,1985-NMSC-017, 102 N.M. 383]).

As to the first requirement, the result of a new trial would probably be different as to some if not all of the charges if evidence was introduced to show that B.G. felt pressure to make the statements she did at the first trial under the belief that her freedom depended on whether the State was satisfied with her testimony. Thus, the first requirement of the ***Garcia/Volpato*** test is satisfied.

As to the second requirement, the evidence was discovered after the first trial. While the defense may have, at the first trial, challenged the credibility of B.G.'s statements, Mr. Jackson's trial counsel could only have learned, after the trial, about B.G.'s post-trial telephone conversation, in which she agreed with the specific assertion that she felt pressured to make the statements she did at the first trial. As such, the second requirement of the test was satisfied.

Likewise, the third requirement of the ***Garcia/Volpato*** test was also met. Trial counsel interviewed B.G. prior to trial and had endeavored to learn whether it was true that she was involved in prostitution together with Mr. Jackson. Nevertheless, not until B.G. had the post-trial telephone conversation with Ms. Bickam did it come out that she felt pressured to make the statements she did. Therefore, despite due diligence, the new information could not be learned until the phone call took place after the trial. *But see,* ***State v. Sena***, 1985-NMSC-086, ¶ 7, 103 N.M. 312 (Recanted testimony is not 'new' evidence so much as a correction of earlier allegedly perjurious evidence; the falsity of existing evidence can ordinarily be learned prior to trial through due diligence.)

Furthermore, as to the fourth requirement, B.G.'s credibility and honesty on the question of whether she was brought into a life of prostitution through Mr. Jackson was certainly material. It was the ultimate issue before the jury as to most if not all the counts faced by Mr. Jackson.

In ***Garcia***, 2005-NMSC-038, ¶ 12, the Supreme Court explained that the Court had previously addressed the fifth "cumulative" prong of the test in ***State v. Houston***, 1927-NMSC-024, ¶ 17, 33 N.M. 259, and "that the phrase *merely cumulative* means cumulative evidence the weight of which would probably be insufficient to turn the scales in defendant's favor." ***Garcia***, ¶ 12 (quotation marks omitted; emphasis in original). Here, the newly discovered evidence was not merely cumulative. The district court remarked in ruling on the motion that the defense brought out inconsistencies in B.G.'s testimony during the first trial, such as that she had lied to defense counsel on a previous occasion. (STR14/94). However, the newly discovered statement was not merely cumulative to the previous inconsistencies. A direct statement even if, as here, an agreement with another person that "yeah they did" (STR14/64) pressure her into making certain statements at trial constitutes a new fact over and above previous out-of-court inconsistencies that defense counsel was able to adduce at the first trial. The additional evidence was not the same as that previously adduced; this evidence was new in that it would introduce to the jury that B.G. may have believed that her freedom and, thus, the ability to continue to care for her child depended on satisfying the State's objectives at Mr. Jackson's trial. Therefore, this newly discovered evidence was distinct from any evidence already available to the defense in that respect and was not merely cumulative.

Mr. Jackson further contends that this evidence was not merely contradictory or intended merely for impeachment purposes. As the Supreme Court explained in ***Garcia***, ¶ 15,

> The newly discovered evidence in ***Volpato*** was the testimony of a woman who had previously been afraid to testify as a witness. Her testimony corroborated the defendant's account that two men had entered his pharmacy and murdered his wife. She placed two men outside the defendant's pharmacy on the night in question and remembered hearing a series of gunshots in the same sequence as described by the defendant. Her testimony also indicated how one of the men could have obtained the defendant's gun prior to the murder. We concluded that the new evidence in ***Volpato*** was corroborative and was not merely contradictory. To support this conclusion, we cited ***State v. Fuentes*** for the proposition that it is not a question of which story the judge himself believed to be true, but, rather, whether the defendant should have the right to have all of the testimony submitted to a jury in order that the jury might then determine his guilt or innocence. (internal citations and quotation marks omitted).

The Supreme Court's explanation of what constitutes contradictory as opposed to corroborative evidence makes all the difference in the analysis here. Firstly, B.G.'s statements would not necessarily only be used to impeach her or contradict her testimony at a new trial. With a better understanding that she were to testify truthfully regardless of whether her testimony would help the State procure a conviction, B.G. could give a completely different account of the events than she did in the first trial. If she were willing to acknowledge to Ms. Bickam that she felt she was made to make the statements she did at the first trial, she could have been willing to then say the same in open court testimony. As such, her statements

would not merely be used by the defense in order to impeach or contradict her. Instead, it would constitute direct testimony that would go to the truth of her relationship with Mr. Jackson and her involvement with Ms. McKnight and the Backpage service. Therefore, if, at a new trial, B.G. testified that she did not work for Mr. Jackson and Ms. McKnight as a prostitute, the evidence would be corroborative of Mr. Jackson's testimony and not merely contradictory or impeaching.

For these reasons, Mr. Jackson contends that the test was satisfied as to all six requirements, and the district court abused its discretion in failing to grant a new trial on the basis of newly discovered evidence. *But see*, ***State v. Betsellie***, 1971-NMSC-076, ¶ 12, 82 N.M. 782 ("We very much agree that a defendant should be granted a new trial if perjury of a material witness against him is later discovered. However, we also realize and agree courts must act with great reluctance and with special care and caution before accepting the truth of a claim of perjury, and should properly require the evidence to affirmatively establish the perjury in such clear and convincing manner as to leave no room for reasonable doubt that perjury was committed."); *and see also,* ***Franklin; Boyer,*** *supra.*

As a final point on this issue, undersigned counsel notes to this Court that, in preparing this issue for the brief in chief, he has primarily relied on the typewritten transcript of the hearing on Mr. Jackson's motion for a new trial but has also relied

on Defendant's exhibit two from the hearing. However, as detailed in the statement of facts, *supra*, Defendant's exhibit two was not formally admitted into evidence, and the State opposed its admission. However, the district court elected to keep Defendant's exhibit two as part of the record and to formally admit Defendant's exhibit one. Defendant's exhibit one and Defendant's exhibit two contain the same content: B.G.'s telephonic conversation with Chante Bickam. However, Defendant's exhibit one is an audio-recording, and Defendant's exhibit two is a typewritten transcript of that audio-recording. Unfortunately, the audio-recording comprising Defendant's exhibit one was admitted into evidence as a compact disc, and that compact disc is now cracked, rendering the disc un-playable.[1] The disc was cracked when undersigned counsel first removed it from the exhibit envelope. Ostensibly, it physically cracked at some point between the hearing and being in the possession of this Court.

For this reason, undersigned counsel has relied, in part, on Defendant's exhibit two since, although it was not formally admitted, it was chosen to be kept with the district court record by the presiding judge. And, absent a working copy of the compact disc that was entered as Defendant's exhibit one, the typewritten transcript is now the best remaining evidence of what the district court heard in the recorded conversation at issue. Therefore, since Defendant's exhibit two is part of the

[1] Undersigned counsel did check to see if the disc would play despite the crack, but it would not. In fact, the crack in the CD became more severe as a result.

materials submitted to this Court for purposes of this appeal, Mr. Jackson, through undersigned counsel, contends that it is reliable for this purpose. If this Court holds that exhibit two, having not been formally admitted into evidence, is not reliable for this purpose, Mr. Jackson then seeks reversal of all convictions in this matter as he would otherwise not be able to pursue his appeal on this issue. *See* ***State v. Moore***, 1975-NMCA-042, ¶ 9, 534 P.2d 1124 ("Defendant has done everything that can reasonably be expected in order to perfect his appeal. Under the present state of things his contentions are unreviewable. To deny defendant a new trial would be to deny him his right of appeal guaranteed by the New Mexico Constitution.")

Alternatively, he seeks remand for reconstruction of the record, namely reconstruction on Defendant's exhibit one, and supplemental briefing if appropriate. If reconstruction of the record is this Court's preferred remedy for purposes of this issue, it should be noted that the recording was played in open court during the hearing and, if audible to the court reporter, could be directly transcribed as part of the hearing. However, the present transcript of that hearing contains only a comment as to when the recording was played during the hearing but not its contents: "(NOTE: Recording being played.)" (STR14/37). Therefore, in the interest of efficiency and judicial economy, Mr. Jackson asks this Court to rely, and to permit the parties to rely, on Defendant's exhibit two and maintains that exhibit two, the typewritten

transcript of Defendant's exhibit one, constitutes an effective means of reconstructing the evidence on exhibit one for this issue.

IV. Conclusion

Sharoski Jackson prays for reversal of all counts for lack of sufficient evidence and prays that retrial be barred based on his right to be free from double jeopardy. If this Court does not reverse on that basis, he seeks reversal and a new trial on the basis of the district court's errors in admitting improper evidence and in denying Mr. Jackson a new trial on the basis of newly discovered evidence. He also seeks reversal and a new trial on the count of human trafficking based on an erroneous jury instruction.

Respectfully submitted,

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I hereby certify that a copy of this pleading was served by hand delivery to the Attorney General's Box in the Court of Appeals this 4th day of November, 2016.

Law Offices of the Public Defender