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

7 **STATE OF NEW MEXICO,**

8 Plaintiff-Appellee,

9 v.

NO. 28,866

10 **STEVEN H.,**

11 Child-Appellant.

12 **APPEAL FROM THE DISTRICT COURT OF VALENCIA COUNTY**

13 **John W. Pope, District Judge**

14 Gary K. King, Attorney General

15 Santa Fe, NM

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18 Albuquerque, NM

19 for Appellee

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21 Albuquerque, NM

22 for Appellant

23 **MEMORANDUM OPINION**

24 **GARCIA, Judge.**

1 Steven H. (Child) appeals from an adjudication of delinquency based upon the
2 district court's finding that he committed third-degree criminal sexual contact of a
3 minor (CSCM) under thirteen years of age, contrary to NMSA 1978, Section 30-9-
4 13(C)(1) (2003), and NMSA 1978, Section 32A-2-3(A) & (B) (2005) (amended
5 2009). Child raises four issues on appeal: (1) Child's due process right was violated
6 by the victim advocate's active involvement in the case; (2) Child's right to prepare
7 a defense was violated when the district court denied Child the opportunity to
8 interview Jane Doe (Victim), ordered late interviews with the State's remaining
9 witnesses, and denied Child's motion for a continuance; (3) there was insufficient
10 evidence for Child's adjudication of delinquency; and (4) Child received ineffective
11 assistance of counsel. We conclude that the district court violated Child's right to
12 prepare a defense by denying Child the opportunity to conduct a pretrial interview
13 with Victim based upon the conduct of Child's counsel. Furthermore, retrial would
14 not implicate double jeopardy concerns because sufficient evidence supports Child's
15 adjudication of delinquency. As a result, we reverse Child's adjudication of
16 delinquency and remand to the district court for a new trial. Because we reverse on
17 these grounds, we do not reach the remaining issues raised by Child on appeal.

18 **BACKGROUND**

1 On October 1, 2007, the State filed a petition asserting that Child was a
2 delinquent child based upon his alleged commission of one count of first-degree
3 criminal sexual penetration (CSPM) (child under thirteen years of age) and two counts
4 of second-degree CSCM (child under thirteen years of age). The State subsequently
5 issued a witness list, including Victim, Victim’s parents, and several additional
6 witnesses who reside in Arizona.

7 After the parties’ unsuccessful attempt to reach an agreement regarding
8 scheduling interviews of Victim and other witnesses, Child filed a motion to compel
9 witness interviews, requesting that the district court require the State to produce
10 Victim and other Arizona witnesses for interviews at least six weeks prior to trial. At
11 the resulting hearing, the parties agreed that Victim was subject to a pretrial interview,
12 but disagreed regarding when and how the interview would be conducted since Victim
13 was five-years-old and lived out-of-state. Child argued that mistaken identity was a
14 potential issue because Victim knew another boy named Steven, and Victim never
15 referred to Child as “Steven,” but only as “the big, tall boy.” As a result, Child
16 contended that Victim’s interview needed to be scheduled with sufficient time to
17 allow the defense to hire an expert to evaluate Victim’s statement. Child further relied
18 on *State v. Orona*, 92 N.M. 450, 589 P.2d 1041 (1979), to argue that not allowing

1 Child sufficient time before trial to interview Victim and other witnesses would deny
2 Child the right to prepare a defense.

3 The State recognized that Victim was “the main witness in this case” and
4 argued that it would be “abusive” to require Victim to travel from Arizona to New
5 Mexico for both a pretrial interview and trial in such a short period of time.
6 Additionally, the State argued that since Child already had information from a safe
7 house interview with Victim, an interview the weekend before trial would allow Child
8 sufficient time to prepare a defense. In response, Child argued that the safe house
9 interview was insufficient since it “was probably less than ten minutes [in duration],
10 and it wasn’t done in a manner that’s conducive to protecting a defendant’s rights,
11 especially another juvenile’s rights.” Child further contended that Child had no
12 opportunity to ask questions regarding the possible mistaken identity in the safe house
13 interview.

14 The district court ordered that Child be allowed to interview Victim and other
15 witnesses in Phoenix, Arizona. The court reasoned that interviewing Victim in
16 Phoenix would provide a reasonable compromise between Victim’s comfort and
17 Child’s right to prepare for trial. The court further reasoned that it would be “very

1 difficult for [Child] to prepare for trial without having any kind of contact with
2 [Victim] before trial.” Specifically, the court concluded that
3 if [Child is] going to be able to even attempt to put up a mistaken identity
4 defense, he’s almost going to have to be able to interview [Victim]. And
5 . . . if he is going to interview [Victim] for a mistaken identity defense,
6 he’s going to almost have to be able to do that with some time to be able to
7 verify . . . what [Victim] says.

8 Subsequent to the scheduled interviews in Phoenix, the State filed a notice of
9 ineffective assistance of defense counsel and a motion for protective order. The State
10 alleged and provided evidence that Child’s counsel attempted to videotape the witness
11 interviews without either a prior agreement with the State or a court order, and Child’s
12 counsel “became enraged, hostile and violent” after the State refused to allow
13 videotaping of the interviews. The State further provided evidence that the first
14 interview with an investigating detective was unsuccessful because after the detective
15 refused to answer questions that he deemed irrelevant, Child’s counsel then told the
16 detective to “get out.” Due to this conduct, Child’s counsel was escorted from the
17 building, and the interviews with Victim and other witnesses were cancelled. The
18 State additionally provided evidence that Child’s counsel subsequently had Victim’s
19 parents personally served with subpoenas for alternate pretrial interviews despite the
20 State’s rejection of interviews on the specified date. The State argued that defense

1 counsel's conduct fell below the standard of care for a reasonably effective attorney,
2 and that the district court should find defense counsel ineffective. In the alternative,
3 the State asked the district court to enter a protective order that would require that all
4 interaction between Child's counsel, Victim, and the State's additional witnesses be
5 supervised by the district court. The State did not ask the court to prohibit Child from
6 interviewing the complaining witness. In response, Child filed a motion to dismiss
7 due to prosecutorial misconduct and violation of Child's right to prepare a defense.
8 Child argued that defense counsel attempted to videotape the interviews at the request
9 of Child's expert witness and that the State allowed the interviews to be cancelled
10 without regard for Child's rights or the court order.

11 The district court heard the parties' motions at a hearing on March 6, 2008. The
12 court expressed concern that trial was coming up and that Victim had not yet been
13 interviewed. Victim's advocate then stated that she had "very grave concerns" about
14 subjecting Victim to a pretrial interview with Child's counsel based upon his conduct
15 in Phoenix. As a result, Victim's advocate asked the court to exercise its discretion
16 to prevent Child's counsel from interviewing Victim since very young children are
17 protected from confrontation even in a trial setting, and Child's "constitutional rights
18 are not at play." The State subsequently argued that one of its biggest concerns was

1 whether Child was going to receive effective assistance of counsel that would “defend
2 [Child’s] constitutional rights,” and further described its attempts to protect those
3 rights by providing pretrial interviews. The State asserted that the interviews did not
4 occur “[s]olely because of what [Child’s counsel] did.” As a result, the State asked
5 the court to find defense counsel ineffective. In the alternative, the State asked that
6 the witness interviews be supervised by the court, reasoning that its main concern was
7 protecting Victim in light of defense counsel’s conduct.

8 Child responded by correcting several alleged misrepresentations, including
9 explaining that defense counsel asked to videotape the interviews at the request of
10 Child’s expert witness. Child further contended that although defense counsel and the
11 State were both assertive toward each other, defense counsel was not unprofessional.
12 Child confirmed that the interviews were ultimately “shut down by the officers
13 because the officers were butting heads with [Child’s counsel] so bad that [he] finally
14 did ask the officer to leave.” Finally, Child argued that the main question was how
15 Child was going to receive a fair trial under the circumstances since Child was not
16 given an opportunity to interview the witnesses. Child further contended that he
17 needed to conduct the interviews in order to prepare Child’s theory of the case and
18 allow experts to prepare to testify regarding Child’s theory of the case.

1 The district court ultimately denied the State’s motion to find defense counsel
2 ineffective, reasoning that although there were certain ethical issues, the court
3 believed Child’s counsel to be “quite capable of going forward with this case.”
4 Without providing additional reasoning, the court further stated that it was “not going
5 to order that [Victim] have any pretrial interviews at this point,” and that the court
6 would order that the remaining interviews be supervised by the court. In a written
7 order following the hearing, the court found that Child’s right to prepare a defense did
8 not include videotaping the witness interviews and that “pretrial interviews should be
9 conducted utilizing protective measures.” As a result, the court ordered that pretrial
10 interviews with Victim “will not be allowed” and that a bailiff of the court would
11 supervise the interviews with all other witnesses for the State. At a subsequent
12 hearing, the court clarified that the conduct of Child’s counsel was the reason for the
13 protective measures.

14 At a hearing on March 13, 2008, the district court heard Child’s motion to
15 dismiss, or in the alternative, to exclude witness testimony or grant Child a
16 continuance. Child argued that due to the court’s order regarding pretrial interviews,
17 his “opportunity to get a fair trial and to prepare his defense [was] irretrievably lost
18 at [that] point.” Child further contended and his expert witness testified that a

1 continuance was needed to allow Child time to prepare for the interview with the
2 State's expert on the following day and also to allow Child's expert time to adequately
3 evaluate the statements before trial. Child argued that he had insufficient time to
4 prepare a defense regarding mistaken identity or evaluate whether testimony would
5 constitute impermissible vouching for the credibility of Victim. The court summarily
6 denied Defendant's motion for dismissal, suppression, or a continuance without any
7 reasoning or findings.

8 During a bench trial on March 17-18, 2008, Child waived cross-examination
9 of Victim. In Child's closing statement, Child argued that Victim had never referred
10 to Child as "Steven" but as "the boy" or the "big tall boy," but the State in rebuttal
11 contended that no testimony was presented to support Child's argument. The district
12 court adjudged Child delinquent based upon the commission of third-degree CSCM,
13 and Child subsequently appealed. We reverse and remand for a new trial.

14 **DISCUSSION**

15 **Right to Prepare a Defense**

16 Child argues that his right to prepare a defense was violated when the district
17 court denied Child the opportunity to interview Victim, ordered late interviews with
18 the State's remaining witnesses, and denied Child's motion for a continuance.

1 Specifically, Child contends that since Victim referred to another person named
2 “Steven” and referred to Child only as “that boy,” an interview with Victim was
3 crucial in order for Child to prepare a mistaken identity defense.

4 We review a district court’s granting or denial of discovery in a criminal case
5 under an abuse of discretion standard. *State v. Layne*, 2008-NMCA-103, ¶ 6, 144
6 N.M. 574, 189 P.3d 707. “We cannot say the [district] court abused its discretion by
7 its ruling unless we can characterize it as clearly untenable or not justified by reason.”
8 *State v. Casillas*, 2009-NMCA-034, ¶ 24, 145 N.M. 783, 205 P.3d 830 (internal
9 quotation marks and citation omitted).

10 Initially, we note that in the district court below, the parties and Victim’s
11 advocate agreed that Victim was subject to a pretrial interview, but disputed when and
12 how the interview would be conducted. As a result, the issue of whether Victim was
13 subject to an interview is not before this Court, and we only review whether the
14 district court abused its discretion by denying Child an opportunity to interview
15 Victim based upon defense counsel’s conduct.

16 Child relies on *Orona* to argue that his right to prepare a defense was violated.
17 92 N.M. at 452-53, 589 P.2d at 1043-44. In *Orona*, the defendant was charged with
18 CSPM involving a child under thirteen years of age, the state’s witness list included

1 both the alleged victim and her older sister, and the alleged victim and her sister were
2 the state's main witnesses. *Id.* at 451-52, 589 P.2d at 1042-43. Prior to trial, the
3 prosecution presented evidence that the defendant had contacted the alleged victim's
4 sister in an attempt to persuade her not to testify against him. *Id.* at 451, 589 P.2d at
5 1042. As a consequence, the district court entered an order that neither the defendant
6 nor his attorneys could contact or depose the alleged victim or her sister. *Id.*
7 However, the court "allow[ed] copies of the witnesses' grand jury testimony to be
8 made available to defense counsel in order to assist [the] defendant in preparation of
9 his case." *Id.* Our Supreme Court reversed the defendant's convictions, holding that
10 the circumstances did not justify an outright prohibition on access to the alleged
11 victim and her sister and that the order violated the defendant's right to prepare a
12 defense. *Id.* at 452-53, 589 P.2d at 1043-44. Instead, the Court reasoned that the
13 district court could have "fashion[ed] some means to ensure that the witnesses [would]
14 be protected from intimidation without unduly impairing [the] defendant's right to
15 prepare a defense." *Id.*

16 We conclude that *Orona* controls this case. Similarly to *Orona*, Child was
17 charged with CSPM involving a child under thirteen years of age in which the alleged
18 victim was one of the State's main witnesses. *See id.* at 451-52, 589 P.2d at 1042-43.

1 Furthermore, where defendant's access to grand jury testimony was not sufficient to
2 protect the defendant's right to prepare for trial in *Orona*, we conclude that Child's
3 access to Victim's safe house interview and other discovery was not sufficient to
4 protect Child's right to prepare a defense in this case. *See id.* at 451, 453, 589 P.2d
5 at 1042, 1044. Specifically, the safe house interview and other discovery did not
6 address any discrepancies in identity and did not give Child the opportunity to
7 question Victim regarding the possible mistake of identity. Finally, just as *Orona*
8 concluded that an absolute restriction on the defendant's access to the alleged victim
9 was not justified by the defendant's improper conduct, we conclude that an absolute
10 restriction on Child's access to Victim was not justified by the conduct of defense
11 counsel. *See id.* at 452-53, 589 P.2d at 1043-44. We echo our Supreme Court's
12 concerns expressed in *Orona*. We are aware of the sensitive nature of this case, the
13 nature of the alleged crimes, and the problems that could have arisen in a pretrial
14 interview due to Victim's age and the conduct of defense counsel. *See id.* at 453, 589
15 P.2d at 1044. However, we conclude that the district court abused its discretion by
16 denying Child any subsequent opportunity to interview Victim before trial. Instead,
17 the district court could have fashioned some reasonable protective means, short of an
18 absolute restriction, that would have allowed the necessary interview so Child could

1 prepare an adequate defense, while ensuring that Victim would be protected from
2 improper intimidation by defense counsel. *See id.*

3 The State argues that *Orona* is distinguishable because the district court did not
4 impose an “absolute restriction” on Child’s access to Victim. *See id.* (reasoning that
5 “in the absence of some demonstrable good cause, a [district] court may not impose
6 an absolute restriction on defense counsel’s access to the [s]tate’s prospective
7 witnesses”). Specifically, the State contends that the court did not deny Child the
8 opportunity to interview Victim because Child’s counsel could have interviewed
9 Victim in Phoenix had his conduct not resulted in the cancellation of the interview.
10 The State further argues that since the “sole reason” for the order prohibiting the
11 interview was the conduct of counsel hired by Child, Child in effect chose to not
12 conduct the interview by choosing to continue retaining said counsel. Finally, the
13 State argues that the restriction was only a partial restriction because it only covered
14 the last eleven or fewer days prior to trial.

15 We conclude that the district court’s order was an absolute restriction on
16 Child’s access to Victim. The State had failed to make Victim available for interviews
17 prior to the cancellation of the interview in Phoenix. The court’s subsequent order
18 clearly states that “pretrial interviews will not be allowed with [Victim],” and the

1 order does not include any exception permitting interviews to be conducted by
2 alternate counsel or under any other circumstances. Furthermore, although the order
3 only covered the remaining time period immediately before trial, the language and
4 effect of the order imposed an absolute restriction that had the undisputed effect of
5 preventing Child from interviewing Victim before trial.

6 Finally, we decline to impute the conduct of Child's counsel to Child. *Orona*
7 clarifies that "[r]egardless of who prevents the interviews, the effect may be to deprive
8 [the] defendant of his right to prepare a defense." *Id.* at 452, 589 P.2d at 1043. *Orona*
9 further declined to impute the defendant's motives in contacting the alleged victim
10 and her sister to the defendant's counsel. *Id.* at 453, 589 P.2d at 1044. The
11 defendant's own improper conduct was insufficient to waive his right to interview the
12 alleged victim in *Orona*, and we conclude that the improper conduct of Child's
13 counsel is also insufficient to waive Child's right to prepare an adequate defense by
14 interviewing Victim in an appropriate manner under court supervision. *See id.* As a
15 result, we conclude that the effect of the district court's order was in fact an absolute
16 restriction that prevented Child from interviewing Victim prior to trial.

17 The State additionally argues that even if this Court determines that an absolute
18 restriction occurred, the State showed good cause for the restriction by presenting

1 evidence of Victim’s vulnerability and defense counsel’s conduct. We disagree. First,
2 Victim’s age did not constitute good cause for an absolute restriction since both
3 parties and Victim’s advocate previously agreed that Victim was subject to an
4 appropriate interview. *See Orona*, 92 N.M. at 451, 453, 589 P.2d 1042, 1044
5 (concluding that the alleged victim’s young age of less than thirteen years did not
6 constitute good cause for an absolute restriction). Second, the conduct of Child’s
7 counsel did not constitute good cause for an absolute restriction where the district
8 court was capable of developing restrictive protective measures for Victim’s interview
9 that were adequate to respond to counsel’s conduct. *See id.* (concluding that the
10 defendant’s conduct did not constitute good cause for an absolute restriction where
11 less restrictive measures could have been adopted to proceed while continuing to
12 protect the witnesses). Specifically, we note that the State did not request an absolute
13 restriction preventing Child from interviewing Victim, but instead requested that the
14 “[c]ourt supervise any and all interaction between [Child’s counsel] and [Victim].”
15 As a result, we conclude that the district court could have adopted less restrictive
16 measures to protect Victim than an absolute restriction preventing Child from
17 interviewing Victim prior to trial.

1 Finally, the State argues that the district court’s order did not prejudice Child
2 because the Child had access to Victim’s safe house interview and the interviews of
3 other witnesses. In *Orona*, our Supreme Court determined that “[n]o more prejudice
4 need be shown than that the [district] court’s order may have made a potential avenue
5 of defense unavailable to the defendant.” *Id.* at 452, 589 P.2d at 1043. As a result of
6 the district court’s denial of an interview with Victim prior to trial, Child had no
7 opportunity to question Victim regarding the possible mistake of identity in order to
8 prepare a mistaken identity defense. Furthermore, the district court previously
9 concluded that “if [Child is] going to be able to even attempt to put up a mistaken
10 identity defense, he’s almost going to have to be able to interview [Victim].” Child’s
11 attempt at trial to argue that a mistake of identity occurred was unsuccessful because
12 no testimony was presented in support of that defense. The district court’s denial of
13 a pretrial interview with Victim denied Child the opportunity to discover any
14 impeaching evidence. *See Layne*, 2008-NMCA-103, ¶ 13 (“Impeachment is crucial
15 to effective cross-examination because it gives a party the opportunity to discredit a
16 witness, so the [trier of fact] has a way to determine whether a witness is untruthful
17 or inaccurate.” (internal quotation marks and citation omitted)). Consequently, we
18 determine that the district court’s denial of the opportunity to interview Victim

1 prejudiced Child because it appears from the record available to have resulted in a
2 potential mistake of identity defense being unavailable to Child. Because Child’s due
3 process right to prepare a defense was violated by the district court’s order that denied
4 an interview of Victim prior to trial, we reverse Child’s adjudication of delinquency.

5 **Sufficiency of the Evidence**

6 Having determined that the violation of Child’s right to prepare for trial
7 mandates reversal, we now consider Child’s argument that there was insufficient
8 evidence for his adjudication of delinquency and that his charges should be dismissed.
9 We note that retrial would implicate double jeopardy concerns if insufficient evidence
10 was presented at trial to support Child’s adjudication of delinquency. *See State v.*
11 *Mascareñas*, 2000-NMSC-017, ¶ 31, 129 N.M. 230, 4 P.3d 1221 (reasoning that as
12 long as sufficient evidence for a conviction was presented at trial, double jeopardy
13 concerns are not implicated by reversing and remanding for a new trial).

14 In reviewing the sufficiency of the evidence, we analyze “whether direct or
15 circumstantial substantial evidence exists and supports a verdict of guilt beyond a
16 reasonable doubt with respect to every element essential for conviction.” *State v.*
17 *Kent*, 2006-NMCA-134, ¶ 10, 140 N.M. 606, 145 P.3d 86. “We determine whether
18 a rational factfinder could have found that each element of the crime was established

1 beyond a reasonable doubt.” *Id.* Furthermore, “we must view the evidence in the
2 light most favorable to the guilty verdict, indulging all reasonable inferences and
3 resolving all conflicts in the evidence in favor of the verdict.” *State v. Cunningham*,
4 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176.

5 To support Child’s adjudication of delinquency based on the act of third-degree
6 CSCM as a lesser-included offense of Count III of the petition, the State was required
7 to prove beyond a reasonable doubt that Child unlawfully and intentionally caused
8 Victim to touch the penis of Child, that Victim was twelve years of age or younger,
9 and that the touching occurred in New Mexico on or about July 28, 2007. *See* § 30-9-
10 13(A) & (C)(1); UJI 14-925 NMRA.

11 Child argues that there was insufficient evidence that Child touched Victim’s
12 buttocks and vagina or that the touching was intentional. This argument is
13 inconsistent with the evidence and adjudication in this case. Child’s adjudication of
14 guilt was based on Child’s alleged act of unlawfully and intentionally causing Victim
15 to touch the intimate parts of Child. As a result, we conclude that Child’s argument
16 is unsupported by the record. We further note that at trial, Victim testified that the
17 boy named “Steven” who lived in New Mexico asked her to “[t]ouch stuff on him,”
18 and Victim drew a picture showing where she touched him. Additionally, Victim’s

1 out-of-court statement regarding sexual contact between Victim and Child was
2 introduced as an excited utterance. Finally, Child's therapist testified that Victim was
3 suffering from an anxiety disorder, which included symptoms of arousal, regressive
4 behavior, and nervousness around strangers. As a result, we conclude that sufficient
5 evidence supported Child's adjudication of delinquency for the purpose of our double
6 jeopardy analysis.

7 **CONCLUSION**

8 For the foregoing reasons, we reverse Child's adjudication of delinquency and
9 remand to the district court for a new trial.

10 **IT IS SO ORDERED.**

11 _____
12 **TIMOTHY L. GARCIA, Judge**

13 **WE CONCUR:**

1

2 **MICHAEL D. BUSTAMANTE, Judge**

3

4 **RODERICK T. KENNEDY, Judge**