STATE V. APODACA

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JOSEPH APODACA,
Defendant-Appellant.

NO. A-1-CA-36371

COURT OF APPEALS OF NEW MEXICO

December 19, 2017

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Michael E. Martinez, District Judge

COUNSEL

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

Bennett J. Baur, Chief Public Defender, Allison H. Jaramillo, Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

TIMOTHY L. GARCIA, Judge. WE CONCUR: J. MILES HANISEE, Judge, EMIL KIEHNE, Judge

AUTHOR: TIMOTHY L. GARCIA

MEMORANDUM OPINION

GARCIA, Judge.

{1} Defendant appeals from the district court's judgment and sentence, convicting him for criminal sexual contact of a minor (under 13) (CSCM) and contributing to the delinquency of a child. Unpersuaded that Defendant showed error, we issued a notice

proposing to affirm. Defendant has responded to our notice with a memorandum in opposition, which we have duly considered. We remain unpersuaded and affirm.

{2} On appeal, Defendant presents four issues to this Court. First, he contends that the district court abused its discretion by denying his motion to order a competency examination for the alleged victim (M.P.), both pretrial and at the time of the safehouse interview. [DS 8; MIO 4-9] Second, Defendant contends that the district court erred by permitting the State to amend its complaint from criminal sexual penetration (CSP) in the first degree to CSCM in the third degree. [DS 8; MIO 9-12] In his third and fourth issues, Defendant challenges the sufficiency of the evidence to show beyond a reasonable doubt that Defendant was the perpetrator. [DS 8; MIO 12-26] Rather than reiterate our full analysis, this opinion focuses on the arguments made in response to our notice.

Denial of a competency evaluation

{3} Defendant maintains that M.P.'s competency was at issue within the meaning of NMSA 1978, Section 30-9-18 (1987), because portions of M.P.'s safehouse interview, conducted when she was four years old, were ambiguous. [MIO 2, 4-9] We understand Defendant's complaint about the interview to be her ambiguous identification of the perpetrator. We observe that there were three males named Joseph, including Defendant, who were closely tied to M.P. at the time of safehouse interview when M.P. was four years old. [DS 4]

{4} Our Rules of Evidence and case law treat competency to appear as witnesses liberally, beginning with a presumption that all persons are competent, subject to very narrow exceptions. *See State v. Perez*, 2016-NMCA-033, ¶ 12, 367 P.3d 909 (citing Rules 11-602, -603, -605, and -606 NMRA). Relevant here is the competency to understand the oath to truthfully testify. *See* Rule 11-603. This requires "a witness to possess a basic understanding of the difference between telling the truth and lying, coupled with an awareness that lying is wrong and may result in some sort of punishment." *Perez*, 2016-NMCA-033, ¶ 14 (internal quotation marks and citation omitted). Section 30-9-18 affords the district court discretion to order a psychological evaluation of the alleged victim where "the court determines that the issue of competency is in sufficient doubt that the court requires expert assistance." Our case law applying Section 30-9-18 suggests that we permit the district court wide discretion to deny a psychological evaluation of the victim. *See State v. Casillas*, 2009-NMCA-034, ¶ 34, 145 N.M. 783, 205 P.3d 830 (rejecting the defendant's claim that the district court erred by denying a competency evaluation of the child victim even where the victim stated in an interview that she sometimes had hallucinations, and the victim's mother testified that the victim was sick, needed help, had been prescribed an anti-psychotic drug, and that the victim had acted abusively toward the defendant in the past).

{5} In the current case, Defendant has provided neither the district court nor this Court with any factual basis to question M.P.'s past or more current competency to testify about the events at issue. [MIO 2] Defendant's response to our notice refers us,

not to evidence about M.P.'s competency, but to articles relating to difficulties in assessing children's abilities to accurately recall events generally. [MIO 6-9] This argument was not made to the district court, and does not establish a showing that M.P. lacked competency to accurately recall events in this case. *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. Cordova*, 2014-NMCA-081, ¶ 10, 331 P.3d 980 ("Argument of counsel is not evidence.") (alteration, internal quotation marks, and citation omitted).

{6} Defendant does not dispute our observation from the record that M.P. cleared up some ambiguity of her statements in the course of the safehouse interview and that M.P. was viewed by the forensic interviewer as unusually verbal for her young age. [DS 5-6, 8] Additionally, because a case was pursued against Defendant many years after the safehouse interview, Defendant's challenge to M.P.'s competency came when M.P. was nearly ten years old, and Defendant does not direct our attention to any evidence that M.P. ever lacked the ability to understand the requirement that she testify truthfully. Ambiguous statements in a four-year-old child's identification of one of three males with the same first name as the perpetrator, along with some clarification about the perpetrator, and followed much later by a more mature and definitive identification of the perpetrator, does not cast sufficient doubt on M.P.'s competency such that the district court abused its discretion in refusing to order a competency examination. We affirm the district court's denial of a competency evaluation of M.P.

The State's Amended Complaint

{7} Defendant contends that the district court violated his due process right to notice by permitting the State to amend its complaint from CSP in the first degree to CSCM in the third degree. [DS 8; MIO 9-12]

{8} Rule 5-204(C) NMRA states that "[t]he court may at any time allow the indictment or information to be amended in respect to any variance to conform to the evidence." Rule 5-204(A) also allows a court to amend an information at any time prior to the verdict but does not allow the court to amend if there is an additional or different offense charged. *See State v. Roman*, 1998-NMCA-132, ¶ 9, 125 N.M. 688, 964 P.2d 852. "Unless the amendment prejudices the defendant's substantial rights, it is not 'grounds for . . . acquittal.'" *State v. Romero*, 2013-NMCA-101, ¶ 9, 311 P.3d 1205 (quoting Rule 5-204(C)). "Prejudice exists when the defendant is unable to reasonably anticipate from the indictment the nature of the proof the state will produce at trial." *Id.* "When one offense is a lesser included offense of a crime named in a charging document, the defendant is put on notice that he [or she] must defend not only against the greater offense as charged but also against any lesser included offense." *State v. Montoya*, 2015-NMSC-010, ¶ 43, 345 P.3d 1056 (alteration in original) (internal quotation marks and citation omitted).

{9} Defendant asserts that because the State altered its theory to impose an entirely new charge after the close of evidence, the amendment ran afoul of Rule 5-204. [MIO

11-12] Our notice referred Defendant to *Romero*, 2013-NMCA-101, ¶ 10, in which we held that CSCM was a lesser included offense of CSP of a minor, where the defendant was charged with having penetrated the minor victim's genitalia, but where the victim's testimony indicated that there was skin-to-skin contact between the defendant's and victim's genitalia. [CN 5] In *Romero*, we reasoned that "the intentional touching or the application of force to the intimate parts of a minor is inherent in the criminal sexual penetration of a minor." *Id.* Accordingly, in *Romero* we held that because the defendant was charged with CSP of a minor, the defendant "was on notice of the facts constituting the CSCM, for which he was ultimately convicted[,]" and that the amendment to the charging document during trial did not result in prejudice. *Id.* ¶ 12.

{10} Defendant distinguishes *Romero* on the grounds that, in the current case, Defendant was on notice to defend against fellatio and that placing his penis on top of M.P.'s head is a completely different allegation that did not relate to the inherent contact involved in fellatio. [MIO 11] We are not persuaded that Defendant has materially distinguished *Romero*. Penile contact with a child's head as opposed to inside her mouth is sufficiently analogous to penile contact with the outside of a child's genital area as opposed to penile penetration of it. Additionally, Defendant again does not explain why the amendment deprived him of due process, only that it did. The amendment did not require proof of an additional element, and the jury instruction required a finding that Defendant caused M.P. to touch Defendant's penis, [RP 168] an accusation against which Defendant was on notice to defend.

{11} As we explained in *Romero*, a "defendant must demonstrate actual prejudice; the mere assertion of prejudice alone is insufficient to establish error warranting reversal." *Id.* ¶ 9. Defendant does not describe his defense—beyond the assertion that M.P. did not sufficiently identify him as the perpetrator—and does not demonstrate that the amendment to the charge prejudiced his defense. Based on the foregoing, we hold that the district court did not err by denying Defendant's motion for a new trial.

Sufficiency of the Evidence

{12} Defendant challenges the sufficiency of the evidence to support his convictions for CSCM and contributing to the delinquency of a minor, arguing that the State did not adequately prove his identity as the perpetrator. [MIO 12-17] Defendant also clarifies that he intended to challenge whether "masturbating on" M.P. meets the statutory requirements of, and legislative intent underlying, the offense of contributing to the delinquency of a minor. [MIO 12-13] We did not understand the docketing statement's sole and vague reference to the State's failure to prove that Defendant was the perpetrator and was a real or implied cause of child delinquency [DS 9] to have raised the distinct and lengthy arguments discussed in the memorandum in opposition. [MIO 17-26] The list of authorities in the docketing statement did not reference any specific source relevant to the issue or relevant to the analysis explored in the memorandum in opposition. [DS 9; MIO 17-26] Nevertheless, we do not treat the issue as a motion to amend and proceed to directly address the merits of the arguments in the memorandum in opposition.

Proof of Identity

{13} Defendant contends that the jury could not reasonably rely on M.P.'s testimony because it was inherently improbable and unsubstantiated by other evidence. [MIO 14-17] Defendant relies on hearsay exceptions and case law analyzing reliability of statements in the context of hearsay exceptions, for purposes of demonstrating that M.P.'s identification of a different Joseph is the more reliable statement. [MIO 15-16] It is not the role of the appellate court to select the most accurate identification of the perpetrator where there are ambiguous statements identifying a perpetrator, followed by a more definitive identification. *See State v. Salas*, 1999-NMCA-099, ¶ 13, 127 N.M. 686, 986 P.2d 482 (recognizing that it is for the fact finder to resolve any conflict in the testimony of the witnesses and to determine where the weight and credibility lie). We add that the docketing statement revealed that M.P.'s mother also testified that M.P. disclosed to her long before she testified that Defendant had sexually touched M.P. [DS 4; RP 169] We continue to believe that Defendant asks us to reweigh the evidence and resolve a conflict in the statements of the child victim in a manner contrary to the jury's verdict. *See State v. Samora*, 2016-NMSC-031, ¶ 34, 387 P.3d 230 (stating that when assessing the sufficiency of the evidence, "we view the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict" (internal quotation marks and citation omitted)); *State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829 (explaining in reviewing the legal sufficiency of the evidence that we disregard all evidence and inferences that support a different result). We will not oblige. We hold that the testimony of the State's witnesses constituted sufficient evidence.

Sufficient Evidence Supports the Offense of Contributing to the Delinquency of a Minor

{14} Defendant contends that insufficient evidence was presented that Defendant caused M.P. *to conduct herself* in a manner injurious to her morals, health, and welfare, as the jury was instructed to consider. [MIO 17; RP 169] Defendant also argues that the Legislature did not intend for masturbation on a four-year-old child to be punished as contributing to the delinquency of a minor (CDM). [MIO 20-26]

{15} Defendant does not specifically describe the evidence the State presented to prove the offense of CDM and argues only that masturbating on M.P. did not cause her to conduct herself or behave in the proscribed manner. [MIO 17-20] Without a complete description of the evidence, Defendant has not sufficiently developed his argument on appeal and cannot prevail on this claim of error. *See* Rule 12-208(D)(3) NMRA; *State v. Chamberlain*, 1989-NMCA-082, ¶ 11, 109 N.M. 173, 783 P.2d 483 (stating that where an appellant fails "to provide us with a summary of all the facts material to consideration of [his or her] issue, as required by [Rule] 12-208[(D)](3), we cannot grant relief on [that] ground"). Furthermore, we are not persuaded by Defendant's assertion that his actions did not cause M.P. to commit any act or conduct herself in any way. [MIO 18] From the docketing statement, it appears that Defendant had M.P. participate in the sexual

assault by causing her to observe him masturbate, by touching her with his penis, and by ejaculating on her hands. [DS 4-5, 7]

{16} Contrary to Defendant's arguments, the New Mexico Supreme Court has stated that "[t]he defendant's act need not *actually cause delinquency*," for the State to prove CDM. *State v. Trevino*, 1993-NMSC-067, ¶ 17, 116 N.M. 528, 865 P.2d 1172. The Court reasoned that this is because the defendant is convicted for his own behavior, not that of the minor, and because the language of the offense suggests we view the defendant's conduct objectively to determine whether the act would tend to cause or encourage delinquency. *See id.* The Court acknowledged that although it would be helpful for the jury if the State would present proof that a defendant's act caused or encouraged delinquent behavior, "such evidence is not required in the jury's exercise of common sense. If the jury finds that the defendant's conduct violated the community sense of decency, propriety, and morality, the jury may infer an adverse impact on the minor that tends to cause or encourage delinquency." *Id.* ¶ 16.

{17} We believe Defendant's conduct with M.P. in the current case "violated the community sense of decency, propriety, and morality" in such a criminal manner that would adversely impact M.P. and tend to encourage delinquency. We are not at liberty, nor are we inclined, to change the Supreme Court's understanding of what the CDM statute criminalizes. The Court of Appeals must follow applicable precedents of the Supreme Court. *See State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, ¶ 20, 135 N.M. 375, 89 P.3d 47 (stating that the Court of Appeals is bound by Supreme Court precedent). We hold that sufficient evidence was presented to support Defendant's conviction for CDM and will not construe the CDM statute in a manner that conflicts with Supreme Court precedent.

{18} Based on the foregoing, we affirm the district court's judgment and sentence.

{19} IT IS SO ORDERED.

TIMOTHY L. GARCIA, Judge

WE CONCUR:

J. MILES HANISEE, Judge

EMIL KIEHNE, Judge