

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

2 Opinion Number: \_\_\_\_\_

3 Filing Date: December 16, 2014

4 **NO. 32,530**

5 **STATE OF NEW MEXICO,**

6        Plaintiff-Appellee,

7 v.

8 **JESSE DURAN,**

9        Defendant-Appellant.

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

11 **Kenneth H. Martinez, District Judge**

12 Gary K. King, Attorney General

13 Santa Fe, NM

14 Ralph E. Trujillo, Assistant Attorney General

15 Albuquerque, NM

16 for Appellee

17 Law Offices of the Public Defender

18 Jorge A. Alvarado, Chief Public Defender

19 Kimberly Chavez Cook, Assistant Appellate Defender

20 Santa Fe, NM

21 for Appellant

1 **OPINION**

2 **GARCIA, Judge.**

3 {1} Defendant, Jesse Duran, appeals from his conviction for criminal sexual  
4 penetration of a minor in the first degree (CSPM). He contends, among other things,  
5 that the district court erred by allowing the individual who conducted the S.A.F.E.  
6 House interview of the victim to testify, as a lay witness, that a majority of children  
7 she interviewed delayed in disclosing sexual abuse. We agree. This delayed  
8 disclosure testimony was the proper subject for expert testimony as opposed to lay  
9 testimony. We also conclude that the error was not harmless. Accordingly, we reverse  
10 Defendant’s conviction and remand for a new trial.

11 **BACKGROUND**

12 {2} Defendant was accused of digitally penetrating his girlfriend’s daughter  
13 (Victim) sometime between 1996 and 1998. Defendant was not charged with CSPM  
14 until May 2006. Victim was twenty-one years old at the time she testified at  
15 Defendant’s trial.

16 {3} Victim testified that Defendant abused her when she was in either second or  
17 fourth grade. Defendant was Victim’s mother’s boyfriend at the time, and Victim was  
18 sleeping on a mattress with Victim’s sister in the living room of Defendant’s mother’s  
19 house. Victim testified that she woke up to Defendant “touching [her].” She said that

1 Defendant placed his fingers in her vagina while she was asleep. She stated  
2 Defendant asked her “if it felt good,” and that she responded by pushing him away.  
3 Victim said that she then got up and went to school. She stated that, after this  
4 incident, she “tried to stay away [from Defendant] as much as [she] could” and “never  
5 felt comfortable in front of him[.]”

6 {4} Victim testified that she did not tell anyone about the incident at the time  
7 because she “was scared” and that she “[didn’t] know” why she was scared. She said  
8 that she later told her sister, three of her cousins, and two of her close friends. None  
9 of these six family members or friends testified at trial. When Victim was in sixth  
10 grade, she told her mother that Defendant had touched her. Victim’s mother  
11 confronted Defendant, who denied the allegation, and Victim’s mother did nothing  
12 further. Victim told her mother again in the fall of 2004, a few months after her  
13 mother had broken off her relationship with Defendant. This time, Victim’s mother  
14 reported the incident to law enforcement, who conducted an investigation. Victim was  
15 interviewed by Denise Clement, a forensic interviewer at a child S.A.F.E. House on  
16 January 25, 2005.

17 {5} Clement testified at trial that a child S.A.F.E. House is a child advocacy center  
18 where professionals interview children who are suspected to be victims of sexual  
19 abuse, physical abuse, or who have witnessed violent crimes. She testified about her

1 interview of Victim and her experience as a S.A.F.E. House interviewer in general.  
2 Clement testified that she worked as a S.A.F.E. House interviewer from 2002 to 2008  
3 and conducted between 1400 and 1600 interviews during that period of time. She  
4 described the interview as “a structured conversation with a child” that is “designed  
5 to try and elicit accurate events about the child[’s] . . . account.” She explained that  
6 “the goal of the interview is to either refute or corroborate the allegation.”

7 {6} During a lengthy bench conference during Clement’s testimony, defense  
8 counsel argued that Clement should not be allowed to testify about the percentage of  
9 children who delay reporting sexual abuse. Defense counsel argued that this was a  
10 subject for expert testimony, and Clement was not qualified as an expert. The district  
11 court overruled Defendant’s objection, stating:

12 Well, it seems to me that, really, this is an issue in the case, and  
13 everybody realizes that it is an issue, and it’s an issue in many child  
14 sexual abuse cases. This witness, based upon her training, and most  
15 especially, her experience in meeting with these children who are  
16 victims of sexual assault, this is not an expert opinion, but is more of a  
17 lay opinion, based upon her experience in the unit. And so I’m going to  
18 go ahead and allow the testimony.

19 {7} The jury was excused for further questioning of Clement. The prosecutor asked  
20 Clement: “[B]ased on your experience, what percentage of the children that you  
21 personally interviewed have a delayed disclosure. Do you know what I mean by  
22 that?” Clement answered, “Yes, I do. It’s been awhile since I reviewed the statistics,

1 but it's greater than 50 percent." Clement explained that this percentage was based  
2 on her personal experience and the S.A.F.E. House's internal record-keeping.  
3 Clement later clarified: "I was really referring to what I'm remembering about the  
4 data. I certainly can't say what percentage of kids I interviewed, because I didn't keep  
5 track of that."

6 {8} When the jury returned, the prosecutor asked Clement, "Can you put a  
7 percentage on how many children delay in disclosing?" Clement stated that she could  
8 not give a percentage, but that "[i]n the majority of children that I've interviewed at  
9 the [S.A.F.E.] House, there is a delay in disclosure." When the issue was raised once  
10 again prior to closing arguments, the district court stated, "I think it's fairly well-  
11 known and considered of people in the field that . . . delayed reporting is common in  
12 these types of cases. . . . I don't find it in any way to be a stretch or outside, you  
13 know, learned treatises and other facts[.]"

14 {9} In its closing argument, the State told the jury that it was "to determine whether  
15 or not [it] believe[d Victim]" and that if it "believe[d] that she was telling the truth  
16 . . . , then the State has proven its case[.]" The jury found Defendant guilty of CSPM.  
17 Defendant was sentenced and this appeal followed.

1 **DISCUSSION**

2 {10} Defendant raises two issues on appeal. First, he contends the district court erred  
3 in allowing Clement to testify that a majority of children she interviewed delayed in  
4 disclosing sexual abuse because her statement was not a lay opinion, and she was not  
5 qualified as an expert to offer such testimony. Second, he contends the district court  
6 erred in failing to excuse three jurors for cause. Because we agree that the district  
7 court erred with respect to Clement’s lay testimony about delayed disclosure, and  
8 because we conclude that the error was not harmless, we reverse Defendant’s  
9 conviction and do not address the juror issue.

10 **A. The Behavior of Child Victims of Sexual Abuse in General is Not a Proper**  
11 **Subject for Lay Testimony**

12 {11} Defendant contends the district court erred in allowing Clement to testify about  
13 the frequency of delayed disclosure of sexual abuse in children because this is not a  
14 proper subject for lay testimony. Generally, we review a district court’s evidentiary  
15 rulings for an abuse of discretion. *State v. Martinez*, 2008-NMSC-060, ¶ 10, 145  
16 N.M. 220, 195 P.3d 1232. But we review de novo “[a] misapprehension of the law  
17 upon which a court bases an otherwise discretionary evidentiary ruling[.]” *Id.*; *see*  
18 *also State v. Torres*, 1999-NMSC-010, ¶ 28, 127 N.M. 20, 976 P.2d 20 (“[T]he  
19 threshold question of whether the trial court applied the correct evidentiary rule or  
20 standard is subject to de novo review on appeal.”).

1 {12} New Mexico courts have reported numerous decisions addressing the  
2 admissibility of expert testimony on the subject of the behavior of children who allege  
3 sexual abuse. *See, e.g., State v. Casaus*, 1996-NMCA-031, ¶¶ 31-32, 121 N.M. 481,  
4 913 P.2d 669 (affirming admission of expert testimony about how a child remembers  
5 an event); *State v. Newman*, 1989-NMCA-086, ¶¶ 11, 15, 109 N.M. 263, 784 P.2d  
6 1006 (affirming admission of expert testimony concerning the general characteristics  
7 of sexually abused children). However, we have no published authority addressing  
8 the admissibility of lay testimony on the subject of children’s behavior when alleging  
9 sexual abuse.

10 {13} Rule 11-701 NMRA governs the admissibility of opinion testimony by lay  
11 witnesses and provides:

12           If a witness is not testifying as an expert, testimony in the form of  
13           an opinion is limited to one that is

14  
15           A. rationally based on the witness’s perception,

16  
17           B. helpful to clearly understanding the witness’s testimony or to  
18           determining a fact in issue, and

19  
20           C. not based on scientific, technical, or other specialized  
21           knowledge within the scope of Rule 11-702 NMRA.

22 Rule 11-702 allows a witness “who is qualified as an expert” to testify “in the form  
23 of an opinion or otherwise” if the witness has “scientific, technical, or other

1 *specialized knowledge*” that “will help the trier of fact to understand the evidence or  
2 to determine a fact in issue.” (Emphasis added.)

3 {14} Defendant contends that the frequency of delayed reporting of sexual abuse by  
4 children is not a proper subject for lay testimony and can only be admitted through  
5 expert testimony. Defendant characterizes Clement’s testimony as “generalities in a  
6 specialized area in the abstract.” The State argues that Clement’s testimony was  
7 properly admitted under Rule 11-701 because it was based on Clement’s personal  
8 observations, not any specialized knowledge. We disagree with the State.

9 {15} Other authorities have concluded that testimony about the behavior of sexually  
10 abused children must be admitted as expert testimony and not lay testimony. In *State*  
11 *v. Gonzalez*, 834 A.2d 354, 356-59 (N.H. 2003), the New Hampshire Supreme Court  
12 held that a social worker’s and detective’s testimony about the frequency of victim  
13 recantations or denials and of delayed disclosure of sexual abuse could not be  
14 admitted as lay opinion. There, the detective testified at trial that he was trained to  
15 interview child victims of sexual abuse and that based on his experience as a lead  
16 investigator, “it is not unusual for a sexual assault victim to delay disclosure.” *Id.* at  
17 359. The court concluded that this testimony should have been excluded. It explained,  
18 “While [the detective’s] testimony was based upon his personal observations while  
19 investigating sexual assault cases, his observations and conclusions regarding the



1 frequency of delayed disclosures required specialized training, experience[,] and skill  
2 not within the ken of the ordinary person.” *Id.* (internal quotation marks and citation  
3 omitted); *see also* 1 Paul DerOhannesian II, *Sexual Assault Trials* § 11.17 at 856 (3d  
4 ed. 2006) (“Opinions about sexual abuse victims’ denials and recantations ordinarily  
5 require training, observations, and experience not within the common knowledge of  
6 the general public and are not admissible as lay witness testimony.”). We agree with  
7 these authorities and conclude that statements about the behavior of children alleging  
8 sexual assault is not a proper subject for lay testimony because it is neither the kind  
9 of personal observation that a lay person is capable of making nor common  
10 knowledge within the general public.

11 {16} The record reflects that the district court conflated the requirements of Rule  
12 11-701 and Rule 11-702. The district court explained that it would allow Clement to  
13 testify about delayed disclosure “based upon her training, and most especially, her  
14 experience in meeting with these children who are victims of sexual assault[.]” The  
15 fact that, as part of Clement’s training and experience, she learned that delay occurred  
16 in a number of cases of alleged child abuse is not a legitimate basis for admitting the  
17 opinion of a lay witness; it can be important in admitting the opinion of an expert  
18 witness. *See* Rule 11-702 (defining an expert witness as “[a] witness who is qualified  
19 as an expert by knowledge, skill, experience, training, or education”). Training and

1 experience are factors to be considered in evaluating expert testimony, not lay  
2 testimony. The court also explained that the frequency of delayed reporting is well-  
3 known by people in this field and reflected in learned treatises. Knowledge contained  
4 in treatises and understood by practitioners in their particular field is the type of  
5 testimony presented by an expert witness because it is not the type of information  
6 generally known by an ordinary citizen or the general public. *See Hopkins v. State*,  
7 639 So. 2d 1247, 1252-53 (Miss. 1993) (reversing the defendant’s conviction where  
8 a social worker testified as a lay witness regarding the defendant’s prior crime of a  
9 pedophilic nature to establish that such a crime was relevant for the propensity of  
10 truthfulness and to impeach the defendant’s credibility without additional expert  
11 testimony relying on statistical studies or treatises).

12 {17} Moreover, during her voir dire examination Clement said that her statement on  
13 delayed disclosure was based not just on her personal observations, but also on  
14 specific statistics compiled in the S.A.F.E. House’s specialized work environment.  
15 She explained that, in answering the prosecutor’s question about the frequency of  
16 delayed disclosure, she “was really referring to what [she was] remembering about  
17 the data.” Thus, her statement about delayed disclosure data was based on  
18 “specialized knowledge” and thus should not have been admitted under Rule 11-701.  
19 *See* Rule 11-701 (stating that lay witness opinion testimony cannot be “based on

1 scientific, technical, or other specialized knowledge within the scope of Rule 11-  
2 702”).

3 {18} We conclude that the district court erred in allowing Clement to testify as a lay  
4 witness that “[i]n the majority of children that I’ve interviewed at the [S.A.F.E.]  
5 House, there is a delay in disclosure.” We reach this conclusion because this  
6 statement was based on “specialized knowledge” within the purview of experts under  
7 Rule 11-702 and infers that Victim’s delayed disclosure was consistent with most of  
8 the children that Clement has interviewed.

9 **B. The Error in Allowing the Interviewer to Testify Regarding the Frequency**  
10 **of Delayed Reporting in Child Abuse Victims Was Not Harmless**

11 {19} We next consider whether the district court’s error in admitting Clement’s  
12 testimony on delayed disclosure was harmful. *See State v. Tollardo*,  
13 2012-NMSC-008, ¶ 25, 275 P.3d 110 (“Improperly admitted evidence is not grounds  
14 for a new trial unless the error is determined to be harmful.”). “We review improperly  
15 admitted evidence for non-constitutional harmless error.” *State v. Serna*, 2013-  
16 NMSC-033, ¶ 22, 305 P.3d 936. A non-constitutional error is harmless “when there  
17 is no reasonable *probability* the error affected the verdict.” *Tollardo*,  
18 2012-NMSC-008, ¶¶ 36, 42 (internal quotation marks and citation omitted) (stating  
19 that the “central inquiry” of non-constitutional harmless error analysis is “whether  
20 [the] error was likely to have affected the jury’s verdict”).

1 {20} In “ ‘assessing the probable effect of evidentiary error,’ ” we “ ‘should evaluate  
2 all of the circumstances surrounding the error.’ ” *Serna*, 2013-NMSC-033, ¶ 23  
3 (quoting *Tollardo*, 2012-NMSC-008, ¶ 43). These circumstances include “the source  
4 of the error [and] the emphasis placed on the error,” *Serna*, 2013-NMSC-033, ¶ 23;  
5 “the other, non-objectionable evidence of guilt, not for a sufficiency-of-the-evidence  
6 analysis, but to evaluate what role the error played at trial[.]” *State v. Leyba*, 2012-  
7 NMSC-037, ¶ 24, 289 P.3d 1215; “the importance of the erroneously admitted  
8 evidence in the prosecution’s case,” *State v. Lovett*, 2012-NMSC-036, ¶ 55, 286 P.3d  
9 265 (alteration, internal quotation marks, and citation omitted); and “whether the  
10 error was cumulative or instead introduced new facts[.]” *Tollardo*, 2012-NMSC-008,  
11 ¶ 43 (alteration, internal quotation marks, and citation omitted). We remain mindful  
12 that “[t]hese considerations, however, are not exclusive[.]” *Serna*, 2013-NMSC-033,  
13 ¶ 23. “[T]hey are merely a guide to facilitate the ultimate determination—whether  
14 there is a reasonable probability that the error contributed to the verdict.” *Id.* The  
15 State bears the burden to prove that the error was harmless. *See State v. Stephen F.*,  
16 2008-NMSC-037, ¶ 38, 144 N.M. 360, 188 P.3d 84.

17 {21} The State contends that any error was harmless because there was sufficient  
18 evidence of Defendant’s guilt even in the absence of Clement’s testimony about  
19 delayed disclosure. We disagree for the following reasons.

1 {22} First, the State was “the source of the error,” not Defendant. *See Serna*, 2013-  
2 NMSC-033, ¶ 23. Defendant did not elicit Clement’s improper testimony—the State  
3 did.

4 {23} Second, the delayed disclosure testimony was not “cumulative”—it presented  
5 the jury with the “new fact[]” that in “the majority of children [Clement interviewed  
6 at the S.A.F.E. House], there was a delay in disclosure.” *See Lovett*, 2012-NMSC-  
7 036, ¶ 55.

8 {24} Third, although the State did not place “emphasis” on the delayed disclosure  
9 testimony, this testimony was important to its case. *See Serna*, 2013-NMSC-033, ¶  
10 23; *Lovett*, 2012-NMSC-036, ¶ 55. It was important, no matter how briefly it was  
11 discussed, because it was designed to lead the jury to infer that Victim’s delay in  
12 disclosing the incident was justified—an inference that would support Victim’s  
13 credibility. *See Miller v. Commonwealth*, 77 S.W.3d 566, 571 (Ky. 2002)  
14 (determining that “[t]here could be only two possible purposes for [questioning an  
15 expert about what percentage of children delay in reporting sexual abuse]: (1) to  
16 prove that [the victim] had, in fact, been abused because, like other abused children,  
17 she delayed reporting the abuse; or (2) to disprove an inference of fabrication arising  
18 from the delay in reporting”).

1 {25} Fourth, although we agree with the State that the other non-objectionable  
2 evidence admitted at trial would be sufficient to uphold the conviction, we do not  
3 analyze this evidence for “sufficiency”; instead, we look at it “to evaluate what role  
4 the [erroneously admitted evidence] played at trial.” *Leyba*, 2012-NMSC-037, ¶ 24.  
5 The only other evidence was Victim’s testimony, her mother’s testimony that Victim  
6 had told her about the incident, and Defendant’s denials to the Victim’s mother and  
7 the police. The State told the jury in its closing argument that this case was about  
8 “whether or not [the jury] believe[d Victim.]” Thus, the “role” of the delayed  
9 disclosure testimony was to support Victim’s credibility, which, as the State  
10 recognized in its closing argument, was the central factual issue that the jury was to  
11 determine at trial—whether Victim “was telling the truth.”

12 {26} We conclude that there is a reasonable probability that Clement’s lay testimony  
13 on delayed disclosure affected the verdict. Where, as here, the improperly admitted  
14 evidence goes to the primary issue of credibility in a sexual abuse case, it is more  
15 likely to be prejudicial. Clement testified to her extensive training and experience  
16 working with victims of child sexual abuse over a six-year period with between 1400  
17 to 1600 S.A.F.E. House interviews that she conducted. As a result, Clement’s  
18 delayed-reporting testimony had the reasonable probability of carrying sufficient  
19 weight to have an impact and effect upon the jury. *See State v. Marrington*, 73 P.3d

1 911, 917 (Or. 2003) (concluding that erroneously admitted expert testimony about  
2 delayed reporting was harmful because the case “involved a swearing contest[, t]he  
3 victim claimed that there had been sexual contact in the form of inappropriate  
4 touching[, the] defendant denied that it had occurred[, with there being] no other  
5 witnesses to the touching, and there was no physical evidence of any kind that  
6 corroborated the alleged abuse[, thus t]he victim’s delayed reporting was not a  
7 tangential issue, but [was] a central factual issue in this case”); *see also Stephen F.*,  
8 2008-NMSC-037, ¶¶ 41-42 (concluding that the improper exclusion of a victim’s  
9 motive to fabricate was not harmless error in an alleged rape case because our courts  
10 “cannot overlook the fact that this [type of] case—like so many of its kind—boils  
11 down to a question of credibility”); *State v. Fairweather*, 1993-NMSC-065, ¶¶ 19-20,  
12 116 N.M. 456, 863 P.2d 1077 (holding that erroneous admission of expert’s  
13 testimony about sexual abuse victim’s truthfulness was harmful because “[c]redibility  
14 . . . was a pivotal issue at trial”); *State v. Lucero*, 1993-NMSC-064, ¶¶ 21-22, 116  
15 N.M. 450, 863 P.2d 1071 (concluding that an erroneous admission of expert  
16 testimony as to a sexual abuse victim’s credibility was not harmless error because  
17 “[t]he only witnesses to the alleged abuse were the defendant and the complainant”  
18 and “credibility was a pivotal issue in [the] case”); *cf. State v. Marquez*,  
19 2009-NMSC-055, ¶ 25, 147 N.M. 386, 223 P.3d 931 (concluding improperly

1 admitted evidence was not harmless because it undermined the defendant's  
2 credibility), *overruled on other grounds by Tollardo*, 2012-NMSC-008, ¶ 37 n.6.

3 **CONCLUSION**

4 {27} Defendant's conviction is reversed. Because Victim's testimony provided  
5 sufficient other evidence to support a conviction, we remand to the district court for  
6 a new trial. *See State v. Dowling*, 2011-NMSC-016, ¶ 18, 150 N.M. 110, 257 P.3d  
7 930 (recognizing that double jeopardy protections do not bar retrial where sufficient  
8 evidence was presented to support a conviction).

9 {28} **IT IS SO ORDERED.**

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**TIMOTHY L. GARCIA, Judge**

12 **WE CONCUR:**

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**JONATHAN B. SUTIN, Judge**

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**MICHAEL E. VIGIL, Judge**