ORIGINAL

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

vs. No. 34,873

SHAROSKI JACKSON,

Defendant-Appellant

STATE'S ANSWER BRIEF

Appeal from the Second Judicial District Court
Bernalillo County, New Mexico
The Honorable Briana Zamora

ORAL ARGUMENT IS REQUESTED

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Statement of Compliance

This brief complies with Rule 12-213 F (3) NMRA because its body contains 10,882 words. This word count was obtained from Microsoft Word 2010. Rule 12-213 G.

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Summary of Proceedings

The Minor, Brianna G. Brianna G. was born on January 12, 1996 and was only 18 at the time of her trial testimony.[1] She was sixteen when she met Defendant[2] in January 2013,[3] and seventeen when she began prostituting for him in February 2013. She had a sexual relationship with Defendant.[4] Defendant talked to her about making money as a prostitute, telling her "his other girl [Tiffany McKnight] was a stripper and a prostitute".[5] Defendant told her that she "could do that, too."[6] At one point, Defendant told her he would not speak to her any more if she did not agree to prostitute.[7] Brianna G. testified that in her presence Defendant instructed Tiffany McKnight to post a prostitution advertisement for her on backpage.com.[8] Brianna G. sent Tiffany McKnight the photos used in the

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[1] **[12-11-2014 Tr. 169:16-19]**

[2] Bonnie Martinez testified that Defendant answered to the name "Rock". **[12-09-2014 Tr. 161:24-15]** In her testimony, Brianna G. repeatedly referred to Defendant by the name "Rock". *See e.g.,* **[12-12-2014 Tr. 9:16; 12:7; 14:7; 24:10; 25:10]**

[3] **[12-11-2014 Tr. 170:21-22]**

[4] **[12-11-2014 Tr. 172:21-22]**

[5] **[12-11-2014 Tr. 173:12-174:14]**

[6] **[12-11-2014 Tr. 174:15-22]**

[7] **[12-12-2014 Tr. 8:17-9:8]**

[8] **[12-11-2014 Tr. 175:175:6-25]**

backpage.com advertisement.[9] Defendant discussed the purpose of the advertisement – to obtain money for sex - with Brianna G.[10] Brianna G. testified that she prostituted herself on approximately 15 occasions, and that she gave the money from these transactions, totaling approximately $3,000 to Defendant because he would ask her for the money.[11] On one occasion Defendant wanted to walk the "track" and dropped her off to seek customers on the street for her prostitution services.[12] Defendant referred to Brianna G. as "the white bitch".[13]

March 9, 2013 – Stardust Hotel. Bonnie Martinez, the aunt of the minor Breanna G., testified that Breanna had lived with her "off and on" because Breanna G. had had a "bad childhood" in that her step-father was abusive, and that her mother and step-father used drugs. **[12-9-2014 Tr. 150:2-6]** On March 9, 2013, Bonnie Martinez drove to the Stardust hotel on Central and Locust in Albuquerque to locate Breanna G. **[12-9-2014 Tr. 153:3-156:25]** Bonnie Martinez went to one of the hotel rooms and pounded on the door, in response to which Defendant opened the door, shoved Breanna G. out of the room, and shut the door. **[12-09-**

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[9] **[12-12-2014 Tr. 9:14-10:9]; [Exhibit B]** (Items 1250 to 1245)

[10] **[12-12-2014 Tr. 10:10-18]**

[11] **[12-11-2014 Tr. 179:10-23]; [12-11-2014 Tr. 180:17-181:3]; [12-11-2014 Tr. 180:15-16]**

[12] **[12-12-2014 Tr. 12:17-16:4]**

[13] **[12-12-2014 Tr. 16:12-15]** (Defendant's use of this term for Brianna G. can be seen in his text messages.)

2014 Tr. 157:1-159:3]; [12-09-2014 Tr. 159:23-160:3] Bonnie Martinez testified that she also saw that Tiffany McKnight was present in the hotel room at that time. **[12-09-2014 Tr. 159:4-22]; [12-09-2014 Tr. 211:10-20]** At some point on March 9, 2013, Bonnie Martinez called to make a report to the Albuquerque Police Department. **[12-09-2014 Tr. 160:25-161:3]; [12-10-2013 Tr. 53:20-54:5]**

March 9, 2013 - Phone Call to Defendant. After Defendant shoved Breanna G. out of the Stardust hotel room and shut the door, Bonnie Martinez made a telephone call to (505) 804-4419, the number provided in the backpage.com prostitution advertisement for Breanna G. admitted as part of **Exhibit A** (unnumbered page 10). It was Defendant who answered the phone call to that number. **[12-09-2014 Tr. 161:24 – 162:12]** Bonnie Martinez testified that in this phone call she accused Defendant of prostituting Breanna G., and that Defendant did not deny it, but instead apologized for it. **[12-09-2013 Tr. 162:16-164:4]** Bonnie Martinez testified that in this March 9, 2013 telephone call she "kept telling [Defendant] that Breanna is not of age and her mentality is not of a 17 - -- 16-, 17-year-old", to which Defendant responded "'I didn't' know that. I didn't know she was underage.'" **[12-09-2014 Tr. 162:16-24]**

Bonnie Martinez' Subsequent Phone Contacts with Defendant. After March 9, 2013, Bonnie Martinez continued to contact Defendant as many as ten

times by calls or texting to or from the (505) 804-4419 telephone number listed in the backpage.com advertisement. **[12-09-2014 Tr. 174:23-175:7]; [12-09-2014 Tr. 176:9-16]; [12-09-2014 Tr. 177:8-11]** Bonnie Martinez testified that she made these post-March 9, 2013 telephone calls and text messages to Defendant because "she knew [Defendant] was still having contact with Breanna", even though she did not "know if – if she was still prostituting". **[12-09-2013 Tr. 177:12-23]** Bonnie Martinez also testified that she had received telephone calls from Defendant using the (505) 804-4419 telephone number. **[12-9-2014 Tr. 180:10-19]**

Bonnie Martinez testified that in one of these post-March 9, 2013 communications Defendant "started saying he's sorry and that his – he had a bad childhood; his grandfather was a pimp; that I shouldn't be the one going through this; it should be Breanna's mom doing this." **[12-09-2014 Tr. 175:16-19]** Bonnie Martinez testified that Defendant "would always say he's sorry, even on the phone" **[12-09-2013 Tr. 180:20-25]**, and that he never denied her accusations that he was prostituting Breanna. **[12-09-2013 Tr. 181:12-17]**

Police Human Trafficking Investigation. On March 19, 2013, Detective Christopher Maes of the Albuquerque Police Department testified that the police vice unit received an anonymous tip that launched their investigation into human trafficking by Defendant. **[12-9-2014 Tr. 228.25-232:24; 233:17-19]** Detective

Maes' interviewed Breanna G., **[12-9-2014 Tr. 232:25-233:2]** and identified Internet advertisements associated with the two phone numbers identified by the anonymous tip, (505) 804-4419 and (505) 712-7204. **[12-9-2014 Tr. 234:4-10; 236:19-22]**.

Backpage.com Advertisements. State's Exhibit A, consisting of nineteen (19) unnumbered pages, includes copies of four separate advertisements posted to the website "backpage.com" that were located by Detective Maes' investigation into human trafficking. **[12-08-2013 Tr. 236:9-22]** Three of these advertisements relate to prostitution services provided by Tiffany McKnight, who is identified therein by the name "Layla Redd"[14], with posting dates of February 15, 2013, February 23, 2013, and March 2, 2013. One of the advertisements relates to prostitution services by Breanna G., with a posting date of March 12, 2013. **[12-09-2014 Tr. 161:5-23]**; **Exhibit A** (unnumbered page 10); **[12-09-2014 Tr. 236:23-237:13]** Each of the four advertisements includes the phone number (505) 804-4419 as a contact number, with that number being the only contact number identified with respect to the advertisement for Breanna G. **[Exhibit A]; [12-10-**

[14] Brianna G. also testified that she knew Tiffany McKnight by the name "Redd" and that Defendant referred to her as "Redd". **[12-11-2014 Tr. 177:14-18]**

2015 Tr. 25:5-7] The advertisements for Tiffany McKnight also include the phone number (505) 712-7204 as a contact number for her.

The March 19, 2013 Sting Operation. Using the information from a backpage.com advertisement for Tiffany McKnight, the police set up an undercover sting operation on March 19, 2013 at the La Quinta hotel located at Gibson and Yale. **[12-09-2014 Tr. 233:24-234:3; 250:10-12]** Tiffany McKnight arrived at the La Quinta hotel with Defendant and another man. **[12-09-2014 Tr. 252:10-15]; [12-10-2014 Tr. 28:11-20]** Detective Maes interviewed Tiffany McKnight in one of the hotel rooms **[12-09-2014 Tr. 250:24]; [12-10-2014 Tr. 28:21-23]; [12-10-2014 Tr. 53:10-13];[Exhibit C]** (redacted by District Court), who he identified as the person shown in the backpage.com advertisement that was used to set up the sting operation. **[12-09-2014 Tr. 250:7-8]; [12-10-2014 Tr. 27:14-25; 28:3-10]**

Cell Phones and Prostitution. Detective Maes testified that "cellular phones are oftentimes used for the purposes of communicating about the prostitution, both with potential clients, with – from the prostitute, between the prostitute and the pimp, and also for photographs and other items relating to the investigation." **[12-10-2014 Tr. 55:7-12]** On cross-examination, he further affirmed that "folks who engage in prostitution … on the Internet" commonly use

cell phones, "maybe as many as three, four, five cell phones", which are commonly "passed around amongst those within their immediate circle." **[12-10-2013 Tr. 64:5-65:13]**

Seizure of Two Cell Phones. During the March 19, 2013 sting operation, the police seized two phones. **[12-10-2014 Tr. 54:6-55:4]; [12-10-2014 Tr. 57:15-22]** One of these phones was a black and white Huawei M865 cell phone ultimately identified as having the phone number (505) 712-7204 (hereinafter the "712 cell phone"), and the other was a black and white Samsung SCH-R631 cell phone ultimately identified as having the phone number (505) 804-4419 (hereinafter the "804 cell phone"). **[12-10-2014 Tr. 98:24-99:17];[12-10-2014 Tr. 117:1-17].** Brianna G. testified that she understood the 712 cell phone number to belong to Tiffany McKnight, and the 804 cell phone number to belong to Defendant.[15] Special Agent Larry Huegler of the New Mexico Attorney General's Office testified regarding his digital forensic analysis within the parameters of a search warrant, and his creation of reports of the contents of both phones. **[12-10-2014 Tr. 88:19-25]**; **[12-10-2014 Tr. 103:12-104:12]**.

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[15] **[12-11-2014 Tr. 186:6-17]**

The 712 Cell Phone. The 712 cell phone was one on which Defendant had received e-mailed[16] documents of a very personal nature, including copies of his Social Security card, his birth certificate and his passport **[12-11-2014 Tr. 21:4-10]**, documents which the District Court did not admit into evidence, but which the District Court found to be "highly probative of the fact that [Defendant] was using this phone and, in fact received extremely personal documents on this phone." **[12-1-2014 Tr. 24:17-19]**; **[12-11-2014 Tr. 26:15-23]**; **[12-11-2014 Tr. 40:19-42:2]**; **[Exhibit G]** (Item 15). Special Agent Huegler testified that he located "2,120 artifacts" on the 712 cell phone pertaining to the information relevant to his search terms. **[12-10-2014 Tr. 116:1-15]**; **[Exhibit E] Photographs of Breanna G – Exhibit I.** Special Agent Huegler identified seven photographs of a scantily clad Breanna G. **[Exhibit I]** (most if not all of which had been taken on March 7, 2013) that he had located on the 712 cell phone. **[12-11-2014 Tr. 45:11-49:24]**; *see also* **[12-10-2014 Tr. 112:9-113:2]**; **[12-10-2014 Tr. 114:12-24]** Two[17] of these seven photographs were used in the March 12, 2013-posted advertisement for prostitution

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[16] Analysis of the 712 cell phone revealed that the personal documents of Defendant were sent to the same e-mail address - b_baailove_200456@yahoo.com - that was identified in two of the backpage.com advertisements for Tiffany McKnight. **[12-11-2014 Tr. 42:5-24]**; *compare* **Exhibit A** (unnumbered pages 1, 2, 4, 6, 7, and 8) and **Exhibit G** (Item 15).

[17] *Compare* **[Exhibit I]** (unnumbered pages 3 and 4) and **[Exhibit A]** (unnumbered page 10).

services by Breanna G. **[12-11-2014 Tr. 49:25-3]; [12-09-2014 Tr. 161:5-23]; Exhibit A** (unnumbered page 10); **[12-09-2014 Tr. 236:23-237:13]**

Exhibit J – MMS Message History for the 712 Cell Phone. MMS messages may be used to transmit photographs from cell phones. Special Agent Huegler identified Exhibit J as a redacted analytical report that shows the MMS message history for the 712 cell phone in four categories: "Uncategorized", "Drafts", "Inbox" and "Sent".

Photographs of Breanna G. Received by the 712 Cell Phone – Exhibit K. Special Agent Huegler identified the photographs contained in Exhibit K as being pictures of Breanna G. that had been sent to the 712 cell phone from phone number (505) 818-0517. **[12-11-2014 Tr. 53:19 -54:3]** Most of the photographs contained in **Exhibit K** are "selfies" taken by Breanna G. of herself. Each of these photographs in Exhibit K include jpeg file information (at top of pages) that Special Agent Huegler correlated with the Items of MMS data contained in the *"in-box" portion* of Exhibit J[18]. On the back of each photograph contained in Exhibit K, Special Agent Huegler noted the date [February 24, 2013], times [between 4:52 a.m. and 4:57 a.m.] and phone number [(505) 818-0517] from

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[18] **[Exhibit J]; [12-11-2014 Tr. 53:7-11]**

which each of these photographs had been transmitted to the 712 cell phone. **[12-11-2014 Tr. 56:10-61:20]**

Photographs of Breanna G. Sent by 712 Cell Phone – Exhibit L. Special Agent Huegler identified the photographs contained in Exhibit L as being pictures of Breanna G. that had been located in the *"MMS sent portion"* of the 712 cell phone. **[12-11-2014 Tr. 61:25 -62:5]** Each of these photographs in Exhibit L includes jpeg file information (at top of pages) that Special Agent Huegler correlated with the Items of MMS data contained in the *"sent" portion* of Exhibit J.[19] On the back of each photograph contained in Exhibit K, Special Agent Huegler noted the dates, times and phone numbers or e-mail addresses to which each of these photographs had been sent from the 712 cell phone. **[12-11-2014 Tr. 56:10-61:20]**

Phone Number (505) 818-0517. In addition to the 712 cell phone and the 804 cell phone, Defendant had another cell phone - not recovered by the police - with the number (505) 818-0517. **[12-09-2014 Tr. 187:8-188:3]** This phone was used by Brianna G. from January to March 2013 **[12-11-2014 Tr. 181:21-25]**; *see also.,* **[Exhibit B]** (Item 2824, page 296, in which Brianna G writes "aye this Bre wudddup thoee"); **[Exhibit B]** (Item 2374, page 285, in which Defendant texts to

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[19] **[Exhibit J]; [12-11-2014 Tr. 53:7-11]**

this number saying "...I got u just listen please Bre I wont tell u shit wrong"); **[Exhibit B]** (Items 2142-2133, page 275, in which Briana transmits 10 selfie photographs of herself to the 712 cell phone).

State's Motion in Limine Regarding Exhibit B. On October 29, 2014, the State filed a pre-trial motion in limine and brief addressing a number of issues pre-trial, including potential objections to texts and other information sent to or received by the 712 cell phone. **[RP 0169-182]** This information was presented to the District Court a document attached as "State's Exhibit 1" that was substantially the source document for what became **Exhibit B**. **[RP 0183-0254]** Defendant did not file a written response to the State's motion in limine. **[11-17-2014 Supp.Tr. 3:12-20]**

Absence of Defense Hearsay Objection to Exhibit B. The District Court conducted three separate hearings on the motion in limine.[20] Not once in the course of these three hearings on the motion in limine object on grounds of hearsay to the Items of information included in what would become **Exhibit B**. Nor did Defendant raise a hearsay objection to **Exhibit B** when it was admitted in evidence

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[20] November 17, 2014 **[11-17-2017 Supp.Tr. 3-125]** (addressing text messages commencing at page 40, line 24), on December 8, 2014 **[12-08-2014 Supp.Tr. 61-97]**, and on December 10, 2014 **[12-10-2014 Tr. 4-23].**

or during the course of testimony by Agent Huegler. **[12-11-2014 Tr. 68-143]** [21] Defendant object to any particular text message or to all of them generally on grounds of hearsay. Nor has Defendant in his Brief in Chief identified how any objection on grounds of hearsay to any text message in Exhibit B has been preserved for appellate review.

Argument

I. Criminal liability for human trafficking of a child contrary to § 30-52-1 (A) (2), NMSA does not require the State to prove as an element of the crime that a defendant knew the age of his child victim.

New Mexico condemns and has a long history of condemning the sexual predation and exploitation of children. Promoting prostitution of an adult is punishable as a fourth degree felony under §30-9-4, NMSA. But "human trafficking" by involving a minor aged 16 or 17 year of age in "commercial sexual activity" is a more serious third degree felony. *See* § 30-52-1 (A) (2) and (C), NMSA. If the human trafficking victim is a 13-15 year old, it is a second degree felony; and if the victim is under 13, it is a first degree felony. *See*§30-52-1 (C) (1) and (2), NMSA. The Legislature has even expressly provided that the sexual

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[21] Exhibit B was admitted into evidence at **[12-11-2014 Tr. 91:19-92:03]**, with counsel for Defendant indicated that he had not objection to its admission "other than the objection I've already raised on the record."

exploitation of a child by human trafficking does not implicate double jeopardy protection. Thus, the human trafficker may also be prosecuted, as in this case, for promoting prostitution pursuant to §30-9-4, NMSA. *See* § 30-52-1 D, NMSA ("Prosecution pursuant to this section shall not prevent prosecution pursuant to any other provision of the law when the conduct also constitutes a violation of that other provision.").

In the absence of statutory language expressly requiring that a defendant has criminal intent with respect to an element of a crime, New Mexico jurisprudence generally requires an examination whether the Legislature actually intended not to require proof of criminal intent. It is submitted that the New Mexico State Legislature did not intend to require the State to prove as an element of the crime of human trafficking that a defendant had knowledge that a child victim was 16 or 17 years-old, 13-15 years old, or under the age of 13.

Standard of Review. The standard of review with respect to jury instructions depends on whether the issue has been preserved. *State v. Benally*, 2001-NMSC-033, ¶ 12. To preserve error concerning a "failure to instruct on an issue, a correct written instruction must be tendered before the jury is instructed." Rule 5-608 (D), NMRA. If the error has been preserved, the instructions are reviewed for reversible error. If not, the instructions are reviewed for fundamental

error. *State v. Cunningham*, 2000-NMSC-009, ¶ 8. Fundamental error does not occur if the jury was not instructed on an element not at issue in the case." *State v. Sutphin*, 2007-NMSC-045, ¶ 16. It is submitted that a defendant's knowledge of the age of a child victim of human trafficking is not an element of the offense under § 30-52-1, NMSA.

A. In the absence of express statutory language requiring proof of criminal intent with respect to an element of a crime, New Mexico courts evaluate whether the Legislature intended to exclude a requirement of criminal intent.

It is a tenet of common law that the commission of a crime generally must be predicated upon some knowledge on the part of a defendant that he has acted wrongfully. This is variously discussed in terms of a defendant's "knowledge of wrongfulness", "scienter", "mens rea", "criminal intent", "guilty knowledge" and "vicious will".

In *Reese v. State,* 1987-NMSC-079, a case involving aggravated assault on a police officer, a majority of the New Mexico Supreme Court could not agree on the rationale why the State's was required to prove that the defendant knew that the person he attacked with a knife was a police officer. The court split on whether it was (a) because it was required by constitutional due process, or (b) because the Legislature intended that such knowledge must be proved. Twenty-two years later, the court rejected the constitutional due process basis, instead acknowledging the

matter to be a question of legislative intent. *See State v. Nozie*, 2009-NMSC-018, ¶ 26 ("We agree with Justice Ransom['s concurring opinion in *Reese v. State*] that it is appropriate to resolve the question of knowledge on the basis of legislative intent.").

However, in *Perez v. State*, 1990-NMSC-115, a statutory rape case, the court used legislative intent analysis to evaluate the relevance of defendant's mistaken knowledge of the child victim's age. The case involved consensual sexual intercourse between a 15-year-old victim and a 20-year-old defendant who believed the child was 17-years old. The court concluded that the State did not bear burden of proving that the defendant knew victim's age, but that the defendant should have been permitted to present a mistake of fact defense.

After *Reese* and before *Nozie,* several New Mexico cases had already established that, in the absence of specific statutory language regarding criminal intent, legislative intent governed whether the State bears the burden of proving criminal intent with respect to an element of a crime.[22] *See State v. Herrera*, 1991-

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[22] Cases prior to *Reese v. State* had also looked to legislative intent as determinative of the issue whether criminal intent constituted a part of the State's burden of proof. *See State v. Barber*, 1978-NMCA-059, ¶ 13 (observing with respect to the crime of killing of game and livestock by use of spotlights, that where "neither the title of the act nor the act itself requires any criminal intent" and "[g]iven the public interest involved and further given the difficulties involved in

NMCA-005, ¶7 (requiring proof defendant knew his driving privileges had been suspended or revoked); *Santillanes v. State*, 1993-NMSC-012, ¶¶ 11-13 (observing that the Legislature had included but not defined the mens rea element in the child abuse statute); *State v. Romero*, 2000-NMCA-029, ¶¶ 12-31 ("if a person has no knowledge and no reason to know that he or she is causing or encouraging a minor to *commit an offense*, the Legislature nevertheless may well have intended that person to be guilty of [contributing to the delinquency of a minor....] We have difficulty, however, understanding how the Legislature could have intended that, if a person has no knowledge and no reason to know that a minor is on probation, or subject to some other reasonable or lawful command or direction, that person can be guilty of causing or encouraging the minor *to refuse to obey the command of the person to whose authority she was subject.*"; *State v. Torres*, 2003-NMCA-101, ¶ 7 (finding that legislative intent to "protect the innocent patrons of an

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protection of big game animals and livestock together with the apparent general public attitude we hold that it clearly appears that the legislature intended to eliminate the element of criminal intent."); *State v. Lucero*, 1982-NMSC-069, ¶ 13, *abrogated on other grounds by Santillanes v. State*, 1993-NMSC-012; *State v. Gunter*, 1974-NMCA-132, ¶¶ 1, 5 (in which the court held that "[a] reading of the statute [which provided:'Contributing to the delinquency of a minor consists of any person committing any act, or omitting the performance of any duty, which act or omission causes, or tends to cause or encourage the delinquency of any person under the age of eighteen (18) years'] indicates the legislature did not intend that criminal intent be an element of the offense....").

establishment serving alcoholic beverages" from "the obvious danger in the combination of firearms and liquor consumption" "places the burden upon such person to ascertain whether he or she is entering an establishment with a liquor license", and thereby precluding availability of mistake of fact defense).

B. New Mexico jurisprudence has long recognized the existence of legislative intent to protect children, especially to protect children from sexual predation, without placing the burden of proof upon the State to establish a defendant's knowledge of the age of the victim.

"Notable Exceptions". "Without specific language, the absence of an element of criminal intent must be construed from consideration of the conduct prohibited and the penalty imposed." *Reese v. State*, 1987-NMSC-079, ¶ 20 (Ransom, J., specially concurring). However, Justice Ransom also noted that while strict liability crimes "are generally misdemeanors carrying a relatively light penalty" or "public welfare offense[s]", "notable exceptions" include sex offenses involving children, and other crimes against children. *Reese v. State*, 1987-NMSC-079, ¶ 20, *citing secondary authorities and cases including State v. Alva*, 1913-NMSC-056 (statutory rape of child under age of 14 years) and *State v. Gunter*, 1974-NMCA-132 (contributing to the delinquency of a minor).

1. New Mexico does not require the State to prove a defendant had knowledge of the age of the child victim as an element of the crime of statutory rape.

In *Perez v. State*, 1990-NMSC-115, the court considered whether a 20-year-old statutory rape defendant should have been permitted to present a mistake of fact defense based on his belief that his 15-year-old victim had been 17-years-old at the time of their consensual sex. The statute at issue, §30-9-11, NMSA (Cum. Supp. 1990) did not specifically exclude or even mention criminal intent or its exclusion with reference to the age of the victim. Instead, the statute criminalized sexual penetration "on a child under thirteen years of age", *see* § 30-9-11 (A) (1), on a child thirteen to sixteen years of age when the perpetrator is in a position of authority over the child and uses this authority to coerce the child to submit", *see* § 30-9-11 (B) (1), and when "perpetrated on a child thirteen to sixteen years of age when the perpetrator is at least eighteen years of age and is at least four years older than the child", *see* § 30-9-11 (D), NMSA. Nevertheless, in light of the history of the statutory rape legislation, the court acknowledged that "[t]he fact that knowledge of a child's age is not an essential element of the crime" and "that the state does not have to prove defendant knew the victim was under the age of sixteen". *Perez v. State*, 1990-NMSC-115, ¶ 6. Even so, the court concluded that "while we do not hold that knowledge of the victim's age is an element of the

offense, we do hold that under the facts of this case the defendant should have been allowed to present his defense of mistake of fact." *Perez v. State*, 1990-NMSC-115, ¶ 11.[23]

2. New Mexico does not require the State to prove a defendant had knowledge of the age of the child victim as an element of the crime of contributing to the delinquency of a minor.

In *State v. Gunter*, 1974-NMCA-132, ¶ 5, the Court of Appeals held that "[a] reading of the statute indicates the legislature did not intend that criminal intent be an element of the offense of contributing to the delinquency of a minor." In doing so, the court noted that children "have generally been a favored class for special protection in New Mexico." *Id.*, ¶ 6. The *Gunter* Court noted the reasons for special protection of children, citing and quoting from *State v. McKinley*, 1949-NMSC-010, ¶ 12, as follows:

> The ways and means by which the venal mind may corrupt and debauch the youth of our land, both male and female, are so

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[23] No jurisprudence establishes the availability of a defense of mistake of fact to a charge of human trafficking of a child victim. Moreover, in this case Defendant did not preserve an issue regarding the propriety of submission of a mistake of fact defense because Defendant proffered no mistake of fact defense jury instruction in the District Court, *see* Rule 5-608 (D), NMRA and has not raised the issue as a matter of fundamental error on appeal. Further, because a defendant's knowledge of the age of a child victim of human trafficking is not an *element* of the offense proscribed by § 30-52-1, NMSA, the omission of a mistake of fact defense instruction cannot constitute fundamental error. *State v. Sutphin*, 2007-NMSC-045, ¶ 16.

> multitudinous that to compel a complete enumeration in any statute designed for protection of the young before giving it validity would be to confess the inability of modern society to cope with the problem of juvenile delinquency.

State v. Gunter, 1974-NMCA-132, ¶ 6.

In *State v. Romero*, 2000-NMCA-029, the Court of Appeals addressed a discrete question presented by Uniform Jury Instruction 14-601 adopted for the crime of contributing to the delinquency of a minor, but did not suggest that proof of a child's age was an element of the offense. The jury instruction identified three types of actions that could constitute contributing to the delinquency of a minor: (1) encouraging a minor to violate a statute; (2) encouraging a minor to disobey reasonable and lawful commands of a person with lawful authority; and (3) encouraging a minor to conduct himself in a manner injurious to his morals, health or welfare. The case addressed the second type of action, with the issue being whether the State bore the burden of proving that the defendant knew or should have known that the child was on probation, such that the defendant knew or should have known that the conduct which the defendant had encouraged would constitute "causing or encouraging the minor *to refuse to obey the command of the person to whose authority she was subject.*" The Court of Appeals held that the State had the burden of proving that the defendant knew or should have known that the minor was on probation.

It is submitted that *State v. Romero* is in line with federal jurisprudence protecting child victims whereby a mens rea requirement is incorporated only to the extent necessary to preclude criminalization of conduct that would otherwise be innocent.

In the present case, Defendant was also convicted of contributing to the delinquency of a minor in violation of §30-6-3, NMSA based upon Defendant's "instruct[ing] Brianna G[] on how to prostitute". **[RP 0003]; [RP 0504]; [RP 0531]** Consistent with precedent as established in *State v. Gunter,* the District Court instructed the jury pursuant to a form jury instruction of the Uniform Jury Instructions, UJI 14-601, that included no requirement that the State prove that a defendant had *knowledge* that the victim was under the age of eighteen. *See* **[RP 0462]** It would be anomalous to require the State to prove Defendant's knowledge of the child's age with respect to the crime of human trafficking by involving a child in "commercial sexual activity" while at the same time not requiring the State to do so with respect to the crime of contributing to the delinquency of a minor by instructing the child "on how to prostitute".

3. In enacting legislation for the protection of children, the New Mexico Legislature expressly states when the State bears the burden of proof as to the age of a child victim.

It is submitted that in the area of legislation adopted for the protection of children, the New Mexico Legislature has demonstrated, contrary to the general rule, its intent to require proof of a defendant's knowledge of a child victim's age only where such criminal intent is expressly stated in the statute. In the context of New Mexico's historical protection of children, when the Legislature intends to require proof as an element of a crime that a perpetrator had knowledge that the victim was under the age of eighteen, it appears to do so expressly.

New Mexico's sexual exploitation of children statute, § 30-6A-3, NMSA, since its amendment in 1993, has criminalized the possession and distribution of child pornography by expressly requiring proof that the perpetrator knew or should have known that the child was under the age of eighteen.[24] But the crimes of

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[24] *See* § 30-6A-3 (A), NMSA ("It is unlawful for a person to intentionally possess any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if that person knows or has reason to know that the obscene medium depicts any prohibited sexual act or simulation of such act and *if that person knows or has reason to know that one or more of the participants in that act is a child under eighteen years of age.*" (Italics added).); § 30-6A-3 (C), NMSA "It is unlawful for a person to intentionally distribute any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if that person knows or has reason to know that the obscene medium depicts any prohibited sexual act or simulation of such act and *if that person knows or has*

causing or permitting a child to engage in a prohibited sexual act for a recording, or of engaging in the manufacture of obscene visual or print medium have not expressly required the State to prove that the perpetrator knew or should have known that the child participant was under the age of eighteen.[25] It is reasonable to infer that when New Mexico first adopted the human trafficking statute, § 30-52-1, NMSA, in 2008, the Legislature drafted it in the context of statutes in pari materia, such as the sexual exploitation of children statute, § 30-6A-3, NMSA, which only requires proof of a defendant's knowledge of the child's age as an element of the crime where the statute expressly so provides. *See Albuquerque Commons Partnership v. City of Albuquerque*, 2011-NMSC-002, ¶ 15 ("When the Legislature enacts a statute we presume that 'it is aware of existing statutes'" (Citation omitted.).

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reason to know that one or more of the participants in that act is a child under eighteen years of age.") (Italics added.).

[25] *See* § 30-6A-3 (D), NMSA ("It is unlawful for a person to intentionally cause or permit a child under eighteen years of age to engage in any prohibited sexual act or simulation of such an act if that person knows, has reason to know or intends that the act may be recorded in any obscene visual or print medium or performed publicly."); § 30-6A-3 (E), NMSA ("It is unlawful for a person to intentionally manufacture any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if one or more of the participants in that act is a child under eighteen years of age.")

It is submitted that the different criminal intent requirements drawn by § 30-6A-3, NMSA with respect to different bases for commission of the crime of sexual exploitation of children parallel the rationale of federal jurisprudence not requiring proof of a defendant's knowledge of the age of a child victim where the perpetrator has had an opportunity to evaluate the age of the child victim in person. *Cf., United States v. Malloy*, 568 F.3d 166, 172 (4th Cir. 2009) ("[J]ust like under traditional statutory rape laws where mistake of age is not a defense, "the perpetrator confronts the underage victim personally and may reasonably be required to ascertain that victim's age."), *citing and quoting United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 n 2 (1994). New Mexico jurisprudence in another context has similarly recognized that in the public interest and advancement of safety concerns the burden of ascertaining facts constituting an element of a crime may be placed upon the defendant. *See e.g., State v. Torres*, 2003-NMCA-101, ¶ 11 ("[Section 30-7-3, NMSA] places the burden upon such [a person in possession of a firearm] to ascertain whether he or she is entering an establishment with a liquor license."). It is submitted that when a defendant has personal interaction with a child victim of human trafficking, it is the defendant who bears the burden of ascertaining the victim's age.

C. Federal jurisprudence limits application of the rule presuming a necessity of proof of criminal intent to and only to the extent that the conduct of a defendant would "otherwise be innocent" absent proof of criminal intent with respect to the element at issue.

In evaluating when a requirement of criminal intent should be incorporated into a New Mexico statute that is silent on the issue, New Mexico courts have looked to federal jurisprudence for guidance. *See e.g., State v. Nozie*, 2009-NMSC-018, ¶ 24; *Reese v. State*, 1987-NMSC-079, ¶¶5-12. Federal courts have taken the position that the government may be presumed to have the burden of proving a defendant's knowledge with respect to an element of a crime only in those situations in which, and only to the extent that, the defendant's conduct would otherwise be innocent in the absence of proof of such knowledge.

In *Elonis v. United States,* 575 U.S. ___, 135 S.Ct. 2001, 2010 (2015), the United States Supreme Court stated that "[w]hen interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Id.*, 135 U.S. at 2010, *citing and quoting Carter v. United States*, 530 U.S. 255, 269 (2000); *see also United States v. Cox*, 577 F.3d 833, 837 (7th Cir. 2009) (declining to require proof of knowledge of age of victim where conduct otherwise known by defendant to be illegal); *United States v. X-Citement*

Video, Inc., 513 U.S. 64, 72 (1994) ("[T]he presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize *otherwise innocent conduct.*" (Italics added.); *Staples v. United States*, 511 U.S. 600, 610 (1994) (holding that criminal liability for possession of a weapon possessing automatic firing capability required proof that the defendant knew the weapon possessed such capacity because, absent that proof, the statute would criminalize behavior that a defendant believed fell within "a long tradition of widespread lawful gun ownership by private individuals");

In *United States v. Taylor*, 239 F.3d 994 (9th Cir. 2001), the Ninth Circuit Court of Appeals considered whether 18 U.S.C. § 2423 (a), a federal statute prohibiting the transportation of a minor for purposes of prostitution or another sex offense, required the government to prove that the defendant knew the victim was a minor. The court held that the statute did not require such proof because the statute was intended to protect minors even in cases where the person transporting the minor did not know the age of the person being transported. In rejecting defendant's position, the Ninth Circuit distinguished cases that required the transporter of hazardous waste to prove a defendant's knowledge of the hazardous character of the material being transported on the basis that in those cases "it is the

hazardous nature of the substance that makes the conduct criminal." *Id.*, 239 F.3d at 997. The court explained the distinction as follows:

> Here, in contrast, the transportation of any individual for purposes of prostitution or other criminal sexual activity is already unlawful under federal law. 18 U.S.C. § 2421. Under 18 U.S.C. § 2423(a), the fact that the individual being transported is a minor creates a more serious crime in order to provide heightened protection against sexual exploitation of minors. *See, e.g.,* H.R. Rep. 105–557, at 17 (1998) (justifying 1998 amendment increasing penalties for offenses under 18 U.S.C. § 2423(a)). As Congress intended, the age of the victim simply subjects the defendant to a more severe penalty in light of Congress' concern about the sexual exploitation of minors. *Cf. U.S. v. Figueroa,* 165 F.3d 111, 115 (2d Cir.1998)(noting that, if a criminal statute's language is unclear, its scienter requirement is presumed to be met once an individual forms the requisite intent to commit some type of crime). This is the conclusion reached by the courts in other circuits that have considered the same issue. *See U.S. v. Hamilton,* 456 F.2d 171, 173 (3rd Cir.1972)(per curiam); *U.S. v. Griffith,* 2000 WL 1253265 (S.D.N.Y.) (holding that a defendant violated Section 2423(a) when the victim was a minor, even if he lacked knowledge that she was).

United States v. Taylor, 239 F.3d 994, 997 (9th Cir. 2001); *see also United States v. Hamilton*, 456 F.2d 171, 173 (3rd Cir. 1974) ("§ 2423 provides a more severe penalty when the girl is under eighteen years of age and, accordingly, knowledge that the girl is under eighteen years of age is not part of the proof requisite by the Government in order to sustain a conviction").

In *United States v. Jones*, 471 F.3d 535 (4th Cir. 2006), the Fourth Circuit also examined 18 U.S.C. § 2423 and held that the government did not bear the

burden of proving that the defendant knew the victim to be under the age of eighteen. The court stated that "our interpretation is the only one consistent with any reasonable 'inference of the intent of Congress.' *Id.*, 471 F.3d at 540. The Fourth Circuit further stated:

> The defendant's interpretation, meanwhile, would strip the statute of its clear purpose: the protection of minors. If the prosecution were required to prove knowledge with regard to the victim's age, it would be the rare defendant who would not claim to have mistaken the victim for an adult. Imposing such a mens rea requirement would be tantamount to permitting adults to prey upon minors so long as they cultivate ignorance of their victims' age. But "the statute is intended to protect young persons who are transported for illicit purposes, and not transporters who remain ignorant of the age of those whom they transport." *Taylor,* 239 F.3d at 996. It would be nonsensical to require proof of knowledge of the victim's age when the statute exists to provide special protection for all minors, including, if not especially, those who could too easily be mistaken for adults. Such minors are still minors, "regardless of what [they] say[ ] or how [they] appear[ ]." *Id.* at 997. For this reason, "[i]gnorance of the victim's age provides no safe harbor from the penalties in 18 U.S.C. § 2423(a)." *Id.*

United States v. Jones , 471 F.3d at 540. In reaching this conclusion, the Fourth Circuit indicated that the presumption incorporating a knowledge requirement as to the elements of a crime applied only where the conduct at issue would otherwise not be criminal at all. *Id.* 471 F.3d at 541, *citing United States v. Cook*, 76 F.3d 596, 601 (4th Cir. 1996) ("[T]here is no reason to apply the presumption in favor of

a knowledge requirement in this case to protect otherwise innocent conduct for the obvious reason that receiving illegal drugs is not otherwise innocent conduct.").

II. The District Court did not abuse its discretion in admitting into evidence the text messages contained in Exhibit B.

Defendant's Blanket Objection. Before the District Court and on appeal, Defendant has made a rather generic and blanket lack-of-foundation challenge to the District Court's careful consideration and admission of approximately 525 Items of information derived from the 712 cell phone as shown in the redacted **Exhibit B.** Neither before the District Court nor on appeal has Defendant made the kind of analysis of individual or groups of text messages necessary to evaluate the District Court's exercise of discretion.

The District Court's Exercise of Discretion. For the District Court's part, in reaching its decision to permit the Jury to consider as evidence Exhibit B (a redacted version of State's Exhibit 1 to its brief in support of motion in limine **[RP 0183-0254]**), the District Court considered the argument of the State prosecutor and over 170 pages containing over 4000 Items of information (text messages, e-mails, and multimedia messages) transmitted from or to the 712 Huawei cell phone. Even the Items of information in State's Exhibit 1 that were ultimately excluded from evidence were a part of the circumstantial evidence supporting the District Court's decision to admit those Items that were admitted. *See* Rule 11-104

(a), NMRA (In deciding "any preliminary question about whether ... evidence is admissible, the court is not bound by evidence rules except those on privilege.") Additionally, the District Court had the testimony of witnesses and other interrelated exhibits supporting its determinations. It is submitted that the District Court did not abuse its discretion in admitting the approximately 525 Items in **Exhibit B** into evidence for consideration by the jury.

Standard of Review – Authentication. A trial court has discretion in the authentication and admission of text message evidence that is reviewed on appeal for an abuse of discretion. *See State v. Mitchell*, No. 32,956, mem. op. at 7 (N.M. Ct. App. Feb. 24, 2014) (non-precedential) (no abuse of discretion in authentication of text messages). Evidence sufficient to authenticate and permit admission of text messages into evidence does not require conclusive proof that the defendant authored them. Rule 11-901 (D), NMRA; *cf. United States v. Barnes*, 803 F.3d 209, 217 (5th Cir. 2015); *State v. Elseman*, 841 N.W. 225, 232 (Neb. 2014). Text messages may be authenticated by circumstantial evidence that the text messages were what their proponent claimed them to be. Rule 11-901, NMRA (Judge may consider "[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances."); *cf. State v. Elseman*, 841 N.W. 225, 233 (Neb. 2014); *State v.*

Otkovic, 322 P.3d 746, 752 (Ut. App. 2014); *State v. Thompson*, 777 N.W.2d 617, 624-25 (N.D. 2010) (listing cases addressing circumstantial evidence deemed relevant to authentication). Circumstantial evidence corroborating the sender's identity may include the context or content of the message themselves. *Cf. Commonwealth v. Koch*, 39 A.3d 996, 1004-5 (Pa. Super. Ct. 2011) ("Often it was important that there be evidence that the e-mails, instant messages or text messages themselves contained factual information or references unique to the parties involved."); *State v. Koch*, 334 P.3d 280, 290 (Idaho 2014); *Rodriguez v. State*, 273 P.3d 845, 849 (Nev. 2012). Such evidence may include evidence that the phone was in the defendant's possession at the time the text messages were sent. *Cf. State v. Otkovic*, 322 P.3d 746, 752 (Ut. App. 2014). Proof of record ownership of the telephone from which the text messages were sent is not necessary, only that the phone was regularly used by the alleged sender. *Cf. State v. Henry*, 875 N.W.2d 374, 400 (Neb. 2016).

The State need only make a prima facie showing of authenticity. *Cf. State v. Otkovic*, 322 P.3d 746, 753 (Ut. App. 2014). Contradictory evidence does not preclude admission of evidence, but only goes to the weight of the evidence. *Cf. State v. Mitchell*, No. 32,956, mem. op. at 7 (N.M. Ct. App. Feb. 24, 2014) (non-precedential) (authentication of text messages); *State v. Otkovic*, 322 P.3d 746, 753

(Ut. App. 2014); *State v. Thompson*, 777 N.W.2d 617, 624 (N.D. 2010). "The possibility of an alteration or misuse by another generally goes to weight, not admissibility." *State v. Henry*, 875 N.W.2d 374, 400 (Neb. 2016). The trial court does not determine whether the evidence is authentic, but only whether there is sufficient evidence from which the jury could reasonably conclude that it is authentic. *State v.* King, 254 P.3d 938, 942 (Az. Ct. App. 2011). Once admitted, it is within the province of the jury to determine whether the defendant sent or received the text messages. *State v. Elseman*, 841 N.W. 225, 234 (Neb. 2014) An objection to evidence should be made with specificity so as to allow the adverse party to obviate the objection and to permit the trial court to intelligently rule on the objection and avoid error. Rule 11-103(a) (1), NMRA; *State v. Tiffany O.*, 174 P.3d 282, 284 (Az. App. 2007); *State v. Koch*, 334 P.3d 280, 290 (Idaho 2014) ("Here, the State provided adequate foundation for the admission of the text messages, especially in light of Koch's objections only pertaining to the lack of direct, eyewitness evidence."

Examples of Items Admitted. It is not possible within space limitations to address each Item subject to challenge here individually. The following examples demonstrate that the District Court did not abuse its discretion in determining that the contents of the Items together with other evidence available to the District

Court supported the reasonable conclusions as to who was using the phones at issue at the given times. To the extent further elaboration may be necessary with respect to these or other Items, the State requests the opportunity to present oral argument.

02/21-22-2013 – Items 2451 through 2374. Defendant, using the 712 cell phone; writes "LOVE U REDD!!!B CAREFUL" and "MAKE SURE U HERE AT 545 REDD"; co-conspirator Tiffany McKnight, using the 804 cell phone, responds to Defendant "YES DADDY" at Item 2447. Later at Item 2380, Tiffany McKnight writes Defendant at the 712 cell phone to say "F U NW ROCK!!!". At Item 2374, Defendant, still using the 712 cell phone, writes Brianna G. on the cell phone with number 505-818-0517, and tells Brianna G. "I got u just listen please listen Bre I won't tell u shit wrong" in response to Brianna G.'s text message at Item 2375 that her roommate[26] "patricia just kicked me out!!!"

02/22/2013 - Items 2359 through 2344. Item 2359, a text message from Defendant on the 712 cell phone to Brianna G takes place about two and a half hours after Defendant had sent Brianna G. the text message in Item 2374. Then in Item 2356, Defendant received a text message from a potential prostitution customer; to which Defendant responded by telling the customer to call the 804

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[26] **[12-11-2014 Tr. 172:9-10]**

cell phone, which was being used by Tiffany McKnight. The customer responded to Defendant that he had tried to do that, but had gotten no answer. Defendant then texted Tiffany McKnight at the 804 cell phone number telling her "Money kallin pick up". Defendant then negotiates pricing for the prostitution services to be provided by Tiffany McKnight, including travel time to Edgewood, New Mexico.

0/23/2013 – Items 2256-2204. In Item 2256 at about 2:04 a.m., Defendant, using the 712 cell phone writes to Tiffany McKnight on the 804 cell phone, "She listen to u and only u Redd... no body els". At Item 2253 at about 2:54 a.m., Defendant writes Tiffany McKnight "put that bitch on this money man real talk we need it baby". Tiffany McKnight responds to Defendant, "OK DADDY I AM ..." In Item 2251, Defendant responds to Tiffany McKnight saying "Fuck all that 4 real man we need a house [so I can parole (these words redacted for admission into evidence] to and we got to live good REDD". In Item 2250, Tiffany McKnight responds "I KNO DADDY PLEASE JUST TRUST ME I GOT U...." Then a series of text messages discusses setting up backpage.com advertisements, including Defendant's question to Tiffany McKnight in Item 2240, Did u put my num on both yall shit??". Items 2209 to 2204 reflect Web History involving backpage.com. (Note also that **Exhibit A**, unnumbered pages 1 and 2 are backpage.com advertisements for prostitution services provided by Tiffany

McKnight that include both the numbers for both the 712 cell phone and the 804 cell phone.)

02/24/2013 – Items 2121-2132. The contents of Items 2121 through Item 2132 and other evidence available to the District Court circumstantially supports the reasonable conclusion that Defendant continued to use the 804 cell phone and Tiffany McKnight continued to use the 712 cell phone. These February 24, 2013 Items included substantial Web History at backpage.com being generated by Tiffany McKnight on the 712 cell phone, followed by a question in Item 2016 from Defendant, "Did you do that [place the advertisements] or no??Whats up???" Tiffany McKnight responded in Item 2164 that she had completed hers, but that she had continued to have problems obtaining pictures, saying "I NEED HER TO SEND THE PICS TO MY FONE INSTEAD….". In Item 2150, Tiffany McKnight tells Defendant that "[Breanna G.] SAID SHE SENDN THEM AND SHE READY…" Beginning about 40 minutes after this text message, Tiffany McKnight begins to receive the first of ten (10) MMS messages from phone number 505-818-0517, messages that contain the selfie photographs of Breanna G. identified by Agent Huegler in Exhibit K. **[12-11-2014 Tr. 56:10-61:20]**[27]

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[27] Brianna G. also testified that she had sent pictures she had taken of herself to Tiffany McKnight. **[12-11-2014 Tr. 176:7-10]**

There are also interspersed comments by Tiffany McKnight indicating that her backpage.com advertisement was working, "I GOT PEOPLE HITN ME UP NW ALREADY ....", and by Defendant indicating his intention to make sure Brianna G. actively pursued prostitution activities, telling her "I know you need some help tho Redd..." and "[d]on't let that white slut sit in that room all night make that ho get sum money. Check her kalls and watch her".

03/03/2013 Items. On March 3, 2013, Defendant was using the 804 cell phone and Tiffany McKnight was using the 712 cell phone. Defendant tells Tiffany McKnight in Item 1622, "Redd u was doing so good,,don't start fuckn up no man u better than that... Business only man!" Tiffany McKnight responds, "I KNO DADDY...!" What follows is a series of text messages between Tiffany McKnight and prospective customers, one going by the name "M3X!c@n" and his friend, in which the a potential commercial sexual transaction including pricing is discuss involving Tiffany McKnight and Brianna G. together. In the midst of these text messages, Tiffany McKnight transmits to one of the prospective customers a picture of Brianna G., the photograph contained in **Exhibit K** (unnumbered front page 2; **Exhibit B** (Item 1583); **Exhibit J** (page 123, Item 14).

III. Defendant failed to preserve any hearsay objection to the text messages contained in Exhibit B.

In the Brief in Chief, Defendant's argument strays beyond the issue of authenticity of the text messages to suggest that the text messages contained in **Exhibit B** constituted hearsay and were improperly admitted into evidence. **[BIC 18-19]** (*citing and quoting Commonwealth v. Koch*, 39 A.3d 996, 1006 (Pa. Super. Ct. 2011) relative to its consideration of a hearsay objection, and arguing that "... the texts constituted hearsay..."). While the issue of authenticity of text messages and a potential hearsay issue may be conceptually related or overlapping, and are sometimes presented together in cases involving text messages[28], the issues are distinct. Critically, Defendant did not raise any hearsay objection before the District Court to any of the text messages contained in Exhibit B (nor to all of them in total), and therefore has failed to preserve a hearsay issue for review on appeal.

Defendant's Brief in Chief does not identify the preservation of any hearsay objection whatsoever to any of the text messages contained in Exhibit B. *See*

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[28] For example, text messages to and from co-conspirators may be admitted into evidence as an exception to the hearsay rule as statements of a party opponent. *See State v. Henry*, 875 N.W.2d 374, 402-405 (Neb. 2016); *State v. Thompson*, 777 N.W.2d 617, 626-27 (N.D. 2010). Also, where the evidence reasonably implies that the defendant sent the text messages at issue, they are admissible as a statement of a party opponent as an exception to the hearsay rule. *See State v. Franklin*, 121 P.3d 447, 452 (Kan. 2005).

generally State v. Allen, 2000-NMSC-002, ¶ 17. For the first time on appeal, Defendant now raises a general hearsay objection to *all* of the text messages in Exhibit B. It is generally not sufficient even before the trial court to make a *general* hearsay exception to the entirety of a witness testimony or to multiple statements contained in an exhibit. *State v. Henry*, 875 N.W.2d 374, 400-401 (Neb. 2016). Rather, the opponent must identify to the trial court which particular statements are objectionable as hearsay. *State v. Barr*, 1999-NMCA-081, ¶ 31.. Only after the opponent demonstrates that the evidence is hearsay does the burden shift to the proponent to lay the foundation for an exception to the hearsay rule for the trial court's consideration. *Id.* But in the absence of specific hearsay objections to specific text messages – or even any objection to all of them in total – before the District Court, Defendant's hearsay objection should not now be considered – for the first time - on appeal.

IV. Substantial evidence supported the jury's verdicts.

A. Substantial evidence supports Defendant's conviction for human trafficking of a minor.

Defendant challenges the sufficiency of the evidence with respect to the conviction for human trafficking, arguing that no rational juror could find that Defendant "recruited, solicited, enticed, transported or obtained" B.G to commit

prostitution because the minor Brianna G. wanted to be a prostitute. **[BIC 23]** It is submitted that even if Defendant's position were factually supported it would be legally inadequate as a defense to the crime that the child wanted to be a prostitute. The crime of human trafficking of a minor is intended to protect minors who may not be able to exercise good judgment and who may be unable to protect themselves.

As demonstrated in the recitation of evidence above, substantial evidence supports Defendant's involvement in prostituting Brianna G. in violation of the human trafficking statute, including his directing Tiffany McKnight to create a backpage.com prostitution advertisement for Brianna G., his discussions with the child about prostitution, and his statements to her that he would discontinue communication with her if she did not prostitute herself.

B. Substantial evidence supports Defendant's conviction for promoting prostitution.

Defendant challenges the sufficiency of the evidence with respect to the conviction for promoting prostitution by arguing that no rational juror could find that Defendant "solicited a patron for B.G. in her role as a prostitute, and that "there's no information that [Defendant] solicited any particular individual for ... that purpose". As demonstrated in the recitation of evidence above, substantial evidence supports Defendant's involvement soliciting patrons for Brianna G. as a

prostitute, including his instigation of and involvement in the creation of a backpage.com online advertisement for her services as a prostitute. It was his telephone number on the backpage.com advertisement that patrons would call when seeking her services. Brianna G. testified that she would make contact with persons seeking her prostitution services by being advised by Defendant when to meet them. **[12-12-2014 Tr. 11:25 – 12:16]**

C. Substantial evidence supports Defendant's conviction for accepting the earnings of a prostitute.

As demonstrated in the recitation of evidence above, substantial evidence supports Defendant's conviction for accepting the earnings of a prostitute, including the testimony of Brianna G. that she gave the prostitution money, totaling approximately $3,000[29] to Defendant because he would ask for the money.[30]

D. Substantial evidence supports Defendant's conviction for contributing to the delinquency of a minor.

As in Defendant's argument regarding his human trafficking conviction, Defendant argues that there is insufficient evidence to sustain his conviction for contributing to the delinquency of a miner by causing or encouraging Briana G. to

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[29] **[12-11-2014 Tr. 180:17-181:3]**
[30] **[12-11-2014 Tr. 180:15-16]**

engage in prostitution, because he contends that she wanted to be a prostitute. It is submitted that even if Defendant's position were factually supported it would be legally inadequate as a defense to the crime that the child wanted to be a prostitute. The crime of contributing to the delinquency of a minor is intended to protect minors who may not be able to exercise good judgment and who may be unable to protect themselves. As demonstrated in the recitation of evidence above and in the record as a whole, substantial evidence supports Defendant's conviction for contributing to the delinquency of a minor. Defendant is and should be criminally liable for his "contribution" to the delinquency of a minor.

E. Substantial evidence supports Defendant's conviction for conspiracy.

Defendant challenges the sufficiency of the evidence with respect to the conviction for conspiracy by arguing that no rational juror could find that Defendant's acknowledged agreement with Tiffany McKnight to establish an "escort service", in which they together arranged for Brianna G.'s active promotion and participation, encompassed the criminal acts of human trafficking, promoting prostitution or contributing to the delinquency of a minor. As demonstrated in the recitation of evidence above and in the record as a whole, substantial evidence supports Defendant's conviction for conspiracy.

V. The District Court did not abuse its discretion in denying Defendant's motion for a new trial.

Standard of Review. A trial court's exercise of discretion in denying or granting a motion for a new trial will not be overturned "unless there is a manifest abuse of discretion." *State v. Garcia*, 2005-NMSA-038, ¶ 7. The evaluation of the "probability of new evidence changing a verdict is a question addressed to the sound discretion of the trial court." *Id.*, ¶ 9 (Citation omitted.) A motion for new trial will not be granted based on newly discovered evidence unless it meets each of the following six (6) requirements:

> 1) it 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. Recent cases have consistently applied this standard. *State v. Stephens*, 99 N.M. 32, 653 P.2d 863 (1982); *State v. Fuentes*, 67 N.M. 31, 351 P.2d 209 (1960). The discretion of a trial court is not to be lightly interfered with, and an order denying a motion for a new trial will not be overturned except for an abuse of discretion.

State v. Volpato, 1985-NMSC-017, ¶ 7.

The "New Evidence."The "new evidence" proffered by Defendant was a questionable audio recording of a telephone call involving Brianna G. that Defendant contends indicates and admission to lying at trial, but which actually contains no such admission to lying either in general or as to any particular element of her testimony relevant to the determination of the case.

District Court's Reasoning. From the bench at the end of the hearing on the motion for new trial, the District Court denied the otion for new trial, providing as its reasons that (1) the vagueness of the recorded conversations indicated that this was not new evidence at all; (2) at best, the recorded conversations were "merely impeaching or contradictory" (and cumulative of the impeachment of the witness at trial), (3) the statements presented in the recordings were not specific enough to demonstrate that they would probably change the result of the trial; and (4) there was other evidence at trial apart from Brianna G.'s testimony that established Defendant's guilt. **[05-13-2015 Supp.Tr. 93:17-94:25]** The District Court was correct in its assessment, and certainly did not commit a manifest abuse of its discretion.

Chante Bickham. Defendant offered a recording[31] of telephone voices made post-trial of one or more conversations between Brianna G. and Chante Bickham,

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[31] Ms. Bickham first testified that she made the recordings on her cell phone and these were contained in two separate files. **[05-13-2015 Supp.Tr. 28:3-19]** However, Ms. Bickham later testified that there was only one file. **[05-13-2015 Supp.Tr. 32:16-20]** The first recording or segment is approximately 2 minutes and 45 seconds long; the second is approximately 2 minutes and 14 seconds long. Ms. Bickham also explained that she had received another telephone call in the middle of her conversation with Brianna. **[05-13-2015 Supp.Tr. 28:24-29:2]** Ultimately, the District Court admitted the audio recording(s) into evidence as Defendant's Exhibit 1, but rejected admission of Defendant's Exhibit 2, a transcript made by

the girlfriend of Defendant's brother. Ms. Bickham had been alleged to have been involved in witness tampering. **[05-13-2015 Supp.Tr. 5:13-6:13]** ("[T]here may be charges against [Ms. Bickham] ...because of the allegation of the AG's Office that she attempted to get Brianna Garcia not to show up for court", and that she "was engaged in trying to get Ms. Garcia to leave town on the Greyhound.")

The Audio Recordings. At the commencement of the audio recordings, the timid and child-like voice of a caller explains, "I just wanted to see how he [Defendant] was doing." Then Ms. Bickham berates Brianna for attempting to conceal her identity, and of her feeble denial of that fact. Ultimately, she breaks down and admits that she is Brianna. Ms. Bickham then lies to Brianna that the phone call is not being recorded. Brianna again says "I just wanted to see how he [Defendant] was doing and I just wanted to apologize for everything."

Ms. Bickham abruptly responds, "So, why were you lying in court?" Twelve seconds go by on the recording with no response. Ms. Bickham prods, "Huh?" After a few more seconds, Brianna asks, "Did you say why was I lie?...", at which point there is an abrupt break in the recording.

Defendant, but did allow the transcript to be included as a part of the record. **[05-13-2015 Supp.Tr. 48:11-50:23:]**

Brianna G. – A Reluctant Witness. The recording recommences with Ms. Bickham saying, "Those people made you say stuff …", to which Brianna G. agreed saying "Yeah, they did," and acknowledging that if she didn't testify, she would have to be sitting in jail, which she said she couldn't do because she had a daughter to take care of. Defendant suggests that this response constituted an admission that Brianna G. had lied in court. But in fact, Brianna G. had been a problematic witness who did not want to testify at all, and who had been arrested and placed in jail solely to make sure she was available to testify at trial. Had Brianna G. refused to testify, it is not beyond possibility that she could face contempt proceedings.

On August 14, 2014, the District Court found that Defendant had "engaged in misconduct that was designed to prevent the alleged victim, B.G., from testifying at trial in this matter." **[RP 0150]** The District Court had also found that Brianna appeared "immature, impressionable and vulnerable to Defendant's misconduct", and that "Defendant's contacts with [Brianna] were close and continuous and designed to prevent her from testifying at trial and from testifying truthfully. Brianna was arrested and placed in jail on a material witness warrant to assure that she would be present to testify at Defendant's trial. **[RP 370, 372-374, 381-385]**

Brianna G. did not Admit to Lying in Court about Anything. Ms. Bickham, then again interjects, "So, why did you lie?" and berates Brianna again about being a "liar" in attempting to conceal her identity in the phone call, but without clarifying what else Brianna was supposed to have lied about. Brianna, obviously concerned about Defendant's situation, states that she "feels like a horrible person" and that she "didn't want that to happen." But Brianna did not admit or acknowledge to Ms. Bickham in their recorded conversations that she had lied about anything other than her identity in making the telephone call. Ms. Bickham herself acknowledged under oath that "[n]owhere in that entire recording, do we hear Brianna Garcia say, I lie or I was lying". **[05-13-2015 Supp.Tr. 41:5-8]** Ultimately, Defendant had to settle in the hearing on the motion for new trial with Ms. Bickham's testimonial acknowledgement that Brianna had not affirmatively said during the recorded conversation that she "did not lie during the trial". **[05-13-2015 Supp.Tr. 48:8-10]; [05-13-2015 Supp.Tr. 63:3-14]** (defense counsel was left to argue that "[Brianna G.] may not have said [...] I lied about him pimping me or about me being a prostitute, or about me giving him money ... but [n]ot one time did she say, I told the truth.").

Conclusion

The State respectfully requests this Court to affirm.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief was mailed this 21st day of April, 2017 to the following counsel of record:

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