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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. 30,438

10 **MARY ESTHER LOVATO,**

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 D. Eric Hannum

19 Albuquerque, NM

20 for Appellant

21 **MEMORANDUM OPINION**

22 **CASTILLO, Chief Judge.**

1 This is Defendant’s second appeal in this case. Defendant was tried and
2 convicted of criminal sexual penetration of her adolescent granddaughter, D.L., and
3 related offenses. In her first appeal, Defendant made one claim—that her counsel was
4 ineffective. In an unpublished opinion, we held that she had made a prima facie case
5 of ineffective assistance of counsel sufficient to require an evidentiary hearing. *State*
6 *v. Lovato*, No. 28,910, 2009 WL 6763582, at *2-3 (N.M. Ct. App. Mar. 12, 2009).
7 We then remanded the matter to the district court for a hearing to “clarify the facts
8 surrounding [the d]efendant’s claim” and to “issue a definitive determination as to
9 prejudice.” *Id.* at *2. Based on the testimony presented at this hearing, the district
10 court found that Defendant had not been prejudiced and concluded that her counsel’s
11 “actions or inactions did not render the trial unfair or the verdict suspect.” In the
12 present appeal, Defendant claims the district court erred in denying her claim of
13 ineffective assistance of counsel. We affirm the determination of the district court.

14 **BACKGROUND**

15 To evaluate Defendant’s current appeal, we begin with a short summary of what
16 occurred at trial and at the evidentiary hearing. At trial, the State presented evidence
17 showing that Defendant had sexually molested D.L. regularly between the ages of four
18 and eight years old and had forced and encouraged D.L.’s use of illicit drugs.
19 Specifically, D.L. testified that on different occasions Defendant had digitally

1 penetrated her vagina and anal cavity, placed her tongue in D.L.'s vagina, placed
2 drugs inside D.L.'s vagina, sucked and bit D.L.'s nipples and breasts, forced D.L. to
3 suck on Defendant's breasts, and attempted to force D.L. to touch Defendant's vagina.
4 D.L. also testified that Defendant forced her female cousin, M.B., to endure similar
5 sexual trauma. In addition to the sexual acts themselves, D.L. testified that Defendant
6 lured and trapped her in Defendant's bedroom to molest her and threatened to kill
7 D.L., her mother, and her sister if she ever revealed the abuse. D.L. also testified that
8 Defendant had encouraged illicit drug abuse by using drugs openly in D.L.'s presence,
9 blowing drug-laced smoke into D.L.'s face, having D.L. accompany Defendant on
10 drug runs, forcing D.L. to process drugs for consumption, and attempting to force
11 D.L. to use illicit drugs through an injection needle.

12 To corroborate and support D.L.'s testimony, the State called Denise Lovato
13 —D.L.'s mother (Mother), Florencia Griego—D.L.'s maternal grandmother
14 (Grandmother), Detective Ginger Walker of the Bernalillo County Sheriff's
15 Department, Senior Social Worker Elizabeth Dupassage of the Children, Youth, and
16 Families Department, and Dr. Rene Ornelas—D.L.'s treating physician and expert of
17 child sexual abuse.

18 Defense counsel (Counsel) challenged each of the State's witnesses on cross-
19 examination and called M.B. as a defense witness. Counsel revealed through cross-

1 examination that D.L. had been previously abused by another individual, refuting the
2 inference that D.L.'s knowledge of sexual acts could only have been derived from
3 Defendant. Counsel further revealed through cross-examination that CYFD found
4 D.L.'s previous claim of sexual abuse unsubstantiated. Counsel attacked each lay
5 witness's credibility by revealing discrepancies between the testimonies of D.L.,
6 Mother, and Grandmother. Counsel also attacked the motives of Mother and
7 Grandmother and suggested that they had conspired and coached D.L. to incriminate
8 Defendant because they disliked her. Finally, counsel called M.B., D.L.'s female
9 cousin who was also left in Defendant's care, to show D.L.'s story was inconsistent
10 with M.B.'s account. M.B. testified that she was with D.L. and Defendant many times
11 and had never witnessed or experienced any sexual or drug abuse, despite D.L.'s
12 claims that M.B. was present during the abuse and was herself abused alongside D.L.
13 Counsel corroborated M.B.'s testimony with Dupassage's admission that CYFD was
14 unable to substantiate any abuse of M.B., contrary to D.L.'s claims that Defendant had
15 abused both of the girls contemporaneously.

16 The jury convicted Defendant of criminal sexual penetration in the first degree,
17 attempt to commit criminal sexual penetration, kidnaping, criminal sexual contact
18 (with a child under 13), bribery of a witness, and contributing to the delinquency of
19 a minor. As noted above, Defendant appealed, and the case was remanded for an

1 evidentiary hearing.

2 At the hearing, there were two witnesses: Dr. Ornelas and Counsel. Dr.
3 Ornelas was questioned about her opinion at trial and whether her opinion would have
4 changed had she had additional information about D.L.'s previous abuse. She stated
5 that her opinion would not have changed. Counsel explained his trial tactics. He
6 stated that his primary strategy was to show that D.L.'s allegations were fabricated as
7 part of a type of family feud. In this regard, he pointed to M.B.'s recantation of the
8 same abuse, CYFD's inconsistent findings and processing of the two girls, D.L.'s
9 previous sexual abuse allegation that was unsubstantiated by CYFD, and the general
10 disdain for Defendant held by Mother and Grandmother. He also explained that
11 because he did not want the jurors to "think . . . [he was] trying to hide something[,]"
12 it was his practice to forego valid objections when "it [did not] make a material,
13 substantial impact, or [was] consistent with . . . [my] theory of the case."

14 After the hearing, the parties filed briefs on the issue. The district court
15 determined that Counsel had made a professional error by not seeking a Rule 11-413
16 NMRA hearing before the deposition of Dr. Ornelas, but it also determined that there
17 was no prejudice. Additionally, the district court found that Counsel's handling of the
18 case was based on a plausible trial strategy and concluded that there was no
19 ineffective assistance of counsel demonstrated in this case.

1 **DISCUSSION**

2 Ineffective assistance of counsel is a doctrine rooted in constitutional law. *See*
3 *Patterson v. LeMaster*, 2001-NMSC-013, ¶ 16, 130 N.M. 179, 21 P.3d 1032 (“The
4 Sixth Amendment to the United States Constitution, applicable to the states through
5 the Fourteenth Amendment, guarantees not only the right to counsel but the right to
6 the effective assistance of counsel.” (internal quotation marks and citation omitted)).

7 Although this is the first time this Court will review a claim of ineffective assistance
8 of counsel after remand to the district court for an evidentiary hearing, we look to
9 New Mexico case law to establish the standard of review. Matters of constitutional
10 concern are reviewed de novo. *See State v. DeGraff*, 2006-NMSC-011, ¶ 6, 139 N.M.

11 211, 131 P.3d 61 (“[The defendant’s] arguments primarily raise questions of
12 constitutional law, which we review de novo.”). Whether a given ineffective
13 assistance of counsel claim has merit, however, is a factually dependent inquiry.

14 Matters of factual concern are reviewed for substantial evidence. *State v. Urioste*,
15 2002-NMSC-023, ¶ 6, 132 N.M. 592, 52 P.3d 964 (“We . . . defer to the district
16 court’s findings of fact if substantial evidence exists to support those findings.”).

17 Accordingly, Defendant’s ineffective assistance of counsel claim presents us with a
18 mixed question of fact and law. *Accord Duncan v. Kerby*, 115 N.M. 344, 347-48, 851
19 P.2d 466, 469-70 (1993). “Under this standard, the [district] court’s factual

1 determinations are subject to a substantial evidence standard of review, and its
2 application of the law to the facts is subject to de novo review.” *State v. Snell*, 2007-
3 NMCA-113, ¶ 7, 142 N.M. 452, 166 P.3d 1106. This is consistent with the standard
4 of review utilized by the Supreme Court in habeas petitions under Rule 5-802 NMRA.
5 *Duncan*, 115 N.M. at 347-48, 851 P.2d at 469-70.

6 Our courts look to the United States Supreme Court’s two-pronged test for
7 ineffective assistance of counsel as outlined in *Strickland v. Washington*, 466 U.S.
8 668, 690, 692, 694 (1984). *State v. Bernal*, 2006-NMSC-050, ¶ 32, 140 N.M. 644,
9 146 P.3d 289. To establish ineffective assistance of counsel, a defendant must prove
10 that counsel’s performance was deficient *and* that such deficiency resulted in
11 prejudice against the defendant. *State v. Gonzales*, 2007-NMSC-059, ¶ 14, 143 N.M.
12 25, 172 P.3d 162. Generalized prejudice is insufficient. *See Lytle v. Jordan*,
13 2001-NMSC-016, ¶ 25, 130 N.M. 198, 22 P.3d 666. Rather, a defendant must show
14 that counsel’s errors were so serious and such a failure of the adversarial process that
15 they “undermine[] judicial confidence in the accuracy and reliability of the outcome.”
16 *State v. Quinones*, 2011-NMCA-018, ¶ 30, 149 N.M. 294, 248 P.3d 336 (internal
17 quotation marks and citation omitted). According to Defendant, Counsel’s error falls
18 into two broad categories: (1) failure to challenge the admissibility of various
19 statements implicating Defendant, and (2) failure to file a written Rule 11-413 motion

1 allowing cross-examination of the State’s medical expert on D.L.’s earlier sexual
2 abuse. We address each in turn.

3 **Failure to Object**

4 Defendant contends that Counsel was ineffective for failing to object to
5 statements made at trial. We organize the statements into four groups: (1) statements
6 describing the safe house interview and CYFD’s sexual abuse assessment process, (2)
7 hearsay statements relaying D.L.’s account of sexual abuse and kidnaping, (3) hearsay
8 statements summarizing Mother’s account of D.L.’s behavior and Defendant’s drug
9 abuse and prior bad acts, and (4) hearsay statements recounting M.B.’s allegation of
10 sexual abuse. We evaluate each group of statements under the first prong of our test.
11 Our review “must be highly deferential,” *Lytle*, 2001-NMSC-016, ¶ 50, and we
12 therefore employ a strong presumption that Counsel’s conduct “falls within the wide
13 range of reasonable professional assistance.” *State v. Hunter*, 2006-NMSC-043, ¶ 13,
14 140 N.M. 406, 143 P.3d 168 (internal quotations and citation omitted). “Failure to
15 object to every instance of objectionable evidence or argument does not render
16 counsel ineffective; rather, failure to object falls within the ambit of trial tactics.” *State*
17 *v. Allen*, 2000-NMSC-002, ¶ 115, 128 N.M. 482, 994 P.2d 728 (alteration omitted)
18 (internal quotation marks and citation omitted). Any sound trial tactic withstands
19 review. *State v. Garcia*, 2011-NMSC-003, ¶ 33, 149 N.M. 185, 246 P.3d 1057.

1 **Safe house interview and CYFD’s sexual abuse assessment process**

2 At trial, the State described the safe house interview without objection. In
3 addition, Counsel allowed Dupassage to explain each step of CYFD’s lengthy
4 investigation process in detail, including the process of “substantiating” or
5 “unsubstantiating” an allegation of child sexual abuse, which according to Defendant,
6 allowed the CYFD to usurp the jury’s fact-finding function. Failing to object to
7 inadmissible evidence can be a trial tactic. *See State v. Swavola*, 114 N.M. 472, 475,
8 840 P.2d 1238, 1241 (Ct. App. 1992) (“[A]cquiescence to the introduction of
9 inadmissible evidence may sometimes be tactically advantageous.”). By allowing the
10 jury to hear about the safe house interview and CYFD’s internal process, Counsel was
11 able to undermine witness credibility and expose important inconsistencies in CYFD’s
12 results. The record reveals that Counsel was able to show, through cross-examination
13 of Dupassage, that (1) M.B. had initially claimed that Defendant had also molested
14 her, but that CYFD could not substantiate that allegation; (2) D.L.’s safe house
15 interview was delayed for more than two months, while M.B.’s was completed almost
16 immediately; and (3) CYFD was unable to substantiate D.L.’s previous sexual abuse
17 allegation during a similar process. Counsel’s actions were based on a trial strategy.
18 There is no ineffective assistance of counsel here.

1 **Hearsay statements of D.L.’s account of sexual abuse and kidnaping**

2 Defendant challenges counsel’s failure to object to three hearsay statements: (1)
3 Dr. Ornelas’s summary of Mother’s account of D.L.’s description of the abuse; (2)
4 Detective Walker’s testimony recounting another detective’s statement that
5 “[Defendant] was the one that [D.L.] said had sexually molested her”; and (3)
6 Detective Walker’s statement that “during [D.L.’s] safe house interview, she said that
7 [Defendant] would shut the door with a very large rock.”

8 Again, we cannot say that Counsel was ineffective in failing to object to these
9 statements. At the evidentiary hearing, Counsel proffered plausible rational trial
10 tactics for each omission. Counsel believed that the sexual abuse hearsay would
11 inevitably “come into the trial” as part of D.L.’s testimony. Counsel wanted it to
12 come in to support his theory of fabrication due to family discord. Certain statements
13 allowed him to demonstrate bias and attack the credibility of the State’s witnesses.
14 For instance, Counsel explained that he declined to object to Mother and
15 Grandmother’s testimony recounting D.L.’s initial revelation of sexual abuse because,
16 in his view, “the importance that it weighed for the defense, was that . . . [M]other and
17 . . . [G]randmother questioned right then whether [D.L.] was telling the truth.”
18 Counsel further explained that he did not object to Detective Walker’s hearsay
19 because it served his purpose in that “[he] tried to paint Detective Walker as being

1 . . . kind of prejudiced . . . [as evidenced by] her just sort of taking at face value the
2 prior detective’s conclusion without any more study.”

3 On review, “[w]e need not decide whether [counsel] was right. We must only
4 decide whether a reasonably competent attorney might have reasoned and concluded
5 as he did.” *State v. Rojo*, 1999-NMSC-001, ¶ 64, 126 N.M. 438, 971 P.2d 829
6 (internal quotation marks and citation omitted). Counsel’s reasoned decision to forego
7 certain hearsay objections to bolster his own theory, to undermine the witness’s or
8 D.L.’s credibility, or because the evidence was otherwise admissible through another
9 witness, falls squarely within sound trial tactics.

10 **Hearsay statements recounting Mother’s account of D.L.’s behavior and**
11 **Defendant’s drug abuse and other prior bad acts**

12 We also find no deficiency in Counsel’s decision not to object to Dr. Ornelas’s
13 retelling of Mother’s out-of-court statements regarding Defendant’s drug habits and
14 Mother’s suspicions that Defendant was sexually abusing D.L. The most
15 inflammatory of the challenged statements described Defendant as a “methadone,
16 crack and heroin” addict, who had been “doing drugs all along,” and whom Mother
17 was suspicious of “because she used to put her tongue in [D.L.]’s mouth when she was
18 little.” Counsel explained at the evidentiary hearing that these harsh statements
19 aligned with his theory that Mother was out to blatantly incriminate Defendant in
20 furtherance of a bitter family feud. To that end, Counsel revealed through cross-

1 examination of Dr. Ornelas that, despite Mother’s purported concerns, she still left
2 D.L. in Defendant’s care. Additionally, Counsel was aware that much of what was
3 relayed through hearsay would be admitted and cross-examined during Mother’s
4 testimony. Given the heavy presumption in favor of effectiveness of counsel, we will
5 not hold these reasoned omissions as deficient. *See Lytle*, 2001-NMSC-016, ¶ 26
6 (“This inquiry must take into account all of the circumstances surrounding the defense
7 . . . [,] must be highly deferential . . . [, and] requires that every effort be made to
8 eliminate the distorting effects of hindsight” (internal quotation marks and
9 citations omitted)).

10 **Hearsay statements recounting M.B.’s account of sexual abuse**

11 Finally, Defendant faults Counsel for failing to object to Detective Walker’s
12 statement that M.B. told her that Defendant “had sex with me.” Counsel welcomed
13 this hearsay as an integral part of his theory of the case: that D.L. and M.B. had
14 initially fabricated the sexual abuse under pressure of the family feud, but M.B. had
15 since recanted and was now, as a defense witness, telling the truth that no abuse had
16 occurred. Counsel sought to convince the jury that there was reasonable doubt by
17 contrasting the girls’ initial allegations with their now conflicting testimony. We see
18 no deficiency in Counsel furthering this theory by strategically foregoing objections.
19 *See State v. Brazeal*, 109 N.M. 752, 757, 790 P.2d 1033, 1038 (Ct. App. 1990)

1 (“[E]ffectiveness is not measured by mindlessly adding the number of motions,
2 objections, and questions raised by defense counsel.”).

3 In conclusion, having failed to demonstrate Counsel was deficient by making
4 a reasoned choice not to object to the above statements, it is unnecessary to weigh the
5 prejudicial effect of each statement. *Garcia*, 2011-NMSC-003, ¶ 34 (stating that
6 because “trial counsels’ performance was not deficient[,] we need not reach the
7 prejudice prong of the inquiry”). Counsel was not ineffective with regard to the above
8 referenced statements.

9 **Failure to Comply With Rule 11-413**

10 Dr. Ornelas was unavailable for trial, so the State played a video deposition of
11 her testimony. In that video, Dr. Ornelas testified about her medical evaluation and
12 treatment of D.L. following D.L.’s allegation that she had been sexually abused by
13 Defendant. The State benefitted most from Dr. Ornelas’s conclusion that the physical
14 examination of D.L. was consistent with D.L.’s allegations of sexual abuse, recent
15 behavioral problems, and advanced sexual knowledge.

16 On cross-examination, Counsel refuted the first two tenets of Dr. Ornelas’s
17 conclusion. Dr. Ornelas was compelled to admit that the infection she observed in
18 D.L.’s vagina, as well as any redness, swelling, or discharge, was not necessarily the
19 “result of sexual abuse.” Dr. Ornelas further admitted that D.L.’s “sleep problems,

1 nightmares, urinating in various odd places, and fear and anger . . . can be associated
2 . . . with anything that would stress a child[, even] . . . sexual abuse from long ago.”

3 Because Counsel did not understand the requirements with respect to Rule 11-
4 413(B), he was prevented from refuting Dr. Ornelas’s conclusion that D.L.’s advanced
5 sexual knowledge was consistent with the allegation Defendant sexually abused D.L.
6 Counsel repeatedly attempted to question Dr. Ornelas about D.L.’s previous sexual
7 abuse. Each time, however, the State’s objections were sustained because Counsel
8 had not filed a written motion in compliance with Rule 11-413(B), which requires that
9 if evidence of the victim’s past sexual conduct “is proposed to be offered, the
10 defendant must file a written motion prior to trial.”

11 Defendant argues that Counsel’s failure to follow the requirements of Rule 11-
12 413 constitutes ineffective assistance of counsel. As we acknowledged in our
13 memorandum opinion during the first appeal, Counsel’s failure to follow the
14 procedural requirements of Rule 11-413 is a professional deficiency. *See Lovato*,
15 2009 WL 6763582, at *2. There was nothing presented at the evidentiary hearing that
16 would negate this conclusion. Thus, the first prong of the test is met. We must now
17 assess the prejudicial impact of this error. We will find prejudice if, as a result of a
18 counsel’s deficient performance, “there is a reasonable probability that, absent the
19 errors, the factfinder would have had a reasonable doubt respecting guilt.” *State v.*

1 *Dylan J.*, 2009-NMCA-027, ¶ 38, 145 N.M. 719, 204 P.3d 44 (internal quotation
2 marks and citation omitted).

3 Although in *State v. Payton*, 2007-NMCA-110, ¶ 11, 142 N.M. 385, 165 P.3d
4 1161 we concluded that evidence countering the assumption of sexual naivete is
5 essential to a proper defense, this conclusion does not require that such evidence must
6 be admitted through expert testimony or through every possible witness. In *Payton*,
7 the defendant was prevented from presenting *any* evidence of the victim’s previous
8 sexual abuse and “the prosecutor apparently effectively urged the jury to find that
9 someone as young as [the victim] would not have knowledge of sexual matters unless
10 [the d]efendant had victimized her.” *Id.* ¶ 14. The present case is distinguishable.
11 D.L.’s previous sexual abuse was referenced at least fifteen separate times throughout
12 trial, first in opening and then in closing, by both the State and Counsel, on direct and
13 cross-examination, and through five separate witnesses, including D.L. herself. The
14 only State witness not cross-examined on the matter was Dr. Ornelas and that was
15 because of Counsel’s failure to follow Rule 11-413(B).

16 Defendant relies on *United States v. Cronin*, 466 U.S. 648, 659 (1984), and
17 contends that “failure to be able to confront Dr. Ornelas on this critical topic deprived
18 Defendant of the ability” to undermine Dr. Ornelas’s credibility, which eroded
19 Defendant’s right to effective cross-examination, and thereby poisoned the sanctity

1 of the trial. We disagree. *Cronic* references the proposition recognized in *Davis v.*
2 *Alaska*, 415 U.S. 308, 318 (1974), that “[n]o specific showing of prejudice [is]
3 required . . . [when] the petitioner ha[s] been denied the right of effective
4 cross-examination.” *Cronic*, 466 U.S. at 659 (internal quotation marks omitted). That
5 presumption of prejudice, however, will not be entertained unless defense counsel
6 “entirely fails to subject the prosecution’s case to meaningful adversarial testing.”
7 *Bell v. Cone*, 535 U.S. 685, 696-97 (2002) (“When we spoke in *Cronic* of the
8 possibility of presuming prejudice . . . , we indicated that the attorney’s failure must
9 be complete.”). In *Davis*, the defense counsel was prevented by the trial court from
10 cross-examining the prosecution’s key eyewitness about his own probation at the time
11 of his cooperation with police. 415 U.S. at 310-11. In effect, the *Davis* jury never
12 heard any evidence of the defendant’s theory that the prosecution’s eyewitness—who
13 was on probation at the time—was motivated by a concern to divert suspicion away
14 from himself. *Id.* at 317. The United States Supreme Court held that “jurors were
15 entitled to have the benefit of the defense theory before them so that they could make
16 an informed judgment as to the weight to place on [the eyewitness’s] testimony which
17 provided a crucial link in the proof of petitioner’s act.” *Id.* (alteration omitted)
18 (internal quotation marks and citation omitted).

19 In contrast, the jury here was made aware of D.L.’s previous sexual abuse and

1 Counsel's theory that D.L.'s advanced sexual knowledge and behavior could be
2 attributed to the previous abuse and not to contact with Defendant. After the
3 deposition, Counsel filed a Rule 11-413 motion, which was granted, enabling him to
4 cross-examine every live witness about D.L.'s previous sexual abuse by Mother's
5 boyfriend. Additionally, Dr. Ornelas herself admitted that D.L.'s behavioral problems
6 could be associated with "sexual abuse from long ago."

7 Despite the presentation of that theory to the jury, Defendant maintains that she
8 was prejudiced because Dr. Ornelas was not individually questioned about whether
9 "[D.L.] got her sexual knowledge, if she did, from either [Defendant] or Joseph, . . .
10 [M]other's boyfriend." While the jury was not allowed to hear Dr. Ornelas's answer
11 to this question, we disagree that the absence of Dr. Ornelas's view on the subject
12 prejudiced Defendant such that "there is a reasonable probability that, absent the
13 errors, the factfinder *would* have had a reasonable doubt respecting guilt." *Dylan J.*,
14 2009-NMCA-027, ¶ 38 (emphasis added) (internal quotation marks and citation
15 omitted).

16 By the time Dr. Ornelas's video deposition was played, the jury already knew
17 of D.L.'s prior sexual abuse as every preceding witness had acknowledged that abuse.
18 Dr. Ornelas admitted that D.L.'s behavioral problems could be associated with "sexual
19 abuse from long ago." Dr. Ornelas's testimony at the evidentiary hearing was that her

1 opinion would not have changed at all had she been told at the deposition that D.L.
2 had been abused by Mother's boyfriend prior to the alleged sexual abuse by
3 Defendant. Even the prosecutor recognized Counsel's theory and felt the need to
4 rebut its impact during closing arguments. Finally, to the extent Defendant is claiming
5 that the jury was deprived of a line of inquiry that would have revealed Dr. Ornelas's
6 conclusion as predetermined and not worthy of belief, we believe Counsel sufficiently
7 tested Dr. Ornelas's credibility through lengthy cross-examination, revealing that she
8 was "a stock, standard, stick-to-your-outline sort of a [s]tate/plaintiff witness."

9 The final step in our prejudice analysis is to "compare the weight of this
10 prejudice against the totality and strength of the evidence of [the d]efendant's guilt
11 and determine if the outcome of the trial has been rendered unreliable." *State v.*
12 *Roybal*, 2002-NMSC-027, ¶ 26, 132 N.M. 657, 54 P.3d 61. We determine that any
13 slight prejudice that might have been caused by Counsel's failure to ask Dr. Ornelas
14 about previous abuse is minor in comparison to the overwhelming evidence of guilt
15 presented to the jury.

16 D.L. relayed a cogent and credible story, describing in painful detail specific
17 instances of sexual abuse by Defendant. On cross-examination, D.L.'s story did not
18 waiver. Her testimony was corroborated by her recent behavioral problems, as
19 recounted by Mother and Grandmother, and her story did not divert from her original

1 allegation several years earlier. Defendant's only witness, M.B., offered an alternate
2 version of events; however, M.B. changed her testimony while on the stand, could not
3 remember important facts and dates, and recanted her initial allegation of sexual
4 abuse. In the face of such evidence, we cannot conclude that the jury would have
5 rendered a different decision had Dr. Ornelas acknowledged D.L.'s sexual knowledge
6 could have come from prior abuse.

7 Dr. Ornelas's conclusions and credibility were sufficiently tested and the jury
8 heard testimony sufficient to apprise it of each of Defendant's theories. Moreover, we
9 will not presume that the jury assigned undue weight to Dr. Ornelas as a medical
10 expert. *See State v. Alberico*, 116 N.M. 156, 164-65, 861 P.2d 192, 200 (1993) (“[I]t
11 is not within the province of our appellate courts to assume that juries will accord
12 undue weight to expert opinion testimony The jury is not required to accept
13 expert opinions as conclusive and disregard all other evidence bearing on the issue.”)
14 Based on a full review of the trial transcripts, the video deposition, and the evidentiary
15 hearing, we hold that Counsel's failure to cross-examine Dr. Ornelas on D.L.'s sexual
16 history did not prejudice Defendant such that our confidence in the reliability of the
17 jury's outcome is undermined.

18 **CONCLUSION**

1 We affirm the district court's ruling and deny Defendant's request for a new
2 trial based on a violation of her Sixth Amendment right to effective assistance of
3 counsel.

4 **IT IS SO ORDERED.**

5 _____
6 **CELIA FOY CASTILLO, Chief Judge**

7 **WE CONCUR:**

8 _____
9 **MICHAEL D. BUSTAMANTE, Judge**

10 _____
11 **RODERICK T. KENNEDY, Judge**