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

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,

4 v.

NO. 31,796

5 **JAMES BENTLEY NEWELL,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF SANDOVAL COUNTY**

8 **Louis P. McDonald, District Judge**

9 Gary K. King, Attorney General

10 Santa Fe, NM

11 Sri Mullis, Assistant Attorney General

12 Albuquerque, NM

13 for Appellee

14 Alex Chisholm

15 Albuquerque, NM

16 for Appellant

17 **MEMORANDUM OPINION**

18 **WECHSLER, Judge.**

1 {1} Defendant James Bentley Newell appeals his conviction for third degree
2 criminal sexual contact of a minor (CSCM). Defendant contends on appeal that the
3 district court erroneously excluded a photograph of the minor victim (Victim) and the
4 testimony of a defense witness, Jessica Borrego (Borrego). We hold that the district
5 court did not abuse its discretion in excluding the photograph and testimony. We
6 therefore affirm.

7 **BACKGROUND**

8 {2} A grand jury indicted Defendant on one count of criminal sexual penetration
9 (CSP) of a minor under the age of thirteen, a first degree felony contrary to NMSA
10 1978, Section 30-9-11 (2009). The alleged incident that gave rise to the criminal
11 proceedings against Defendant occurred during a birthday party at Victim's home for
12 Victim's older brother. Defendant attended the party with his fiancée, who was a
13 relative of Victim's mother. Victim, who was twelve years old at the time of the
14 incident, testified at trial that she fell asleep on a couch in the living room at some
15 point during the party. She testified that while she was partially asleep, Defendant
16 approached her on the couch and asked her if she was "okay." She responded "yes"
17 and Defendant proceeded to ask her the same question again twice. Victim testified
18 that she then felt Defendant run his hand up her pant leg and that he then digitally
19 penetrated her four times. Victim stated that she left the living room immediately

1 afterward and went upstairs, where she told her mother what had happened. A
2 confrontation ensued between Defendant and Victim's parents, and the police were
3 later called to the residence.

4 {3} Defendant testified in his own defense at the trial. According to Defendant's
5 version of the events that transpired, he had been drinking heavily at the party and was
6 looking for a place to sleep when he went to the living room where Victim was
7 sleeping. Once there, he noticed that Victim was sleeping with half of her body off
8 of the couch and that she was squirming and moaning as if she was having a bad
9 dream or was uncomfortable. Defendant testified that he asked her if she was okay
10 and that he then put his right hand under Victim's legs, moved her back fully on to the
11 couch, and rearranged her blanket. Defendant stated that this was the extent of his
12 contact with Victim. He testified that almost immediately thereafter, Victim got up
13 and left the room.

14 {4} At trial, the jury was instructed on both CSP and CSCM, as a lesser-included
15 offense on the CSP charge. The jury returned a guilty verdict for CSCM. This appeal
16 followed.

17 **EXCLUSION OF PROFFERED EVIDENCE**

18 {5} On appeal, Defendant argues that the district court improperly excluded (1) an
19 online photograph of Victim in which she misrepresented her age and location, and

1 (2) Borrego’s testimony as to Defendant’s behavior around her daughters while he
2 was drinking. We address the propriety of each of these evidentiary rulings in turn.
3 “We examine the admission or exclusion of evidence for abuse of discretion, and the
4 district court’s determination will not be disturbed absent a clear abuse of discretion.”
5 *State v. Kent*, 2006-NMCA-134, ¶ 18, 140 N.M. 606, 145 P.3d 86. “An abuse of
6 discretion occurs when the ruling is clearly against the logic and effect of the facts and
7 circumstances of the case. We cannot say the trial court abused its discretion by its
8 ruling unless we can characterize it as clearly untenable or not justified by reason.”
9 *State v. Rojo*, 1999-NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829 (internal quotation
10 marks and citation omitted).

11 **Exclusion of Victim’s Photograph**

12 {6} During cross-examination of Victim, Defendant sought to admit a Facebook or
13 Myspace photograph of Victim in which she represented herself to be eighteen years
14 old and residing in Pennsylvania. The district court refused to admit the photograph
15 after the State objected on grounds of relevancy. On appeal, Defendant summarily
16 argues that the photograph should have been admitted because it challenged Victim’s
17 credibility and was therefore proper impeachment evidence under Rule 11-608(A)
18 NMRA.

1 {7} We are not persuaded by Defendant’s argument. Initially, we note that the
2 photograph is not part of the record on appeal. As a result, Defendant’s argument that
3 the photograph challenged Victim’s credibility because it “showed [Victim] in a less
4 innocent light” than the photograph of Victim that was admitted at trial is entirely
5 speculative. We will not set aside the district court’s discretionary ruling based on
6 mere speculation regarding the nature of a photograph that is not part of the record on
7 appeal. *See State v. Jim*, 1988-NMCA-092, ¶ 3, 107 N.M. 779, 765 P.2d 195 (stating
8 that “[i]t is [the] defendant’s burden to bring up a record sufficient for review of the
9 issues he raises on appeal”).

10 {8} In addition, although Defendant contends that the photograph was admissible
11 under Rule 11-608(A), he provides no analysis as to why the photograph was
12 admissible under this rule. Rule 11-608(A) permits a party to attack or support a
13 witness’s credibility “by testimony about the witness’s reputation for having a
14 character for truthfulness or untruthfulness, or by testimony in the form of an opinion
15 about that character.” The photograph was not testimony about either Victim’s
16 reputation for having a character for truthfulness or untruthfulness or an opinion about
17 such character. Defendant’s argument does not fall under Rule 11-608(A).

18 {9} We are not otherwise convinced by Defendant’s generalized argument that the
19 photograph was relevant to, and challenged, Victim’s credibility. We observe that

1 prior to Defendant seeking admission of the photograph, Victim had already readily
2 admitted during cross-examination that she misrepresented her age and her location
3 on her Facebook and Myspace pages. And while the photograph itself was not
4 admitted, the district court did permit Defendant to show the photograph to Victim
5 during cross-examination and to ask her questions about the photograph and her
6 reasons for lying about her age and location. In light of this testimony, the photograph
7 would not have served to challenge Victim’s credibility, but instead was offered to
8 corroborate Victim’s testimony. While “[t]he fact that a photograph is cumulative or
9 repetitious does not, in and of itself, make it inadmissible[,]” the photograph should
10 be “reasonably relevant to the issues of the case.” *State v. Hutchinson*, 1983-NMSC-
11 029, ¶ 41, 99 N.M. 616, 661 P.2d 1315. Here, however, we are not persuaded that the
12 photograph was particularly relevant to the issues raised at trial. As the State points
13 out on appeal, Defendant did not challenge Victim’s age or the location where the
14 alleged CSCM took place during the trial proceedings. Nor is there any indication that
15 Defendant was aware of the photograph or of Victim’s Facebook or Myspace pages
16 at the time of the alleged incident. Thus, in light of Victim’s admission that she had
17 lied about her age and location online coupled with Defendant’s failure to establish
18 that the photograph was relevant to the issues raised at trial, we are unable to conclude

1 that the district court abused its discretion in declining to admit the photograph. We
2 therefore affirm the district court on this issue.

3 **Exclusion of Borrego's Testimony**

4 {10} Defendant argues that the district court erred in excluding character evidence
5 that he sought to introduce through the testimony of Borrego, a friend of Defendant's
6 fiancée. According to Defendant's proffer, Borrego would have testified that
7 Defendant was often around her three minor daughters, that Defendant and his fiancée
8 had taken care of her daughters, that her daughters had spent the night at Defendant's
9 home, and that she had never had any concerns regarding Defendant's behavior
10 around her daughters. In addition, Borrego would have testified that she had not
11 witnessed Defendant's behavior change when he had been drinking. The district court
12 rejected Defendant's argument that the proffered testimony was pertinent evidence of
13 Defendant's character under Rule 11-608 or Rule 11-404(A) NMRA.

14 {11} On appeal, Defendant contends that the excluded testimony was admissible as
15 evidence of his good character under Rule 11-404(A)(2)(a) because it was "pertinent
16 to how [Defendant] conducted himself around [Borrego's] young daughters, even
17 when he was drunk." Because Defendant does not renew the argument he made
18 below regarding the admissibility of Borrego's testimony under Rule 11-608, we limit
19 our analysis of the admissibility of the proffered testimony to Rule 11-404.

1 {12} Rule 11-404 generally prohibits the admission of evidence of a person's
2 character or character trait "to prove that on a particular occasion the person acted in
3 accordance with the character or trait." Rule 11-404(A)(1). In criminal cases,
4 however, an exception exists that allows a defendant to offer evidence of a pertinent
5 trait of his or her own character. Rule 11-404(A)(2)(a). The methods of proving a
6 defendant's pertinent character trait are governed by Rule 11-405 NMRA, which
7 permits two manners of proof. In cases in which the "person's character or character
8 trait is an essential element of a charge, claim, or defense," proof of the character or
9 trait may be made by specific instances of that person's conduct. Rule 11-405(B).
10 Character evidence can also be introduced if evidence of a pertinent trait is introduced
11 in the form of reputation or opinion testimony. *See* Rule 11-404(A)(2)(a); Rule 11-
12 405(A).

13 {13} Borrego's proffered testimony on behalf of Defendant as to how Defendant
14 behaved when he was around her daughters in the past and his lack of behavioral
15 changes when drinking was confined to the specific experiences Borrego had with
16 Defendant. Under Rule 11-405(B), prior specific instances of conduct are admissible
17 only when the "person's character or character trait is an essential element of a charge,
18 claim, or defense[.]" Because Defendant's character or character traits are not

1 essential elements of the charge of CSCM, nor of a claim or defense at issue in this
2 case, Borrego’s proffered testimony is not admissible under Rule 11-405(B).

3 {14} Defendant’s only avenue for admission of Borrego’s testimony as character
4 evidence was as opinion or reputation evidence of a pertinent character trait under
5 Rule 11-404(A)(2)(a) and Rule 11-405(A). We note initially that some, but not all,
6 jurisdictions have been willing to recognize the moral and safe treatment of children
7 as a character trait under evidentiary rules similar to ours. *See, e.g., State v. Rhodes*,
8 200 P.3d 973, 976-77 (Ariz. Ct. App. 2008) (“[S]exual normalcy, or appropriateness
9 in interacting with children, is [an admissible] character trait”); *State v. Anderson*, 686
10 P.2d 193, 204 (Mont. 1984) (holding that orthodox sexual mores admissible as
11 character trait); *State v. Workman*, 471 N.E.2d 853, 861 (Ohio Ct. App. 1984)
12 (holding that excellence with children establishing complete trust from them
13 admissible as character trait); *Wheeler v. State*, 67 S.W.3d 879, 882-83 (Tex. Crim.
14 App. 2002) (holding that safe and moral treatment of children and young girls
15 admissible as character trait). *But see Hendricks v. State*, 34 So. 3d 819, 822-23 (Fla.
16 Dist. Ct. App. 2010) (stating character for sexual morality not admissible as character
17 trait). This Court has recently discussed whether the safe and moral treatment of
18 children is a character trait admissible under Rule 11-404. In *State v. Davis*, Chief
19 Judge Kennedy, in dissent, concluded that “the safe and moral treatment of children

1 is a character trait admissible under Rule 11-404.” No. 29,699, mem. op. ¶ 38 (N.M.
2 Ct. App. May 30, 2012) (Kennedy, J., dissenting) (non-precedential), *cert. quashed*,
3 2012-NMCERT-008, 296 P.3d 491. This case does not place before us the question
4 of whether the treatment of children can be an admissible character trait under our
5 Rules of Evidence. In Defendant’s proffer, Defendant did not ask Borrego her
6 opinion of Defendant’s character for the treatment of children, nor did Defendant
7 proffer Borrego to speak for Defendant’s reputation in the community. Instead,
8 Defendant asked Borrego about her experiences with Defendant when he was with her
9 children and also when drinking. Borrego’s proffered testimony was not properly in
10 the form of an opinion or evidence of reputation, and thus it was inadmissible under
11 Rule 11-405(A). *See* Rule 11-405(A) (allowing character evidence otherwise
12 admissible when in the form of an opinion or by testimony as to reputation). The
13 district court did not err in excluding Borrego’s testimony.

14 **CONCLUSION**

15 {15} We affirm Defendant’s conviction.

16 {16} **IT IS SO ORDERED.**

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18

JAMES J. WECHSLER, Judge

1 **WE CONCUR:**

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3 _____
3 **JONATHAN B. SUTIN, Judge**

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5 _____
5 **LINDA M. VANZI, Judge**