

1 proposing to affirm. Defendant has responded with a memorandum in opposition. Not
2 persuaded, we affirm.

3 **Prior Bad Act Evidence**

4 {2} Defendant continues to challenge the admission of prior bad act evidence. [MIO
5 3] “We review the admission of evidence under an abuse of discretion standard and
6 will not reverse in the absence of a clear abuse.” *See State v. Sarracino*, 1998-NMSC-
7 022, ¶ 20, 125 N.M. 511, 964 P.2d 72.

8 {3} Here, Defendant had been found guilty of aggravated battery of a household
9 member and she filed a de novo appeal in district court. [RP 3] In the district court
10 trial, Victim testified that Defendant had hit him in the past. [MIO 3; DS 6] Defendant
11 claims that these prior incidents were inadmissible prior bad act evidence. *See* Rule
12 11-404(B) NMRA. However, defense counsel signaled in opening statement that they
13 would present evidence of Victim’s prior bad acts, i.e. that he was the aggressor in
14 their prior altercations. [DS 6-7] Consistent with the opening statement, Defendant’s
15 testimony referenced these prior bad acts. [DS 2-3] As a result, the admission of the
16 prior bad acts of Defendant was admissible under Rule 11-404(A)(2)(b). Because
17 Defendant had opened the door on prior bad act evidence, we conclude that the district
18 court acted within its discretion in admitting this evidence irrespective of any claims
19 of prejudice. *See* Rule 11-403 NMRA. It also follows that no prior notice was required

1 because Defendant was presumed to know that prior bad act evidence would be
2 admissible if she opened the door.

3 **Comment on Right to Silence**

4 {4} Defendant continues to claim that the court erred in admitting testimony on
5 Defendant's invocation of her right to be silent. [MIO 8] *See generally State v.*
6 *DeGraff*, 2006-NMSC-011, ¶ 12, 139 N.M. 211, 131 P.3d 61 (discussing comments
7 on silence). Here, Defendant's brother testified that he picked Defendant up after the
8 incident. [DS 5] Defendant was upset and appeared to have been in a physical
9 confrontation. [DS 5] Defendant's brother testified that he drove her to the police
10 station, where an officer there did not get Defendant's side of the story but instead
11 treated her as a guilty party; as a result, he told Defendant not to say anything. [DS 5]
12 Defendant's docketing statement indicated that the brother's comments were elicited
13 by the prosecutor, who said "you told her not to speak to [the] officer[.]" [DS 9]

14 {5} Under these circumstances, the district court could construe the prosecutor's
15 comments as limited to an attack on the brother's credibility as a defense witness. *See*
16 *State v. Rojo*, 1999-NMSC-001, ¶ 55, 126 N.M. 438, 971 P.2d 829 (noting that test
17 is whether prosecutor's comments were directly aimed at a defendant's right to remain
18 silent). The brother had stated that he wanted to have the officers take pictures of
19 Defendant's injuries, because she was the victim. [DS 5] The prosecutor's question

1 was limited to his statement to his sister, and did not inquire into Defendant's
2 response. As such, the district court could construe this as limited to the brother's own
3 credibility.

4 {6} For the reasons set forth above, we affirm.

5 {7} **IT IS SO ORDERED.**

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MICHAEL E. VIGIL, Judge

8 **WE CONCUR:**

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JULIE J. VARGAS, Judge

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STEPHEN G. FRENCH, Judge