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

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,

4 v.

NO. 31,316

5 **DANIEL MUNIZ,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF GRANT COUNTY**

8 **H.R. Quintero, District Judge**

9 Gary K. King, Attorney General

10 Santa Fe, NM

11 for Appellee

12 Jacqueline L. Cooper, Chief Public Defender

13 Eleanor Brogan, Assistant Appellate Defender

14 Santa Fe, NM

15 for Appellant

16 **MEMORANDUM OPINION**

17 **WECHSLER, Judge.**

18 Defendant appeals his convictions for nine counts of second degree criminal

1 sexual contact of a minor under age thirteen. [RP 149-155] In a second notice of
2 proposed summary disposition, we proposed to affirm Defendant's convictions but to
3 remand so that Defendant's sentence could be corrected to reflect the appropriate
4 parole term and to change an erroneous statutory reference. Defendant has filed a
5 second memorandum in opposition to our proposed affirmance but in favor of
6 resentencing to reduce the time Defendant must serve on parole. After considering
7 Defendant's second memorandum, we remain unconvinced that the disposition
8 proposed in our second notice is in error. Therefore, we affirm Defendant's
9 convictions and remand for correction of Defendant's sentence.

10 **Resentencing**

11 Defendant was charged in the amended criminal information with three counts
12 of first degree criminal sexual penetration of a minor under age thirteen (CSPM), eight
13 counts of second degree criminal CSCM, and one count of third degree CSCM. [RP
14 122-125] *See* NMSA § 30-9-13(A), (B)(1), (C)(1) (2003); NMSA 1978, § 30-9-
15 11(A), (D)(1) (2009). He entered a plea agreement and was ultimately sentenced on
16 nine counts of second degree CSCM. [RP 129-133, 149-155] Even though Defendant
17 pled to, and was convicted of, nine counts of second degree CSCM, the amended
18 judgment and sentence indicates that Defendant violated Section 30-9-13(A), (C)(1),
19 which is a third degree felony. [150-151]

1 In our second notice, we proposed to remand for correction and clarification of
2 Defendant's sentence. We proposed to agree with the State that the district court had
3 the authority to sentence Defendant for nine counts of second degree CSCM. [SMIO
4 3] *See State v. Herrera*, 2001-NMCA-073, ¶ 9, 131 N.M. 22, 33 P.3d 22 (stating that
5 the district court is authorized to negotiate a no contest plea to any charged offense or
6 a lesser or related offense). However, the amended judgment and sentence appears
7 to contain a clerical error because, even though it classifies count 12 as a second
8 degree felony, it erroneously cites to Section 30-9-13(A)(C)(1), a third degree felony.
9 [RP 152] Thus, we proposed to remand for clarification and correction of Defendant's
10 sentence. *Cf. State v. Ross*, 100 N.M. 48, 52, 665 P.2d 310, 314 (Ct. App. 1983)
11 (remanding the judgment and sentence to the district court to correct the incorrect
12 statutory reference contained in the defendant's sentence while observing that
13 "[c]lerical mistakes in judgments or orders, arising from oversight or omission are not
14 deemed jurisdictional, and may be corrected by the court at any time and after such
15 notice, if any, as the court may specify").

16 In his second memorandum in opposition, Defendant opposes our proposed
17 disposition because the amended criminal indictment specifically alleges that
18 Defendant committed a third degree felony by alleging that Defendant caused "Jane
19 Doe, a child under the age of thirteen (13) years at the time, to touch Defendant's

1 unclothed penis with her hands[.]” [RP 124; 2DMIO 1] He argues that this behavior
2 falls squarely within the conduct prohibited under Section 30-9-13(C)(1). [2DMIO
3 2] Because he was charged with the commission of a third degree felony, Defendant
4 claims he was pleading to a third degree felony and thus his sentence should reflect
5 his conviction of a third degree felony. [2DMIO 2] We disagree.

6 As previously discussed, in addition to being charged with commission of third
7 degree CSCM, Defendant was charged with committing three counts of first degree
8 CSPM. [RP 122-125] Therefore, the district court was justified in accepting his plea
9 to nine counts of second degree CSCM because one of the counts is a “lesser or
10 related offense” to first degree CSP as it “is reasonably related to [the] charged
11 offense.” *Herrera*, 2001-NMCA-073, ¶¶ 9-10 (internal quotation marks and citation
12 omitted). [RP 129-133] .

13 Thus, we remand for correction and clarification of Defendant’s sentence
14 because it erroneously cites to a third degree felony even though Defendant pled to,
15 and was convicted of, a second degree felony.

16 **Parole**

17 In his previous memorandum in opposition, Defendant claimed he was
18 wrongfully sentenced to a parole period of five years to natural life pursuant to NMSA
19 1978, § 31-21-10.1(A)(2) (2007), because at the time Defendant committed the

1 crimes, NMSA 1978, § 31-21-10.1(A) (2003), provided that he could only be
2 sentenced to a parole period between five and twenty years. [1DMIO 1-2, 3-6; RP
3 153] In our second notice, we proposed to agree and to remand so that Defendant's
4 sentence could be corrected to state a parole period of five to twenty years. Neither
5 party has opposed our proposed disposition on this issue. Therefore, we remand so
6 that Defendant can be resentenced to a parole period between five and twenty years
7 in accordance with the law in effect at the time he committed the crimes.

8 **Ineffective Assistance**

9 In his first memorandum in opposition, Defendant claimed that his trial
10 counsel's ineffectiveness resulted in a guilty plea that was not entered into knowingly
11 and voluntarily. [1DMIO 6] Defendant also claimed that the district court erred in
12 accepting his plea agreement because he demonstrated obvious misgivings regarding
13 the plea at the plea and disposition hearing and because the charges were not
14 supported by sufficient evidence. [1DMIO 11]

15 We proposed to affirm on all of these contentions in our second notice of
16 proposed summary disposition. In his second memorandum in opposition, Defendant
17 makes no new arguments but instead relies on the facts, authorities, and arguments set
18 forth in his first memorandum in opposition and his docketing statement. [2DMIO 2-
19 3] Therefore, for the reasons set forth in our first and second notices of proposed

1 summary disposition, we affirm the district court's acceptance of Defendant's plea
2 agreement and affirm Defendant's convictions.

3 **Conclusion**

4 For the reasons set forth above and in our first and second notices of proposed
5 disposition, we affirm Defendant's convictions for nine counts of second degree
6 CSCM. For the reasons set forth above and in our second notice, we remand for
7 clarification and correction of Defendant's sentence.

8 **IT IS SO ORDERED.**

9

10

JAMES J. WECHSLER, Judge

11 **WE CONCUR:**

12

CYNTHIA A. FRY, Judge

14

MICHAEL E. VIGIL, Judge

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