

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico

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STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

No. A-1-CA-39735

GARY GREGOR,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF RIO ARRIBA COUNTY

Mary Marlowe Sommer, District Court Judge

Raúl Torrez, Attorney General

Santa Fe, NM

Van Snow, Assistant Attorney General

Albuquerque, NM

for Appellee

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Santa Fe, NM

for Appellant

MEMORANDUM OPINION

IVES, Judge.

{1} The opinion filed on July 12, 2023, is hereby withdrawn, and this opinion is substituted in its place. After a jury trial, Defendant Gary Gregor was convicted of four counts of first-degree kidnapping, contrary to NMSA 1978, Section 30-4-1 (2003); three counts of criminal sexual penetration of a minor under the age of

thirteen (CSPM), a first-degree felony, contrary to NMSA 1978, Section 30-9-11(D)(1) (2007, amended 2009); and three counts of criminal sexual contact of a minor under the age of thirteen (CSCM), a third-degree felony, contrary to NMSA 1978, Section 30-9-13(C)(1) (2003). On appeal Defendant argues that (1) double jeopardy principles require us to vacate two of his CSPM convictions and one of his CSCM convictions and (2) insufficient evidence supports his convictions for kidnapping, CSPM, and CSCM. We conclude that Defendant's first argument has merit under New Mexico double jeopardy precedent, including *State v. Serrato*, 2021-NMCA-027, 493 P.3d 383, which controls our analysis here and which we decline the State's invitation to overrule. *Serrato* requires that three of Defendant's ten convictions be vacated. However, seven of Defendant's convictions stand because we reject Defendant's arguments that the evidence is insufficient.

DISCUSSION

I. Double Jeopardy Principles Require That Three of Defendant's Convictions Be Vacated

{2} Defendant argues that two of his CSPM convictions and one of his CSCM convictions are each based on the same evidence as a corresponding conviction for first-degree kidnapping and that a double jeopardy violation will occur if the convictions for both the sexual offense and the kidnapping in each pair are left in place. We agree for the following reasons.

1 {3} Defendant raises a double description challenge, which we review under a
2 two-part test. *See Swafford v. State*, 1991-NMSC-043, ¶ 25, 112 N.M. 3, 810 P.2d
3 1223. First, we must determine “whether the conduct underlying the offenses is
4 unitary, *i.e.*, whether the same conduct violates both statutes.” *Id.* If the conduct is
5 unitary, we must determine whether the Legislature intended to permit dual
6 punishment for that conduct. *See State v. Swick*, 2012-NMSC-018, ¶ 11, 279 P.3d
7 747.

8 {4} This Court has applied the two-prong test to a double jeopardy challenge that
9 was substantially the same as Defendant’s. In *Serrato*, the defendant contended he
10 could not be convicted of both first-degree kidnapping and CSCM. 2021-NMCA-
11 027, ¶ 21. This Court agreed. As to the unitary conduct prong, this Court explained
12 that the defendant was convicted of CSCM for touching the victim’s breasts, and
13 that the defendant was convicted of first-degree kidnapping because he committed a
14 sexual offense against the victim during the kidnapping. *Id.* ¶¶ 23-26; *see* § 30-4-1
15 (providing that kidnapping is a first-degree felony if the defendant inflicts a sexual
16 offense on the victim); *accord* UJI 14-403 NMRA (describing essential elements of
17 kidnapping). This Court observed that the state only presented evidence of “one
18 sexual offense that occurred during the course of the kidnapping: the touching of
19 [the victim’s] breasts.” *Serrato*, 2021-NMCA-027, ¶ 26. Rejecting the notion that
20 the defendant completed the first-degree kidnapping before he committed CSCM,

1 this Court explained that commission of a sexual offense during the kidnapping is
2 an essential element of first-degree kidnapping, and that “the elements of first-degree
3 kidnapping were not satisfied until a sexual offense was committed.” *Id.* Because
4 “the facts presented at trial demonstrate[d] that the first-degree kidnapping and
5 CSCM charges were based on the same conduct,” this Court “conclude[d] that the
6 conduct underlying both offenses [was] unitary.” *Id.* ¶ 27 (emphasis omitted).

7 {5} As to the legislative intent prong, this Court recognized that a modified
8 *Blockburger* analysis was necessary because the kidnapping and CSCM statutes do
9 not expressly allow multiple convictions and that there are alternative ways of
10 committing kidnapping. *Id.* ¶ 28; *see also State v. Franco*, 2005-NMSC-013, ¶ 14,
11 137 N.M. 447, 112 P.3d 1104 (expressing approval of the modified *Blockburger*
12 test). That analysis entails “look[ing] to the [s]tate’s trial theory to identify the
13 specific criminal cause of action for which the defendant was convicted, filling in
14 the case-specific meaning of generic terms in the statute when necessary.” *Serrato*,
15 2021-NMCA-027, ¶ 16 (internal quotation marks and citation omitted). If this
16 inquiry reveals that, under the state’s trial theory, “one statute is subsumed within
17 the other, then the analysis ends and the statutes are considered the same for double
18 jeopardy purposes.” *State v. Silvas*, 2015-NMSC-006, ¶ 12, 343 P.3d 616. To
19 pinpoint the state’s trial theory in *Serrato*, this Court reviewed the indictment, the
20 jury instructions, and the state’s closing argument, which indicated that the basis for

1 both the kidnapping conviction and the CSCM conviction was the touching of the
2 victim's breasts. 2021-NMCA-027, ¶¶ 30-32. Accordingly, this Court accepted the
3 defendant's argument that the CSCM conviction was subsumed in the first-degree
4 kidnapping conviction, and that the defendant was being punished twice for the same
5 offense. *Id.* ¶¶ 21, 32. The remedy for the double jeopardy violation was to vacate
6 the defendant's conviction for the less serious offense, CSCM. *Id.* ¶ 32.

7 {6} *Serrato* controls our analysis of Defendant's double jeopardy claims. We
8 conclude that all of Defendant's claims involve a first-degree kidnapping conviction
9 paired with either a CSPM or CSCM conviction that is based on the same conduct,
10 and that, under the State's theory at Defendant's trial, each CSPM or CSCM
11 conviction is subsumed by the corresponding kidnapping conviction. We explain
12 each conclusion in turn.

13 {7} As to the unitary conduct prong of the *Swafford* test, the same straightforward
14 analysis applies to all three pairs of kidnapping and sex offense convictions: CSPM
15 in Count 1 and kidnapping in Count 4; CSPM in Count 2 and kidnapping in Count
16 5; and CSCM in Count 12 and kidnapping in Count 8.¹ One of the essential elements
17 in all three kidnapping instructions is that Defendant "inflicted a sexual offense upon
18 [the victim] during the course of the kidnapping," and the State concedes on appeal

¹Throughout this opinion we refer to the counts using the numbers assigned by the district court in its order renumbering the counts in the indictment and in its judgment and sentence.

1 that each kidnapping instruction referred to the underlying sexual offense in the
2 pairing described above. Each pair of convictions is therefore based on unitary
3 conduct because, as in *Serrato*, the elements of first-degree kidnapping were not
4 satisfied until Defendant committed the underlying sexual offense. *See Serrato*,
5 2021-NMCA-027, ¶ 26.

6 {8} Turning to the legislative intent prong, we apply the modified *Blockburger*
7 test to each pair of convictions. As to each pair, we conclude that the kidnapping
8 charge subsumes the sexual offense charge.

9 {9} The jury instruction for the CSPM conviction in Count 1 indicates that
10 Defendant was convicted of that crime for inserting one or more fingers “into the
11 vulva of [N.H.] while she was wearing a skirt.” The jury instruction for the
12 corresponding kidnapping conviction in Count 4 describes the underlying sexual
13 offense generically but indicates that Defendant “restrained [N.H.] by intimidation
14 by having her sit at council table right next to him and putting his hands on her
15 thighs.” On appeal, the State acknowledges that the act of penetration charged in
16 Count 1 occurred while Defendant restrained N.H. at council table as charged in
17 Count 4. Additionally, during its closing argument, the State described the elements
18 of the various sex offences; stated that “[for] kidnapping, we’re looking at *the same*
19 *sex offenses*”; and noted, as to the kidnapping charge related to Count 1, “it was that
20 intimidation that caused her to stay, so that he could commit *the* sex act against her.”

1 {10} The jury instruction for the CSPM conviction in Count 2 indicates that
2 Defendant was convicted of that crime for inserting one or more fingers “into the
3 vulva of [N.H.] while she was wearing pants.” The jury instruction for the
4 corresponding kidnapping conviction in Count 5 describes the sexual offense
5 generically but indicates that Defendant “restrained [N.H.] by intimidation by
6 keeping her chair close to him, the difference in their size, and his position as her
7 teacher.” On appeal, the State acknowledges that the act of penetration charged in
8 Count 2 occurred while Defendant restrained N.H. in exactly the manner charged in
9 Count 5. And in its closing argument the State noted the direct relationship between
10 the kidnapping in Count 5 and the CSPM in Count 2. When explaining the elements
11 of the former, the prosecutor stated, “[T]his is the kidnapping that is connected to
12 Count 2.”

13 {11} The jury instruction for the CSCM conviction in Count 12 indicates that
14 Defendant was convicted of that crime because he “touched or applied force to the
15 buttock(s) of [A.L.] while in the closet.” The jury instruction for the corresponding
16 kidnapping conviction in Count 8, while generic as to the underlying sexual offense,
17 indicates that Defendant “restrained or confined [A.L.] by force and intimidation by
18 having [A.L.] go to the classroom closet, standing in between her and the closet door,
19 kissing her on the lips and touching her groin and buttocks.” The State acknowledges
20 on appeal, consistent with its closing arguments at trial, that the sexual contact

1 charged in Count 12 occurred while Defendant was restraining A.L. in exactly the
2 manner charged in Count 8.

3 {12} Based on our conclusions that each pair of convictions is based on unitary
4 conduct and that the sexual offense in each pair is subsumed by its corresponding
5 kidnapping conviction, we hold that the double jeopardy principles set forth in
6 *Serrato* and other precedents require that one of the convictions in each pair be
7 vacated. See 2021-NMCA-027, ¶ 32; *State v. Luna*, 2018-NMCA-025, ¶ 11, 458
8 P.3d 457 (“If application of either approach to the *Blockburger* test ‘establishes that
9 one statute is subsumed within the other, the inquiry is over and the statutes are the
10 same for double jeopardy purposes—punishment cannot be had for both.’” (quoting
11 *Swafford*, 1991-NMSC-043, ¶ 30)).

12 {13} The State contends that instead of relying on *Serrato*, we should overrule it,
13 arguing that it “is so unworkable as to be intolerable,” *Swick*, 2012-NMSC-018, ¶ 17
14 (internal quotation marks and citation omitted), because it “conflicts with New
15 Mexico precedent and because it misread the Legislature’s intent.” Because we do
16 not believe that the State has provided a compelling reason to overrule *Serrato*, we
17 decline to do so. See *Padilla v. State Farm Mut. Auto. Ins. Co.*, 2003-NMSC-011,
18 ¶ 7, 133 N.M. 661, 68 P.3d 901.

19 {14} The State contends that *Serrato* conflicts with *State v. McGuire*, 1990-NMSC-
20 067, ¶¶ 8-14, 110 N.M. 304, 795 P.2d 996, in which our Supreme Court held that no

1 double jeopardy violation occurred when the defendant was convicted of kidnapping
2 and criminal sexual penetration (CSP), even though the kidnapping conviction was
3 used to elevate the CSP conviction to a second-degree felony. The State argues that
4 while *Serrato* “held that first-degree kidnapping is not complete until the defendant
5 commits the underlying sex crime[,] . . . *McGuire* stated that kidnapping is complete
6 when the defendant restrains the victim with the requisite intent.” This is true, but it
7 does not mean there is a conflict between *Serrato* and *McGuire* because the courts
8 in those cases were interpreting substantially different kidnapping statutes. The
9 statute that was at issue in *Serrato* and that is at issue here defines first-degree
10 kidnapping to include the essential element of inflicting a sexual offense on the
11 victim. See § 30-4-1(A)(4), (B). That was the basis for the *Serrato* court’s conclusion
12 that the defendant did not commit first-degree kidnapping until he committed
13 CSCM. See 2021-NMCA-027, ¶¶ 26-27. In contrast, inflicting a sexual offense was
14 not an essential element of kidnapping in *McGuire*. Instead, the essential element
15 that related to a sexual offense pertained to mens rea: the defendant’s intent to hold
16 the victim against her will for services, including sexual purposes. *McGuire*, 1990-
17 NMSC-067, ¶¶ 7-8. Our Supreme Court recognized that “[o]nce defendant
18 restrained the victim with the requisite intent to hold her for service against her will,
19 he had committed the crime of kidnapping,” and the kidnapping and CSP—which
20 occurred *after* the elements of kidnapping were satisfied—were not based on the

1 same conduct. *Id.* ¶¶ 9-10. The Court emphasized the distinction between using “the
2 same facts to prove *successive* offenses that depend on *separate* conduct with the
3 use of the same facts to prove *concurrent* offenses that depend on the *same* conduct.”
4 *Id.* ¶ 10. *McGuire* involved the former; *Serrato* involved the latter. The different
5 analyses and outcomes in the two cases illustrate the critical distinction drawn by
6 our Supreme Court in *McGuire*. These precedents are harmonious, not discordant.
7 We therefore reject the State’s argument that *Serrato* conflicts with *McGuire*.
8 {15} We also reject the State’s argument that *Serrato* conflicts with *State v.*
9 *Dominguez*, 2014-NMCA-064, 327 P.3d 1092. The State relies on parts of
10 *Dominguez* that do not pertain to the double jeopardy challenge made by the
11 defendant in that case. *Id.* ¶¶ 13-19. The question in the cited paragraphs of
12 *Dominguez* was whether the absence of a special verdict form for first-degree
13 kidnapping precluded the defendant from being convicted of that offense, requiring
14 entry of judgment for second-degree kidnapping instead. *Id.* We perceive no conflict
15 between *Serrato*’s double jeopardy holding and *Dominguez*’s holding that in the
16 absence of a special verdict form, the defendant could be convicted of first-degree
17 kidnapping because he was also convicted of CSP.²

²The State cites cases in which our Supreme Court has “approved of simultaneous trials for CSP and first-degree kidnapping.” The State argues that the outcomes in those cases “would be impossible under *Serrato*’s reasoning.” But, as the State acknowledges, our Supreme Court did not address double jeopardy challenges in those cases. Accordingly, the cited cases do not stand for any

1 {16} Finally, the State argues that *Serrato* rests on the erroneous conclusion that
2 the Legislature did not intend to allow separate punishments for first-degree
3 kidnapping and the underlying sexual offense. The State faults the *Serrato* court for
4 “[r]elying exclusively on the modified *Blockburger* test”; for not examining whether
5 the two offenses are aimed at addressing different social evils; and for not
6 considering the language, structure, and legislative history of the kidnapping, CSPM,
7 and CSCM statutes. The State’s argument is contrary to our Supreme Court’s
8 precedents. *See, e.g., State v. Porter*, 2020-NMSC-020, ¶ 20, 476 P.3d 1201 (“Under
9 the modified *Blockburger* analysis, if we determine that one of the offenses
10 subsumes the other offense, the double jeopardy prohibition is violated, and
11 punishment cannot be had for both.” (internal quotation marks and citation
12 omitted)); *Swafford*, 1991-NMSC-043, ¶ 30 (“If [the *Blockburger*] test establishes
13 that one statute is subsumed within the other, the inquiry is over and the statutes are
14 the same for double jeopardy purposes—punishment cannot be had for both.”).
15 Those precedents were binding on the *Serrato* court. *See State ex rel. Martinez v.*
16 *City of Las Vegas*, 2004-NMSC-009, ¶ 20, 135 N.M. 375, 89 P.3d 47 (stating that
17 the Court of Appeals is bound by Supreme Court precedent). Having concluded that

proposition regarding double description challenges to convictions for first-degree kidnapping and underlying sexual offenses. *See Sangre de Cristo Dev. Corp. v. City of Santa Fe*, 1972-NMSC-076, ¶ 23, 84 N.M. 343, 503 P.2d 323 (“The general rule is that cases are not authority for propositions not considered.”). And the cited cases therefore do not conflict with *Serrato*’s double jeopardy holding.

1 the conviction for the underlying sexual offense was subsumed by the conviction for
2 first-degree kidnapping under the modified *Blockburger* test, the *Serrato* court was
3 compelled to also conclude that the Legislature did not intend to allow separate
4 convictions and punishments for the same conduct.

5 **II. Sufficient Evidence Supports Defendant's Convictions**

6 {17} Defendant contends that the State presented insufficient evidence to support
7 his convictions for first-degree kidnapping, CSPM, and CSCM. Applying New
8 Mexico's established standard of review for sufficiency challenges, *see State v.*
9 *Garcia*, 2011-NMSC-003, ¶ 5, 149 N.M. 185, 246 P.3d 1057; *State v. Sutphin*, 1988-
10 NMSC-031, ¶ 21, 107 N.M. 126, 753 P.2d 1314, we disagree.

11 {18} As to Defendant's kidnapping convictions, Defendant limits his challenge to
12 two of the essential elements: that he exercised restraint by force or intimidation as
13 to N.H. and A.L. and that he acted with the intent to commit a sexual offense.
14 Importantly, Defendant does not contend that the victims' testimony is inadequate,
15 if accepted as true by the jury, to support the challenged elements. Having carefully
16 reviewed the record, we conclude that the victims' testimony sufficed to allow a
17 rational jury to find that the State proved the challenged elements beyond a
18 reasonable doubt. Defendant argues only that his wife's testimony is inconsistent
19 with the verdicts. Specifically, Defendant argues that his wife testified that she was
20 often in the classroom during the relevant time period, and that she never observed

1 any of the criminal acts that the jury found that Defendant committed. We reject this
2 argument as contrary to our standard of review, which prohibits us from reweighing
3 the evidence and revisiting the jury’s credibility determinations. *See Garcia*, 2011-
4 NMSC-003, ¶ 5. Defendant presented his version of the facts through his wife’s
5 testimony, but the jury was free to reject that version and instead accept as true the
6 testimony of the victims and find him guilty based on that testimony. *See State v.*
7 *Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829 (“Contrary evidence
8 supporting acquittal does not provide a basis for reversal because the jury is free to
9 reject [the d]efendant’s version of the facts.”). We hold that the evidence suffices to
10 support Defendant’s kidnapping convictions.

11 {19} For similar reasons, we reject Defendant’s argument that the evidence does
12 not suffice to support his CSPM and CSCM convictions. Again, Defendant does not
13 contend that the victims’ testimony is inadequate, if accepted as true by the jury, to
14 support the challenged elements. And again, Defendant’s argument runs headlong
15 into our standard of review. Defendant claims that “[t]he State’s case depended
16 entirely on the credibility of [the victims and another witness] as they recalled their
17 experiences,” and that testimony was not credible because the witnesses “gave
18 inconsistent accounts on a number of details,” and because their testimony was not
19 supported by forensic or medical evidence. But whether to find the witnesses against
20 Defendant credible and how to resolve any inconsistencies in their testimony was

1 within the exclusive province of the jury, *see State v. Tapia*, 2015-NMCA-048, ¶ 20,
2 347 P.3d 738; we may not revisit the jury’s credibility determinations, *see Garcia*,
3 2011-NMSC-003, ¶ 5; and New Mexico law no longer requires corroboration. *See*
4 NMSA 1978, § 30-9-15 (1975); *State v. Nichols*, 2006-NMCA-017, ¶ 10, 139 N.M.
5 72, 128 P.3d 500 (“In prosecutions for criminal sexual penetration, the testimony of
6 the victim need not be corroborated and lack of corroboration has no bearing on [the]
7 weight to be given to the testimony.” (alterations, internal quotation marks, and
8 citation omitted)). Deferring to the jury as our standard of review requires, we
9 decline to undo its guilty verdicts. We hold that the evidence of CSPM and CSCM
10 suffices.

11 **CONCLUSION**

12 {20} We remand this case to the district court to vacate three of Defendant’s ten
13 convictions. The court must exercise its discretion to vacate either the CSPM
14 conviction in Count 1 or the kidnapping conviction in Count 4 and either the CSPM
15 conviction in Count 2 or the kidnapping conviction in Count 5 because the CSPM
16 offenses and the kidnapping offenses are all first-degree felonies. *See Porter*, 2020-
17 NMSC-020, ¶ 42 (explaining that when “both offenses result in the same degree of
18 felony, the choice of which conviction to vacate lies in the sound discretion of the
19 district court”); *see also* § 30-9-11(D)(1) (first-degree CSPM); § 30-4-1 (first-degree
20 kidnapping). The district court must also vacate the conviction for CSCM in Count

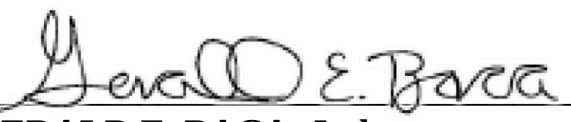
1 12 because that conviction carries a shorter sentence than the kidnapping conviction
2 in Count 8. *See State v. Montoya*, 2013-NMSC-020, ¶ 55, 306 P.3d 426 (explaining
3 that “where one of two otherwise valid convictions must be vacated to avoid
4 violation of double jeopardy protections, we must vacate the conviction carrying the
5 shorter sentence”); *see also* § 30-9-13(C)(1) (third-degree CSCM). We otherwise
6 affirm.

7 {21} **IT IS SO ORDERED.**

8 
9 **ZACHARY ALVES, Judge**

10 **WE CONCUR:**

11 
12 **SHAMMARA H. HENDERSON, Judge**

13 
14 **GERALD E. BACA, Judge**