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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. 29,110

10 **ANDRES RAMOS,**

11 Defendant-Appellant.

12 **APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY**

13 **Douglas R. Driggers, District Judge**

14 Gary K. King, Attorney General

15 Santa Fe, NM

16 Francine A. Chavez, Assistant Attorney General

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18 for Appellee

19 Jacqueline L. Cooper, Acting Chief Public Defender

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21 Santa Fe, NM

22 for Appellant

23 **MEMORANDUM OPINION**

24 **GARCIA, Judge.**

1 Defendant appeals his conviction for criminal sexual contact of a minor
2 (CSCM) in the second-degree (child under 13), contrary to NMSA 1978, Section 30-
3 9-13(B)(1) (2003). On appeal, Defendant argues that the district court erred in
4 refusing to instruct the jury on the unlawfulness of the touching. We hold that the
5 district court properly instructed the jury and therefore affirm Defendant's conviction.

6 **BACKGROUND**

7 At the time of the incident, Defendant and Victim were next door neighbors.
8 Victim, who was then five years old, was playing at Defendant's house with
9 Defendant's two-year-old son when Defendant began spraying the children with
10 water. Defendant's conviction stems from Victim's allegation that, during this time,
11 Defendant reached his hand inside her pants and underwear and touched her vulva,
12 which Victim referred to at trial as her "private part."

13 **DISCUSSION**

14 On appeal, Defendant argues that the district court erred in refusing his tendered
15 jury instructions which required the jury to find, as an element of CSCM, that the
16 touching of Victim's vulva was unlawful. Because Defendant preserved this issue
17 below, we review for reversible error. *See State v. Benally*, 2001-NMSC-033, ¶ 12,
18 131 N.M. 258, 34 P.3d 1134. Under this standard of review, we determine "whether
19 a reasonable juror would have been confused or misdirected by the jury instruction."

1 *Id.* (internal quotation marks and citations omitted). In making this determination, we
2 consider whether the district court’s refusal to instruct the jury on unlawfulness
3 resulted in “instructions which, through omission or misstatement, fail[ed] to provide
4 the juror with an accurate rendition of the relevant law.” *Id.*

5 In support of this issue, Defendant makes two specific arguments. First,
6 Defendant argues that because he tendered a jury instruction on unlawfulness, this
7 Court must reverse as a matter of law under a reversible error standard of review,
8 regardless of the evidence presented below. Second, Defendant argues that the
9 evidence below nonetheless supported submission of his tendered jury instruction on
10 unlawfulness because, if any touching of Victim’s vulva occurred, it occurred
11 inadvertently during innocent horseplay. For reasons discussed below, we are
12 unpersuaded by both of Defendant’s arguments.

13 **Review for Reversible Error Does Not Change the Guiding Principle that the**
14 **District Court Properly Denies a Tendered Jury Instruction Regarding**
15 **Unlawfulness if the Evidence Does Not Support its Submission**

16 It is well established that an instruction on the unlawfulness of a touching is
17 required only when the element of unlawfulness is factually in dispute. *See State v.*
18 *Orosco*, 113 N.M. 780, 784, 833 P.2d 1146, 1150 (1992) (holding that an instruction
19 for unlawfulness is not required if the element of unlawfulness is not at issue); *see*
20 *also* UJI 14-925 NMRA, Use Note 4 (providing that the bracketed element of

1 unlawfulness should be used “if the evidence raises a genuine issue of the
2 unlawfulness of the defendant’s actions”). In this regard, the unlawfulness of a
3 touching is at issue when a defendant does not dispute that he or she touched the
4 victim, but asserts that the touching lacked the requisite criminal intent. *See, e.g.,*
5 *State v. Osborne*, 111 N.M. 654, 660, 808 P.2d 624, 630 (1991) (recognizing that
6 “[t]here are any number of circumstances where . . . a touching [of a minor’s intimate
7 parts] is not merely excusable or justifiable but entirely innocent, such as a touching
8 for the purpose of providing reasonable medical treatment, nonabusive parental or
9 custodial care, or, in some circumstances, parental or custodial affection” (internal
10 quotation marks and citation omitted)). Similarly, the unlawfulness of a touching is
11 at issue when the defendant denies the touching, but alternatively contends that if a
12 touching took place, it was for a lawful purpose. *See, e.g., State v. Landers*, 115 N.M.
13 514, 516, 853 P.2d 1270, 1272 (Ct. App. 1992) (recognizing that the lawfulness of a
14 touching is at issue if a defendant presents evidence to support the defense that he did
15 not sexually touch the victim or, alternatively, that if he touched the victim in
16 prohibited places, it was for a lawful purpose), *overruled on other grounds by State*
17 *v. Kerby*, 2005-NMCA-106, ¶¶ 28-29, 138 N.M. 232, 118 P.3d 740, *aff’d*, 2007-
18 NMSC-014, 141 N.M. 413, 156 P.3d 704. Conversely, if there is no evidence of
19 lawful behavior, then the district court is not required to instruct on the element of

1 unlawfulness. *See, e.g., State v. Sandate*, 119 N.M. 235, 244, 889 P.2d 843, 852 (Ct.
2 App. 1994) (holding that a jury instruction on unlawfulness for a charge of CSCM
3 was not required because there is no situation where the defendant's placing of his
4 tongue on or around the minor victim's vagina could be considered lawful).

5 Defendant acknowledges the foregoing case law, but suggests that its
6 application on appeal changes depending on whether the review is for fundamental
7 error or for reversible error. To this end, Defendant asserts that while the evidence
8 below must support the submission of a jury instruction on unlawfulness when the
9 review is for fundamental error, a request alone for a jury instruction on unlawfulness
10 merits its submission when the review is for reversible error. Thus, from Defendant's
11 perspective, because his jury instructions on unlawfulness were requested and refused,
12 automatic reversible error occurred. Stated another way, Defendant argues that by
13 requesting a jury instruction on unlawfulness, under a reversible error standard of
14 review, he necessarily placed the element of unlawfulness at issue, irrespective of the
15 actual evidence or facts introduced at trial. We disagree.

16 The main analytical distinction between a fundamental error analysis and a
17 reversible error analysis is the level of scrutiny afforded to claims of error. *State v.*
18 *Cunningham*, 2000-NMSC-009, ¶ 21, 128 N.M. 711, 998 P.2d 176 (recognizing that
19 parties who have properly preserved an alleged error for appeal are afforded a less

1 onerous level of scrutiny under a reversible error standard). Thus, under a reversible
2 error analysis, the failure to include an essential element in the elements instruction
3 can never be corrected by including the concept elsewhere in the instructions. *Id.* In
4 contrast, under a fundamental error analysis, the failure to include an essential element
5 in the elements instruction may be corrected by subsequent proper instructions that
6 adequately address the omitted element. *Id.* ¶¶ 21-22.

7 This differing level of scrutiny, however, does not detract from the guiding
8 principle regarding whether a jury instruction should be submitted in the first place.
9 Submission of the requested instruction depends upon whether the evidence supports
10 it. *State v. Lucero*, 1998-NMSC-044, ¶ 5, 126 N.M. 552, 972 P.2d 1143 (stating that
11 “[i]t is basic that a defendant is entitled to have his [or her] theory of the case
12 submitted to the jury under proper instructions *where the evidence supports it*”
13 (alteration in original) (emphasis added) (internal quotation marks and citation
14 omitted)). Our case law extends this guiding principle equally to review for reversible
15 error and fundamental error. *See State v. Brown*, 1996-NMSC-073, ¶ 34, 122 N.M.
16 724, 931 P.2d 69 (holding that “[w]hen evidence at trial supports the giving of an
17 instruction on a defendant’s theory of the case, failure to so instruct is reversible
18 error” (emphasis added)); *State v. Lopez*, 1996-NMSC-036, ¶ 11, 122 N.M. 63, 920
19 P.2d 1017 (recognizing that the failure to include an essential element in an instruction

1 for a crime does not constitute fundamental error “*when the element that was omitted*
2 *from the instruction was not at issue in the trial*” (emphasis added)). Furthermore, the
3 Use Note for UJI 14-925 specifically indicates that the bracketed element of
4 unlawfulness should be used “if the evidence raises a genuine issue of the
5 unlawfulness of the defendant’s actions.” UJI 14-925, Use Note 4; *see State v.*
6 *Barber*, 2004-NMSC-019, ¶ 10 n.1, 135 N.M. 621, 92 P.3d 633 (recognizing that
7 unlike committee commentary, the use notes for jury instructions are adopted by our
8 Supreme Court and binding on district courts). Thus, in the present case, the
9 determinative inquiry under our review for reversible error is whether or not the
10 evidence supported submission of Defendant’s tendered jury instructions for
11 unlawfulness of the touching.

12 **The Evidence Presented Did Not Warrant Submission of a Jury Instruction on**
13 **Unlawfulness of the Touching**

14 While Defendant at trial unequivocally denied touching Victim in any way, he
15 now asserts that any touching of Victim’s vulva, if it happened at all, “could have
16 occurred unintentionally while he was engaged in otherwise appropriate horseplay”
17 with Victim. We recognize that jury instructions on inconsistent theories are not
18 improper if supported by the evidence. *See State v. Skippings*, 2011-NMSC-021, ¶ 22,
19 ___ N.M. ___, ___ P.3d ___ (recognizing that where evidence of two theories is
20 presented to the jury, jury instructions on inconsistent theories may be issued to the

1 jury). Thus, we proceed to consider whether there was any view of the evidence
2 presented that could have supported a reasonable inference that Defendant touched
3 Victim’s vulva and the touching was lawful. *See Poore v. State*, 94 N.M. 172, 175,
4 608 P.2d 148, 151 (1980) (“[A] defendant is still entitled to an instruction which sets
5 forth his theory of the case if there is supportive evidence.”); *Orosco*, 113 N.M. at
6 784, 833 P.2d at 1150 (holding that an instruction for unlawfulness is required if there
7 is “any evidence or suggestion in the facts, however slight, that could have put the
8 element of unlawfulness in issue”).

9 Victim testified that, while she was playing at Defendant’s house with
10 Defendant’s son, the children found an empty candy bottle. Victim testified that
11 Defendant’s wife rinsed out the candy bottle and filled it with water, and that
12 Defendant then sprayed the children with water from the bottle. Victim testified that,
13 during this time, she lifted up her shirt, and Defendant squirted her belly with water
14 and rubbed her belly. Victim testified that she told Defendant not to touch her belly.
15 Significantly, Victim also testified that Defendant stuck his hand inside her pants and
16 underwear and touched her “private part” with his hand.

17 Both Victim and her mother testified that, after Victim returned home, she told
18 her mother about the touching. Victim’s mother related her observation that Victim’s
19 private parts were red and that Victim told her that Defendant “squeezed . . .” “[h]er

1 pee-pee, her ‘colita’ in front,” which is how Victim referred to her private part at the
2 time of the incident. Victim’s mother additionally testified that, when she
3 subsequently confronted Defendant, he initially denied touching or being anywhere
4 near Victim. Eventually, in response to more questioning by Victim’s mother,
5 Defendant admitted rubbing Victim’s belly, but not touching her vulva.

6 At trial, Defendant denied touching either Victim’s vulva or belly. Defendant
7 further related that, when questioned by Investigator Palmer, he denied any touching
8 and speculated instead that Victim may have accused him of touching her private part
9 because her underwear was wet from water running down her torso. Lastly, witnesses
10 for Defendant—his son, his sister, and his wife—also testified that Defendant never
11 touched Victim in any way.

12 In support of his horseplay theory, Defendant points out that “[t]here was no
13 evidence that [Defendant] had a plan or scheme to molest [Victim] or that he had done
14 anything like this before.” Defendant also points out that everyone who testified
15 acknowledged that he was “playing with the children while they ran to and fro to the
16 trampoline.” Defendant suggests that these circumstances support a view of the
17 evidence in which Defendant may have touched Victim inadvertently during innocent
18 horseplay.

19 When examining the evidence relevant to Defendant’s “innocent horseplay”

1 argument, the only evidence presented of any contact with Victim was limited to
2 spraying Victim with water and touching her belly. Given this evidence, perhaps
3 Defendant is suggesting that his hand may have inadvertently touched Victim's vulva
4 in the course of spraying her with water or touching her belly. However, there was
5 no evidence to that effect, nor did Defendant argue below that the jury should have
6 viewed the evidence in that way. Furthermore, no reasonable inference can be made
7 that these circumstances would also result in Defendant separately and inadvertently
8 putting his hand inside Victim's pants and underwear to squeeze and touch her vulva.
9 Unlike a situation, for example, where a parent is bathing a small child who was
10 already undressed and in doing so touched the child's intimate parts, we hold that no
11 view of the evidence in this case supports Defendant's argument that he may have
12 inadvertently and lawfully put his hand inside Victim's pants and underwear, touching
13 her vulva, while spraying her with water or rubbing her belly. *See Sandate*, 119 N.M.
14 at 244, 889 P.2d at 852 (holding that a jury instruction on unlawfulness for a charge
15 of CSCM was not required because there is no situation where the defendant's placing
16 of his tongue on or around the minor victim's vagina could be considered lawful); *Cf.*
17 *Osborne*, 111 N.M. at 660, 808 P.2d at 630 (recognizing that "[t]here are any number
18 of circumstances where . . . a touching [of a minor's intimate parts] is not merely
19 excusable or justifiable but entirely innocent, such as a touching for the purpose of

1 providing reasonable medical treatment, nonabusive parental or custodial care, or, in
2 some circumstances, parental or custodial affection” (internal quotation marks and
3 citation omitted)). We therefore agree with the district court’s ruling that Defendant’s
4 innocent horseplay theory did not support the giving of an unlawfulness instruction
5 under the facts in this case. *Cf. Lucero*, 1998-NMSC-044, ¶ 5 (recognizing that
6 defendants are only entitled to have the jury instructed on their theory of the case
7 when the evidence supports it).

8 Moreover, to the extent Defendant suggests that Victim may have mistakenly
9 believed that he touched her private parts because her underwear became wet as the
10 water ran down her torso, we also disagree that this factual circumstance warranted
11 an unlawfulness instruction. Instead, this view of the evidence would simply call into
12 question whether Defendant actually touched Victim’s vulva. However, the jury
13 instruction actually given required the jury to determine whether Defendant touched
14 Victim’s vulva, which the jury did find. *See, e.g., State v. Venegas*, 96 N.M. 61, 63,
15 628 P.2d 306, 308 (1981) (“Ordinarily, a defendant is not entitled to a specific
16 instruction where the jury has already been adequately instructed upon the matter by
17 other instructions.”).

18 Despite the lack of evidence to support his horseplay theory, Defendant argues
19 that his Sixth Amendment right to a jury required the giving of an unlawfulness

1 instruction so the jury could consider whether any touching that occurred was lawful.
2 Defendant is of course entitled to have a jury determine whether the essential elements
3 of the crime were committed. However, apart from Defendant's outright denial of any
4 touching, the only evidence before the jury was of a touching of Victim's vulva that
5 could only be construed as unlawful. Thus, if the jury found that Defendant touched
6 Victim's vulva, which the jury did, the jury necessarily found that the touching was
7 unlawful. Accordingly, we find no merit to Defendant's claim that the refusal to give
8 an unlawfulness instruction amounted to a denial of his Sixth Amendment right to a
9 jury.

10 Ultimately, this case boiled down to a swearing match between Victim and
11 Defendant, with Victim alleging that Defendant touched her "private part" and
12 Defendant conversely denying that he touched Victim in any way. Thus, the factual
13 issue to be resolved by the jury was whether or not Defendant touched Victim's vulva
14 at all, as opposed to whether or not, in the course of a touching, Defendant
15 inadvertently touched Victim's vulva. Because no reasonable inference can be drawn
16 from the evidence that the lawfulness of the touching was at issue, we hold that the
17 district court properly denied Defendant's tendered jury instructions on unlawfulness.
18 *See Orosco*, 113 N.M. at 783-84, 786, 833 P.2d at 1149-50, 1152 (failing to instruct
19 on an element of a case is not reversible error if there was no dispute that the element

1 was established by the evidence).

2 **CONCLUSION**

3 Based on the foregoing analysis, we affirm.

4 **IT IS SO ORDERED.**

5
6

TIMOTHY L. GARCIA, Judge

7 **WE CONCUR:**

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9

MICHAEL D. BUSTAMANTE, Judge

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RODERICK T. KENNEDY, Judge