STATE V. ASARISI

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
WILLIAM ASARISI,
Defendant-Appellant.

No. 33,531

COURT OF APPEALS OF NEW MEXICO

December 16, 2015

APPEAL FROM THE DISTRICT COURT OF LUNA COUNTY, Daniel Viramontes, District Judge

COUNSEL

Hector H. Balderas, Attorney General, Santa Fe, NM, Jane A. Bernstein, Assistant Attorney General, Albuquerque, NM, for Appellee

Jorge A. Alvarado, Chief Public Defender, J.K. Theodosia Johnson, Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

JONATHAN B. SUTIN, Judge. WE CONCUR: JAMES J. WECHSLER, Judge, J. MILES HANISEE, Judge

AUTHOR: JONATHAN B. SUTIN

MEMORANDUM OPINION

SUTIN, Judge.

{1} In December 2011, Defendant William Asarisi was charged with two counts of criminal sexual penetration (CSP) in the first degree, contrary to NMSA 1978, Section

30-9-11(D)(1) (2009),[1] based upon the allegation that on or between January 1, 1992, and December 31, 1993, when Victim was under the age of thirteen, Defendant caused Victim to engage in one act of fellatio, and on another occasion, Defendant caused Victim to engage in sexual intercourse. Victim did not report the incidents of alleged sexual abuse until 2011.

{2} A jury found Defendant guilty of both counts of CSP. On appeal, he seeks reversal of his convictions, claiming that (1) there was insufficient evidence to support his convictions, (2) he received ineffective assistance of counsel, (3) he was prejudiced by prosecutorial misconduct, (4) the State improperly used a previous conviction to impeach his testimony, and (5) reversal of his convictions is warranted on the basis of cumulative error. We hold that the State presented sufficient evidence to support Defendant's convictions. We further hold that Defendant has not made a prima facie showing of ineffective assistance of counsel, nor has he demonstrated that he was prejudiced by prosecutorial misconduct or that the district court abused its discretion in admitting his prior conviction. We affirm.

BACKGROUND

{3} Victim was thirty-one years old at the time of the trial. Victim testified as to the following facts. When Victim was ten years old her mother, who was then divorced from Victim's father, became "fond" of Defendant and introduced him to Victim. Victim's mother and Defendant eventually planned to get married, and because Victim's mother wanted Victim to get to know Defendant better, Defendant asked Victim's mother if Victim could sleep over at his house. The events that led to the present case occurred during those overnight visits.

{4} On one of the overnight visits, Victim went into Defendant's bedroom to see what he was watching on television; Defendant was watching a pornographic video, and he invited Victim to watch with him. Victim sat on the foot of Defendant's bed, he asked her whether she had ever seen a man's penis before, and when Victim said "no," Defendant showed Victim his penis. Defendant instructed Victim to move closer to him, and when she did, Defendant grabbed the back of Victim's head, put his penis inside her mouth, held her head in place, and ejaculated.

{5} On another overnight visit, on a school night, Defendant woke up Victim in the morning, Defendant sat on the couch where Victim was sleeping, told her it was time to get up, removed her covers, and started touching her legs and moving his hand toward her "private area." Defendant removed Victim's underwear, pulled his pants down around his knees, opened Victim's legs, and penetrated Victim's vagina with his penis. After Defendant "finished," he told Victim to clean herself up, Victim went to the bathroom, saw blood and "white stuff" when she wiped herself, and felt pain and burning. When Victim went to school that morning, she sat in class, feeling frozen in her seat, and feeling like everyone was looking and staring at her as though they knew that something had happened. When Victim got home, she went straight to her room and stayed there. Victim never told her mother or anyone else what had happened.

{6} At trial, in response to the prosecutor's inquiry into why Victim finally reported the alleged sexual abuse, Victim testified that one night after having a conversation with her stepdaughter about something that "concerned" Victim, Victim went to bed. She testified:

> I just felt like I had a crack in my head just a white light had shone and I felt something bad had happened to me. I had fell asleep that night and I had woke up in the middle of the night screaming, and it's like everything that he'd ever done to me came flooding back, just laying there in bed. And I can still feel his weight on me, him touching me, the smell of his body, the look on his eyes. . . .

Victim testified that after she woke up, she was crying, and her husband asked her what was wrong. She stated that she "told him everything that I remembered from my nightmare and he had told me, . . . 'I don't know what could be done but you should try and call the police,' and so that morning, I did."

{7} In response to Victim's reference to her "nightmare," the prosecutor and Victim had the following exchange.

> Prosecutor: Now you say 'everything that you remembered from your nightmare,' was it a nightmare?
>
> Victim: To me it was.
>
> Prosecutor: Was it something you only dreamed or was it something you truly remembered?
>
> Victim: It's something I truly remembered.

Later, on redirect examination, in response to the prosecutor's inquiry into why she never disclosed the sexual abuse to anyone, Victim testified, "I don't know. I was never a person to reveal anything to anybody."

{8} Defendant testified in his own defense at trial. He denied having committed the acts that led to the charges in this case. Defendant also presented the testimony of Kathy Fuller, a polygraph examiner. Further details related to Defendant's and Ms. Fuller's testimony are provided, to the extent they are necessary, later in this Opinion.

{9} On appeal Defendant raises several issues that, he claims, are grounds for reversal. We conclude that the State's presentation of Victim's testimony constituted sufficient evidence to support Defendant's convictions. We also conclude that Defendant has failed to make a prima facie showing of ineffective assistance of counsel, that he was not prejudiced by prosecutorial misconduct, and that the district court did not abuse its discretion by admitting evidence of Defendant's prior felony conviction. Because Defendant fails to demonstrate error, the doctrine of cumulative error does not apply in this case.

DISCUSSION

Sufficiency of the Evidence

{10} In relevant part, the jury was instructed that, in order to find Defendant guilty of Count 1, the State was required to prove beyond a reasonable doubt that Defendant caused Victim to engage in fellatio when Victim was under the age of thirteen. As to Count 2, the jury was instructed that the State was required to prove beyond a reasonable doubt that Defendant caused Victim to engage in sexual intercourse when Victim was under the age of thirteen.

{11} Based on Victim's testimony, the jury's verdicts of guilty as to both counts of CSP were supported by the evidence presented at trial. Defendant does not argue on appeal that Victim's testimony was not sufficient to satisfy the elements of the CSP charges. Instead, Defendant argues that Victim's testimony alone, without independent corroborating evidence, was insufficient to allow the jury to find beyond a reasonable doubt that Defendant committed the crimes with which he was charged.

{12} In cases of alleged CSP, "the testimony of the victim need not be corroborated and lack of corroboration has no bearing on [the] weight to be given to the testimony." *State v. Nichols*, 2006-NMCA-017, ¶ 10, 139 N.M. 72, 128 P.3d 500 (alterations, internal quotation marks, and citation omitted); *see* NMSA 1978, § 30-9-15 (1975). As an appellate court, we view the evidence in the light most favorable to the verdict, and if credibility is at issue, we accept any interpretation of the evidence that supports the fact-finder's findings. *Id.* ¶ 9. We do not substitute our judgment for that of the fact-finder with regard to the credibility of a witness or the weight to be given to witness testimony. *Id.* In the present case, in light of the fact that Victim's testimony was found to be credible by the jury and satisfied the elements of CSP, Defendant's sufficiency of the evidence argument provides no basis for reversal.

{13} On appeal, Defendant makes a compelling but unpreserved argument that, in cases such as this with uncorroborated testimony as to a long-passed occurrence, expert testimony should be required to explain the phenomenon of repressed and recovered memories and to ensure the reliability of the victim's testimony. Presently, New Mexico criminal law has not addressed and ruled upon whether the concept of repressed or recovered memory can be considered in relation to the reliability of substantially delayed and uncorroborated testimony of sexual abuse and whether expert testimony may be required in that regard. Nor is there an exception to or limitation of the principle that the testimony of the alleged victim of CSP need not be corroborated when the victim is testifying as to sexual abuse based on a repressed or recovered memory.[2] Further, there is no statute of limitations applicable to the crime of CSP as it relates to a minor. *See* § 30-9-11(D)(1) (stating that CSP on a child under thirteen years old is a first degree felony); NMSA 1978, § 31-18-23(E)(2)(d) (2009) (stating that CSP as provided in Section 30-9-11(D) constitutes a "violent felony"); NMSA 1978, § 30-1-8(I) (2009) (stating that, for a first degree violent felony, "no limitation period shall exist and prosecution for these crimes may commence at any time after the occurrence of the

crime"). While these are issues that a party may wish to address with the Legislature or in a future case, here, there exists no evidence in the record that Victim "repressed" or "recovered" her memory,[3] and we will not issue an advisory opinion to address this hypothetical and unpreserved issue. *See State v. Leon*, 2013-NMCA-011, ¶ 33, 292 P.3d 493 ("We generally do not consider issues on appeal that are not preserved below." (internal quotation marks and citation omitted)); *State v. Verdugo*, 2007-NMCA-095, ¶ 30, 142 N.M. 267, 164 P.3d 966 (declining to address hypothetical issues in what would constitute an advisory opinion as to those issues).

Prosecutorial Misconduct

{14} Defendant argues that a number of comments made by the prosecutor during closing argument constituted prosecutorial misconduct. Because Defendant failed to object to any of the allegedly improper comments, Defendant seeks reversal on the ground that the comments rose to the level of fundamental error. *State v. Sosa*, 2009-NMSC-056, ¶ 26, 147 N.M. 351, 223 P.3d 348 (stating that where counsel fails to object to comments made during closing argument, an appellate court's review of allegedly improper comments is for fundamental error). To conclude that a prosecutor's improper comments amounted to fundamental error, we "must be convinced that the prosecutor's conduct created a reasonable probability that the error was a significant factor in the jury's deliberations in relation to the rest of the evidence before [it]." *Id.* ¶ 35 (internal quotation marks and citation omitted).

{15} Defendant lists a number of allegedly improper comments made by the prosecutor but we limit our discussion to those comments about which he develops an argument. *See State v. Fuentes*, 2010-NMCA-027, ¶ 29, 147 N.M. 761, 228 P.3d 1181 (stating that an appellate court does not consider undeveloped arguments). He argues first that the prosecutor improperly mentioned to the jury that, during voir dire, one panel member stated that for sixty years she did not tell anyone that she had been sexually abused and another panel member had not remembered having been sexually abused until her brother told her that she had been. Secondly, he argues that the prosecutor "improperly called [Defendant] a liar" when the prosecutor asserted that Defendant's recitation of the circumstances under which he met Victim's mother, Defendant's stated reason that his own mother did not babysit his children, and his statement that his biological children were not treated differently from his stepchildren were "blatantly untrue." Third, Defendant argues that the prosecutor improperly vouched for Victim by stating that Victim had no reason to be in the courtroom other than to tell the jury what happened to her when she was ten years old.

{16} The prosecutor's invocation of statements made by panel members during voir dire was unquestionably improper. *See State v. Sellers*, 1994-NMCA-053, ¶ 20, 117 N.M. 644, 875 P.2d 400 (recognizing that the prosecutor's closing remarks must be based on evidence). We are not persuaded, however, that the comments rose to the level of fundamental error. During trial, the jury heard Victim's testimony, including what she remembered of the alleged sexual abuse, her reason for not reporting the alleged abuse when it occurred, and what prompted her to report the alleged abuse in 2011.

The prosecutor's improper comments were briefly mentioned only once and in the context of a closing argument. *See Sosa*, 2009-NMSC-056, ¶ 26 (stating that, in analyzing the effect of alleged prosecutorial misconduct, one factor to consider is whether the comments were pervasive and repeated). Under these circumstances, we are not persuaded that the improper comments were a "significant factor in the jury's deliberations in relation to the rest of the evidence before [it]." *Id.* ¶ 35 (internal quotation marks and citation omitted). This issue does not amount to fundamental error.

{17} In regard to the prosecutor's comment that some of Defendant's testimony was "blatantly untrue," we are not persuaded that the comment was improper. *State v. Dominguez*, 2014-NMCA-064, ¶ 25, 327 P.3d 1092 ("[W]here the defendant has testified, the [prosecution] has a right to . . . comment upon the credibility of the defendant as a witness." (alteration, internal quotation marks, and citation omitted)), *cert. denied*, 2014-NMCERT-005, 326 P.3d 1111. Viewed in context, the comment was intended to encourage the jury to notice inconsistencies in Defendant's testimony and to consider aspects of Defendant's testimony that did not, in the prosecutor's view, make any sense.

{18} Further, even assuming that the comment on Defendant's credibility was improper, we would not conclude that it rose to the level of fundamental error. The comment was not directed at any portion of Defendant's testimony in which he denied committing the two acts of CSP, nor was it pertinent to any aspect of Defendant's testimony regarding his relationship with Victim, in particular. In light of the State's presentation of evidence that was relevant to the CSP charges, we fail to see and Defendant does not demonstrate how comments regarding whether Defendant honestly recounted the exact circumstances under which he met Victim's mother, who babysat his children, or whether his biological children were treated differently from his stepchildren could have been a significant factor in the jury's deliberations. *See Sosa*, 2009-NMSC-056, ¶ 35 (stating that to conclude that fundamental error occurred an appellate court "must be convinced that the prosecutor's conduct created a reasonable probability that the error was a significant factor in the jury's deliberations in relation to the rest of the evidence before [it]" (internal quotation marks and citation omitted)).

{19} Finally, we do not agree with Defendant that the prosecutor improperly vouched for Victim's credibility. Improper vouching arises when the prosecutor either invokes "the authority and prestige of the prosecutor's office or [suggests] the prosecutor's special knowledge." *Dominguez*, 2014-NMCA-064, ¶¶ 23-24 (internal quotation marks and citation omitted). Here, the prosecutor's comment on Victim's reason for testifying neither suggested special knowledge nor invoked the prestige of the prosecutor's office, therefore it did not constitute vouching, and it was not improper.

Ineffective Assistance of Counsel

{20} "Criminal defendants are entitled to reasonably effective assistance of counsel under the Sixth Amendment." *State v. Tafoya*, 2012-NMSC-030, ¶ 59, 285 P.3d 604 (internal quotation marks and citation omitted). "When an ineffective assistance claim is

first raised on direct appeal, we evaluate the facts that are part of the record. If facts necessary to a full determination are not part of the record, an ineffective assistance claim is more properly brought through a habeas corpus petition[.]" *State v. Roybal*, 2002-NMSC-027, ¶ 19, 132 N.M. 657, 54 P.3d 61. "An appellate court will not second-guess counsel's strategic judgment unless the conduct does not conform with an objective standard of reasonableness." *Tafoya*, 2012-NMSC-030, ¶ 59 (internal quotation marks and citation omitted). We review claims of ineffective assistance of counsel de novo. *Id.*

{21} "Our Supreme Court has expressed a preference that ineffective assistance of counsel claims be adjudicated in habeas corpus proceedings, rather than on direct appeal." *State v. Cordova*, 2014-NMCA-081, ¶ 7, 331 P.3d 980, *cert. denied*, 2014-NMCERT-007, 331 P.3d 923. "Therefore, this Court will only remand a case for an evidentiary hearing [on the issue of counsel's ineffectiveness] if the record on appeal supports a prima facie case of ineffective assistance of counsel." *Id.* To demonstrate a prima facie case of ineffective assistance of counsel, a defendant must establish that "(1) counsel's performance was deficient, and (2) such deficient performance resulted in prejudice[.]" *Tafoya*, 2012-NMSC-030, ¶ 59 (alteration, internal quotation marks, and citation omitted). In the present case, Defendant argues that his counsel was ineffective because counsel (1) did not file a motion to suppress Victim's "repressed-recovered memories" testimony, (2) did not elicit testimony from Ms. Fuller regarding whether Defendant denied having committed the acts that led to the CSP charges in this case, (3) failed to retain an expert to testify about the lack of reliability of repressed and recovered memories, (4) did not seek to admit Defendant's marriage license into evidence as an exhibit, and (5) failed to object during the State's closing argument.

{22} As discussed earlier in this Opinion, the only evidence in this case regarding Victim's memories of Defendant's actions was Victim's testimony. Defense counsel did not raise any issue related to repressed or recovered memory in his cross-examination of Victim, nor did he develop any contention relating to the issue of repressed or recovered memory. Therefore, to the extent that Defendant's ineffective assistance claim is premised on the notion that in order to provide reasonably effective counsel in a case involving repressed and recovered memories, counsel was required to seek suppression of Victim's testimony or retain an expert to testify for the defense, the facts of this case do not support the argument. Defendant may raise these issues in a habeas corpus proceeding. *See Roybal*, 2002-NMSC-027, ¶ 19 ("If facts necessary to a full determination are not part of the record, an ineffective assistance claim is more properly brought through a habeas corpus petition[.]").

{23} Defendant does not argue that his counsel's failure to object to the State's closing argument resulted in prejudice. As such, Defendant has failed to demonstrate that his counsel was ineffective by failing to object to the State's closing argument. *See State v. Guerra*, 2012-NMSC-027, ¶ 23, 284 P.3d 1076 (stating that it is the defendant's burden to prove both prongs of the ineffective assistance of counsel test and failure to prove either prong defeats an ineffectiveness claim).

{24} Defendant contends that his counsel should have sought to admit Defendant's marriage license into evidence as an exhibit because it would have demonstrated to the jury that while Victim did not accurately recall Defendant's address during the relevant time period, Defendant did. Defendant reasons that this was important to demonstrate to the jury that while Defendant's memory was accurate, Victim's was flawed.

{25} In the presence of the jury, Defendant relied on his marriage license to refresh his memory of what his address was at the time of the alleged acts of CSP. Thus the jury was aware that Defendant could not recall that address from memory without using the marriage license as a reminder. At best, admitting the marriage license into evidence would have allowed the jury to confirm that Defendant had accurately testified as to the content of the document after having reviewed it. We are unable to conclude that counsel's decision not to seek to admit the exhibit rendered his performance deficient or that admission of the exhibit would have affected the outcome of the trial. *See Tafoya*, 2012-NMSC-030, ¶ 59 ("A successful claim for ineffective assistance of counsel requires [the d]efendant to establish that (1) counsel's performance was deficient, and (2) such deficient performance resulted in prejudice[.]" (alteration, internal quotation marks, and citation omitted)).

{26} Defendant argues further that counsel's "most glaring mistake" was his failure to ask Ms. Fuller what Defendant's answers were in response to her polygraph questions regarding the alleged acts of sexual abuse. In response to defense counsel's direct examination of her, Ms. Fuller testified that she asked Defendant three relevant questions: (1) "Did you ever place [Victim's] mouth on your penis in Deming?"; (2) "Did you ever place your penis in [Victim's] vagina while living in Deming?"; and (3) "Did you ever engage in sexual intercourse [meaning oral, vaginal, or anal sex] with [Victim]?" Defense counsel followed up by asking Ms. Fuller whether she was able to form an opinion as to the results that she received. Ms. Fuller responded that based upon the polygraph results, it was her opinion that Defendant "was truthful to the relevant questions." Defense counsel did not ask Ms. Fuller whether Defendant had responded with "yes" or "no" in answering the relevant questions.

{27} Defendant contends that as a result of counsel's failure to ask whether Defendant admitted or denied having committed the acts of sexual abuse, "the jury could imagine" that Defendant "passed" the polygraph because he admitted to having sexually abused Victim. Viewing Ms. Fuller's testimony in the context of Defendant's trial, we are not persuaded by this argument. Defendant, who testified before Ms. Fuller, denied having committed the alleged acts of CSP, and Defendant presented Ms. Fuller's testimony in support of his defense. A jury could and we think would reasonably infer that, consistent with his testimony, Defendant had denied committing the alleged acts of CSP in his answers to the relevant polygraph questions. A jury could also infer that had Defendant's polygraph test results been unfavorable to his defense, he would not have called Ms. Fuller as a witness. Moreover, the prosecutor vigorously cross-examined Ms. Fuller for nearly twenty minutes, but never elicited testimony that Defendant admitted that he committed the acts of CSP in order to be truthful during the polygraph examination. A reasonable inference is that had Defendant answered "yes" to

the relevant questions, the prosecutor would have brought that to light during her cross-examination of Ms. Fuller. In light of these facts, a reasonable conclusion is that if the jurors "imagined" anything, they imagined that Defendant denied having committed the acts of CSP and that he passed the polygraph test. Thus, even assuming that counsel's decision not to elicit testimony regarding Defendant's specific answers to the relevant polygraph questions fell below an objective standard of reasonableness, we are not persuaded that Defendant was prejudiced by that failure. *See Tafoya*, 2012-NMSC-030, ¶ 59 (describing the requirements for a successful claim for ineffective assistance of counsel).

{28} In sum, we conclude that Defendant has not established a prima facie case of ineffective assistance of counsel. To the extent that Defendant wishes to pursue his claim of ineffectiveness further, he may do so in the context of a habeas corpus proceeding.

Defendant's Prior Conviction

{29} On cross-examination, the State asked Defendant whether he had "picked up a felony conviction" in Connecticut. Defendant's counsel objected to the question, but the basis of the objection and the court's ruling were stated during an unrecorded bench conference and were not made part of the record. The district court permitted Defendant to answer the question, and Defendant said, "Yes." The State did not inquire further into the conviction and beyond Defendant's answer, no evidence pertaining to the conviction was admitted at trial or otherwise made part of the record.

{30} In Defendant's brief in chief, he argues that the State violated Rule 11-609(B) NMRA by impeaching him with a conviction that was more than ten years old without giving him prior written notice of its intent to do so. *See id.* (stating that if more than ten years have passed since the witness's conviction or release from confinement, evidence of the conviction is admissible only if the evidence "substantially outweighs its prejudicial effect, and . . . the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use"). In its answer brief, the State contends that the conviction was fewer than ten years old. *See* Rule 11-609(A)(1)(b) (stating that evidence of a prior criminal conviction must be admitted for the purpose of attacking a witness's character for truthfulness if the probative value of the evidence outweighs its prejudicial effect). Since Defendant does not respond to the State's representation that the conviction was less than ten years old, Defendant has conceded the issue of the age of the conviction. *See State v. Templeton*, 2007-NMCA-108, ¶ 22, 142 N.M. 369, 165 P.3d 1145 ("[T]he failure to respond to contentions made in an answer brief constitutes a concession on the matter[.]" (internal quotation marks and citation omitted)). In light of the fact, conceded by Defendant, that the conviction was fewer than ten years old the issue before us is whether the district court abused its discretion in permitting the inquiry under Rule 11-609(A)(1)(b).[4]

{31} The nature of Defendant's prior conviction was not presented at trial and is not at issue on appeal. Defendant and the State both agree that this case was "a battle of credibility" between Defendant and Victim and that the fact of the prior conviction bore only upon the issue of Defendant's credibility. The fact of Defendant's prior felony conviction had probative value related to the issue of Defendant's credibility. *See State v. Trejo*, 1991-NMCA-143, ¶ 10, 113 N.M. 342, 825 P.2d 1252 (recognizing that crimes involving fraud or deceit are directly probative of credibility and stating that "even if the alleged crime did not involve dishonesty, there is proven dishonesty when the defendant goes to trial, denies the offense, and then is convicted"). Thus, barring a conclusion that the prosecutor's inquiry would be more prejudicial than probative, the district court was required by Rule 11-609(A)(1)(b) to permit it. *See id.* (stating that evidence of a prior criminal conviction must be admitted for the purpose of attacking a witness's character for truthfulness if the probative value of the evidence outweighs its prejudicial effect).

{32} On appeal, Defendant makes no attempt to demonstrate that the inquiry into his prior conviction was more prejudicial than probative. To the extent that we may assume that Defendant made such an argument in the district court, the argument was not made on the record and we have no way to know what Defendant's counsel argued or what the court's reasoning may have been. Under these circumstances, we are provided with no reason to conclude that the court abused its discretion in permitting the prosecutor's inquiry into Defendant's prior conviction.

{33} Defendant's argument, raised for the first time in his reply brief that the conviction was inadmissible "propensity evidence" will not be considered. *State v. Castillo-Sanchez*, 1999-NMCA-085, ¶ 20, 127 N.M. 540, 984 P.2d 787 (stating that this Court will not review arguments that are raised for the first time in a reply brief).

Cumulative Error

{34} Defendant argues that the doctrine of cumulative error requires reversal in his case. Defendant has failed to demonstrate error, and therefore, there is no basis upon which to conclude that cumulative error requires reversal in this case. *State v. Samora*, 2013-NMSC-038, ¶ 28, 307 P.3d 328 ("Where there is no error to accumulate, there can be no cumulative error." (alteration, internal quotation marks, and citation omitted)).

CONCLUSION

{35} We affirm.

{36} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

J. MILES HANISEE, Judge

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1 At the time that the alleged crimes were perpetrated, the relevant statute was NMSA 1978, Section § 30-9-11(A)(1) (1991, prior to 2001 amendment).

2 In the context of civil litigation, the Legislature has provided that "[a]n action for damages based on personal injury caused by childhood sexual abuse shall be commenced by a person before" the person's twenty-fourth birthday or "three years from the date of the time that a person knew or had reason to know of the childhood sexual abuse . . . as established by competent medical or psychological testimony." NMSA 1978, § 37-1-30(A)(2) (1995); *Kevin J. v. Sager*, 2000-NMCA-012, ¶ 13, 128 N.M. 794, 999 P.2d 1026 (concluding that "the [L]egislature intended to have the qualifying phrase 'as established by competent medical or psychological testimony' " in Section 37-1-30(A)(2) "apply to the preceding clause 'know or had reason to know of the childhood sexual abuse and that the childhood sexual abuse resulted in an injury to the person' in its entirety").

3 We reject any interpretation of Victim's testimony about her "nightmare" as having evoked a repressed or recovered memory. Defendant could have but he did not explore that notion on cross-examination.

4 Based on this ruling, we deny the State's motion to supplement the record on appeal with judgment, or in the alternative, motion to take judicial notice.