

**STATE V. WOOD**

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**STATE OF NEW MEXICO,  
Plaintiff-Appellee,  
v.  
MERLIN WOOD,  
Defendant-Appellant.**

No. A-1-CA-35672

COURT OF APPEALS OF NEW MEXICO

December 13, 2017

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Nan G. Nash,  
District Judge

**COUNSEL**

Hector H. Balderas, Attorney General, Santa Fe, NM, for Appellee

Scott M. Davidson, Albuquerque, NM, for Appellant

**JUDGES**

M. MONICA ZAMORA, Judge. WE CONCUR: JULIE J. VARGAS, Judge, STEPHEN G. FRENCH, Judge

**AUTHOR:** M. MONICA ZAMORA

**MEMORANDUM OPINION**

**ZAMORA, Judge.**

{1} Defendant Merlin Wood appeals from his convictions of four counts of criminal sexual contact of a minor and two counts of child abuse, recklessly permitted or caused. In this Court's notice of proposed disposition, we proposed to summarily affirm.

Defendant filed a memorandum in opposition (MIO), which we have duly considered. Remaining unpersuaded, we affirm Defendant's convictions.

{2} After reviewing the record, Defendant acknowledges in his memorandum in opposition that the district court remedied his double jeopardy concern and, thus, has withdrawn his double jeopardy argument. [MIO 5-6] See *State v. Johnson*, 1988-NMCA-029, ¶ 8, 107 N.M. 356, 758 P.2d 306 (explaining that, when a case is decided on the summary calendar, an issue is deemed abandoned when a party fails to respond to the proposed disposition of that issue). He then includes a thorough statement of preservation [MIO 2-6], addressing the concerns regarding preservation raised in our notice of proposed disposition.

{3} Thereafter, Defendant continues to argue that his due process rights were violated because his ability to defend himself was limited by the extended time frame in the charging document and by the fact that the State was permitted to extend the time frames even further during trial. [See MIO 6, 8] Defendant addresses the nine factors raised in *State v. Baldonado*, 1998-NMCA-040, ¶ 27, 124 N.M. 745, 955 P.2d 214 [MIO 9-17], and ultimately claims that the prejudice that he suffered from the two-to-seven year time frame alleged in the charging document is that, if they had been shorter or more specific, he "could have investigated those time frames, and events around those time frames, to cast doubt on the veracity of [Victim]'s uncorroborated and late-reported claims of abusive behavior" [MIO 16]. However, we are unpersuaded that the *Baldonado* factors weigh in Defendant's favor, which is, at times throughout his memorandum in opposition, seemingly acknowledged by Defendant.

{4} For example, the first consideration is the age and intelligence of Victim and her ability to particularize the date and time of the offense. See *id.* As noted by Defendant, Victim was between five and twelve during the alleged time frame during which the incidents occurred, and she was "not able to particularize the date and time of the alleged offenses." [MIO 9] Indeed, as noted by Defendant, Victim had a very difficult time identifying any of the relevant time frames, she had "no idea" what grade she was in during the relevant period, and she "could not remember" how the conduct started or ended. [Id.] Accordingly, a time period that would necessarily include the incidences might need to be a little longer to accommodate the memory of a victim as young as five years old, up to fifteen years later. [See *id.*] This does not weigh in favor of limiting a time period to a specific date or even a single year.

{5} Similarly, the third factor inquires into the extent to which Defendant had frequent, unsupervised access to Victim. See *id.* As acknowledged by Defendant, he "had frequent[,] unsupervised access to [Victim] during the years of the alleged counts." [MIO 12] Because Defendant's access to Victim was frequent and unsupervised, a shorter time frame would not likely have changed anything—to wit: even if the time frame for the counts were limited to a year, Defendant's role as Victim's father [see CN 8] and his frequent and unsupervised access to her would mean that Defendant would be confronted with the same difficulties in preparing an alibi when he had ongoing access to Victim. As such, Defendant's frequent, unsupervised access to Victim

undermines his contention that a shorter time frame would have, in fact, been beneficial, and the third *Baldonado* factor weighs against him.

{6} Likewise, the fourth factor addresses, *inter alia*, whether the offenses would have been likely to have been discovered immediately. *See id.* Again, due to the nature of the offenses in this case and the age of Victim at the time they occurred, they would not likely have been immediately discovered—in fact, Defendant notes that only one was immediately discovered [MIO 12]—and, thus, a shorter time frame would not actually benefit Defendant and/or his ability to prepare a defense or alibi. *See id.* The fifth, sixth, and seventh factors look at the length of the period of time asserted and in relation to the number of acts alleged and the passage of time between the period alleged for the crime and the time the abuse was asserted, *see id.*, which, in the present case, do not really swing in one direction or another. In other words, there were four counts that occurred over a time frame of two to five or seven years, and the crimes were not reported for several years, and, in and of itself, there is nothing to indicate that the charging period presents an unreasonable time frame or that a shorter time frame would have changed the analysis of these factors. *See id.* All in all, the factors do not weigh in Defendant’s favor.

{7} Although other factors may provide slight weight to Defendant’s argument—for example, the second factor, that the *majority* of the offenses were based on single incidents, as opposed to being part of an ongoing course of conduct [see MIO 11]; the eighth factor, that the State may not have made thorough efforts to narrow the time frame [see MIO 15]; or the ninth factor, that Defendant could not assert a plausible alibi with regard to any specific incident [see MIO 16], *see id.*—the weight provided is just that: slight. With the majority of the factors indicating that the time frame was not unreasonably long in light of the circumstances, we are unpersuaded that the slight weight provided by these limited factors results in a finding that the district court erred in permitting the time frame. *See id.* ¶¶ 27-29 (stating that the factors should be considered as a whole and in the context of the case to determine the reasonableness of the time frame).

{8} Moreover, to the extent Victim’s memory limited her capacity to identify the relevant time periods with more precision [see MIO 9-11], Defendant’s ability to establish a defense by “cast[ing] doubt on the veracity of [Victim]’s uncorroborated and late-reported claims of abusive behavior” [see MIO 16] would be heightened, not diminished, by focusing on Victim’s memory or lack of precision. Defendant has not made a persuasive argument as to why the extended time frame in fact impaired his ability to launch a defense.

{9} Accordingly, we conclude that Defendant has failed to prove that the district court erred in concluding that there was no due process violation as a result of the time frames identified in the charging document or as a result of the State extending any of the time frames during trial. *See Hennessy v. Duryea*, 1998-NMCA-036, ¶ 24, 124 N.M. 754, 955 P.2d 683 (“Our courts have repeatedly held that, in summary calendar cases, the burden is on the party opposing the proposed disposition to clearly point out errors

in fact or law.”); *State v. Mondragon*, 1988-NMCA-027, ¶ 10, 107 N.M. 421, 759 P.2d 1003 (stating that “[a] party responding to a summary calendar notice must come forward and specifically point out errors of law and fact[,]” and the repetition of earlier arguments does not fulfill this requirement), *superseded by statute on other grounds as stated in State v. Harris*, 2013-NMCA-031, ¶ 3, 297 P.3d 374. Thus, for the reasons stated in our notice of proposed disposition and herein, we affirm Defendant’s convictions.

**{10} IT IS SO ORDERED.**

**M. MONICA ZAMORA, Judge**

**WE CONCUR:**

**JULIE J. VARGAS, Judge**

**STEPHEN G. FRENCH, Judge**