

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

2 Opinion Number: _____

3 Filing Date: October 12, 2017

4 **NO. A-1-CA-34597**

5 **STATE OF NEW MEXICO,**

6 Plaintiff-Appellee,

7 v.

8 **BRIAN ADAMO,**

9 Defendant-Appellant.

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

11 **Raymond L. Romero, District Judge**

12 Hector H. Balderas, Attorney General

13 Maris Veidemanis, Assistant Attorney General

14 Santa Fe, NM

15 for Appellee

16 Bennett J. Baur, Chief Public Defender

17 Mary Barket, Assistant Appellate Defender

18 Santa Fe, NM

19 for Appellant

1 **OPINION**

2 **VIGIL, Judge.**

3 {1} The motion for rehearing is denied. The formal opinion filed in this case on
4 August 31, 2017, is hereby withdrawn, and this opinion is substituted in its place.

5 {2} A jury found Defendant Brian Adamo guilty of one count of sexual
6 exploitation of children (possession) in violation of NMSA 1978, Sections 30-6A-
7 3(A) (2007, amended 2016), under the Sexual Exploitation of Children Act (the Act),
8 NMSA 1978, §§ 30-6A-1 to -4 (1984, as amended through 2016). This is commonly
9 known as possession of child pornography. Defendant appeals, and concluding there
10 was no reversible error in Defendant’s trial, we affirm.

11 **BACKGROUND**

12 {3} Following a preliminary hearing in the magistrate court in Carlsbad, New
13 Mexico, the district attorney filed a criminal information in the district court charging
14 Defendant with eighteen counts of sexual exploitation of children (possession) in
15 violation of Section 30-6A-3(A). Pursuant to *State v. Olsson*, 2014-NMSC-012, 324
16 P.3d 1230, an amended criminal complaint was then filed charging Defendant with
17 a single count of sexual exploitation of children (possession). At trial, the evidence
18 established the following facts.

1 {4} Every internet subscriber has a unique Internet Protocol (IP) address that is
2 assigned by the subscriber's internet provider and corresponds with the subscriber's
3 residential address. Carlsbad Police Department Detective Blaine Rennie, who
4 investigates crimes against children, testified that in March 2012, using software that
5 detects IP addresses that have downloaded images of suspected child pornography
6 and computers that are sharing such files, he detected "an exorbitant amount of
7 downloads" of images that were identified as child pornography. The software
8 monitors "SHA1 numbers," unique number-letter combinations that are assigned to
9 images when they are uploaded to the internet. Specifically, the software detects
10 SHA1 numbers that are associated with child pornography and computers that are
11 sharing such files, known as "peer-to-peer sharing." The downloads belonged to an
12 IP address where similar downloads had been detected in March 2011. There were
13 more than nine hundred downloads of suspected child pornography in a year at this IP
14 address, and the majority were determined to be images of child pornography.

15 {5} Detective Rennie contacted Agent Owen Pena of the New Mexico Attorney
16 General's Office and asked him to try to obtain images from a single source at that
17 IP address. This is possible because images that one is willing to share with others are
18 downloaded and stored in the shared folder of the owner's computer using peer-to-
19 peer software. Agent Pena explained that a person using peer-to-peer software must

1 download an image to the owner's computer, then direct that the image be placed in
2 the shared folder of the computer; otherwise, the image cannot be accessed by another
3 party. The image may be seen before it is downloaded and then saved in the shared
4 folder.

5 {6} On April 6, 2012, Agent Pena succeeded in
6 downloading five images of child pornography from
7 the shared folder of a computer at the IP address.
8 Four of these images were admitted into evidence,
9 and all of them had the same "pre-teen hard
10 core" (PTHC) search term. Agent Pena said that
11 images such as those he retrieved would be found
12 in a file-sharing network, using known search
13 terms for child pornography such as "PTHC."
14 Normal search engines such as Google or Yahoo
15 filter and "block" search terms for hard core child
16 pornography images. With assistance from Agent

1 Lisa Keyes of the Department of Homeland
2 Security, Detective Rennie learned that the name
3 and address of the account holder was Defendant's
4 mother at a residential address in Carlsbad.

5 {7} On June 19, 2012, a search warrant was executed at the home associated with
6 the IP address. Defendant, his mother, and his father were at home. Defendant's
7 bedroom appeared as if he did not often leave the room, and it was described as
8 messy, in "disarray," with pizza boxes, tissues, food items, clothes strewn about, and
9 sexual paraphernalia consisting of penile extenders, penile pumps, sex toys, and pills.
10 Defendant also had an operating computer in his bedroom with two hard drives, one
11 of which was an external hard drive. The computer was on at the time, depicting a
12 story with child characters and "sexual overtones."

13 {8} There were many computers in the home because Defendant's father operated
14 a computer repair business, and all the computers were seized. While some were non-
15 functional and could not be analyzed, Agent Victor Sanchez of the New Mexico
16 Department of Homeland Security searched all of the undamaged computers and
17 devices for pornography and child pornography. The only pornography he found was
18 on the external hard drive from Defendant's room. Agent Sanchez testified that the

1 external hard drive contained massive amounts of non-child pornography, including
2 bestiality and cartoon pornography, which was highly organized and categorized by
3 type, actors, and the like. Agent Sanchez did not find a category for child
4 pornography, nor did he find evidence that there ever had been one.

5 {9} Agent Sanchez did not find any active or accessible child pornography when
6 he searched the external drive. However, using a process called “data carving,” he did
7 find child pornography in the deleted files. Agent Sanchez described “data carving”
8 in layman’s terms. He said to think of a computer as a library with books. The
9 computer’s master file table (MFT) is analogous to the card catalog in a library and
10 it tells the computer where the books are in the library. When the computer wants to
11 find something, it does not go through all its rows looking for the book, but it goes
12 to the MFT (the card catalog) that points to where the book is supposed to be, and
13 gets it. When a file is “deleted,” people have a misconception that the file is gone, but
14 it isn’t. The computer only goes into the card catalog and rips up the index card that
15 told the computer where the file could be found. The book is still in the library, but
16 the function of the card catalog telling the computer where the book is located is
17 gone. Data carving tells the computer to go through every aisle in the library and look
18 for images that were deleted, and the images are then recovered. Using this process,
19 Agent Sanchez was able to retrieve approximately fifty-two images containing child

1 pornography, and twelve were admitted into evidence. These were different from the
2 four images admitted into evidence that were obtained by Agent Pena. The same
3 analysis was performed on the computer belonging to Defendant's parents, and no
4 images of child pornography were found.

5 {10} Defendant did not testify, and he did not present any evidence. Additional
6 facts, necessary to address Defendant's arguments, are set forth in our analysis of
7 Defendant's arguments.

8 **II. DISCUSSION**

9 {11} Defendant argues on appeal that the judgment and sentence must be reversed
10 because: (1) there was insufficient evidence to support the verdict; (2) there was
11 fundamental error in the jury instructions; (3) the district court abused its discretion
12 in admitting sexual items found in Defendant's bedroom; (4) the evidence about
13 Defendant refusing to speak to the police was improperly admitted; (5) ineffective
14 assistance of counsel; and (6) other errors. We address each argument in turn.

15 **1. Sufficiency of the Evidence**

16 {12} Defendant contends that the evidence was not sufficient for a rational jury to
17 conclude beyond a reasonable doubt that Defendant intentionally possessed child
18 pornography, as required by Section 30-6A-3(A). We disagree.

1 {13} “Evidence is sufficient to sustain a conviction when there exists substantial
2 evidence of a direct or circumstantial nature to support a verdict of guilt beyond a
3 reasonable doubt with respect to every element essential to a conviction.” *State v.*
4 *Smith*, 2016-NMSC-007, ¶ 19, 367 P.3d 420 (internal quotation marks and citation
5 omitted). “Substantial evidence is relevant evidence that a reasonable mind might
6 accept as adequate to support a conclusion.” *State v. Largo*, 2012-NMSC-015, ¶ 30,
7 278 P.3d 532 (internal quotation marks and citation omitted). “In reviewing whether
8 there was sufficient evidence to support a conviction, [appellate courts] resolve all
9 disputed facts in favor of the [s]tate, indulge all reasonable inferences in support of
10 the verdict, and disregard all evidence and inferences to the contrary.” *Id.* (internal
11 quotation marks and citation omitted); *see State v. Myers*, 2009-NMSC-016, ¶¶ 7, 13,
12 146 N.M. 128, 207 P.3d 1105 (setting forth the standard for reviewing evidence for
13 sufficiency in a bench trial). We have already set forth what the pertinent evidence
14 was at trial.

15 {14} The evidence supports the jury’s finding that
16 sometime in the past Defendant knowingly
17 possessed child pornography. The evidence showed
18 that there were more than nine hundred

1 downloads of suspected child pornography in a
2 year to the IP address used by Defendant's
3 computer, and most were determined to be images
4 of child pornography. In March 2012, exorbitant
5 amounts of child pornography were being
6 downloaded to that same IP address. Images of
7 child pornography can only be obtained from a
8 file sharing network where search terms such as
9 "PTHC" are used. The following month, on April 6,
10 2012, Agent Pena used peer-to-peer software to
11 retrieve five images of child pornography from the
12 shared folder of a single computer at the same IP
13 address. A person using peer-to-peer software
14 downloads the image to the owner's computer
15 where it can be viewed. Then, in order to share
16 the image with other computers, the owner either

1 purposefully directs the image to be saved in the
2 shared folder of the computer, or sets up the
3 peer-to-peer software to automatically save
4 images to the shared folder. The image can then
5 be accessed by other computers with peer-to-peer
6 software, such as Agent Pena's. Four of the images
7 Agent Pena obtained were admitted into evidence,
8 and all of them had the same search term "PTHC."

9 {15} Two months later, on June 19, 2012, a search warrant was executed at the
10 physical address where the IP address was located. There were several computers at
11 the home because Defendant's father operated a computer repair business at the
12 home. Agent Sanchez searched all of the undamaged computers and devices for
13 pornography and child pornography, and pornography was found only on the external
14 hard drive of Defendant's computer. The external drive had massive amounts of non-
15 child pornography, which was highly categorized. Although Agent Sanchez did not
16 find any active child pornography that could be accessed on the computer, by using
17 a process called "data carving" he was able to retrieve approximately fifty-two images

1 of child pornography that had been “deleted” from the hard drive, and twelve of these
2 images were admitted into evidence. A similar process failed to disclose any child
3 pornography images on the computer belonging to Defendant’s parents.

4 {16} A rational jury could fairly conclude from the foregoing evidence that there was
5 a single computer at the IP address downloading massive amounts of pornography.
6 Child pornography was also downloaded using peer-to-peer software. Child
7 pornography is only accessible through a file sharing network with search terms specific
8 to child pornography, and it can only be accessed by other users of peer-to-peer software
9 if it is purposefully stored in a shared folder. From the shared folder of that single
10 computer at the IP address, Agent Pena was able to retrieve five images of child
11 pornography using peer-to-peer software on April 6, 2012. Two months later, on June
12 19, 2012, approximately fifty-two deleted images of child pornography were found on
13 the external hard drive of Defendant’s computer. The jury was
14 able to look at the images retrieved by Agent
15 Pena and Agent Sanchez, and following the
16 instructions given by the district court, determine
17 for itself whether the images were child
18 pornography.

1 {17} We cannot overlook the fact that when the search warrant was executed, and
2 an agent went into Defendant’s room, his computer was on, depicting children in a
3 story with “sexual overtones.” In *People v. Jaynes*, 2014 IL App (5th) 120048, ¶ 57,
4 11 N.E.3d 431, the court held that such evidence was admissible “to show intent,
5 knowledge, and absence of mistake or accident.” “The defendant’s demonstrated
6 interest in materials dealing with children engaged in sexual acts tended to show that
7 his accessing illicit images was knowing and voluntary rather than inadvertent.” *Id.*

8 {18} Under all the evidence, a fair inference is that the sole computer at the IP
9 address that was used to download and share child pornography was Defendant’s, and
10 that Defendant had knowingly obtained, manipulated, stored, and shared the child
11 pornography using his computer.

12 In the context of prior possession of child pornography, a
13 computer user knowingly possesses the contraband when the user
14 intentionally downloads child pornography to the computer but later
15 deletes the file or when he or she performs some function to reach out
16 and select the image from the Internet. Indeed, a computer user who
17 intentionally accesses child pornography images on a website gains
18 actual control over the images, just as a person who intentionally
19 browses child pornography in a print magazine knowingly possesses
20 those images, even if he later puts the magazine down.

21 *New v. State*, 755 S.E.2d 568, 575 (Ga. Ct. App. 2014) (footnotes and internal
22 quotation marks omitted); see *State v. Santos*, 2017-NMCA-____, ¶ 14, ____ P.3d ____,
23 (No. 35,175, June 21, 2017) (concluding that by downloading, viewing, and deleting

1 videos on his computer, the defendant possessed child pornography); *Wise v. State*,
2 364 S.W.3d 900, 907 (Tex. Crim. App. 2012) (concluding that the evidence was
3 sufficient for the jury to find that the defendant knowingly and intentionally
4 possessed child pornography images before they were deleted); *see also State v.*
5 *Brown*, 1984-NMSC-014, ¶ 12, 100 N.M. 726, 676 P.2d 253 (“A material fact may
6 be proven by inference.”); *State v. Stefani*, 2006-NMCA-073, ¶ 39, 139 N.M. 719,
7 137 P.3d 659 (stating that a jury is free to draw inferences from the facts necessary
8 to support a conviction).

9 {19} Defendant argues that because experts conceded that, in certain instances, it is
10 possible for child pornography to be “unwittingly” downloaded; that Defendant’s
11 computer was not directly tied to the images Agent Pena downloaded; that it was
12 possible for Agent Pena to have accessed any computer being repaired; that there is
13 no evidence that the images retrieved by Agent Sanchez were the same ones Agent
14 Pena downloaded; and that just because images had, at one time, been downloaded
15 to the external drive, does not in and of itself demonstrate that they were knowingly
16 or intentionally downloaded and then intentionally kept. In other words, Defendant
17 asserts that the evidence was lacking. These are all matters that the jury was free to
18 accept or reject in its consideration and weighing of the evidence. *See State v. Tapia*,
19 2015-NMCA-048, ¶ 12, 347 P.3d 738 (stating that determining the weight and effect

1 of evidence is reserved to the jury as the fact-finder). In finding Defendant guilty, the
2 jury rejected the propositions and conclusion that Defendant advances, and it is not
3 within our purview to “re-weigh the evidence to determine if there was another
4 hypothesis that would support innocence[.]” *State v. Garcia*, 2005-NMSC-017, ¶ 12,
5 138 N.M. 1, 116 P.3d 72. Defendant also argues that because Agent Sanchez
6 conceded that there was no indication Defendant could retrieve the deleted files or
7 that he had exercised any control over the deleted files other than to delete them, the
8 evidence is insufficient. Under the totality of the evidence presented, we disagree. *See*
9 *State v. Schuller*, 843 N.W.2d 626, 637 (Neb. 2014) (“It seems reasonable to infer that
10 [the defendant] deleted the files to hide evidence of his earlier knowing possession”
11 of child pornography).

12 {20} The jury was instructed that it had to find Defendant possessed child
13 pornography on or about April 6, 2012, and/or June 12, 2012. We conclude that the
14 evidence was sufficient for a rational jury to find beyond a reasonable doubt that
15 Defendant intentionally possessed child pornography on both of these dates.

16 **2. Fundamental Instructional Error**

17 {21} Defendant did not object to the jury instructions in the district court, and he
18 therefore waived his right to argue that reversible error in the instructions requires a
19 new trial. *See* Rule 12-321(A) NMRA (“To preserve an issue for review, it must

1 appear that a ruling or decision by the trial court was fairly invoked.”). Defendant can
2 only prevail on appeal by demonstrating that the jury instructions as given constitute
3 fundamental error. *See State v. Sandoval*, 2011-NMSC-022, ¶ 13, 150 N.M. 224, 258
4 P.3d 1016 (stating that if error in the jury instructions was not preserved in the district
5 court, the appellate court reviews the instructions for fundamental error rather than
6 reversible error).

7 {22} In *State v. Anderson*, 2016-NMCA-007, ¶ 9, 364 P.3d 306, this Court set forth
8 the standard for determining whether a jury verdict may be set aside for fundamental
9 error in jury instructions as follows:

10 [W]e first apply the standard for reversible error by determining if a
11 reasonable juror would have been confused or misdirected by the jury
12 instructions that were given. Juror confusion or misdirection may stem
13 from instructions which, through omission or misstatement, fail to
14 provide the juror with an accurate rendition of the relevant law. If we
15 determine that a reasonable juror would have been confused or
16 misdirected by the instructions given, our fundamental error analysis
17 requires us to then review the entire record, placing the jury instructions
18 in the context of the individual facts and circumstances of the case, to
19 determine whether the defendant’s conviction was the result of a plain
20 miscarriage of justice. If such a miscarriage of justice exists, we deem
21 it fundamental error.

22 (Alteration, internal quotation marks, and citations omitted); *see also Sandoval*,
23 2011-NMSC-022, ¶¶ 13, 15, 20, 21 (describing the foregoing analytical framework
24 for determining fundamental error in the jury instructions).

1 {23} We begin with an analysis of the statutory elements. The Act uses precisely
2 defined terms to describe what is commonly understood to be pornography.
3 Pornography under the Act is “any obscene visual or print medium” that depicts “any
4 prohibited sexual act[.]” Section 30-6A-3(A).¹ Using these defined terms, Section 30-

16 ¹Section 30-6A-2 states:

17 As used in the Sexual Exploitation of Children Act . . . :

18 A. “prohibited sexual act” means:

19 (1) sexual intercourse, including genital-genital, oral-genital,
20 anal-genital or oral-anal, whether between persons of the same or
21 opposite sex;

22 (2) bestiality;

23 (3) masturbation;

24 (4) sadomasochistic abuse for the purpose of sexual
25 stimulation; or

10 (5) lewd and sexually explicit exhibition with a focus on the
11 genitals or pubic area of any person for the purpose of sexual
12 stimulation;

13 B. “visual or print medium” means:

14 (1) any film, photograph, negative, slide, computer diskette,
15 videotape, videodisc or any computer or electronically generated
16 imagery; or

15 (2) any book, magazine or other form of publication or
16 photographic reproduction containing or incorporating any film,
17 photograph, negative, slide, computer diskette, videotape,
18 videodisc or any computer generated or electronically generated
19 imagery;

20

1 6A-3(A) sets forth the elements of sexual exploitation of children (possession) as
2 follows:

3 It is unlawful for a person to intentionally possess any obscene visual or
4 print medium depicting any prohibited sexual act or simulation of such
5 an act *if* that person knows or has reason to know that the obscene
6 medium depicts any prohibited sexual act or simulation of such act *and*
7 *if* that person knows or has reason to know that one or more of the
8 participants in that act is a child under eighteen years of age.

9 (Emphasis added). Stated in plain language, and broken down into its constituent
10 parts, Section 30-6A-3(A) makes it a crime to: (1) “intentionally possess” a “visual
11 or print medium” such as a photograph or computer image that depicts pornography
12 if: (2) a person “knows or has reason to know” that the medium depicts any
13 “prohibited sexual act;” and (3) the person “knows or has reason to know that one or
14 more of the participants in that act is a child under eighteen years of age.” In other
15 words, it is not a crime under Section 30-6A-3(A) to intentionally possess
16 pornography. However, it is a crime if a person intentionally possesses pornography

21 E. “obscene” means any material, when the content if taken as
22 a whole:

23 (1) appeals to a prurient interest in sex, as determined by the
24 average person applying contemporary community standards;

25 (2) portrays a prohibited sexual act in a patently offensive
26 way; and

27 (3) lacks serious literary, artistic, political or scientific value.

1 and that person “knows or has reason to know” that one or more of the participants
2 in the pornography “is a child under eighteen years of age.”

3 {24} The jury was instructed on the essential elements of possession of child
4 pornography as follows:

5 For you to find [D]efendant committed the act of sexual
6 exploitation of children (possession) as charged in Count 1, the [S]tate
7 must prove to your satisfaction beyond a reasonable doubt each of the
8 following elements of the crime:

- 9 1. [D]efendant had any obscene visual medium in his possession;
- 10 2. [D]efendant knew the obscene medium depicted a prohibited
11 sexual act²;
- 12 3. [D]efendant knew or had reason to know that one of the
13 participants was under the age of eighteen years of age;
- 14 4. This happened in New Mexico on or about the 6th day of April,
15 2012, and/or the 19th day of June, 2012.

16 Defendant contends the instructions suffer from fundamental error in three respects
17 in that they do not: (1) require a finding that Defendant “intentionally possessed”
18 child pornography as required by Section 30-6A-3(A); (2) require a finding of
19 recklessness, the scienter required by the First Amendment; and (3) inform the jury

20 ²We note that this instruction required the jury to find that Defendant “knew”
21 the obscene visual medium depicted a sexual act, a higher standard than what is
22 required by Section 30-6A-3(A), that a person “knows or has reason to know” such
23 a fact.

1 that merely deleting the images from the computer is not legally sufficient to
2 constitute possession. We now turn to these arguments.

3 **A. Intentional Possession**

4 {25} Defendant first argues that Section 30-6A-3(A) requires a person to
5 “intentionally possess” child pornography and that the instructions erroneously
6 omitted this *mens rea* requirement. Specifically, Defendant contends that because the
7 instruction only required the jury to find that Defendant had child pornography “in
8 his possession,” rather than with a specific intent to “intentionally possess” child
9 pornography, it is fundamentally flawed. We disagree.

10 {26} Defendant’s argument overlooks the structure of the statute and other
11 instructions given to the jury. The jury was instructed, first, that it had to find that
12 Defendant “had any obscene visual medium in his possession[.]” There is no dispute
13 that each of the computer images admitted into evidence constitute an “obscene visual
14 medium” that depicts a “prohibited sexual act,” that is, that they depict pornography.
15 The jury was given an instruction on “possession” that conforms with UJI 14-130
16 NMRA as follows:

17 A person is in possession of an obscene visual medium when, on
18 occasion in question, he knows what it is, he knows it is on his person
19 or in his presence and he exercises control over it.

20 Even if the object is not in his physical presence, he is in possession
21 if he knows what it is and where it is and he exercises control over it.

1 A person’s presence in the vicinity of the object or his knowledge of
2 the existence or the location of the object is not, by itself, possession.

3 This instruction required the jury to find that Defendant knew he had pornographic
4 computer images, that he knew they were on his person or in his presence, and that
5 he exercised control over them. In order to find “possession” under this instruction,
6 the jury necessarily had to find that the possession was “knowing.” *See People v.*
7 *Kent*, 970 N.E.2d 833, 839 (N.Y. 2012) (noting that “[t]he exercise of dominion or
8 control is necessarily knowing” (alteration, internal quotation marks and citation
9 omitted)). The jury was also instructed that it was required to find that Defendant
10 “acted intentionally” and that “[a] person acts intentionally when he purposely does
11 an act which the law declares to be a crime.” This instruction therefore required the
12 jury to additionally find that it was Defendant’s purpose to possess the pornography.
13 Taken together, these instructions required the jury to find that Defendant
14 “intentionally” possessed the pornography; that is, Defendant’s possession of the
15 pornography was both intentional and knowing.

16 {27} It would have been preferable for the first paragraph of the jury instructions to
17 require a finding that Defendant “intentionally had any obscene visual medium in his
18 possession,” but as we have pointed out, omitting the word “intentionally” would not
19 cause jury confusion or misdirection because the instructions actually required the
20 jury to find that Defendant’s possession of the child pornography was intentional.

1 Jury instructions are “sufficient if they fairly and correctly state the applicable law.”
2 *State v. Rushing*, 1973-NMSC-092, ¶ 20, 85 N.M. 540, 514 P.2d 297. Since there was
3 no reversible error, it follows that there was no fundamental error in the instructions.

4 **B. Scierter Requirement Under the First Amendment**

5 {28} Secondly, Defendant argues that the essential elements instruction requiring
6 the jury to find that Defendant “knew or had reason to know” that one of the
7 participants was under the age of eighteen years is inconsistent with the requirement
8 that he act intentionally and the minimum scierter required by the First Amendment
9 to the United States Constitution, which Defendant contends is recklessness. We have
10 already determined that the essential elements instruction complies with the statutory
11 requirement of “intentional possession” of a medium, visual or print, that depicts
12 obscenity. This is separate from the additional statutory requirement that a person
13 “knows or has reason to know that one or more of the participants in that act is a child
14 under eighteen years of age.” Section 30-6A-3(A). We therefore turn to Defendant’s
15 argument that the instruction on this element is flawed with fundamental error
16 because it does not require the jury to find recklessness, which Defendant contends
17 the First Amendment requires.

18 {29} Possession of child pornography is not protected by the First Amendment. *See*
19 *Osborne v. Ohio*, 495 U.S. 103, 111 (1990). States have a compelling interest in

1 “safeguarding the physical and psychological well-being of a minor” and “[t]he
2 prevention of sexual exploitation and abuse of children constitutes a government
3 objective of surpassing importance.” *New York v. Ferber*, 458 U.S. 747, 756-57
4 (1982) (internal quotation marks and citation omitted). Moreover, while pornography
5 is entitled to First Amendment protection and can only be banned if deemed to be
6 obscene under *Miller v. California*, 413 U.S. 15, 36-37 (1973), pornography that
7 depicts minors can be proscribed, consistent with the First Amendment, whether or
8 not the images are obscene. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 240 (2002).
9 Nonetheless, the power to criminalize the possession of child pornography is not
10 without limits. *See Ferber*, 458 U.S. at 764. Child pornography laws, like obscenity
11 statutes, present a risk of self-censorship of constitutionally protected material.
12 Therefore, “[a]s with obscenity laws, criminal responsibility [for possession of child
13 pornography] may not be imposed without some element of scienter on the part of the
14 defendant.” *Id.* at 765. However, what level of scienter is constitutionally required,
15 consistent with the First Amendment, to criminalize the possession of child
16 pornography has not been decided by the United States Supreme Court. *See*
17 *Commonwealth v. Kenney*, 874 N.E.2d 1089, 1102 (Mass. 2007) (noting the absence
18 of a decision from the United States Supreme Court on what level of scienter is
19 constitutionally required to convict a person of possession of child pornography);

1 *State v. Mauer*, 741 N.W.2d 107, 113 (Minn. 2007) (noting that the minimum
2 standard of scienter required for child pornography “remains unclear” because it has
3 not yet been defined by the United States Supreme Court). Defendant would have us
4 follow *Mauer*, however, we find *Kenney* more persuasive, and follow its reasoning.
5 {30} In *Mauer*, the Minnesota Supreme Court considered what level of scienter is
6 required to satisfy the First Amendment under a Minnesota statute making it a crime
7 to possess child pornography if the defendant “has reason to know” that the work
8 involves a minor. 741 N.W.2d at 109 (internal quotation marks and citation omitted).
9 The court concluded that the words “reason to know” are ambiguous in the context
10 of the First Amendment, and resorted to rules of statutory construction to determine
11 their meaning under its statute. *Id.* at 112-13. The court said that in *Osborne*, 495 U.S.
12 at 115, the United States Supreme Court “approved a recklessness standard,” and
13 concluded that the phrase “has reason to know” in Minnesota’s statute should
14 likewise require a recklessness standard. *Mauer*, 741 N.W.2d at 115 (internal
15 quotation marks and citation omitted). Following statutory and case law definitions
16 of “recklessness” and “recklessly,” the *Mauer* court held that, “a possessor of child
17 pornography has ‘reason to know’ that a pornographic work involves a minor where
18 the possessor is subjectively aware of a ‘substantial and unjustifiable risk’ that the
19 work involves a minor.” *Id.* (quoting Minn. Stat. § 617.247 subd. 4(a)).

1 {31} In our view, this standard is not constitutionally required, and unnecessarily
2 confuses what is required under Section 30-6A-3(A). *Osborne* does hold that a
3 finding of recklessness satisfies the constitutional requirement of “some element of
4 scienter” in a statute criminalizing the possession of child pornography, 495 U.S. at
5 115, but *Osborne* does not require a finding of recklessness. Again, the United States
6 Supreme Court has not established what level of scienter is required to make
7 possession of child pornography a crime; it has only stated that “some element of
8 scienter” is required. On the other hand, in *Ginsberg v. New York*, 390 U.S. 629, 633-
9 34, 643 (1968), the United States Supreme Court approved of a scienter requirement
10 expressed as a “reason to know” in a statute that made it a crime “knowingly to sell”
11 material defined to be obscene to a minor under seventeen.

12 {32} We are more persuaded by *Kenney* in which the court held that Massachusetts’s
13 possession of child pornography scienter requirement that a defendant “knows or
14 reasonably should know to be under the age of [eighteen] years of age” is
15 constitutionally sufficient. 874 N.E.2d at 1102-03 (internal quotation marks and
16 citation omitted). Child pornography, by definition, depicts children performing
17 sexual acts. In most cases, the image itself gives a person a “reason to know” that the
18 person depicted is under eighteen years of age. *See United States v. Katz*, 178 F.3d
19 368, 373 (5th Cir. 1999) (“A case by case analysis will encounter some images in

1 which the models are prepubescent children who are so obviously less than [eighteen]
2 years old that expert testimony is not necessary or helpful to the fact finder.”); *State*
3 *v. Reinbold*, 824 N.W.2d 713, 723 & n.20, 724 (Neb. 2013) (noting that several courts
4 have concluded that it is not always necessary for the prosecution to present expert
5 testimony on the minor’s age); *State v. May*, 829 A.2d 1106, 1118-19 (N.J. Super. Ct.
6 App. Div. 2003) (stating that the images themselves that were admitted into evidence
7 proved that the ages of those depicted were under sixteen years of age); *State v.*
8 *Alinas*, 2007 UT 83, ¶ 31, 171 P.3d 1046 (stating that courts have generally
9 recognized that, based on visual examination, jurors are capable of determining
10 whether the children depicted are under eighteen years of age). The statutory
11 requirement that a person “has reason to know” that a child depicted is under eighteen
12 years of age requires “some element of scienter.” The State’s “burden of proof on that
13 element may be satisfied with evidence that the physical disparity between the subject
14 of the sexually explicit material and a person who is eighteen years of age is such that
15 it would be obvious (beyond a reasonable doubt) to a reasonable person that the
16 material was proscribed.” *Kenney*, 874 N.E.2d at 1103. A defendant may present
17 evidence that the defendant reasonably did not know the child’s age, in which case
18 the state will be required to “prove that no reasonable person would not have known
19 that the child subject was under the age of eighteen.” *Id.*

1 {33} No argument was made at trial that the children in the images admitted into
2 evidence were not obviously under eighteen years of age, and there is no basis for us
3 to conclude that the jury was misled or confused by the instructions they received.

4 {34} We hold that the scienter requirement in Section 30-6A-3(A) that a person
5 “knows or has reason to know” that one or more of the participants depicted in the
6 child pornography is under eighteen, is constitutionally sufficient.

7 The fact that there will be very few cases at the margin raising doubt as
8 to the age of the child, with the vast majority of cases being self-evident
9 as to age, is sufficient, given the authority of the [l]egislature to regulate
10 in this area, to conclude that the scienter requirement of the statute is
11 constitutionally valid.

12 *Kenney*, 874 N.E.2d at 1103-04. Because there was no error in the jury instructions
13 on this element of the crime, there was no fundamental error.

14 **C. Deletion Does Not Equate With Possession**

15 {35} This brings us to Defendant’s last argument under this point, that the
16 instructions suffered from fundamental error because they failed to include a
17 statement that passing possession of the images for the sole purpose of deleting them
18 from a computer is not legally sufficient to constitute possession. We disagree. The
19 instructions required the jury to find that Defendant “intentionally possessed” the
20 medium depicting the child pornography. Finding “intentional possession” under the
21 instructions given required the jury to find that Defendant did more than exercise

1 passing control over the images for the purpose of deleting them. We therefore reject
2 Defendant's last argument of fundamental error.

3 **3. Admission of Sexual Items Into Evidence**

4 {36} Before beginning his opening statement, the prosecutor approached the bench
5 and advised the court that he intended to discuss that the investigators found bestiality
6 on Defendant's computer, together with sex toys and male enhancement products in
7 Defendant's bedroom. The prosecutor argued that this evidence was probative of
8 Defendant's intent and that he was a sexual deviant. Defense counsel objected to the
9 sex toys and male enhancement products on grounds that it was prejudicial and
10 irrelevant to whether Defendant possessed child pornography. The district court ruled
11 that evidence of the sex toys and male enhancement products could be mentioned
12 because it was relevant to showing a prurient interest, motive, and intent. The district
13 court also ruled that this evidence could be mentioned because proving a prohibited
14 sexual act under the child pornography statute requires proof of a sexually explicit
15 exhibition for the purpose of sexual stimulation. Defendant contends that the district
16 court erred in ruling that the evidence could be mentioned in the State's opening
17 statement, and in subsequently allowing its admission into evidence under Rules 11-
18 403 and 11-404 NMRA. We agree that the evidence was inadmissible but that its
19 admission into evidence was harmless error under the circumstances.

1 {37} The admission of evidence under Rules 11-403 and 11-404(B) is reviewed for
2 an abuse of discretion. *State v. Otto*, 2007-NMSC-012, ¶ 9, 141 N.M. 443, 157 P.3d
3 8 (“We review the [district] court’s decision to admit evidence under Rule 11-404(B)
4 for [an] abuse of discretion.”). “An abuse of discretion occurs when the ruling is
5 clearly against the logic and effect of the facts and circumstances of the case.” *Otto*,
6 2007-NMSC-012, ¶ 9 (internal quotation marks and citation omitted); see *State v.*
7 *Chamberlain*, 1991-NMSC-094, ¶ 9, 112 N.M. 723, 819 P.2d 673 (“The [district]
8 court is vested with great discretion in applying Rule [11-]403, and it will not be
9 reversed absent an abuse of that discretion.”).

10 {38} Rule 11-404(B)(1) directs that “[e]vidence of a crime, wrong, or other act is not
11 admissible to prove a person’s character in order to show that on a particular occasion
12 the person acted in accordance with the character.” However, such evidence “may be
13 admissible for another purpose, such as proving motive, opportunity, intent,
14 preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” Rule
15 11-404(B)(2). Rule 11-404(B)(1) articulates a principle that evidence of other crimes,
16 wrongs, or acts should generally be excluded. *State v. Jones*, 1995-NMCA-073, ¶ 5,
17 120 N.M. 185, 899 P.2d 1139. However, if such evidence is offered for a proper
18 purpose under Rule 11-404(B)(2), a district court is required to articulate or identify
19 the consequential fact to which the proffered evidence is directed. *Jones*, 1995-

1 NMCA-073, ¶ 5; *see State v. Aguayo*, 1992-NMCA-044, ¶ 18, 114 N.M. 124, 835
2 P.2d 840 (“The initial threshold for admissibility of prior uncharged conduct is
3 whether it is [for a proper purpose] probative on any essential element of the charged
4 crime.”). Finally, even if the evidence is ruled admissible, a district court must engage
5 in the balancing process under Rule 11-403. *See id.* (“The court may exclude relevant
6 evidence if its probative value is substantially outweighed by a danger of one or more
7 of the following: unfair prejudice, confusing the issues, misleading the jury, undue
8 delay, wasting time, or needlessly presenting cumulative evidence.”).

9 {39} We agree with Defendant that the sex toys and male enhancement products
10 found in Defendant’s bedroom had no particular relevance to any issue in the case.
11 Rather, the evidence served no purpose other than to portray Defendant’s character,
12 in the words of the prosecutor, as a “sexual deviant.” We therefore conclude that the
13 evidence was not admissible under Rule 11-404(B). The district court’s ruling was
14 that the evidence was relevant. Rule 11-401 NMRA mandates that in order for
15 evidence to be relevant, it must satisfy a two-part test: (1) it must have “any tendency
16 to make a fact more or less probable than it would be without the evidence,” and (2)
17 the evidence “is of consequence in determining the action.” A person’s possession of
18 sex toys and male enhancement products does not make it more likely that the person
19 will search for, download, view, save, and delete child pornography using a computer.

1 *Cf. United States v. Quarles*, 25 M.J. 761, 775 (N-M. Ct. Crim. App. 1987) (“We fail
2 to see how possession of sexual aids and erotic magazines equates with being a sex
3 fiend or deviant much less having any probative value” as to whether the defendant
4 sodomized his children). In other words, the evidence was irrelevant and
5 inadmissible. *See* Rule 11-402 NMRA (“Irrelevant evidence is not admissible.”). We
6 therefore conclude that the district court abused its discretion in admitting this
7 evidence. *See State v. Perez*, 2016-NMCA-033, ¶ 11, 367 P.3d 909 (noting that an
8 abuse of discretion arises from the exercise of discretion based on a misunderstanding
9 of the law).

10 {40} We must still determine if the error in admitting the sex toys and male
11 enhancement products into evidence was reversible error. The admission of evidence
12 in violation of the Rules of Evidence is a non-constitutional error, and a non-
13 constitutional error is harmless unless there is a “reasonable probability” that the error
14 affected the verdict. *State v. Vargas*, 2016-NMCA-038, ¶ 24, 368 P.3d 1232. “To
15 determine the likely effect of the error, courts must evaluate all of the circumstances.
16 These circumstances include other evidence of the defendant’s guilt, the importance
17 of the erroneously admitted evidence to the prosecution’s case, and the cumulative
18 nature of the error.” *Id.* (citation omitted); *see State v. Tollardo*, 2012-NMSC-008,
19 ¶¶ 43-44, 275 P.3d 110 (setting forth considerations for reviewing courts when

1 assessing whether the improper admission of evidence is harmless error). The
2 evidence, not objected to, is that there were more than nine hundred downloads in a
3 year, most of which were known images of child pornography, to the IP address used
4 by Defendant's computer; that in March 2012, "exorbitant" amounts of child
5 pornography were being downloaded to that same IP address; that in April 2012,
6 child pornography was retrieved from a "shared" folder of a computer at that IP
7 address; that when the search warrant was executed, "massive" amounts of non-child
8 pornography, highly categorized, were found on Defendant's computer in addition
9 to images of child pornography. This evidence evinces an intense, excessive interest
10 in sex, and we fail to see any reasonable probability that admission of the sex toys and
11 male enhancement products impacted the verdict. We therefore hold that the
12 erroneous admission of this evidence was harmless.

13 **4. Ineffective Assistance of Counsel**

14 {41} Defendant argues that his attorney's ineffective assistance resulted in the
15 admission of prejudicial, inadmissible evidence, and that he is therefore entitled to
16 a new trial. The framework for deciding a claim of ineffective assistance of counsel
17 is well settled.

18 For a successful ineffective assistance of counsel claim, a defendant
19 must first demonstrate error on the part of counsel, and then show that
20 the error resulted in prejudice. Trial counsel is generally presumed to
21 have provided adequate assistance. An error only occurs if

1 representation falls below an objective standard of reasonableness. If
2 any claimed error can be justified as a trial tactic or strategy, then the
3 error will not be unreasonable. With regard to the prejudice prong,
4 generalized prejudice is insufficient. Instead, a defendant must
5 demonstrate that counsel's errors were so serious, such a failure of the
6 adversarial process, that such errors undermine judicial confidence in
7 the accuracy and reliability of the outcome. A defendant must show a
8 reasonable probability that, but for counsel's unprofessional errors, the
9 result of the proceeding would have been different.

10 *State v. Bernal*, 2006-NMSC-050, ¶ 32, 140 N.M. 644, 146 P.3d 289 (alterations,
11 internal quotation marks, and citations omitted). We now turn to each claim
12 Defendant makes.

13 **A. Evidence of Bestiality**

14 {42} After the prosecutor advised the district court that he wanted to tell the jury in
15 his opening statement that bestiality was found on Defendant's computer, the district
16 court disallowed the evidence of bestiality on grounds that it was too prejudicial.
17 However, defense counsel said she did not object because it was found on
18 Defendant's computer and because similar search terms are used to find material
19 related to bestiality and child pornography. The district court therefore ruled that if
20 defense counsel had no objection, the bestiality evidence could be mentioned as well.
21 Agent Sanchez later testified in cross-examination from defense counsel that
22 bestiality and child pornography search terms are mutually exclusive.

1 {43} Defendant argues that counsel was ineffective in allowing the highly
2 inflammatory and prejudicial bestiality evidence to be admitted because there is “no
3 doubt” it was inadmissible under Rules 11-404(B) and 11-403, and having agreed to
4 its admission, she had an obligation to bring in evidence substantiating that search
5 terms for bestiality and child pornography are similar. A reasonable trial strategy
6 could be that the bestiality pornography evidence, together with the other evidence
7 in the case, e.g., that Defendant had massive amounts of non-child pornography on
8 the external hard drive to his computer, which included cartoon pornography, that
9 was highly organized and categorized by type, actors, and the like, and that there was
10 no active or accessible child pornography on the hard drive demonstrated that
11 Defendant’s interest in sexual matters, while extreme and outrageous, did not include
12 an interest in child pornography. This argument was actually made in defense
13 counsel’s opening statement, as well as Defendant’s brief to this Court. Counsel’s
14 alleged error in this instance can appropriately be justified as a trial tactic or strategy.

15 **B. Sexual Child Story**

16 {44} Agent Lea Whitis from the Department of Homeland Security was present
17 during the search, primarily to catalogue the items seized, but she did walk through
18 the house. Upon entering Defendant’s room, she noted that the computer was on and
19 that there was a story on it with child characters and what she characterized as “sexual

1 overtones.” When she was asked how the story affected her, defense counsel objected
2 on the basis that the story was not produced in discovery and Agent Whitis did not
3 mention it in her interview. The prosecutor admitted that the story had not been
4 disclosed or produced in discovery. The district court sustained the objection on
5 relevancy grounds and because the story was not disclosed in discovery, while noting
6 that some evidence relating to the story had already been admitted without objection.

7 {45} Defendant argues that the failure to object to evidence of the child sex story
8 until after the State discussed it in their opening statement and the State had elicited
9 testimony about the story’s contents, constituted ineffective assistance of counsel, “as
10 the evidentiary challenges [to its admission] were clearly meritorious.” Whether the
11 child sex story was admissible is, however, subject to debate. *See Jaynes*, 2014 IL
12 App (5th) 120048, ¶¶ 55-57 (concluding that stories about underage sex found on the
13 defendant’s computer were admissible in a prosecution for possession of child
14 pornography to show that the defendant sought out sexual material involving children
15 and that it was knowing and voluntary, rather than inadvertent). We cannot conclude
16 that defense counsel provided ineffective assistance by failing to object to its receipt
17 in evidence.

18 **Defendant’s “Character”**

1 {46} Agent Keyes from the Department of Homeland Security was also present
2 when the search warrant was executed. She testified to the condition of Defendant's
3 room and the presence of sex toys, male enhancement products, and a weapon inside
4 the room. Asked if she also learned anything else about Defendant, Agent Keyes said
5 that Defendant's mother described Defendant as someone who was not very social,
6 did not have friends or go out, and spent most of his time in his room.

7 {47} Defendant contends that defense counsel's failure to object to the testimony
8 about what Defendant's mother said rendered counsel's assistance ineffective.
9 Defendant asserts the evidence was inadmissible hearsay of Defendant's character
10 that was inadmissible under Rules 11-404(B) and 11-403. The State counters that this
11 testimony was "merely cumulative" of the testimony of Agent Keyes and other agents
12 describing Defendant's room, and therefore was not prejudicial. In any event, the
13 failure to object may have resulted from a deliberate choice not to object in order to
14 avoid bringing attention to the testimony. *See State v. Martinez*, 1996-NMCA-109,
15 ¶ 26, 122 N.M. 476, 927 P.2d 31 ("Failure to object to every instance of objectionable
16 evidence does not render counsel ineffective; rather, failure to object falls within the
17 ambit of trial tactics." (internal quotation marks and citation omitted)).

18 {48} In conclusion, we are unable to adequately determine whether any of the
19 foregoing alleged shortcomings of counsel deprived Defendant of constitutionally

1 adequate and effective assistance of counsel. Concluding that Defendant has failed
2 to present a prima facie case of ineffective assistance of counsel, we reject
3 Defendant's claims without prejudice to Defendant pursuing habeas corpus
4 proceedings based on these arguments. *See Bernal*, 2006-NMSC-050, ¶¶ 33, 36
5 (expressing a general preference for ineffective assistance of counsel claims to be
6 brought and resolved in habeas corpus proceedings, and when a prima facie case is
7 not made on appeal, the claim is rejected without prejudice to raise the claim in a
8 habeas corpus proceeding).

9 **5. Comment on Defendant's Silence**

10 {49} In her opening statement, defense counsel discussed the execution of the search
11 warrant. Defense counsel said that the jury would hear that Defendant's parents let
12 the police into the home and were in fact cooperative in asking and answering
13 questions, that there were no problems, and that Defendant "refused to talk without
14 a lawyer."

15 {50} During his testimony, Detective Rennie was asked how cooperative Defendant
16 and his parents were when the search warrant was executed. Detective Rennie said
17 that Defendant's father was compliant and responsive, and that Defendant's mother
18 was also cooperative and answered questions. The prosecutor asked if Defendant had
19 been willing to talk to the officers, and Detective Rennie answered, "no." Defense

1 counsel objected, the parties approached the bench, and the district court immediately
2 sustained the objection and admonished the prosecutor not to comment on
3 Defendant's silence. The district court noted defense counsel's opening statement and
4 ruled that it would not declare a mistrial, even though none was requested. The
5 district court told the prosecutor not to mention this again and instructed the jury to
6 disregard the question and answer.

7 {51} Defendant contends that the district court committed error in refusing to
8 declare a mistrial because the question asked of Detective Rennie and his answer
9 constituted an unconstitutional comment on Defendant's silence. Because the facts
10 are undisputed, our review of Defendant's claim is de novo. *See State v. Gutierrez*,
11 2003-NMCA-077, ¶ 9, 133 N.M. 797, 70 P.3d 787.

12 {52} Like the district court, we observe that the question to Detective Rennie
13 apparently had its genesis in defense counsel's opening statement. New Mexico
14 recognizes the doctrine of invited error. *State v. Jim*, 2014-NMCA-089, ¶ 22, 332
15 P.3d 870 ("It is well established that a party may not invite error and then proceed to
16 complain about it on appeal."). This doctrine has been applied to the Fifth
17 Amendment privilege to remain silent. *See, e.g., State v. Crumley*, 625 P.2d 891, 894
18 (Ariz. 1981) (in banc); *Shingledecker v. State*, 734 So. 2d 483, 483-84 (Fla. Dist. Ct.
19 App. 1999) (per curiam); *State v. Batchelor*, 579 S.E.2d 422, 428-29 (N.C. Ct. App.

1 2003); However, it is not necessary for us to consider whether the doctrine and any
2 limits to that doctrine apply in this case. Assuming that Defendant’s pre-arrest silence
3 is entitled to constitutional protection, we conclude that Defendant’s constitutional
4 right to remain silent was not used against him.

5 {53} In *Greer v. Miller*, 483 U.S. 756, 759 (1987), the defendant testified in his own
6 defense, and on cross-examination, he was asked, “Why didn’t you tell this story to
7 anybody when you got arrested?” Defense counsel immediately objected and
8 requested a mistrial. *Id.* The trial judge denied the motion for mistrial, sustained the
9 objection, and instructed the jury to disregard. *Id.* The prosecutor did not further
10 pursue the matter, and did not mention it in his closing argument. *Id.* The United
11 States Supreme Court held that, under the circumstances, the prosecutor had not used
12 the defendant’s silence. *Id.* at 764-65. Similarly, in *State v. Smith*, 2001-NMSC-004,
13 ¶ 36, 130 N.M. 117, 19 P.3d 254, our Supreme Court held, “We hold that there was
14 no violation of [the d]efendant’s right to silence when the prosecutor’s single
15 question was not answered, defense counsel immediately objected, the prosecutor did
16 not pursue the matter further, and defense counsel refused a curative instruction.”
17 There is no material difference here.

18 {54} Although Detective Rennie answered the question, there was an immediate
19 objection that was sustained, the prosecutor was admonished not to mention

1 Defendant's silence again, the prosecutor complied, and the jury was instructed to
2 disregard the question and the answer. Under the circumstances, we hold that there
3 was no unconstitutional, impermissible use made of Defendant's silence.

4 **6. Remaining Arguments**

5 {55} We summarily answer Defendant's remaining arguments. First, Defendant
6 argues, pursuant to *State v. Franklin*, 1967-NMSC-151, 78 N.M. 127, 428 P.2d 982,
7 and *State v. Boyer*, 1985-NMCA-029, 103 N.M. 655, 712 P.2d 1, that the district
8 court lacked personal and subject matter jurisdiction. Defendant filed numerous pro
9 se motions asserting that the district court lacked jurisdiction. Among the grounds
10 asserted were that Defendant is a private American citizen, not a United States
11 citizen, with a private rather than a public residence in New Mexico; that he is not the
12 person named in the criminal information because his name is not spelled in capital
13 letters; that the prosecution could not proceed because there is no "flesh and blood"
14 victim. No authority is cited to us in support of Defendant's argument, and we do not
15 consider it. *See State v. Ibarra*, 1993-NMCA-040, ¶ 13, 116 N.M. 486, 864 P.2d 302
16 ("We are entitled to assume, when arguments are unsupported by cited authority, that
17 supporting authorities do not exist.").

18 {56} Secondly, Defendant argues that he was denied his right to conflict-free
19 counsel because counsel did not agree with jurisdictional arguments asserted in

1 Defendant's pro se motion to dismiss for lack of jurisdiction, or his motion to excuse
2 the district court judge on the grounds that he was biased against pro se litigants.
3 Defendant fails to cite to any authority supporting the legal validity of those motions,
4 or to support his assertion that defense counsel has an obligation to argue in support
5 of pro se motions that have no merit. We therefore decline to consider this argument
6 any further. *See id.*

7 {57} Finally, Defendant argues that he was denied his constitutional right to
8 represent himself. To determine if a defendant has made a valid, knowing, intelligent,
9 and voluntary waiver of his constitutional right to counsel, *State v. Reyes*, 2005-
10 NMCA-080, ¶¶ 4, 9, 137 N.M. 727, 114 P.3d 407, a district court is required to
11 "inform itself regarding a defendant's competency, understanding, background,
12 education, training, experience, conduct and ability to observe the court's procedures
13 and protocol." *State v. Chapman*, 1986-NMSC-037, ¶ 10, 104 N.M. 324, 721 P.2d
14 392. Defendant prevented the district court from making that determination when he
15 refused to answer any of the district court's questions relating to his ability to
16 represent himself, and simply kept repeating that he is "standing on [his] documents."
17 There was no error in denying Defendant's request to represent himself.

18 **CONCLUSION**

19 {58} The judgment and sentence of the district court is affirmed.

1 {59} **IT IS SO ORDERED.**

2

3

MICHAEL E. VIGIL, Judge

4 **WE CONCUR:**

5

6 **JAMES J. WECHSLER, Judge**

7

8 **JONATHAN B. SUTIN, Judge**