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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. 33,243

5 **OTHON CALVILLO,**

6 Defendant-Appellant.

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

8 **Mark T. Sanchez, District Judge**

9 Hector H. Balderas, Attorney General

10 Santa Fe, NM

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12 Albuquerque, NM

13 for Appellee

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17 Albuquerque, NM

18 for Appellant

19 **MEMORANDUM OPINION**

20 **GARCIA, Judge.**

1 {1} Defendant appeals his convictions for two counts of criminal sexual penetration
2 of a minor (CSPM) in the first degree (child under 13), contrary to NMSA 1978,
3 Section 30-9-11(D)(1) (2009) and two counts of criminal sexual contact of a minor
4 (CSCM) in the second degree (child under 13), contrary to NMSA 1978, Section 30-
5 9-13(B) (2004). On appeal, Defendant argues that the district court: (1) committed
6 plain error by allowing the State's expert witness to comment on the credibility of the
7 Victim's testimony; (2) committed fundamental error by failing to provide specificity
8 in the charging documents that violated Defendant's due process and double jeopardy
9 rights; (3) erred in convicting Defendant for two counts of second degree CSCM
10 based upon four separate and distinct assertions of error; and (4) erred in convicting
11 Defendant of a second count of CSPM during the second time period stated in the
12 charging documents because insufficient evidence was presented to support this
13 conviction.

14 {2} In its answer brief, the State conceded that one of the two CSPM convictions,
15 Count 2, should now be reversed because insufficient evidence was presented to
16 establish when the acts of CSPM occurred under Count 2. The State concedes that any
17 pattern of criminal conduct occurring while the Victim was in the third grade must
18 now be reduced to a single count, resulting in a single conviction under Count 1. The
19 State further concedes that both counts of CSCM should be reversed based upon

1 insufficient evidence. Defendant does not disagree with the State's concessions, and
2 argues that the remaining conviction for CSPM should also be reversed based upon:
3 (1) plain error in allowing the State's expert witness to comment on the credibility of
4 the Victim's testimony and identity of the perpetrator; (2) fundamental error by failing
5 to provide specificity in the charging documents that violated Defendant's due process
6 rights; and (3) insufficiency of the evidence to support one count of CSPM.

7 {3} First, we accept the State's concessions regarding the reversal of one count of
8 CSPM and both counts of CSCM. We also agree that the State committed plain error
9 when it used its expert witness to bolster and support Victim's credibility regarding
10 the allegations of sexual abuse by identifying Defendant as the perpetrator of the
11 sexual abuse and providing expert testimony diagnosing Victim's medical symptoms
12 as resulting from sexual abuse. Because plain error occurred, we address whether there
13 was sufficient evidence to support Defendant's conviction for the one remaining count
14 of CSPM. We hold that sufficient evidence does exist in the record to support
15 Defendant's conviction for CSPM under Count 1. We therefore reverse and remand
16 for a new trial on Count 1. Finally, based upon our plain error determination and
17 remand for a new trial on Count 1, we conclude that it is unnecessary to address
18 Defendant's remaining assertion of error.

1 **BACKGROUND**

2 {4} The relevant facts are known to the parties. Based upon the State's concession
3 regarding one of Defendant's convictions of CSPM and both convictions of CSCM,
4 we briefly summarize only the facts necessary to resolve the two remaining disputed
5 issues. The remaining issues are: (1) whether plain error occurred during the testimony
6 of Dr. Reena Isaac, the State's expert witness and (2) whether the evidence was
7 sufficient to support a conviction for one count of CSPM.

8 {5} At the inception of the incidents identified at trial, Victim was a third-grader in
9 Hobbs, New Mexico, where he lived with his grandfather, mother, and Defendant,
10 who was mother's second husband. Victim failed the third grade and was required to
11 repeat the third grade during this time frame. Victim told Dr. Isaac about the sexual
12 abuse that occurred over the course of this time period, approximately two years in
13 duration, and later testified at trial that Defendant anally penetrated Victim with his
14 penis twenty times, including various incidents of touching or sexual fondling that
15 occurred during the course of these multiple events. There were no other witnesses to
16 the alleged incidents, and Victim did not report the incidents of sexual abuse to
17 anyone for a few years, even after he moved with his natural father near Houston,
18 Texas. Evidence was also presented that at or around the time of the incidents,
19 Victim's mother noticed an attitude change and that something was wrong with

1 Victim. Victim's natural father noticed that Victim was angry and withdrawn; and
2 Victim's maternal grandmother saw that Victim was angry, withdrawn, and started
3 having bowel movements in his underwear.

4 {6} After the incidents of sexual abuse were reported to Victim's aunt, Victim
5 spoke to law enforcement and was eventually taken to see Dr. Isaac, a pediatrician
6 who was affiliated with Baylor College of Medicine and had a sub-specialty in
7 forensic pediatrics and/or child abuse pediatrics. At trial, Dr. Isaac was qualified as
8 an expert witness in the field of forensic pediatrics. Dr. Isaac testified that during her
9 examination of Victim, she discovered soft stool around Victim's anus that was
10 indicative of encopresis, a syndrome of random, uncontrolled defecation. Dr. Isaac
11 also testified that Victim was below normal in both body size and weight, based upon
12 his age, and suffered from anger issues. Dr. Isaac testified and confirmed that Victim
13 told her about the sexual abuse that had occurred, including the fondling and anal
14 penetration. Based upon her overall examination and evaluation of Victim, Dr. Isaac
15 was asked "whether [Victim] suffered anal penetration and/or fondling" and answered
16 that "[Victim] carries the diagnosis of sexual abuse." Finally, Dr. Isaac also testified
17 that Victim identified Defendant as the perpetrator of the sexual abuse. Defendant
18 made no objection to any of the expert testimony by Dr. Isaac.

1 **DISCUSSION**

2 **1. Plain Error Occurred During Dr. Isaac’s Testimony**

3 {7} On appeal, Defendant argues that testimony by Dr. Isaac constitutes plain error
4 and his remaining conviction for one count of CSPM must be reversed. Because
5 Defendant failed to object to Dr. Isaac’s testimony or otherwise preserve this issue
6 below, we now review this evidentiary matter for plain error. Rule 11-103(D), (E)
7 NMRA; *see State v. Montoya*, 2015-NMSC-010, ¶ 46, 345 P.3d 1056. For plain error
8 to have occurred, the appellate court “must be convinced that admission of the
9 testimony constituted an injustice that created grave doubts concerning the validity of
10 the verdict.” *Montoya*, 2015-NMSC-010, ¶ 46 (internal quotation marks and citation
11 omitted). Under this standard of review, we must also “examine the alleged errors in
12 the context of the testimony as a whole.” *Id.* (internal quotation marks and citations
13 omitted).

14 {8} The trial in this case was primarily focused on the credibility of Victim’s
15 testimony. No other witness testified about observing any sexual interaction between
16 Defendant and Victim. Looking at the case as a whole, Dr. Isaac’s testimony not only
17 recounted Victim’s statements about the sexual abuse, she also named Defendant as
18 the perpetrator of the abuse and specifically gave a forensic pediatrician’s expert
19 medical opinion that Victim carried a diagnosis of sexual abuse. This testimony was

1 not accidental and was all solicited through direct questioning by the prosecutor. The
2 cumulative effect of this testimony accomplished three strategic purposes for the
3 State: (1) it bolstered and supported Victim’s credibility regarding the allegations of
4 sexual abuse, (2) it specifically diagnosed that Victim’s medical symptoms resulted
5 from sexual abuse, and (3) it bolstered and supported Victim’s allegation that the
6 sexual abuse was committed by Defendant.

7 {9} Our Supreme Court has previously determined that expert testimony of this
8 nature is sufficiently prejudicial to constitute plain error. *See State v. Lucero*, 1993-
9 NMSC-064, ¶¶ 12-19, 21-22, 116 N.M. 450, 863 P.2d 1071 (applying the standard for
10 plain error and holding that expert testimony directly bolstering the credibility of the
11 victim and connecting the diagnosis to sexual abuse by a specific perpetrator
12 established plain error and required reversal). In this case, Dr. Isaac’s testimony is
13 equally concerning with regard to its influence on the validity of the verdict. *See State*
14 *v. Alberico*, 1993-NMSC-047, ¶ 89, 116 N.M. 156, 861 P.2d 192 (noting that only
15 “[i]ncidental verification of [a] victim’s story or indirect bolstering of [a victim’s]
16 credibility” is permissible by the state). With Victim’s testimony and credibility being
17 the pivotal issues in this case, Dr. Isaac went far beyond testifying that Victim’s
18 symptoms were potentially consistent with acts of sexual abuse. *See Lucero*, 1993-
19 NMSC-064, ¶ 17. By testifying about Victim’s statements regarding specific acts of

1 genital fondling, sexual abuse, and tying Victim’s symptoms to a medical diagnosis
2 of sexual abuse, Dr. Isaac was validating Victim’s testimony of abuse as well as
3 Victim’s credibility. *Id.* ¶ 18.

4 {10} An expert is not allowed to testify that a victim’s symptoms were in fact caused
5 by or resulted from sexual abuse. *See Alberico*, 1993-NMSC-047, ¶ 91 (recognizing
6 that such testimony improperly encroaches upon the province of the jury). An expert
7 is also prohibited from testifying as to the identity of the alleged perpetrator of the
8 crime. *See id.* ¶ 88 (noting that such identification testimony by the expert encroaches
9 too far upon the jury’s function as the arbiter of credibility); *see also Lucero*, 1993-
10 NMSC-064, ¶ 16 (recognizing that “naming the perpetrator was tantamount to saying
11 that the complainant was telling the truth”). Dr. Isaac made both of these additional
12 errors during her testimony in this case. As a result, Dr. Isaac’s expert testimony was
13 of sufficient significance to raise grave doubts about the validity of the jury’s verdict
14 convicting Defendant of CSPM. *See State v. Fairweather*, 1993-NMSC-065, ¶¶ 18-20,
15 116 N.M. 456, 863 P.2d 1077 (determining that an expert’s bolstering of a victim’s
16 credibility and stating that the victim’s symptoms were in fact caused by sexual abuse
17 was not harmless error, especially when credibility was a pivotal issue at trial). These
18 grave doubts arise from the very limited circumstantial and inferential nature of the
19 State’s remaining evidence against Defendant. The improper emphasis and bolstering

1 provided by Dr. Isaac clearly provided that additional support the State wanted to
2 present the jury in order to obtain Defendant’s conviction. *See Lucero*, 1993-NMSC-
3 064, ¶ 22 (concluding that where the “credibility [of the alleged sexual abuse victim]
4 was a pivotal issue in this case, it is likely that the jury was swayed by [the expert’s]
5 improper testimony”). As a result, we determine that Dr. Isaac’s testimony rises to the
6 level of plain error in this particular case.

7 {11} Because plain error occurred, we must address the appropriate remedy for this
8 error. *See State v. Paiz*, 1999-NMCA-104, ¶¶ 33-34, 127 N.M. 776, 987 P.2d 1163
9 (remanding for a new trial once a determination of plain error has been established);
10 *see also State v. Romero*, 1980-NMCA-052, ¶ 2, 94 N.M. 300, 609 P.2d 1256
11 (reversing for plain error and remanding for a new trial). To avoid double jeopardy,
12 remand for retrial is only permitted if the state has presented sufficient evidence to
13 support a Defendant’s conviction at the first trial. *State v. Consaul*, 2014-NMSC-030,
14 ¶ 41, 332 P.3d 850; *State v. Cabezuela*, 2011-NMSC-041, ¶ 40, 150 N.M. 654, 265
15 P.3d 705.

16 **2. The Sufficiency of the Evidence to Support Defendant’s Conviction for One**
17 **Count of CSPM**

18 {12} We now address Defendant’s claim that insufficient evidence was presented by
19 the State to support his conviction for one count of CSPM. In reviewing the
20 sufficiency of the evidence, the court determines “whether substantial evidence of

1 either a direct or circumstantial nature exists to support a verdict of guilt beyond a
2 reasonable doubt with respect to every element essential to a conviction.” *State v.*
3 *Garcia*, 2011-NMSC-003, ¶ 5, 149 N.M. 185, 246 P.3d 1057 (internal quotation
4 marks and citation omitted). Evidence is viewed by the appellate court in “the light
5 most favorable to the guilty verdict, indulging all reasonable inferences and resolving
6 all conflicts in the evidence in favor of the verdict.” *State v. Cunningham*, 2000-
7 NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. This Court “does not weigh the
8 evidence or substitute its judgment for that of the fact finder as long as there is
9 sufficient evidence to support the verdict.” *State v. Chavez*, 2009-NMSC-035, ¶ 11,
10 146 N.M. 434, 211 P.3d 891 (internal quotation marks and citation omitted). In short,
11 the court determines if “a rational jury *could* have found beyond a reasonable doubt
12 the essential facts required for a conviction[.]” *Garcia*, 2011-NMSC-003, ¶ 5 (internal
13 quotation marks and citation omitted).

14 {13} One aspect of Defendant’s insufficiency argument deals with dates that specific
15 encounters were said to have occurred and those dates allegedly conflicting with
16 Defendant’s incarceration sometime in 2007 and continuing into 2008. The other
17 aspect of Defendant’s insufficiency argument deals with an alleged failure to present
18 distinct evidence supporting the time frame for Count 2, those dates being between
19 March 30, 2006 through April 30, 2007. We can resolve both arguments very quickly.

1 {14} Defendant does not dispute the sufficiency of the evidence presented by the
2 State to support his conviction for CSPM under Count 1, which occurred from March
3 1, 2005 through April 1, 2006. In addition, Defendant does not argue that his
4 incarceration in 2007 conflicted with the time frame charged in Count 1. All of
5 Defendant's arguments regarding the sufficiency of the evidence either attack the
6 evidence presented to support Count 2 or question the time frame specified in Count
7 2. These sufficiency arguments are now moot because the State has stipulated to the
8 dismissal of the conviction for Count 2. *See State v. Sergio B.*, 2002-NMCA-070, ¶ 9,
9 132 N.M. 375, 48 P.3d 764 (“An appeal is moot when no actual controversy exists,
10 and an appellate ruling will not grant the appellant any actual relief.”). As a result,
11 Defendant's arguments regarding Count 2 have already been resolved in his favor.

12 {15} Although Defendant does not specifically attack the evidence presented to
13 support Defendant's conviction under Count 1, this Court must still determine that
14 sufficient evidence exists to support a retrial on Count 1. *See Consaul*, 2014-NMSC-
15 030, ¶ 41. The State has identified details from Victim's testimony to support the
16 incidents of sexual abuse under Count 1. Victim specifically testified about numerous
17 incidents of anal penetration while he was in the third grade year that continued into
18 the next year when he repeated the third grade. This evidence supports numerous
19 incidents of sexual abuse during the time frame set forth under Count 1, and

1 Defendant's briefs did not attack any of this evidence when he challenged the
2 sufficiency of the evidence to support the one remaining count of CSPM. *See State v.*
3 *Reyes*, 2002-NMSC-024, ¶ 43, 132 N.M. 576, 52 P.3d 948 (recognizing the
4 defendant's misapprehension of the appellate review process for sufficiency of the
5 evidence and noting that "[a]n appellate court does not evaluate the evidence to
6 determine whether some hypothesis could be designed[,] which is consistent with a
7 finding of innocence" (internal quotation marks and citation omitted)), *abrogated on*
8 *other grounds by Allen v. LeMaster*, 2012-NMSC-001, 267 P.3d 806. As a result, we
9 hold that sufficient evidence was presented by the State to support Defendant's
10 conviction on Count 1. Count 1 is remanded to the district court for retrial.

11 {16} As a result of the State's concessions regarding three of Defendant's
12 convictions and our reversal and remand for a new trial on the one remaining count
13 of CSPM, we determine that it is unnecessary for this Court to address any of
14 Defendant's remaining assertions of error. *See State v. Vallejos*, 1994-NMSC-107, ¶
15 13, 118 N.M. 572, 883 P.2d 1269.

16 **CONCLUSION**

17 {17} Based on the State's concessions and our analysis regarding the remaining
18 conviction for CSPM, we reverse Defendant's CSPM conviction under Count 2 and
19 both convictions for CSCM. In addition, we reverse and remand this matter back to

1 the district court for a new trial on Count 1 of CSPM.

2 {18} **IT IS SO ORDERED.**

3

4

TIMOTHY L. GARCIA, Judge

5 **WE CONCUR:**

6

7 **M. MONICA ZAMORA, Judge**

8

9 **J. MILES HANISEE, Judge**