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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. 28,181**

10 **NOEL SANCHEZ,**

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 Margaret E. McLean, Assistant Attorney General

16 Joel Jacobsen, Assistant Attorney General

17 Santa Fe, NM

18 for Appellee

19 Hugh W. Dangler, Chief Public Defender

20 Corey J. Thompson, Assistant Appellate Defender

21 Santa Fe, NM

22 for Appellant

23 **MEMORANDUM OPINION**

1 **WECHSLER, Judge.**

2 Defendant appeals from his convictions of kidnapping (second degree), four  
3 counts of criminal sexual penetration (second degree), criminal sexual contact (fourth  
4 degree), aggravated assault with a deadly weapon (fourth degree), and battery. He  
5 argues on appeal that: (1) the district court denied his right to confrontation by  
6 allowing testimony concerning DNA evidence by an expert who did not gather or test  
7 the evidence; (2) the district court denied his right to present a defense by restricting  
8 his evidence concerning the nature of his prior sexual contact with the victim; and (3)  
9 the evidence was insufficient to support his convictions. We affirm.

10 **RIGHT TO CONFRONTATION**

11 After the victim was stopped by Sergeant Tim Zagorski of the Doña Ana  
12 County Sheriff's Department, she was taken to a Sexual Assault Nurse Examiner  
13 (SANE nurse) for examination. The SANE nurse collected samples of the victim's  
14 bodily fluids, hair, saliva, and fingernails. She also collected a substance from under  
15 the victim's fingernails that was later identified as fecal matter and matched with  
16 Defendant's DNA. The collected matter was ultimately tested at the crime lab by  
17 DNA technician Eve Takamura.

18 At trial, Lydia Vandiver, a SANE nurse, testified as an expert in sexual assault  
19 examination. She testified about the examination of SANE nurse Deonne Arnold,

1 who had died before trial. Defendant did not raise a confrontation objection. The  
2 objections Defendant did raise during Ms. Vandiver’s testimony were sustained.  
3 Although Defendant argues on appeal that Ms. Vandiver testified about Ms. Arnold’s  
4 report, no report was received as evidence. Noreen Purcell, a forensic scientist at the  
5 Department of Public Safety, also testified regarding the DNA evidence. Defendant  
6 did not raise any objection to her testimony or to the exhibits the State offered in  
7 connection with her testimony. The State did not offer any report of Ms. Takamura.

8 “To preserve a claim of error for appellate review involving the admissibility  
9 of evidence, a party must make a timely objection.” *State v. Lopez*, 105 N.M. 538,  
10 544, 734 P.2d 778, 784 (Ct. App. 1986), *holding modified on other grounds by State*  
11 *v. Baca*, 114 N.M. 668, 671-72, 845 P.2d 762, 765-66 (1992). This preservation  
12 requirement applies to confrontation issues. *See State v. Lucero*, 104 N.M. 587, 590-  
13 91, 725 P.2d 266, 269-70 (Ct. App. 1986) (“The issue of denial of the right to  
14 confrontation may not be raised for the first time on appeal.”). Because Defendant did  
15 not raise objections at trial to the testimony he now complains of on appeal, we do not  
16 consider his arguments.

17 **PRIOR SEXUAL RELATIONSHIP**

18 Defendant argues in his brief in chief that the district court limited his ability  
19 to present a full and fair defense by limiting his inquiry about prior sexual conduct

1 between the victim and Defendant. Defendant had filed a motion for an in camera  
2 hearing to determine the admissibility of the victim's past sexual conduct. At the  
3 hearing, Defendant's attorney stated that two witnesses would testify that the victim  
4 and Defendant had engaged in previous sexual conduct and that one of the witnesses,  
5 Patricia Medina, would testify to observing them engaging in oral sex. Defendant's  
6 attorney argued that the prior sexual conduct was significant to Defendant's defense  
7 because it connected Defendant's DNA material with the victim, impeached the  
8 victim's description of the allegations, and provided a motive for the victim to give  
9 a false description because she was in a long-term relationship with another man.  
10 Defendant's attorney further argued that Defendant's defense would be one of  
11 consent.

12 The district court granted Defendant's motion and allowed testimony  
13 concerning Defendant's prior sexual conduct with the victim. In permitting Ms.  
14 Medina's testimony, however, the district court stated that it would not permit a  
15 description of the sexual act on direct examination and would only permit any detail  
16 if the State made inquiry on cross examination. Defendant's attorney did not indicate  
17 any objection to the court's ruling.

18 On appeal, Defendant contends that the district court "limited his ability to  
19 present a full and fair consent defense" because "a more detailed examination

1 regarding the observed prior sexual conduct . . . would have further corroborated his  
2 version of the events on the day of the alleged attack.” He asserts that under *State v.*  
3 *Johnson*, 1997-NMSC-036, ¶ 29, 123 N.M. 640, 944 P.2d 869, the details of the prior  
4 conduct “closely resemble those of the present case.” We review the district court’s  
5 determination as to the admissibility of evidence for an abuse of discretion. *State v.*  
6 *Mendez*, 2009-NMCA-060, ¶ 18, 146 N.M. 409, 211 P.3d 206, *cert. granted*, 2009-  
7 NMCERT-006, 146 N.M. 734, 215 P.3d 43. “An abuse of discretion occurs when the  
8 ruling is clearly against the logic and effect of the facts and circumstances of the case.  
9 We cannot say the trial court abused its discretion by its ruling unless we can  
10 characterize it as clearly untenable or not justified by reason.” *State v. Rojo*, 1999-  
11 NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829 (filed 1998) (internal quotation marks  
12 and citation omitted).

13         In analyzing for an abuse of discretion, we first note that the district court  
14 granted Defendant’s motion and allowed testimony concerning the prior sexual  
15 conduct. To the extent that the district court limited the testimony, Defendant does  
16 not explain here, and he did not explain in the district court, how the description of the  
17 conduct would further corroborate his version of the events or resemble the acts in the  
18 present case. Moreover, in her proffer of testimony at the hearing on Defendant’s  
19 motion, Ms. Medina did not specify any sexual act. The district court did not abuse

1 its discretion in its ruling.

## 2 **SUFFICIENCY OF THE EVIDENCE**

3 Defendant argues that the evidence was insufficient to convict him of the  
4 crimes. In particular, he contends that (1) “the State did not offer any independent  
5 corroborating physical or forensic evidence directly linking him to the alleged sexual  
6 conduct and disputing his defense that he engaged in a consensual sexual encounter  
7 with [the victim] mere hours before her alleged assault”; and (2) “the State merely  
8 relied on the [victim’s] false testimony, even though [Defendant] presented many  
9 credible witnesses who testified that he and [the victim] had a prior sexual  
10 relationship, thereby reducing her credibility and refuting her testimony that she had  
11 never met” Defendant. When reviewing the sufficiency of the evidence to support a  
12 conviction, the issue “is whether substantial evidence of either a direct or  
13 circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt  
14 with respect to every element essential to a conviction.” *State v. Sutphin*, 107 N.M.  
15 126, 131, 753 P. 2d 1314, 1319 (1988). We resolve all disputed facts in favor of the  
16 guilty verdict, disregarding all evidence and inferences to the contrary. *State v.*  
17 *Garcia*, 2009-NMCA-107, ¶ 20, 147 N.M. 150, 217 P.3d 1048. We do not reweigh  
18 the evidence or determine whether some other hypothesis consistent with a finding of

1 innocence could be designed. *Id.* ¶ 21.

2       The jury had ample evidence with which to convict. The victim testified that  
3 Defendant forced her into her car at knife point, threatened to kill her, and raped her  
4 repeatedly. Sheriff deputies and an investigator testified that tires on the victim's car  
5 had been punctured and that when one encountered the victim after the incident, the  
6 victim was hysterical and in shock. Investigator Lindell Wright observed the victim's  
7 hair fall out where she said that Defendant had pulled it. The evidence from the  
8 SANE examination was consistent with penetration and force and non-consensual sex.  
9 The DNA evidence connected Defendant to the victim.

10       Although Defendant contends that the State did not offer any corroborating  
11 evidence linking him to the illegal conduct and disputing his contention that he had  
12 prior sexual contact with the victim that would account for the physical evidence  
13 introduced, on appeal, we review only to ascertain if the State presented substantial  
14 evidence, including circumstantial evidence, of guilt. Moreover, evidence that  
15 conflicts with the victim's credibility does not alter the equation. It was the jury's  
16 responsibility to evaluate the evidence and the credibility of the witnesses. *State v.*  
17 *Gipson*, 2009-NMCA-053, ¶ 12, 146 N.M. 202, 207 P.3d 1179. It was free to reject  
18 Defendant's version of the facts. *Garcia*, 2009-NMCA-107, ¶ 21.

19 **CONCLUSION**

1 We affirm Defendant's convictions.

2 **IT IS SO ORDERED.**

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**JAMES J. WECHSLER, Judge**

5 **WE CONCUR:**

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**CYNTHIA A. FRY, Chief Judge**

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**CELIA FOY CASTILLO, Judge**