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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 Opinion Number: _____

3 Filing Date: June 29, 2022

4 **No. A-1-CA-39180**

5 **STATE OF NEW MEXICO,**

6 Plaintiff-Appellee,

7 v.

8 **FERMIN MORENO-ORTIZ,**

9 Defendant-Appellant.

10 **APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY**

11 **James Waylon Counts, District Judge**

12 Hector H. Balderas, Attorney General

13 Maris Veidemanis, Assistant Attorney General

14 Santa Fe, NM

15 for Appellee

16 Bennett J. Baur, Chief Public Defender

17 Carrie Cochran, Assistant Appellate Defender

18 Santa Fe, NM

19 for Appellant

1 **OPINION**

2 **YOHALEM, Judge.**

3 {1} Defendant Fermin Moreno-Ortiz appeals his conviction for one count of
4 criminal sexual penetration (CSP) in the third degree, contrary to NMSA 1978,
5 Section 30-9-11(F) (2009). Defendant challenges the sufficiency of the evidence
6 supporting his conviction and argues that a witness’s statement offered by the
7 prosecution that Defendant is “savage and tries to hook up with all the girls” is
8 inadmissible character evidence requiring reversal.

9 {2} We conclude that sufficient evidence in the record supports Defendant’s
10 conviction, and that, although the witness’s statement was character evidence which
11 was inadmissible under Rule 11-404(A)(1) NMRA, Defendant did not object.
12 Because its admission was not plain error requiring reversal, we affirm Defendant’s
13 conviction.

14 **BACKGROUND**

15 {3} The charges in this case arose when Victim attended a party in a house
16 Defendant shared with friends. Victim was acquainted with Defendant, but testified
17 that she had no interest in dating him. Carlos Nagdi, a young man whom Victim was
18 attracted to and with whom she had once before had a sexual encounter, was also in
19 attendance. Everyone at the party was drinking. Both Nagdi and Victim testified that

1 they had quite a lot to drink that night. Nagdi estimated that he had more than twenty
2 drinks.

3 {4} At one point, Victim was feeling “really drunk” and moved into the den to
4 sleep it off. Nagdi followed her and they began making out. Nagdi and Victim agreed
5 that this conduct was consensual. Victim testified that she “blacked out” and the next
6 thing she remembers was waking up in Defendant’s bedroom. She testified that
7 when she “came to,” Nagdi was in front of her with his penis in her mouth, and
8 Defendant was behind her, penetrating her vaginally. Victim testified that she
9 consented to sex with Nagdi but not with Defendant. Victim reported the incident to
10 police early the following morning.

11 {5} Nagdi was called to the stand by the prosecution. He testified that he had
12 consensual sex with Victim in Defendant’s bedroom. He claimed Victim was
13 interactive and engaged the entire time. He admitted, however, that he was so drunk
14 at the time he could not remember parts of the sexual encounter.

15 {6} Nagdi was interviewed at the police station the morning after the party. The
16 interview was not offered or admitted into evidence at trial. Nagdi, however, was
17 asked by the prosecution on direct examination whether during the police interview
18 he had made the statement that “[Defendant] is savage and tries to hook up with all
19 the girls.” Nagdi denied making that statement. Later the prosecutor questioned
20 Detective Guerrero, one of the officers who interviewed Nagdi, about whether Nagdi

1 had made the statement during his interview at the police station. Detective Guerrero
2 contradicted Nagdi, testifying that she recalled Nagdi making that statement.
3 Defendant did not object to this testimony.

4 {7} Defendant was found guilty of third degree criminal sexual penetration (force
5 or coercion). On appeal, Defendant argues (1) the evidence is insufficient to support
6 his conviction; and (2) the admission of Nagdi’s statement that “[Defendant] is
7 savage and tries to hook up with all the girls” requires reversal.

8 **DISCUSSION**

9 **I. Sufficient Evidence in the Record Supports Defendant’s Conviction**

10 {8} Defendant argues that his conviction is not supported by sufficient evidence
11 in the record. Specifically, Defendant claims that the State failed to prove that Victim
12 was unconscious, asleep or physically helpless when Defendant had sex with her and
13 that even if Victim was unconscious, asleep or physically helpless, Defendant knew
14 or had reason to know of her condition. Defendant points to Nagdi’s testimony that
15 Victim was responsive while he was having sex with her and claims that the term
16 “blacked out,” which was used by the Victim, is ambiguous and can refer to being
17 unconscious or instead to being unable to remember, while behaving normally.

18 {9} The State argues that the Victim’s use of the terms “blacked out” and “came
19 to” generally refers to being unconscious or physically helpless, and that the
20 inference drawn by the jury that Defendant knew or should have known about

1 Victim’s condition was reasonable. We agree with the State and conclude that the
2 evidence was sufficient to support the jury’s verdict.

3 {10} In reviewing the sufficiency of the evidence, we begin by viewing “the
4 evidence in the light most favorable to the guilty verdict, indulging all reasonable
5 inferences and resolving all conflicts in the evidence in favor of the verdict.” *State*
6 *v. Holt*, 2016-NMSC-011, ¶ 20, 368 P.3d 409 (internal quotation marks and citation
7 omitted). We then consider “whether, after viewing the evidence in the light most
8 favorable to the prosecution, *any* rational trier of fact could have found the essential
9 elements of the crime beyond a reasonable doubt.” *State v. Cunningham*, 2000-
10 NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176 (internal quotation marks and citation
11 omitted). “Contrary evidence supporting acquittal does not provide a basis for
12 reversal because the jury is free to reject [the d]efendant’s version of the facts.” *State*
13 *v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829. “The jury instructions
14 become the law of the case against which the sufficiency of the evidence is to be
15 measured.” *Holt*, 2016-NMSC-011, ¶ 20 (alterations, internal quotation marks, and
16 citation omitted).

17 {11} In this case, the jury was instructed that to find Defendant guilty of criminal
18 sexual penetration by force or coercion, they must find the following elements of the
19 crime beyond a reasonable doubt: “(1) [D]efendant caused [Victim] to engage in
20 sexual intercourse or anal intercourse; (2) [Victim] was unconscious, asleep or

1 physically helpless AND [D]efendant knew or had reason to know of the condition
2 of [Victim]; (3) This happened in New Mexico on or about April 21-22, 2016.” *See*
3 UJI 14-944 NMRA.

4 {12} Defendant admitted to engaging in sexual intercourse with Victim,
5 establishing the first element of the offense. Defendant argues that the second
6 element—that Victim was unconscious, asleep or physically helpless—was not
7 established by the evidence. This element requires the jury to assess Victim’s
8 condition at the time of the incident. Victim testified that she “blacked out” and did
9 not remember anything that happened from the time she started making out with
10 Nagdi in the den until she “came to” in Defendant’s bedroom to find Nagdi and
11 Defendant having sex with her.

12 {13} In addition to Victim’s testimony, the State called an expert witness, a
13 toxicologist, to testify about blood test results showing the amount of alcohol and
14 other substances Victim had in her body that night and the effect of those substances
15 on Victim at the time of the incident. The toxicologist estimated that Victim’s blood
16 alcohol content would have been at least 0.125 g/100mL approximately five hours
17 earlier when the incident at issue took place, well above the 0.08 g/100 mL
18 presumptive intoxication limit for driving a car. *See* NMSA 1978, § 66-8-102(C)(1)
19 (2016). The toxicologist also testified that Victim had taken a seizure medication

1 that, when combined with alcohol, can cause excessive sleeping, confusion, and
2 difficulties with memory or speaking.

3 {14} While Defendant concedes that this testimony was sufficient to prove that
4 Victim “blacked out,” he argues that being “blacked out” does not necessarily mean
5 that she was “unconscious, asleep or physically helpless,” as required by the jury
6 instruction, or that her appearance and conduct would necessarily put others on
7 notice that she was unable to consent. Defendant relies on Nagdi’s testimony that
8 Victim was awake and interacting with him for the entire sexual encounter. Nagdi,
9 however, also admitted that he did not recall long periods from that night, including
10 some of the time he was having sex with Victim, because he had at least twenty
11 drinks that night.

12 {15} Resolving all disputed facts in favor of the State and indulging all reasonable
13 inferences in support of the verdict, as we must, *see Holt*, 2016-NMSC-011, ¶ 20,
14 we conclude that the evidence is sufficient to support the jury’s conclusion that
15 Victim was “unconscious, asleep or physically helpless,” and that Defendant knew
16 or had reason to know of Victim’s condition. It was the duty of the jury to weigh the
17 evidence and to decide how to resolve the contradictions in Nagdi’s testimony. *See*
18 *Romero v. H. A. Lott, Inc.*, 1962-NMSC-037, ¶ 11, 70 N.M. 40, 369 P.2d 777 (“Mere
19 inconsistencies or perhaps contradictions in the testimony of a witness only affect
20 his credibility and it is the duty of the trier of the facts to weigh the evidence,

1 determine the credibility of the witness and the weight to be given the testimony,
2 and, where the truth lies.”). Whether Victim was “unconscious, asleep or physically
3 helpless,” and whether her condition was or should have been visible to Defendant
4 are questions of fact for the jury to decide based on all the evidence. The fact that
5 Victim’s statement that she “blacked out” was ambiguous and could have been
6 interpreted in a manner that might support acquittal, does not mean that the evidence
7 was insufficient to support the decision made by the jury. *See Rojo*, 1999-NMSC-
8 001, ¶ 19 (“Contrary evidence supporting acquittal does not provide a basis for
9 reversal because the jury is free to reject [the d]efendant’s version of the facts.”).
10 There is sufficient evidence in the record to support the jury’s verdict.

11 **II. Although Nagdi’s Statement Was Inadmissible Character Evidence**
12 **Offered to Show Propensity, Its Admission Did Not Amount to Plain**
13 **Error Requiring Reversal**

14 {16} Defendant next argues that Nagdi’s statement to the police that “[Defendant]
15 is savage and tries to hook up with all the girls” was inadmissible evidence of bad
16 character and that its admission requires reversal and remand for a new trial. The
17 State denies both that the statement was inadmissible, and, even if it was
18 inadmissible, that its admission was sufficiently prejudicial to require reversal. We
19 agree that the statement’s admission does not require reversal under the doctrine of
20 plain error.

1 **A. Standard of review**

2 {17} The parties disagree about the proper standard of review on appeal. The State
3 claims that Defendant failed to object to either of the two instances where the
4 prosecution relied on the statement at trial. In the absence of an objection, the State
5 contends that this Court should review for fundamental error. Although Defendant
6 admits he made no objection to the prosecution’s second use of the statement in
7 questioning Detective Guerrero, he claims he objected to the original question to
8 Nagdi and argues that our review, therefore, should be for reversible error.

9 {18} Our review of the transcript shows that defense counsel did not object either
10 to the prosecution’s original question to Nagdi about whether he made this statement
11 in his police interview or to the prosecution’s subsequent questioning of Officer
12 Guerrero impeaching Nagdi’s denial. When a timely objection has not been made,
13 we review the admission of evidence for plain error.¹ *See State v. Lucero*, 1993-
14 NMSC-064, ¶ 13, 116 N.M. 450, 863 P.2d 1071 (stating that plain error applies to
15 evidentiary matters that were not brought to the attention of the district court); *see*
16 *also* Rule 11-103(E) NMRA (“A court may take notice of a plain error affecting a
17 substantial right, even if the claim of error was not properly preserved.”). To reverse

¹Defendant objected later to a different question, which Defendant claimed had been asked and answered previously. No objection was made to the prosecution’s question about whether he recalled “telling Detective Guerrero that [Defendant] is savage and tries to hook up with all the girls.”

1 a conviction based on plain error, the reviewing court must be convinced that the
2 testimony was admitted in error and that its admission affected the “substantial
3 right[s]” of the accused. Rule 11-103(E). “[T]he Court must be convinced that
4 admission of the testimony constituted an injustice that created grave doubts
5 concerning the validity of the verdict.” *State v. Montoya*, 2015-NMSC-010, ¶ 46,
6 345 P.3d 1056 (internal quotation marks and citation omitted).

7 **B. The Statement Was Improper Character Evidence Under Rule 11-**
8 **404(A)(1)**

9 {19} We look first at whether the challenged statement was admitted in error. In
10 this case, the jury heard the statement twice: first when Nagdi was questioned by the
11 prosecutor, and again when the prosecution impeached Nagdi’s denial that he had
12 made the statement with Detective Guerrero’s contrary testimony. Defendant claims
13 that the statement that he “is savage and tries to hook up with all the girls” is evidence
14 of bad character, and that it was offered by the prosecution for the sole purpose of
15 showing that Defendant acted in conformance with his character by committing the
16 crime charged.

17 {20} Rule 11-404(A)(1) is designed to prohibit admission of negative character
18 traits to prove that a defendant acted in accordance with those traits. *State v. Lucero*,
19 1992-NMCA-107, ¶ 9, 114 N.M. 489, 840 P.2d 1255. In a criminal case, the
20 prosecution is not permitted to introduce negative character evidence if its sole aim
21 is proving the accused’s propensity to commit the crime charged. *See id.*

1 (“Testimony which amounts to evidence of a defendant’s bad character or
2 disposition to commit the crime charged is clearly inadmissible.”). Such evidence is
3 disallowed, not because character evidence lacks relevance, but because, although
4 relevant, it has a substantial prejudicial effect. *State v. Martinez*, 2008-NMSC-060,
5 ¶ 23, 145 N.M. 220, 195 P.3d 1232; *see also State v. Rackley*, 2000-NMCA-027,
6 ¶ 12, 128 N.M. 761, 998 P.2d 1212 (“Evidentiary rules restricting the use of
7 propensity evidence reflect a judgment that the probative value of such evidence is
8 outweighed by unfair prejudice, confusion and waste of time.”).

9 {21} Although the State generally denies that it questioned Nagdi about the
10 statement to suggest that Defendant had a propensity to act consistently with Nagdi’s
11 negative description of his character, the State offers no legitimate purpose for
12 admitting this statement of bad character. The State fails to articulate any permissible
13 consequential fact it was attempting to prove with Nagdi’s statement. *See State v.*
14 *Gallegos*, 2007-NMSC-007, ¶ 22, 141 N.M. 185, 152 P.3d 828 (holding that a
15 permissible purpose must be articulated).

16 {22} Although articulating no permissible purpose justifying admission of the
17 statement, the State claims that its questioning of Detective Guerrero was justified
18 to impeach Nagdi and undermine his credibility. This Court in *Lucero*, however,
19 rejected as improper the state’s successful attempt in that case to introduce
20 inadmissible evidence of prior misconduct by claiming it was impeachment of the

1 defendant’s denial that misconduct had occurred. 1992-NMCA-107, ¶ 14. *Lucero*
2 noted that allowing impeachment using otherwise inadmissible evidence of bad
3 character “permitted the [s]tate to introduce a collateral, irrelevant, and potentially
4 prejudicial issue into the case.” *See id.*; *see also State v. Ross*, 1975-NMCA-056,
5 ¶¶ 6-9, 88 N.M. 1, 536 P.2d 265 (disallowing impeachment with testimony about
6 bad character because it would have been inadmissible under Rule 11-404 on direct
7 examination).

8 {23} We hold, therefore, that the challenged statement was inadmissible evidence
9 of bad character, which had no purpose other than showing that Defendant acted
10 consistently with his bad character, committing the crime charged. Such a statement
11 was inadmissible, both when offered on direct examination and when used to
12 impeach Nagdi’s denial that he made the statement.

13 **C. Admission of the Statement Does Not Amount to Plain Error**

14 {24} Having held that Nagdi’s statement was inadmissible character evidence, we
15 now turn to the second prong of the plain error analysis: whether the admission of
16 the evidence creates “grave doubts concerning the validity of the verdict” or the
17 fairness of the trial. *See Montoya*, 2015-NMSC-010, ¶ 46. “Plain error is an
18 exception to the general rule that parties must raise timely objection to improprieties
19 at trial, and therefore it is to be used sparingly.” *State v. Dylan J.*, 2009-NMCA-027,
20 ¶ 15, 145 N.M. 719, 204 P.3d 44 (internal quotation marks and citation omitted).

1 {25} In this case, we conclude that the plain error doctrine does not demand
2 reversal. Defendant’s conviction turned primarily on whether Victim was too
3 impaired to consent to have sex and whether the extent of her impairment should
4 have been obvious to Defendant. The statement that “[Defendant] is savage and tries
5 to hook up with all the girls” suggests only that Defendant looks for an opportunity
6 to have sex, not that he has forcible sex or sex with nonconsenting people. Defendant
7 did not deny seeking and having sex with Victim; the questions for the jury focused
8 on Victim’s level of intoxication and consciousness and on whether her inability to
9 consent would have been apparent to a reasonable person. We, therefore, conclude
10 that the admission of this statement did not create substantial prejudice to Defendant
11 concerning either the validity of the verdict or the fairness of the trial required to
12 constitute plain error.

13 **CONCLUSION**

14 {26} For the reasons stated, we affirm Defendant’s conviction.

15 {27} **IT IS SO ORDERED.**

16
17

JANE B. YOHALEM, Judge

1 **WE CONCUR:**

2

3

J. MILES HANISEE, Chief Judge

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5

GERALD E. BACA, Judge