STATE V. CHAVEZ

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
BRANDON CHAVEZ,
Defendant-Appellant.

No. A-1-CA-34275

COURT OF APPEALS OF NEW MEXICO

December 6, 2017

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Stan Whitaker, District Judge

COUNSEL

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

Bennett J. Baur, Chief Public Defender, Nina Lalevic, Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

MICHAEL E. VIGIL, Judge. WE CONCUR: TIMOTHY L. GARCIA, Judge, M. MONICA ZAMORA, Judge

AUTHOR: MICHAEL E. VIGIL

MEMORANDUM OPINION

VIGIL, Judge.

{1} Brandon Chavez (Defendant) appeals his convictions for two counts of criminal sexual penetration (CSP) in the second degree, two counts of CSP in the third degree,

one count of false imprisonment, and one count of criminal sexual contact (CSC). Defendant raises the issues of sufficiency of the evidence to support his convictions, whether his convictions violated double jeopardy, whether the district court erred in its admission of evidence, whether the jury was improperly instructed, and whether there was prosecutorial and juror misconduct at his trial. We affirm in part and reverse in part.

BACKGROUND

{2} Defendant's convictions arise from his sexual assault of Celeste DeBari (Victim). Victim and Defendant dated for four years prior to the incident and although at the time of the sexual assault the couple's relationship had ended, Defendant was still living in Victim's home along with her son, JD, as well as Defendant's son.

{3} At trial, Victim testified in pertinent part, to the following facts concerning the evening of the sexual assault. Victim came home with JD to meet Defendant and his son so that the four of them could go to dinner. Victim went into her bedroom and found Defendant lying on her bed. Defendant, apparently drunk and slurring his words, asked Victim to hug him. Victim told Defendant that she did not think that was a good idea and proceeded to enter her bathroom and closed the door behind her. Defendant then entered the bathroom while Victim was using the bathroom.Victim asked Defendant to leave, but he refused.Instead, Defendant hovered over Victim and started touching her breasts underneath her shirt and bra. Victim again asked Defendant to leave and to stop touching her. Defendant responded by reaching down and touching Victim's pubic area and saying: "[L]et me fuck you. I want to . . . lick your pussy." Victim once again asked Defendant to leave the bathroom and he reluctantly complied.

{4} After finishing in the bathroom, Victim re-entered her bedroom to find Defendant had closed the bedroom door and was waiting for her naked. Defendant grabbed Victim by the hips and pulled her shirt and bra over her head. Victim told Defendant that she loved him, but that she did not want to have sex with him. Defendant responded: "[L]et me just fuck you real quick. It will take like two minutes." Victim said no, but Defendant persisted and told Victim: "[O]kay, fine. Just suck my dick for a little bit and then we'll go." Victim again said no.

{5} Defendant then pushed Victim down by her shoulders, in a manner painful to Victim, until she was kneeling down in front of him. Defendant held Victim by her head and hair and forced her to perform oral sex on him. Victim told Defendant to let go of her because he was hurting her, but he did not comply and continued to hold her by her hair, pulling her up until she was alongside his body.

{6} Defendant next told Victim to "get naked for me[,]" which she understood to mean to take off her pants and underwear. When Victim declined, Defendant responded by telling her he would rape her if she did not get naked. Believing that Defendant would follow through with his threat if she did not comply, Victim took off the rest of her clothing.

{7} Defendant then mounted Victim with his legs straddled around her. Defendant reached down and started kissing Victim's breast and inserted his finger into Victim's vagina over her requests to stop. Eventually, Victim was able to move away from Defendant far enough that his finger came out of her vagina. However, with Defendant's body on top of her and her hair stuck under her back, she was trapped beneath Defendant. While trapped beneath Defendant, Victim placed her left arm between her legs to prevent Defendant's repeated attempts to penetrate her vagina with his penis. And in an attempt to get free from him, Victim agreed to have sex with Defendant and told him to get on his back. Defendant agreed, but held Victim's arms and shoulders while he repositioned himself. Victim positioned herself on top of Defendant, but then jumped off of him and grabbed her clothing from the floor. As she did so, Defendant called Victim vulgar names, went into the bathroom and slammed the door.

{8} In response to Victim's testimony concerning her recollection of the facts surrounding the sexual assault, defense counsel focused the majority of her cross-examination on impeaching Victim by suggesting that Victim's trial testimony and description of the sexual assault had either changed from her prior statements or had added new facts and details. On re-direct, the State proffered a redacted version of an email sent to Defendant by Victim shortly after the alleged sexual assault describing some of the events surrounding the sexual assault that were consistent with her trial testimony. In a bench conference, the State argued that it sought to have the email admitted to rebut defense counsel's suggestions that she was changing or adding to her story. The district court admitted the redacted email over defense counsel's objection.

{9} Prior to trial, the State disclosed JD as a witness in early May 2014. The defense made attempts in the months of May and June 2014 to set up times to interview JD, but was unable to coordinate a time with the State. The defense later learned of the existence of a S.A.F.E. House interview of JD apparently in the State's possession, but was unable to acquire a copy from the Albuquerque Police Department's evidence locker. At the hearing on Defendant's motion to exclude JD as a witness, held three days before the first day of trial, the State explained to the district court that while it believed that the S.A.F.E. House interview of JD existed, it had not provided it to the defense because it did not know that the recording was unavailable. The district court observed that because the State included JD on its witness list and knew that JD had made a prior S.A.F.E. House statement that it should have provided Defendant with that statement, even without the defense requesting it. The district court ordered the State to provide JD's S.A.F.E. House interview to the defense by the end of the day, but that it would not exclude JD from testifying at trial. The district court also stated that if the State failed to produce the interview to the defense as ordered, it would likely exclude JD as a witness on the first day of trial. In accordance with the order, the State provided Defendant with JD's S.A.F.E. House interview prior to the close of business that day.

{10} At trial, JD's testimony added no substantive evidence related to the CSP, false imprisonment, or CSC charges against Defendant because he had no personal knowledge of what happened in Victim's bedroom during the sexual assault. JD's lack of personal knowledge concerning the sexual assault was further highlighted by defense

counsel's cross-examination and impeachment of JD on that point. JD's direct testimony was limited to his recollection of events that occurred before and after the sexual assault that were relevant only to the counts of child abuse and assault on a household member alleged in Defendant's indictment, and for which the district court entered directed verdicts in favor of Defendant at the close of the State's evidence.

{11} During closing argument, defense counsel made multiple statements, with no objection from the State, urging that it should be a troubling fact to the jury that the police officers who investigated Victim's case did not testify at trial even though they had been mentioned throughout the trial. The State responded in rebuttal that: "There is no testimony about [the] officers [who investigated Victim's case]. There is really no reason for you to speculate about that."

{12} The jury convicted Defendant of two counts of criminal sexual penetration in the second degree (CSP II), two counts of criminal sexual penetration in the third degree (CSP III), one count of false imprisonment, and one count of criminal sexual contact (CSC). Defendant filed five timely post-trial motions which addressed issues he argued warranted setting aside the jury's verdict and granting him a new trial. The district court denied all of Defendant's post-trial motions. This appeal followed.

DISCUSSION

{13} Defendant challenges his conviction for two counts of CSP II, two counts of CSP III, one count of false imprisonment, and one count of criminal sexual contact. His claims fall into six categories: (1) sufficiency of the evidence to support Defendant's convictions for CSP, false imprisonment, and CSC; (2) whether under the circumstances Defendant's convictions for CSP II, CSP III, and false imprisonment violate double jeopardy; (3) whether the jury was properly instructed on CSP; (4) whether the district court erred in permitting JD to testify at Defendant's trial; (5) issues raised in Defendant's post-trial motions under *State v. Franklin*, 1967-NMSC-151, 78 N.M. 127, 428 P.2d 982 and *State v. Boyer*, 1985-NMSC-029, 103 N.M. 655, 712 P.2d 1, and (6) cumulative error. We address Defendant's claims accordingly.

I. There Was Sufficient Evidence to Support the Jury's Verdicts, Convicting Defendant of Two Counts of CSP II, One Count of False Imprisonment, and One Count of CSC

{14} The first issue we address in Defendant's appeal is whether there was sufficient evidence to support his conviction for two counts of CSP II, one count of false imprisonment, and one count of CSC.

{15} In reviewing Defendant's challenge to the sufficiency of evidence supporting his convictions, the appellate courts "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." *State v. Carrillo*, 2017-NMSC-023, ¶ 42, 399 P.3d 367 (internal quotation marks and citation omitted). The central consideration in sufficiency

of evidence review is whether substantial direct or circumstantial evidence exists to support a verdict beyond a reasonable doubt as to all essential elements of the crimes for which the defendant was convicted. *See State v. Suazo*, 2017-NMSC-011, ¶ 32, 390 P.3d 674; *see also Fitzhugh v. N.M. Dep't of Labor, Emp't Sec. Div.*, 1996-NMSC-044, ¶ 24, 122 N.M. 173, 922 P.2d 555 (observing "[s]ubstantial evidence is evidence that a reasonable mind would regard as adequate to support a conclusion" (internal quotation marks and citation omitted)). In jury trials, "the jury instructions are the law of the case against which the sufficiency of the evidence supporting the jury's verdict is to be measured." *State v. Duttle*, 2017-NMCA-001, ¶ 18, 387 P.3d 885.

A. Sufficient Evidence Was Presented at Trial to Support the Jury's Verdicts Convicting Defendant of Two Counts of CSP II (Committed During the Commission of False Imprisonment)

{16} CSP is defined as the "unlawful and intentional causing of a person to engage in sexual intercourse, cunnilingus, fellatio or anal intercourse or the causing of penetration, to any extent and with any object, of the genital or anal openings of another, whether or not there is any emission." NMSA 1978, § 30-9-11(A) (2009). Under Counts 1 and 2 of the indictment, Defendant was charged with CSP II, pursuant to Section 30-9-11(E)(5), which requires that CSP, as defined above, be perpetrated "in the commission of any other felony[.]" In order to convict Defendant of criminal sexual penetration while committing another felony as charged in Count 1, the jury was instructed it must find that: (1) "[D]efendant caused [Victim] to engage in fellatio"; (2) "[D]efendant committed the act during the commission of a False Imprisonment"; (3) the "act was unlawful"; and (4) the crime "happened in New Mexico on or about the 23rd day of September, 2011." In order to convict Defendant of CSP while committing another felony as charged in Count 2, the jury was instructed that it must find that: (1) "[D]efendant caused the insertion, to any extent, of his finger(s) into the vagina of [Victim]"; (2) "[D]efendant committed the act during the commission of a False Imprisonment"; (3) the "act was unlawful"; and (4) the crime "happened in New Mexico on or about the 23rd day of September, 2011."

{17} Under the jury instructions, there was sufficient evidence to convict Defendant of two counts of CSP II (committed during commission of false imprisonment). First, concerning Count 1 of the indictment, Victim testified that after she refused to perform oral sex on Defendant, he pushed Victim down by her shoulders until she was in a kneeling position where he proceeded to hold Victim by her head and hair forcing her to perform fellatio. When Defendant forced Victim to perform fellatio on him, this established the fact necessary for the jury to find that Defendant caused Victim "to engage in fellatio." Defendant's conduct of pushing Victim's shoulders down and holding her by her head and hair against her will constituted the intentional constraint or confinement without consent and without lawful authority necessary to establish the felony of false imprisonment as was instructed to the jury. *See* NMSA 1978, § 30-4-3 (1963) ("False imprisonment consists of intentionally confining or restraining another person without his consent and with knowledge that he has no lawful authority to do

so."). As a result, there was sufficient evidence presented at trial to support the jury's verdict convicting Defendant of CSP II under Count 1 of the indictment.

{18} Second, concerning Count 2 of the indictment, Victim testified that soon after she was forced to perform oral sex on Defendant, Defendant mounted Victim with his legs straddling her, which left Victim trapped under Defendant. While straddling Victim, Defendant inserted his finger into her vagina, even though she told him to stop. This went on until Victim was able to move away causing his finger to come out of her vagina. Defendant's conduct of inserting his finger into Victim's vagina satisfied the requirement in the jury instruction that Defendant "caused the insertion, to any extent, of his finger(s) into the vagina" of Victim. Defendant's conduct of mounting and straddling Victim, causing her to become trapped underneath him during Defendant's act of digital penetration is sufficient evidence of intentional constraint and confinement without consent or lawful authority to support a finding that Defendant's second act of CSP was committed during the commission of a false imprisonment. Section 30-4-3. As a result, there was sufficient evidence to support the jury's verdict convicting Defendant of CSP II under Count 2 of the indictment.

B. Sufficient Evidence Was Presented at Trial to Support the Jury's Verdict Convicting Defendant of an Additional Count of False Imprisonment

{19} As noted in our sufficiency of the evidence analysis for Defendant's two counts of CSP II, false imprisonment is defined as "intentionally confining or restraining another person without his consent and with knowledge that he has no lawful authority to do so." Section 30-4-3. In order to convict Defendant of false imprisonment pursuant to Count 3 of the indictment, the jury was instructed that it must find that: (1) "[D]efendant restrained and/or confined [Victim] against her will"; (2) "[D]efendant knew he had no authority to restrain and/or confine [Victim]; (3) the "act was unlawful"; and (4) the crime "happened in New Mexico on or about the 23rd day of September, 2011."

{20} There was sufficient evidence to support convicting Defendant of one count of false imprisonment independent of Defendant's two CSP II (committed during the commission of false imprisonment) convictions. In *State v. Muise*, this Court stated that the restraint or confinement for false imprisonment need only be brief and may arise out of words, acts, gestures, or similar means, which result in a reasonable fear of personal difficulty or personal injury if the victim does not submit. 1985-NMCA-090, ¶ 22, 103 N.M. 382, 707 P.2d 1192. Here, the jury could have based its conviction of Defendant for one count of false imprisonment on his words and acts occurring after Defendant's first act of CSP II and prior to his second act of CSP II. *See State v. Corneau*, 1989-NMCA-040, ¶ 16, 109 N.M. 81, 781 P.2d 1159 (concluding "[t]he act of CSP is not a continuing offense; it is completed upon penetration"). After forcing Victim to perform oral sex on him, Defendant pulled Victim up next to him by the hair and told her to "get naked" for him. When Victim declined, Defendant threatened to rape her if she did not get naked, and Victim complied because she took his threat seriously. Under these facts, Defendant's forceful physical act of pulling Victim next to him by her hair and threat of raping Victim established words and acts that would put a reasonable person

in fear of personal injury or difficulty if they did not submit. As a result, there was sufficient evidence for the jury to convict Defendant of one count of false imprisonment independent of the acts of false imprisonment incidental to Defendant's CSP II convictions. *See id.* (holding any restraint or confinement that occurs before or after an act of CSP "is separate from the CSP itself, not inherent in the CSP, and does not constitute the same force or coercion necessary to establish CSP" (internal quotation marks omitted)).

C. Sufficient Evidence Was Presented at Trial to Support the Jury's Verdict Convicting Defendant of One Count of CSC

{21} CSC is defined as "the unlawful and intentional touching of or application of force, without consent, to the unclothed intimate parts of another who has reached his eighteenth birthday, or intentionally causing another who has reached his eighteenth birthday to touch one's intimate parts." NMSA 1978, § 30-9-12(A) (1993). Defendant was charged with two counts of misdemeanor CSC which is "criminal sexual contact . . . when perpetrated with the use of force or coercion." Section 30-9-12(D). In order to find Defendant guilty of each count of CSC, the jury was instructed it must find: (1) "[D]efendant touched or applied force to the unclothed breasts of [Victim] without her consent"; (2) "[D]efendant used physical force or physical violence"; (3) "[Victim] was 18 years of age or older"; (4) the "act was unlawful"; and (5) the act "happened in New Mexico on or about the 23rd day of September, 2011."

{22} There was sufficient evidence to convict Defendant with CSC. In *State v. Huff*, this Court determined that the use of "physical force or physical violence" to support a conviction for CSC need only be enough to "negate consent." 1998-NMCA-075, ¶¶ 9, 12, 125 N.M. 254, 960 P.2d 342 (internal quotation marks and citation omitted). Defendant's conduct of hovering over Victim in the bathroom and reaching under her shirt and bra to touch her breasts was sufficient physical force to negate consent as Victim told Defendant to stop and leave the bathroom. As a result, we determine there was sufficient evidence for a reasonable jury to return a verdict against Defendant for one count of CSC.

{23} Because there was sufficient evidence presented at trial to find Defendant guilty of CSC, we affirm the jury's verdict convicting Defendant of one count of CSC. Having determined that there was sufficient evidence to support the jury's verdicts convicting Defendant of two counts of CSP II (committed during the commission of false imprisonment), one count of false imprisonment, and one count of CSC, we turn to whether any aspects of the jury's verdicts violated Defendant's constitutional right to be free from double jeopardy.

II. Defendant's Right to Be Free From Double Jeopardy Was Not Violated by the Jury's Verdicts Convicting Him of One Count of False Imprisonment and CSP II; However the Jury's Verdicts Convicting Defendant of Two Counts of CSP III and Two Counts of CSP II Violated Double Jeopardy

{24} We next review Defendant's two double jeopardy claims, which were raised for the first time on appeal. *See* NMSA 1978, § 30-1-10 (1963) ("The defense of double jeopardy may not be waived and may be raised by the accused at any stage of a criminal prosecution, either before or after judgment."); *see also State v. Crain*, 1997-NMCA-101, ¶ 15, 124 N.M. 84, 946 P.2d 1095 (noting that pursuant to Section 30-1-10, double jeopardy claims cannot be waived). Appellate courts review double jeopardy issues de novo, but where factual issues are intertwined with double jeopardy analysis, appellate courts defer to the district court's findings of fact, unless unsupported by substantial evidence. *See State v. Baca*, 2015-NMSC-021, ¶ 25, 352 P.3d 1151.

{25} The Fifth Amendment to the United States Constitution, applicable to the state of New Mexico through the Fourteenth Amendment, protects defendants against double jeopardy—the imposition of successive prosecutions and multiple punishments for the same offense. *See State v. Bello*, 2017-NMCA-049, ¶ 6, 399 P.3d 380; *State v. Armendariz*, 2006-NMCA-152, ¶ 5, 140 N.M. 712, 148 P.3d 798; *see also* U.S. Const. amends. V, XIV. The prohibition against double jeopardy, in pertinent part, prohibits charging a defendant with violations of multiple statutes for the same conduct contrary to legislative intent. *See Armendariz*, 2006-NMCA-152, ¶ 5 (describing this form of double jeopardy as a "double-description" case (internal quotation marks and citation omitted)). Where a jury's verdict is "legally inadequate" under the jury instructions, and subjects a defendant to multiple punishments for the same conduct, this also constitutes a violation of double jeopardy. *Kersey v. Hatch*, 2010-NMSC-020, ¶ 12, 148 N.M. 381, 237 P.3d 683. (internal quotation marks and citation omitted).

{26} Defendant's double jeopardy claims raise two questions—whether it violates double jeopardy: (1) to be convicted of two counts of CSP II and one count of false imprisonment where false imprisonment was used to enhance the CSP charges to second-degree felonies; and (2) to be convicted of two counts of CSP II and two counts of CSP III (under the alternative theories of guilt submitted to the jury).

A. Defendant's Conviction for One Count of False Imprisonment and Two Counts of CSP II Committed in the Commission of a False Imprisonment Do Not Violate Double Jeopardy

{27} Defendant's first double jeopardy claim is that his false imprisonment conviction should be vacated because the predicate felony, false imprisonment, was subsumed into his CSP II convictions. Defendant relies on the analysis in *State v. Frazier* pertaining to felony murder and predicate felonies therein. 2007-NMSC-032, ¶ 23, 142 N.M. 120, 164 P.3d 1 (stating that "when a jury finds a defendant guilty of felony murder, it has already determined the fact-based unitary conduct question—it has found that the killing happened during the commission of the underlying felony" (emphasis omitted)). The State argues that Defendant's conviction for false imprisonment does not violate double jeopardy because the false imprisonment and counts of CSP II perpetrated by Defendant involved distinct acts. We agree and note that because we determine that the conduct underlying Defendant's acts of CSP II and false

imprisonment was not unitary, we need not address the second part of double-description, double jeopardy analysis—the question of legislative intent.

{28} Under *Swafford v. State*, double-description, double jeopardy claims undergo a two-part analysis. 1991-NMSC-043, ¶ 25, 112 N.M. 3, 810 P.2d 1223. In the first part of the analysis, we inquire into "whether the conduct underlying the offenses is unitary[.]" *Id.* If and only if we determine that the conduct at issue is unitary, we proceed to the second part of the analysis where we focus on the language of the statutes to determine whether the [L]egislature intended to create separately punishable offenses." *Id.* "If the [L]egislature intended multiple punishments, there is no double jeopardy violation even though the conduct for the offenses is unitary. *Armendariz*, 2006-NMCA-152, ¶ 6.

{29} Whether conduct is unitary under the first part of double-description analysis is a factual question requiring close review of the evidence presented at trial to determine whether there is "sufficient indicia of distinctness" separating the illegal acts charged under multiple statutes. *Armendariz*, 2006-NMCA-152, ¶ 7 (internal quotation marks and citation omitted). Sufficient indicia of distinctness is present when "two events are sufficiently separated by either time or space." *Id.* (internal quotation marks and citation omitted). For example, "[t]here are sufficient indicia of distinctness when one crime is completed before another." *Id.* "There are also sufficient indicia of distinctness when the conviction is supported by at least two distinct acts of forces, one which completes the first crime and another which is used in conjunction with the subsequent crime." *Id.* Indeed, in any situation, "the key inquiry is whether the same force was used to commit both crimes." *Id.*

{30} Because there was sufficient evidence presented at trial to support convicting Defendant with false imprisonment independent of his two CSP II (committed in the commission of false imprisonment) convictions, we determine the conduct underlying Defendant's two counts of CSP II and one count of false imprisonment was not unitary. As we noted earlier in our discussion, both acts of CSP II (committed during the commission of false imprisonment) were "completed upon penetration." *Corneau*, 1989-NMCA-040, ¶ 16. However, our analysis also indicated that there was another instance of conduct on the part of Defendant (i.e., Defendant's threat that he would rape victim if she did not get naked), that was separated from Defendant's acts of CSP II by sufficient indicia of distinctness because it occurred after the penetration that completed Defendant's first act of CSP II and before Defendant mounted and trapped Victim beneath him during the commission of Defendant's second act of CSP II. *See State v. Cordova*, 1999-NMCA-144, ¶¶ 21-23, 128 N.M. 390, 993 P.2d 104 (holding facts supporting the defendant's convictions for criminal sexual contact of a minor (CSCM) and false imprisonment were not unitary where the CSCM was completed before the act of restraint underlying the false imprisonment occurred, though each instance of restraint occurred during the same encounter). This indicia of distinctiveness is sufficient to distinguish the instant case from *Frazier*, where our Supreme Court held that it violated double jeopardy to convict the defendant of kidnapping and felony murder predicated on the same instance of kidnapping because the conduct underlying the kidnapping and homicide was unitary. 2007-NMSC-032, ¶¶ 5, 35. As a result, we

determine the force underlying Defendant's acts of CSP II and false imprisonment was not unitary, and the jury's verdicts finding Defendant guilty of two counts of CSP II (committed during the commission of false imprisonment) and one count of false imprisonment did not violate Defendant's right to be free from double jeopardy.

{31} Because we determine that the jury's verdicts convicting Defendant of two counts of CSP II and one count of false imprisonment do not violate double jeopardy, we affirm these convictions.

B. Defendant's Conviction for Two Counts of CSP II and Two Counts of CSP III, Which Were Submitted to the Jury as Alternative Theories of Guilt for the Same Acts of CSP, Violated Double Jeopardy

{32} Defendant's second double jeopardy claim is that it was reversible error for the district court to enter four general guilty verdicts for CSP based on only two charged counts of CSP II with CSP III charged as an alternative to CSP II in both counts. Defendant argues he "was thus convicted of four felony counts for what was charged as two felony counts with alternatives." The State concedes that the verdicts finding Defendant guilty of CSP III should not have been entered in addition to the two guilty verdicts entered against him for CSP II. We agree, however, we are not bound to any concession by the State. *See State v. Foster*, 1999-NMSC-007, ¶ 25, 126 N.M. 646, 974 P.2d 140 (noting that New Mexico appellate courts are not bound by the state's concession that double jeopardy is violated in a given case), *abrogated on other grounds by State v. Montoya*, 2015-NMSC-010, ¶ 58, 345 P.3d 1056.

{33} Convictions entered under a general verdict must be reversed if one of the alternative bases for conviction provided in the jury instructions is not legally adequate. *See Kersey*, 2010-NMSC-020, ¶ 12 (discussing whether the jury's general verdict convicting the defendant of first-degree murder under both of the two alternative theories of guilt under the same statute violated double jeopardy). "This is because jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law." *Id.* (alteration, internal quotation marks, and citation omitted); *See Duttle*, 2017-NMCA-001, ¶ 18 (stating that the "jury instructions are the law of the case"). As a result, it cannot be assumed "that jurors will know to avoid an alternative basis for reaching a guilty verdict that would result in a violation of the Double Jeopardy Clause." *Kersey*, 2010-NMSC-020, ¶ 12 (internal quotation marks and citation omitted). Rather, "we must presume that a conviction under a general verdict requires reversal if the jury is instructed on an alternative basis for the conviction that would result in double jeopardy, and the record does not disclose whether the jury relied on this legally inadequate alternative." *Id.* (internal quotation marks and citation omitted). Where a jury's general guilty verdict violates this principle, the conviction for the lesser offense must be vacated. *See id.*

{34} Defendant's convictions for CSP III were not legally adequate under the instructions to the jury. At the close of evidence, the jury was instructed that under Count 1 of the indictment, Defendant could be found guilty of CSP II (committed during

the commission of false imprisonment), or in the alternative, of CSP III for the same alleged act of CSP. The instructions concerning the second count of CSP alleged against Defendant contained the same language as Count 1 permitting the jury to find Defendant guilty of CSP II (committed during the commission of false imprisonment), or in the alternative, CSP III for his second alleged act of CSP. Based on these instructions, the jury should have only returned a maximum of two guilty verdicts against Defendant for CSP. However, the record indicates that the jury misunderstood its charge and returned four general guilty verdicts against Defendant for CSP—two in the second-degree and two under the third-degree alternative theory of guilt. Under these facts, the jury returned verdicts that were contrary to law. As a result we vacate Defendant's two convictions for the lesser offense of CSP III.

{35} Having determined that Defendant's convictions for CSP II and false imprisonment did not violate his right to be free from double jeopardy, but that his convictions for CSP III in addition to his two convictions for CSP II do violate double jeopardy, we turn to Defendant's claim that the jury was improperly instructed as to CSP by the district court.

III. Defendant Failed to Preserve the Issue of Whether the Jurors Were Improperly Instructed That CSP III Was an Alternative, Rather Than Step-Down to CSP

{36} Defendant next submits that the district court erred in permitting the jury to be instructed that it could consider CSP II and CSP III as alternative theories of guilt. Instead, he argues the jury should have been instructed on CSP III as a "step-down" from CSP II. The State contends, and we agree, that Defendant's claim was not preserved. Although the district court stated that: "I don't think we need a step[-]down, because it's an alternative count[,]" this statement was not challenged by an objection made by Defendant. Rule 12-321(A)-(B) NMRA (providing that "[t]o preserve an issue for review, it must appear that a ruling or decision by the trial court was fairly invoked"; however, in the absence of preservation, the appellate courts may review for fundamental error in their discretion).

{37} Here, the claim that the district court erred in instructing the jury that CSP II and CSP III were alternative theories of guilt for which Defendant could be convicted, as opposed to distinguishing the crimes through a step-down instruction, is not one that this Court will exercise its discretion to review. The jury unanimously found Defendant guilty of the CSP II counts. Submitting the CSP III counts in step-down instructions instead of alternatives to the CSP II counts would not alter this result, as the jury would have been instructed to consider the step-down instruction only if it could not reach a unanimous verdict on the CSP II counts. *See* UJI 14-6012 NMRA. The fact that in this case the jury found Defendant guilty of both the CSP II and CSP III counts does not alter this result, and we have determined that the CSP III convictions must be set aside.

{38} Having determined there is no reversible error arising from Defendant's claim that the jury was improperly instructed as to CSP, we turn to whether the district court erred in not excluding JD from testifying at trial.

IV. The District Court Did Not Abuse Its Discretion in Denying Defendant's Motion to Exclude JD's Testimony at Trial as a Result of the State's Late Disclosure of His S.A.F.E. House Interview to the Defense.

{39} Defendant next claims that the district court erred in denying his motion to exclude JD as a trial witness based on alleged intentional late production by the State of JD's S.A.F.E. House interview despite the defense's repeated requests to the State for the interview. Defendant argues that this late disclosure prejudiced his case by impairing his cross-examination of JD. We disagree.

{40} To support his argument that the district court erred in denying his motion to exclude JD from testifying at his trial, Defendant relies on *State v. Harper* for the proposition that witnesses who are intentionally disclosed late should be excluded from testifying. 2011-NMSC-044, ¶ 2, 150 N.M. 745, 266 P.3d 25. Our Supreme Court, in *State v. Le Mier*, recently clarified its holding in *Harper* on when discovery violations warrant exclusion of a party's witness. *Le Mier*, 2017-NMSC-017, ¶¶ 15, 20, 22, 394 P.3d 959 (holding that the "trial courts possess broad discretionary authority to decide what sanction to impose when a discovery order is violated[,]" and in determining whether to exclude a witness on grounds of a discovery violation, should assess *Harper*'s guiding, but non-dispositive factors of: (1) the culpability of the offending party, (2) the prejudice to the adversely affected party, and (3) the availability of lesser sanctions). In *Harper*, our Supreme Court observed that the district courts have "discretion to impose sanctions for the violation of a discovery order that results in prejudice to the opposing party." 2011-NMSC-044, ¶ 16. The Court continued by stating that "refusal to comply with a district court's discovery order only rises to the level of exclusion or dismissal where the [s]tate's conduct is especially culpable, such as where evidence is unilaterally withheld by the [s]tate in bad faith, or all access to the evidence is precluded by [s]tate intransigence." *Id.* ¶ 17. Late production of discovery may also create prejudice warranting exclusion of evidence where the evidence was material and the disclosure is so late that it undermines the defense's ability to prepare for trial. *See id.* ¶ 20.

{41} In the absence of evidence of either bad faith on the part of the State in its late disclosure of JD's S.A.F.E. House interview or evidence that the content of the interview was material and undermined Defendant's ability to prepare for trial, the district court did not abuse its discretion in denying Defendant's motion to exclude JD from testifying as a witness at trial. The facts indicate that the defense made multiple attempts to acquire JD's S.A.F.E. House interview and to conduct a pre-trial interview of JD in preparation of its case for trial after learning that JD had been added to the State's witness list in May 2014. Responding to Defendant's motion to exclude JD as a trial witness, the State explained to the district court that it had not been aware that the defense had not received a copy of JD's interview or that a copy was unavailable. These facts fall short

of indicating bad faith or intransigence on the part of the State in producing discovery to Defendant. There was also no refusal by the State to promptly disclose a copy of JD's interview before the end of the business day to Defendant upon being ordered by the district court at the hearing on Defendant's motion to exclude. The facts also fail to demonstrate prejudice to Defendant to warrant exclusion of JD as a witness. JD's testimony was carefully limited by the district court to evidence JD had personal knowledge of and that supported the State's alleged counts of child abuse against Defendant, which were dismissed through directed verdicts by the district court. Finally, the late disclosure did not undermine the defense's ability to prepare for trial as it was able to conduct a competent cross-examination and impeachment of JD using his S.A.F.E. House interview. In light of these facts, we determine that the district court's order denying Defendant's motion to exclude JD as a trial witness was not an abuse of discretion, and we affirm this ruling by the court.

V. Defendant's Claims Raised Under *Franklin* and *Boyer* and in Defendant's Post-Trial Motions to Set Aside the Verdict and Be Granted a New Trial Do Not Present Reversible Errors

{42} Defendant next argues that the district court erred in denying his post-trial motions to set aside the verdict and for a new trial submitted under *Franklin* and *Boyer*, which raised three issues: (1) whether Defendant was denied his right to confront witnesses against him at trial by the district court's admission of a redacted email sent to Defendant by Victim; (2) whether the State improperly shifted the burden of proof to the defense during rebuttal in closing arguments; and (3) whether alleged juror misconduct deprived Defendant of his right to be tried by an impartial jury. *See Franklin*, 1967-NMSC-151, ¶ 9 (stating that "appointed [appellate] counsel should set forth contentions urged by a petitioner whether or not counsel feels they have merit"); *Boyer*, 1985-NMCA-029, ¶¶ 17-20 (providing that appellate counsel may raise issues on appeal she adjudges to be frivolous, so long as counsel does not knowingly advance unwarranted claims or false statements of law or fact). We conclude that Defendant's claims under *Franklin* and *Boyer* do not present reversible errors.

{43} District courts have "broad discretion in granting or denying a motion for [a] new trial, and such an order will not be reversed absent clear and manifest abuse of discretion." *State v. Guerra*, 2012-NMSC-027, ¶ 18, 284 P.3d 1076 (internal quotation marks and citation omitted). "[A]buse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. *Id.*

A. The District Court Did Not Abuse Its Discretion by Admitting a Redacted Email Sent From Victim to Defendant

{44} Defendant argues that the district court's admission, during re-direct examination of Victim, of a redacted version of an email sent by Victim to Defendant after the sexual assault was an abuse of discretion because it did not meet the criteria for admission under Rule 11-801(D)(1)(b) NMRA and in effect violated his constitutional right to confront witnesses against him. We disagree.

{45} Rule 11-801(D)(1)(b) provides that a declarant-witness's prior statement does not constitute hearsay if the declarant testifies and is subject to cross-examination about the prior statement and the statement "is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying[.]" *See State v. Salazar*, 1997-NMSC-044, ¶ 66, 123 N.M. 778, 945 P.2d 996 (finding that the declarant-witness's prior statement was admissible where the statement was consistent with the witness's trial testimony, was proffered to rebut a charge of recent fabrication, and was made before the motive to fabricate existed); *State v. Bell*, 1977-NMSC-013, ¶¶ 17-20, 90 N.M. 134, 560 P.2d 925 (holding that the district court did not abuse its discretion in admitting the witness's prior consistent statement to rebut the charge that the witness had been coached in her oral testimony).

{46} The district court did not abuse its discretion in admitting the redacted version of Victim's email to Defendant describing her sexual assault and denying his post-trial motion to set aside the verdict and grant a new trial. The State's use of the redacted email to rehabilitate Victim's credibility is consistent with Rule 11-801(D)(1)(b) for consistent statements used to rebut a charge of recent fabrication as was suggested during the defense's cross-examination of Victim.

B. The District Court Did Not Abuse Its Discretion in Denying Defendant's Motion to Set Aside the Verdict and for a New Trial Based on Improper Prosecutorial Comments Made to the Jury During Closing Arguments

{47} Defendant argues that by telling the jury on rebuttal during closing argument that: "There is no testimony about the officers [who investigated Victim's case]. There is really no need for you to speculate about that[,]" the State improperly shifted the burden of proof to Defendant. To support his claim, Defendant relies solely on *In re Winship*, 397 U.S. 358, 364 (1970) for the proposition that "[t]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." "The State attempted to shirk its duties in this regard[,]" Defendant contends, because the defense was unable to respond to the State's comment. This argument is unpersuasive.

{48} Where a defendant alleges "that improper prosecutorial comments have been made in closing argument, the question is whether the comments deprive the defendant of a fair trial." *State v. Brown*, 1997-NMSC-029, ¶ 23, 123 N.M. 413, 941 P.2d 494. Isolated improper comments made during closing argument are generally insufficient to warrant reversal. *See id.* Appellate courts are "least likely to find [a reversible] error where the defense has opened the door to the prosecutor's comments by its own argument or reference to facts not in evidence." *State v. Sosa*, 2009-NMSC-056, ¶ 33, 147 N.M. 351, 223 P.3d 348 (internal quotation marks and citation omitted).

{49} The district court did not abuse its discretion. Defendant opened the door to the State's comment when defense counsel repeatedly argued that the jury should be troubled that the police officers were frequently mentioned at trial, but did not testify.

Once this door was opened, the State properly responded by urging the jury not to speculate why the police officers who investigated Victim's case did not testify. Further, we agree with the district court's reasoning in its order denying Defendant's motion on this issue that the prosecution merely "reiterated instructions by the court to refrain from speculating about what non-testifying witnesses might say if in fact they were called to testify at trial." As a result, we determine that the district court's order denying Defendant's motion to set aside the verdict and for a new trial was not clearly against the logic and effect of the facts and circumstances of the case.

C. Defendant Was Not Denied the Right to Be Tried by an Impartial Jury on Grounds of Juror Misconduct

{50} The crux of Defendant's argument is that a juror empaneled in his case knew him as a former co-worker, did not mention knowing Defendant during voir dire, and stated to a third person after trial ended that she "participated in the conviction because she believed [Defendant] to be arrogant." The motion was denied by the district court. The district court found that Defendant "provided absolutely no credible or substantive proof that there was any juror misconduct during jury deliberations in this case by any juror. Allegations and innuendo alone cannot serve as a basis [to] support the claim of misconduct." We agree. *See State v. Mann*, 2002-NMSC-001, ¶ 20, 131 N.M. 459, 39 P.3d 124 (holding whether jury tampering, misconduct, or bias is claimed, it must be established that the alleged conduct "unfairly affected the jury's deliberative process"). The district court did not abuse its discretion in denying Defendant's post-trial motion to set aside the verdict and grant a new trial on the basis of juror misconduct.

VI. The Doctrine of Cumulative Error is Inapplicable to This Case

{51} Finally, Defendant argues that the cumulative errors alleged on appeal render the verdict reversible. "The doctrine of cumulative error applies when multiple errors, which by themselves do not constitute reversible error, are so serious in the aggregate that they cumulatively deprive the defendant of a fair trial." *Carrillo*, 2017-NMSC-023, ¶ 53 (internal quotation marks and citation omitted). Cumulative error is to be strictly applied and not invoked unless the whole record demonstrates that the defendant did not receive a fair trial. *See id.* Because we find only one error was made by the district court, i.e., entry by the district court of the jury's verdicts convicting Defendant of two counts of CSP III, we reject Defendant's claim that he was deprived of a fair trial on ground of cumulative error and determine the doctrine entitles him to no further relief.

CONCLUSION

{52} The convictions for two counts of CSP III are vacated, the remaining convictions are affirmed, and the case is remanded for further proceedings in accordance with this opinion.

{53} IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

TIMOTHY L. GARCIA, Judge

M. MONICA ZAMORA, Judge