

STATE V. MUNIZ

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**STATE OF NEW MEXICO,
Plaintiff-Appellee,
vs.
ALFREDO MUNIZ,
Defendant-Appellant.**

No. 30,496 (Otero County CR-2008-299)

COURT OF APPEALS OF NEW MEXICO

December 17, 2010

APPEAL FROM THE DISTRICT COURT OF ORTERO COUNTY, James Waylon
Counts, District Judge

COUNSEL

Gary K. King, Attorney General, Margaret McLean, Assistant Attorney General, Santa Fe, NM, for Appellee

Hugh W. Dangler, Chief Public Defender, Nina Lalevic, Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

JONATHAN B. SUTIN, Judge. WE CONCUR: CYNTHIA A. FRY, Chief Judge,
TIMOTHY L. GARCIA, Judge

AUTHOR: JONATHAN B. SUTIN

MEMORANDUM OPINION

SUTIN, Judge.

Defendant appeals his conviction of two counts of criminal sexual contact of a minor. In our second notice, we proposed to reverse and remand the merger of the two counts

and affirm denial of Defendant's motion to suppress his statement made to police. Both Defendant and the State have responded to our proposed disposition. Having considered their arguments, we reverse and remand for vacation of one count and for resentencing of Defendant. We affirm the denial of the motion to suppress.

The State agrees that reversal is warranted on the merger issue. Defendant likewise agrees with our proposal to reverse. Therefore, for the reasons stated in our second calendar notice, we reverse and remand to the district court to vacate one of the convictions and resentence Defendant. See *State v. Schoonmaker*, 2008-NMSC-010, ¶ 50, 143 N.M. 373, 176 P.3d 1105 (stating that double jeopardy requires one of the convictions to be vacated).

With regard to our proposal to affirm the denial of Defendant's motion to suppress statements that he made to police, Defendant continues to oppose our proposal. He continues to argue that he was not free to leave as the police already knew they were going to arrest him and were simply waiting until he gave an incriminating statement to do it. [DMIO 2]

As we pointed out in both our first and second notices, there is nothing in the record suggesting that the police were going to arrest him regardless of what statement he made. Rather, everything in the record shows that he was free to leave at any time during his statement. [RP 104-05, 240, 242] He was not in custody when he was asked to come to the police station to talk to police.

For the reasons stated in the first and second calendar notices, we affirm the denial of Defendant's motion to suppress his statement made to police.

IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

CYNTHIA A. FRY, Chief Judge

TIMOTHY L. GARCIA, Judge