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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. 29,774

10 **CORNELIUS WHITFIELD,**

11 Defendant-Appellant.

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

13 **Ross C. Sanchez, District Judge**

14 Gary K. King, Attorney General

15 Andrew S. Montgomery, Assistant Attorney General

16 Santa Fe, NM

17 for Appellee

18 Liane E. Kerr

19 Albuquerque, NM

20 for Appellant

21 **MEMORANDUM OPINION**

22 **FRY, Judge.**

23 After a jury trial where the victim testified, Defendant Cornelius Whitfield was
24 convicted of first degree kidnaping, second degree criminal sexual penetration (CSP
25 II), and criminal sexual contact of a minor. On appeal, Defendant argues that the

1 victim's testimony should not have been admitted because he was incompetent to
2 testify and that the district court improperly allowed the State and its lay witnesses to
3 refer to the victim's mild mental retardation at trial. Having been alerted by the State
4 to a possible double jeopardy violation, we conclude that Defendant's convictions for
5 kidnaping and CSP II violate principles of double jeopardy, and we therefore remand
6 with instructions to vacate one of these convictions. We affirm on all other issues.

7 **BACKGROUND**

8 Because the parties are familiar with the factual and procedural background of
9 this case and, because this is a memorandum opinion, we do not provide a detailed
10 description of the events leading to this appeal. We refer to the relevant background
11 information in connection with each issue discussed.

12 **DISCUSSION**

13 Defendant raises two issues on appeal, arguing that the district court abused its
14 discretion in (1) determining that the Victim was competent to testify at trial; and (2)
15 allowing lay testimony regarding Victim's mild mental retardation but, at the same
16 time, excluding testimony regarding another medical diagnosis. Additionally, the
17 State has alerted us to a possible double jeopardy violation arising from Defendant's
18 convictions for kidnaping and criminal sexual penetration. We address each of these
19 issues in turn.

1 **1. Competency Determination**

2 Defendant argues that the district court erroneously determined that Victim was
3 competent to testify at trial. We review a trial court’s determination regarding the
4 competency of a witness for an abuse of discretion. *State v. Hueglin*, 2000-NMCA-
5 106, ¶¶ 21-24, 130 N.M. 54, 16 P.3d 1113; *see Apodaca v. AAA Gas Co.*, 2003-
6 NMCA-085, ¶ 60, 134 N.M. 77, 73 P.3d 215.

7 Pursuant to Rule 11-601 NMRA, “[e]very person is competent to be a witness
8 except as otherwise provided in these rules.” In applying Rule 11-601, “the trial
9 court’s role is to insure that witnesses meet a minium standard regarding the matters
10 on which they will testify, the minimum necessary to permit any reasonable person
11 to put any credence in their testimony.” *Hueglin*, 2000-NMCA-106, ¶ 22 (alterations
12 omitted) (internal quotation marks omitted). In essence, the trial court ensures that
13 witnesses meet a minium standard of competency, and the jury resolves questions of
14 the weight and credibility of the testimony. *Id.* We apply a general presumption that
15 all persons are competent to testify and “[o]rdinarily the party challenging competency
16 bears the burden to show the witness is incompetent.” *Apodaca*, 2003-NMCA-085,
17 ¶ 62.

18 In order to deem a witness to be competent, the district court must determine
19 that the witness has “a basic understanding of the difference between telling the truth

1 and lying, coupled with an awareness that lying is wrong and may result in some sort
2 of punishment.” *Hueglin*, 2000-NMCA-106, ¶ 24 (internal quotation marks omitted);
3 *see State v. Macias*, 110 N.M. 246, 249, 794 P.2d 389, 392 (Ct. App. 1990)
4 (“Competency means that the witness appreciates the duty to speak the truth and
5 possesses the intelligence and the capacities to observe, recollect, and communicate.”).

6 In the proceedings below, Defendant moved to exclude Victim as a witness on
7 competency grounds, and the district court subsequently held a hearing in which
8 Victim was sworn in and subjected to a voir dire examination by the judge in order to
9 determine Victim’s competency. In response to questions from the court, Victim
10 testified regarding the difference between telling the truth and telling a lie, that the
11 purpose of an oath was to tell the truth, that lying can result in punishment or being
12 placed under arrest, and that lying results in punishment in other contexts. The court
13 also posed wide-ranging questions concerning Victim’s family life, schooling, and
14 future plans in order to test Victim’s ability to observe, recollect, and communicate.
15 At the conclusion of the hearing, the district court made an oral ruling from the bench,
16 finding that Victim met “the minimum standards of competence [and] that a
17 reasonable person could put some credence in his testimony.” The court further found
18 that Victim understood the nature of an oath, the consequences of lying, and the
19 requirement of telling the truth at trial.

1 On appeal, Defendant contends that the district court abused its discretion in
2 making the above determination because: (1) Victim told the district court at the
3 hearing that he did not have a good memory and could not recall the events at issue,
4 (2) the questions asked at the hearing did not concern the events at issue, and (3)
5 Defendant was denied the right to present expert testimony on the issue of Victim's
6 competency.

7 We are not persuaded. Based on our review of the record and the transcript of
8 the hearing, we conclude that the district court did not err in finding that Victim was
9 competent to testify. Although Victim answered, "Not really, sir," when asked by the
10 district court judge whether he had a good memory of the sexual assaults, he went on
11 to state that he did remember some of the incidents at issue. He also testified that he
12 understood the importance of telling the truth regarding the incidents, that he would
13 tell the truth, and that if he did not know the answer to questions posed at trial
14 regarding the incidents, he would say "I don't remember . . . [o]r I don't know."
15 These responses, coupled with Victim's earlier answers regarding the meaning of an
16 oath and the consequences of lying, were adequate to meet the minimum standard for
17 competency, and the district court did not abuse its discretion in this regard. *See*
18 *Hueglin*, 2000-NMCA-106, ¶¶ 23-24 (holding that there was no abuse of discretion
19 where the trial court determined that the victim was competent to testify based in part

1 on the victim’s testimony that “she understood that she could get in big trouble if she
2 failed to tell the truth” and her promise to tell the truth (internal quotation marks
3 omitted)).

4 As for Defendant’s contention that the district court’s voir dire examination did
5 not concern the events at issue, we disagree for two reasons. First, there is no
6 requirement under Rule 11-601 that the voir dire examination must focus solely on the
7 factual circumstances of the case. Rather, we have previously emphasized that the
8 district court can make a competency determination even without an evidentiary
9 hearing and that “the judge making the [competency] determination has a good deal
10 of discretion to determine how the examination should be conducted.” *Macias*, 110
11 N.M. at 250, 794 P.2d at 393. Second, and more significantly, the transcript from the
12 hearing does not substantiate Defendant’s assertion that the voir dire examination did
13 not address the events at issue. The district court judge specifically asked Victim
14 questions at the hearing regarding Defendant and his interactions with Defendant. The
15 court also asked Victim if he knew why he was in court that day, to which Victim
16 responded, “Because [Defendant] sexually assaulted me.” At this point, the court
17 asked the questions discussed previously regarding Victim’s memory of the “sexual
18 assaults.” We also note that the district court gave defense counsel an opportunity to
19 submit voir dire questions during a recess in the jury room before the examination

1 commenced, and that defense counsel did not make any objections either during or
2 after the examination concluded. Thus, the record provides no basis for Defendant's
3 characterization on appeal of the district court's voir dire examination.

4 Finally, we are not persuaded by Defendant's assertion that he was denied the
5 right to present expert testimony on the issue of Victim's competency. In *Macias*, we
6 stated that "[a]lthough perhaps competency may be determined by means of a
7 psychological evaluation by a qualified expert who is subject to cross-examination,
8 ordinarily, competency should be determined by a voir dire examination [of the
9 witness by the trial court judge]." 110 N.M. at 250, 794 P.2d at 393. Thus, it was not
10 an abuse of discretion for the district court to make a competency determination based
11 solely on Victim's testimony. As we have already discussed above, Victim's
12 testimony formed a proper basis from which the court could conclude that he was
13 competent to testify. To the extent Defendant argues that a defense expert could have
14 addressed inconsistencies in statements made by Victim in pre-trial interviews or the
15 impact of Victim's medical conditions on his testimony, we conclude that these were
16 issues that spoke to Victim's credibility that fell within the purview of the jury. *See*
17 *Apodaca*, 2003-NMCA-085, ¶ 67 (holding there that "[a]ny confusion [the witness]
18 [may] have expressed in his recount of the events to the investigator, as well as his
19 medicated state were issues of fact that went to credibility and not admissibility and

1 were properly before the jury”); *see also Hueglin*, 2000-NMCA-106, ¶ 22. Thus,
2 based on the foregoing, we conclude that the district court made an adequate inquiry
3 into Victim’s competency and that it did not abuse its discretion in determining that
4 Victim was competent to testify.

5 **2. Testimony Regarding Victim’s Medical Conditions**

6 Defendant also challenges evidentiary rulings made by the district court
7 concerning the admissibility of lay witness testimony on Victim’s medical conditions.
8 Although difficult to discern from his brief-in-chief, Defendant appears to raise two
9 specific issues, arguing that: (1) the district court erroneously denied Defendant’s
10 request for a defense expert to testify regarding Victim’s medical conditions; and (2)
11 the district court improperly allowed prosecutors and certain lay witnesses to refer to
12 Victim as “mildly mentally retarded” and to discuss other “medical diagnoses,” but
13 Defendant was not allowed to elicit lay witness testimony regarding “oppositional
14 defiant disorder.”

15 We review a trial court’s decision to admit or exclude evidence for abuse of
16 discretion. *State v. Martinez*, 2008-NMSC-060, ¶ 10, 145 N.M. 220, 195 P.3d 1232.
17 “An abuse of discretion arises when the evidentiary ruling is clearly contrary to logic
18 and the facts and circumstances of the case.” *State v. Downey*, 2008-NMSC-061,
19 ¶ 24, 145 N.M. 232, 195 P.3d 1244 (internal quotation marks omitted).

1 Defendant first asserts that the district court erroneously denied his request for
2 a defense medical expert at trial because an expert could have assisted the jury in its
3 assessment of Victim’s credibility. We are not persuaded. Defendant fails to provide
4 record support showing that he requested an expert for trial, and our review of the
5 record does not indicate that the district court entered such a ruling. *See State v.*
6 *Garcia*, 2009-NMCA-107, ¶ 23, 147 N.M. 150, 217 P.3d 1048 (stating that we do not
7 consider arguments if the defendant fails to cite record support); *see also* Rule
8 12-216(A) NMRA (stating that “[t]o preserve a question for review it must appear that
9 a ruling or decision by the district court was fairly invoked”). With respect to a
10 defense medical expert, the record only shows that at a pre-trial hearing to address
11 Victim’s competency, defense counsel stated that they had received funding approval
12 for a medical expert who had already reviewed Victim’s medical records. Although
13 the district court ruled on Victim’s *competency* without ordering a medical evaluation
14 of Victim by this expert as requested by defense counsel, there is no indication that
15 the district court disallowed Defendant from calling this expert at trial to address
16 Victim’s *credibility*. However, at trial, Defendant presented the testimony of only one
17 witness, Victim’s sister, and then rested without ever alerting the court to the
18 possibility of a defense expert. As a result, because Defendant had a medical expert

1 who was allegedly available to him but for unknown reasons did not call this or any
2 other expert witness at trial, we conclude that there was no abuse of discretion.

3 Turning to Defendant’s second contention, we also hold that the district court
4 did not abuse its discretion in allowing certain lay witness testimony that Victim was
5 mildly mentally retarded. Victim’s mother testified that Victim was “slightly mentally
6 retarded,” and the prosecutor referred to Victim as “mildly mentally retarded”
7 throughout the trial. We agree with the State that some of the challenged testimony,
8 such as the testimony from Victim’s parents regarding his special needs and that he
9 was enrolled in special education classes, were factual matters that fell within the
10 witness’ personal knowledge and were thus admissible under our evidentiary rules
11 governing lay witness testimony. *See State v. Luna*, 92 N.M. 680, 684, 594 P.2d 340,
12 344 (Ct. App. 1979) (recognizing that lay witnesses may give opinion testimony
13 concerning their own perceptions when they have first-hand knowledge and there is
14 a rational connection between the observations made and the opinion formed). In
15 addition, we also point out that Defendant himself referred to Victim’s developmental
16 delays, prior hospitalizations, and other medical conditions to support his argument
17 that Victim was not credible. Thus, there was no abuse of discretion as Defendant had
18 ample opportunity to observe and question Victim in order to assist the jury in
19 assessing Victim’s credibility and knowledge.

1 Even if we were to assume that the district court improperly allowed the State
2 to refer to mild mental retardation, the error would be harmless. Harmless error for
3 a non-constitutional violation occurs when “there is no reasonable probability the
4 error affected the verdict.” *State v. Barr*, 2009-NMSC-024, ¶ 53, 146 N.M. 301, 210
5 P.3d 198 (emphasis omitted). Reviewing courts consider three factors when
6 determining whether an error is harmless. “The factors are whether there is: (1)
7 substantial evidence to support the conviction without reference to the improperly
8 admitted evidence; (2) such a disproportionate volume of permissible evidence that,
9 in comparison, the amount of improper evidence will appear minuscule; and (3) no
10 substantial conflicting evidence to discredit the State’s testimony.” *Id.* ¶ 56 (footnote
11 omitted). “No one factor is determinative; rather, they are considered in conjunction
12 with one another.” *Id.* ¶ 55.

13 After careful examination of the record and consideration of the three factors
14 identified in *Barr*, we determine that there is no reasonable probability that the
15 improperly admitted evidence affected the verdict. Substantial evidence supports
16 Defendant’s convictions. Victim testified regarding the incident and his safe house
17 interview was played for the jury. Victim’s mother testified regarding what she
18 observed when she walked into Victim’s room on the date of the incident. The record
19 also contains the testimony of a medical expert, who examined Victim following the

1 incident and testified that the exam results were consistent with sexual abuse. Even
2 disregarding the testimony concerning Victim's mild mental retardation, we think that
3 there was sufficient evidence to support Defendant's convictions. Moreover,
4 Defendant did not present substantial evidence to discredit the State's case. Other
5 than presenting the testimony of Victim's sister, who stated that she had no personal
6 knowledge of the incident, Defendant did not present any other evidence to controvert
7 the prosecution's case in chief. We conclude that there was no reasonable probability
8 that the admission of testimony as to Victim's mild mental retardation affected the
9 trial, and thus any error was harmless.

10 We are also unconvinced that the district court abused its discretion in
11 disallowing Defendant from asking Victim's stepfather whether Victim had
12 oppositional defiant disorder. The district court determined that a significant amount
13 of testimony had already been admitted regarding Victim's behavior before and after
14 the incident, and thus, there was no need to "label" it as oppositional defiant disorder.
15 We hold that this ruling was well within the district court's discretion to exclude
16 evidence.

1 **3. Double Jeopardy Violation**

2 We turn now to address the State’s contention, raised in its answer brief, that
3 Defendant’s convictions for first degree kidnaping and CSP II violated his
4 constitutional protections against double jeopardy. At the outset, we note that
5 Defendant has not submitted any briefing to this Court to address the State’s
6 contention. Nevertheless, we consider whether Defendant’s right to be free from
7 double jeopardy was violated because he was convicted of both CSP II (commission
8 of a felony) and kidnaping, the predicate felony underlying the CSP II conviction. We
9 review double jeopardy claims de novo. *State v. Quick*, 2009-NMSC-015, ¶ 6, 146
10 N.M. 80, 206 P.3d 985.

11 The right to be free from double jeopardy “protects against both successive
12 prosecutions and multiple punishments for the same offense” (internal quotation
13 marks omitted). *State v. Armendariz*, 2006-NMCA-152, ¶ 5, 140 N.M. 712, 148 P.3d
14 798. In the present case, we are concerned with the latter, multiple punishments for
15 the same offense, and specifically, what is categorized in our double jeopardy
16 jurisprudence as a “double-description case, which prohibits charging a defendant
17 with violations of multiple statutes for the same conduct in violation of the
18 Legislature’s intent.” *State v. Montoya*, 2011-NMCA-____, ¶ 30, ____ N.M. ____, ____
19 P.2d ____ (No. 28,881, May 27, 2011) (alterations omitted) (internal quotation marks

1 omitted). In such a case, we apply the two-part analysis set forth in *Swafford v. State*
2 and its progeny: (1) whether the conduct underlying the offenses is unitary and (2)
3 if so, whether the Legislature intended for the unitary conduct to be punished as
4 separate offenses. 112 N.M. 3, 13, 810 P.2d 1223, 1233 (1991). Double jeopardy will
5 bar a conviction “if the conduct underlying the two offenses is unitary and the
6 Legislature has not indicated an intent to punish the same conduct separately.” *See*
7 *Montoya*, 2011-NMCA-___, ¶ 30 (alterations omitted) (internal quotation marks
8 omitted).

9 **1. Unitary Conduct**

10 Defendant’s convictions for kidnaping and CSP II arose from an incident that
11 occurred at Victim’s home on August 17, 2005. Accordingly, we begin our analysis
12 by determining whether Defendant’s conduct on that day could be viewed as one,
13 single transaction. We have previously applied the following analysis for unitary
14 conduct:

15 Conduct is not unitary if sufficient ‘indicia of distinctness’ separate the
16 transaction into several acts. In making this determination, we evaluate
17 separations in time and space as well as the quality and nature of the acts
18 or the results involved. Sufficient indicia of distinctness exist when one
19 crime is completed before another, and also when the conviction is
20 supported by at least two distinct acts or forces, one which completes the
21 first crime and another which is used in conjunction with the subsequent
22 crime. The key consideration is whether the same force was used to
23 commit both crimes.

1 *Montoya*, 2011-NMCA-____, ¶ 31 (internal quotation marks and citations omitted).
2 We must ultimately decide “whether the facts presented at trial establish that the jury
3 reasonably could have inferred independent factual bases for the charged offenses.”
4 *State v. Franco*, 2005-NMSC-013, ¶ 7, 137 N.M. 447, 112 P.3d 1104 (internal
5 quotation marks omitted).

6 In the present case, Defendant’s conviction for CSP II (commission of a felony)
7 was based on digital penetration that occurred “during the commission of
8 [k]idnap[ing]” and his conviction for kidnaping was based on Defendant having
9 “restrained or confined” Victim with the intent to “hold [Victim] against [his] will to
10 inflict death, physical injury or a sexual offense.” As we recently reiterated in
11 *Montoya*, “because some force or restraint is involved in every sexual penetration
12 without consent, kidnaping cannot be charged out of every CSP without a showing of
13 force or restraint separate from the CSP.” 2011-NMCA-____, ¶ 38. Thus, we must
14 determine whether the state based its theory of kidnaping on the same force used to
15 commit CSP II; if so, the conduct is unitary.

16 Defendant’s convictions for kidnaping and CSP II were based on the following
17 conduct, as Victim testified at trial. Defendant, a friend of Victim’s older brother,
18 entered Victim’s bedroom and closed the door. Victim tried to leave the room but
19 Defendant was standing in front of the door. Defendant then ordered Victim to pull

1 down his pants and made a verbal threat to force his compliance. Victim pulled down
2 his pants. Defendant then held Victim down on the bed as two penetrations and other
3 sexual contact occurred before Victim's mom walked in, at which point Defendant
4 rushed to the area of the bedroom closet.

5 We conclude that the conduct underlying Defendant's convictions for CSP II
6 and kidnaping was unitary. There are no sufficient indicia of distinctness in the
7 foregoing conduct from which the jury could find independent factual bases for its
8 guilty verdict on the kidnaping and CSP II counts. Defendant's acts were not
9 separated by time or space. There was no change in location nor was any evidence
10 presented to substantiate an intervening struggle or event. *See State v. Pisiso*, 119
11 N.M. 252, 261, 889 P.2d 860, 869 (Ct. App. 1994) (finding unitary conduct for
12 kidnaping and CSP II (during the commission of kidnaping) where, during a five-
13 minute period, the defendant closed and locked the door and then forced victim to
14 perform oral sex in the apartment hallway); *see also Armendariz*, 2006-NMCA-152,
15 ¶ 10 (finding unitary conduct where there was no change in location, the events
16 occurred simultaneously, and there was no intervening struggle between the defendant
17 and victim); *Swafford*, 112 N.M. at 15-16, 810 P.2d at 1235-36 (finding conduct
18 constituting CSP II and assault was non-unitary where the victim was bound, struck
19 several times, and verbally threatened for a period of time before the CSP occurred).

1 Moreover, there is no clear indication that the jury found distinct acts of force
2 to support both the kidnaping and CSP II (commission of a felony) convictions.
3 *Montoya*, 2011-NMCA-____, ¶ 37 (explaining that “unitary conduct occurs when the
4 state bases its theory of kidnaping on the same force used to commit CSP II
5 (commission of a felony) even though there were alternative ways to charge the
6 crime”). It is unclear from the record whether the jury found that the kidnaping
7 occurred by the initial confinement of Victim in the room through the closing of the
8 door or by Defendant’s subsequent restraint of Victim on the bed during the CSP. In
9 fact, the State’s theory of kidnaping, as presented in closing argument, was that both
10 of these acts of force supported the kidnaping charge. *Id.* ¶ 39 (holding that the
11 defendant’s conduct was unitary where the record did not substantiate whether the
12 kidnaping was accomplished by the confinement of the victim’s vehicle with
13 defendant’s truck or by the defendant’s restraint of victim inside her vehicle during
14 the CSP); *see State v. Crain*, 1997-NMCA-101, ¶ 17, 124 N.M. 84, 946 P.2d 1095
15 (finding unitary conduct where the CSP II and the kidnaping charge involved the same
16 use of force during a single act of sexual intercourse). Thus, we conclude that
17 Defendant’s conduct was unitary.

18 **2. Legislative Intent**

1 Because we have concluded that the conduct underlying Defendant’s
2 convictions for CSP II and kidnaping was unitary, we must determine whether the
3 Legislature intended multiple punishments for CSP II and kidnaping. The statutes at
4 issue in this case do not expressly provide for multiple punishment. *See* NMSA 1978,
5 § 30-4-1 (2003); NMSA 1978, § 30-9-11 (2003) (amended 2009). We therefore apply
6 the *Blockburger* test and look at the elements of the statutes as presented in the jury
7 instructions to determine whether the Legislature intended multiple punishments.
8 *Swafford*, 112 N.M. at 14, 810 P.2d at 1234; *see Montoya*, 2011-NMCA-____, ¶¶ 40-
9 41.

10 Here, in order to convict Defendant of CSP II, the jury had to find that
11 Defendant “caused the insertion, to any extent, of a finger into the anus of [Victim]”
12 and that he committed this act “during the commission of [k]idnap[ing]” or,
13 alternatively, through the use of “physical force or physical violence.” In order to
14 convict Defendant of kidnaping, the jury was required to find that Defendant
15 “restrained or confined [Victim] by intimidation or deception” and that he “intended
16 to hold [Victim] against [his] will to inflict death, physical injury or a sexual offense
17 on [Victim].”

18 In comparing the two offenses, we conclude that all of the elements of
19 kidnaping were subsumed within CSP II in this case because the conviction for CSP

1 II required proof of digital penetration that occurred during the commission of
2 kidnaping. *See Montoya*, 2011-NMCA-____, ¶ 42 (holding that kidnaping was
3 subsumed within CSP II (commission of a felony) when the conduct was unitary and
4 an element of CSP II (commission of a felony) required that the sexual contact occur
5 in the commission of kidnaping). Given the unitary conduct in this case, punishment
6 for both kidnaping and CSP II fail the *Blockburger* test and violate Defendant’s right
7 to be free from double jeopardy. We therefore remand to the district court with
8 instructions to vacate the conviction for the lesser offense. *Montoya*, 2011-NMCA-
9 ____, ¶ 43.

10 **CONCLUSION**

11 For the foregoing reasons, we remand to the district court with instructions to
12 vacate Defendant’s conviction for the lesser offense, either kidnaping or CSP II. We
13 affirm on all other issues.

14 **IT IS SO ORDERED.**

15 _____
16 **CYNTHIA A. FRY, Judge**

17 **WE CONCUR:**

1

2 **MICHAEL D. BUSTAMANTE, Judge**

3

4 **TIMOTHY L. GARCIA, Judge**