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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.

**Nos. 28,341 & 28,342**  
(consolidated)

10  
11 **JAMIE GALLEGOS and**  
12 **ARLENE PANIAGUA,**

13 Defendants-Appellants.

14 **APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY**

15 **John A. Dean, District Judge**

16 Gary K. King, Attorney General  
17 Andrea Sassa, Assistant Attorney General  
18 Santa Fe, NM

19 for Appellee

20 Hugh W. Dangler, Chief Public Defender  
21 Susan Roth, Assistant Appellate Defender  
22 Santa Fe, NM

23 for Appellants

24 **MEMORANDUM OPINION**

25 **VIGIL, Judge.**

1 Defendants appeal their convictions for receiving stolen property (over \$100)  
2 and contributing to the delinquency of a minor. Defendants argue that (1) the district  
3 court improperly limited the cross-examination of two witnesses; (2) they were denied  
4 due process and a fair trial by the admission of prior bad act evidence; (3) the  
5 evidence was insufficient to support their convictions; and (4) they received  
6 ineffective assistance of counsel. We disagree and affirm Defendants' convictions.

7 **BACKGROUND**

8 Defendant Gallegos is the mother of Child, who was nine years old when the  
9 underlying conduct occurred. Defendant Paniagua is Child's maternal grandmother.  
10 Defendant Gallegos was laid off of work in the spring of 2006. She had full custody  
11 of Child at that time, but she decided to give Child's paternal grandparents, Angel  
12 (Grandfather) and Rebecca Duran, temporary power of attorney until she was more  
13 established. Defendant Gallegos also agreed to have Child spend part of the summer  
14 with her father in Las Vegas, Nevada.

15 By July 2006, just a few months after sending Child to her paternal  
16 grandparents' home, Defendant Gallegos got an apartment and wanted Child to live  
17 with her again. However, Child's father began a legal custody proceeding. Child  
18 continued to reside with her paternal grandparents, with Defendant Gallegos seeing

1 Child on a visitation schedule. Child testified that it was during this period that  
2 Defendants encouraged her to misbehave, escalating to the point where she was told  
3 to steal money from her grandparents. We detail this evidence in our discussion  
4 below of the issues raised on appeal. Generally, the State’s theory was that  
5 Defendants wanted Child’s behavior to provoke the grandparents into removing Child  
6 from their home and returning custody to Defendant Gallegos. Defendants took the  
7 position that Grandfather used fear to force Child to fabricate her story. The jury  
8 agreed with the State’s version and convicted Defendants of contributing to the  
9 delinquency of a minor and receiving stolen property.

## 10 **DISCUSSION**

### 11 **1. Cross-Examination**

12 Defendants claim that the district court erred in limiting the cross-examination  
13 of Child and Grandfather, thereby preventing them from presenting their defense that  
14 Grandfather had manipulated Child to lie about the stealing. As a result, Defendants  
15 contend that they were deprived of their right of confrontation and due process.

16 A district court may limit cross-examination. *See State v. Sanders*, 117 N.M.  
17 452, 459, 872 P.2d 870, 877 (1994) (“The Confrontation Clause merely guarantees  
18 an opportunity for effective cross-examination; it does not guarantee that the defense

1 may cross-examine a witness ‘in whatever way, and to whatever extent, the defense  
2 might wish.’” (per curiam) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)).  
3 A defendant’s right of confrontation is not violated when the district court restricts  
4 cross-examination to the facts and circumstances implicated by direct examination and  
5 to matters relating to the credibility of the witness. *State v. Smith*, 2001-NMSC-004,  
6 ¶ 23, 130 N.M. 117, 19 P.3d 254; *see also* Rule 11-611(B) NMRA; *State v. Delgado*,  
7 112 N.M. 335, 341, 815 P.2d 631, 637 (Ct. App. 1991). Although we defer to the  
8 district court’s discretion in limiting cross-examination, we review de novo the  
9 question of whether the Confrontation Clause has been violated. *See State v.*  
10 *Gonzales*, 1999-NMSC-033, ¶ 22, 128 N.M. 44, 989 P.2d 419.

11         The State argues that Defendants failed to preserve this issue. Whether  
12 preserved or not, the record shows no abuse of discretion nor does it support a  
13 violation of the Confrontation Clause. A review of the transcript indicates that  
14 Defendants were provided an adequate opportunity to cross-examine Child and  
15 Grandfather with respect to their defense theory that the charges were based on  
16 Grandfather’s motive to lie and manipulation of Child. Specifically, the transcript  
17 demonstrates that defense questioning was properly limited based on relevancy or

1 redundancy and that any limitation did not rise to the level of constitutional concern.

2 *See generally* Rule 11-401 NMRA (defining relevancy).

3         Defendants refer us to several specific portions of cross-examination that they  
4 claim either individually or cumulatively establish error. First, during  
5 cross-examination of Child, Defendants were not allowed to question her about a  
6 Mother’s Day gift that Child had made for Defendant Gallegos; they wanted to show  
7 that the Durans never gave Defendant Gallegos the gift. However, irrespective of  
8 which version of events the jury might believe—that Defendants were guilty or that  
9 Grandfather manipulated Child into lying—the jury was well aware of the animosity  
10 that existed between the Durans and Defendants, including the custody dispute. Thus,  
11 the district court properly determined that the testimony concerning the gift was not  
12 relevant to the jury’s assessment of Child’s credibility. Further, it is speculation to  
13 conclude that an examination of the Mother’s Day incident would have been helpful  
14 to Defendants, as opposed to harmful. *See In re Ernesto M., Jr.*, 1996-NMCA-039,  
15 ¶ 10, 121 N.M. 562, 915 P.2d 318 (“An assertion of prejudice is not a showing of  
16 prejudice.”).

17         Defendants’ second example of alleged error concerns questioning of Child  
18 about the night before the preliminary hearing. Defense counsel asked Child if she  
19 remembered Grandfather spanking her that night. The prosecutor objected on

1 relevance grounds. Although the discussion of this objection is almost completely  
2 inaudible, it appears that defense counsel stated that he was trying to show that the  
3 spanking gave Child a motive to lie. The questioning on the spanking ended after the  
4 bench conference. However, the jury was made aware of the spanking incident:  
5 Grandfather admitted it in his testimony while being cross-examined by defense  
6 counsel. Defense counsel used this incident to argue in closing that this created a  
7 motive for Child to lie. As a result, we believe that Defendants were given an  
8 adequate opportunity to present the spanking episode and how it related to their theory  
9 that the spanking motivated Child to lie.

10         Defendants next refer us to the questioning of Child concerning an incident  
11 where Grandfather became upset and broke or tore her stuffed animal. Child testified  
12 that the incident occurred. The prosecutor then objected and the district court  
13 sustained the objection. Although the judge advised defense counsel to lay a proper  
14 foundation, counsel did not do so and moved into a different line of questioning.  
15 Again, it appears that the district court was simply attempting to prevent this from  
16 turning into a dispute over parenting and custody. The basic facts of the incident were  
17 presented to the jury by Child's testimony and Grandfather's testimony, and defense  
18 counsel used this incident to argue in closing that Child had a motive to lie. We

1 therefore conclude that the district court did not improperly limit Child’s cross-examination.

2 Defendants’ argument with respect to the cross-examination of Grandfather  
3 leads to the same conclusion. Defense counsel was able to ask Grandfather whether  
4 the stuffed animal incident was related to Child’s testimony, and Grandfather denied  
5 that it was. With respect to the spanking incident, defense counsel asked Grandfather  
6 whether it was related to the preliminary hearing, and he responded that he spanked  
7 Child because she had wet the bed.

8 We are not persuaded by Defendants’ reliance on Rule 11-611(B), which  
9 permits cross-examination on specific instances of conduct. As noted, defense  
10 counsel was able to get both Child and Grandfather to agree that the incidents  
11 occurred, and the motive to lie defense was presented to the jury. Although  
12 Defendants claim that it was necessary to more fully explore these incidents, there is  
13 no indication that this would have been helpful to the defense. More to the point,  
14 instead of further exploring these incidents to inferentially show that Child was  
15 intimidated—a speculative endeavor—defense counsel could have simply asked Child  
16 if she was testifying under duress. Because the basic facts of these incidents were  
17 presented to the jury and the motive to lie argument was made based on these basic  
18 facts, we conclude that the district court did not abuse its discretion, and Defendants  
19 were not denied their confrontation and due process rights.

1 **2. Prior Bad Act Evidence**

2 Defendants next issue is stated as follows: “[Grandfather]’s outburst about  
3 uncharged allegations of abuse of [Child] by [Defendant] Gallegos was fundamentally  
4 unfair and denied [Defendants] due process.” Defendants’ argument is based on  
5 Grandfather’s response to the defense counsel’s question about why Grandfather  
6 spanked Child. Grandfather answered, “[b]ecause at ten years old she was still peeing  
7 the bed because somebody couldn’t raise her right. She was beaten and burned and  
8 tortured.” However, a reference to Grandfather’s testimony does not necessarily show  
9 that he was referring to prior bad acts committed by Defendant Gallegos.

10 The reference to not being “raised right” is not a specific bad act subject to  
11 exclusion under Rule 11-404(B) NMRA. The obvious concern is the reference to  
12 Child being “beaten and burned and tortured.” We agree with Defendants that this  
13 would be highly prejudicial if Grandfather had specifically referred to Defendant  
14 Gallegos. *See State v. Aguayo*, 114 N.M. 124, 130, 835 P.2d 840, 846 (Ct. App. 1992)  
15 (noting the highly prejudicial nature of evidence of uncharged misconduct). However,  
16 in this case it is too speculative to say who Grandfather was referring to. *See State v.*  
17 *Jett*, 111 N.M. 309, 312, 805 P.2d 78, 81 (1991) (“An evidentiary ruling within the  
18 discretion of the court will constitute reversible error only upon a showing of an abuse  
19 of discretion and a demonstration that the error was prejudicial rather than

1 harmless[.]” (citation omitted)). Therefore, we conclude that Defendants have not  
2 established error, even if we assume that the objection had been properly preserved,  
3 which it was not.

### 4 **3. Sufficiency of the Evidence**

5 Defendants challenge the sufficiency of the evidence to support their  
6 convictions. We engage in a two-step analysis in evaluating a sufficiency challenge  
7 to a conviction. First, we “view the evidence in the light most favorable to the guilty  
8 verdict, indulging all reasonable inferences and resolving all conflicts in the evidence  
9 in favor of the verdict.” *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711,  
10 998 P.2d 176. Second, we “make a legal determination of whether the evidence  
11 viewed in this manner could justify a finding by any rational trier of fact that each  
12 element of the crime charged has been established beyond a reasonable doubt.” *State*  
13 *v. Apodaca*, 118 N.M. 762, 766, 887 P.2d 756, 760 (1994) (internal quotation marks  
14 and citation omitted). “The reviewing court does not weigh the evidence or substitute  
15 its judgment for that of the fact finder as long as there is sufficient evidence to support  
16 the verdict.” *State v. Mora*, 1997-NMSC-060, ¶ 27, 124 N.M. 346, 950 P.2d 789.

17 In considering Defendants’ sufficiency challenge, we look to the jury  
18 instructions. *See State v. Smith*, 104 N.M. 729, 730, 726 P.2d 883, 884 (Ct. App.  
19 1986) (“Jury instructions become the law of the case against which the sufficiency of

1 the evidence is to be measured.”). In order to support their convictions for receiving  
2 stolen property (over \$100), the jury instructions required the jury to find that  
3 Defendants acquired possession of and/or kept cash and/or jewelry that had been  
4 stolen by another, that they knew or believed that this property had been stolen, and  
5 that the property had a market value over \$100. Further, in order to find Defendants  
6 guilty of contributing to the delinquency of a minor, the evidence had to show that  
7 Defendants, by their actions and/or words, encouraged Child to take jewelry and/or  
8 cash from the Duran residence and that this caused Child to commit the offense of  
9 larceny.

10 Child testified that both Defendants told her to search the Duran residence for  
11 money and to take some if she found any. Child gave the money to Defendant  
12 Gallegos while Defendant Paniagua was present. *Cf. State v. Hoeffel*, 112 N.M. 358,  
13 361, 815 P.2d 654, 657 (Ct. App. 1991) (“Intent can be proved by circumstantial  
14 evidence.”). Child further testified that she took money from the Duran residence on  
15 six or seven occasions. She also stole two rings and a necklace. Her testimony  
16 indicates that she gave the jewelry to both Defendants. Child was told that the goal  
17 of her misbehavior was to cause the Durans to send her back to Defendant Gallegos.

18 Grandfather testified that Child’s behavior changed dramatically during the  
19 time in question, including plummeting school grades and emotional fits. He also

1 testified that he kept over \$5000 cash from his private business in the night stand next  
2 to his bed. When he first noticed that money was missing, it amounted to \$2200,  
3 eventually growing to approximately \$4000. He then began setting up Child by  
4 leaving his wallet out when he was showering, and the amount of missing money grew  
5 to \$4880. He also estimated that \$5000 worth of jewelry had been stolen. Child was  
6 confronted and confessed to Grandfather that she had taken the cash and jewelry. She  
7 wrote down a confession that was admitted as Exhibit 1. Child's therapist also  
8 testified that she confessed to him.

9 In light of this testimony, we conclude that the evidence was sufficient to  
10 support Defendants' convictions. *See State v. Roybal*, 115 N.M. 27, 30, 846 P.2d 333,  
11 336 (Ct. App. 1992) (observing that the fact finder resolves witness credibility).  
12 Although Defendants denied these allegations in their testimony, the jury was free to  
13 reject their version of events. *See State v. Sutphin*, 107 N.M. 126, 131, 753 P.2d 1314,  
14 1319 (1988).

#### 15 **4. Ineffective Assistance of Counsel**

16 Defendants contend that they received ineffective assistance of counsel. "When  
17 an ineffective assistance claim is first raised on direct appeal, we evaluate the facts  
18 that are part of the record. If facts necessary to a full determination are not part of the  
19 record, an ineffective assistance claim is more properly brought through a habeas

1 corpus petition, although an appellate court may remand a case for an evidentiary  
2 hearing if the defendant makes a prima facie case of ineffective assistance.” *State v.*  
3 *Roybal*, 2002-NMSC-027, ¶ 19, 132 N.M. 657, 54 P.3d 61 (citing *State v. Swavola*,  
4 114 N.M. 472, 475, 840 P.2d 1238, 1241 (Ct. App. 1992)). “To establish a prima  
5 facie case of ineffective assistance of counsel, Defendant must show that (1) counsel’s  
6 performance was deficient in that it ‘fell below an objective standard of  
7 reasonableness’; and (2) that Defendant suffered prejudice in that there is ‘a  
8 reasonable probability that, but for counsel’s unprofessional errors, the result of the  
9 proceeding would have been different.’” *State v. Aker*, 2005-NMCA-063, ¶ 34, 137  
10 N.M. 561, 113 P.3d 384 (quoting *Lytle v. Jordan*, 2001-NMSC-016, ¶¶ 26-27, 130  
11 N.M. 198, 22 P.3d 666).

12 “If any claimed error can be justified as a trial tactic or strategy, then the error  
13 will not be unreasonable.” *State v. Bernal*, 2006-NMSC-050, ¶ 32, 140 N.M. 644, 146  
14 P.3d 289; *see also Lytle*, 2001-NMSC-016, ¶ 43 (“On appeal, we will not second  
15 guess the trial strategy and tactics of the defense counsel.” (internal quotation marks  
16 and citation omitted)). ““A claim of ineffective assistance of counsel does not present  
17 an opportunity for hindsight review[,]” however; we look at the totality of the  
18 evidence regarding representation, not just whether the strategy was successful. *State*  
19 *v. Reyes*, 2002-NMSC-024, ¶ 46, 132 N.M. 576, 52 P.3d 948 (quoting *Lytle*, 2001-

1 NMSC-016, ¶ 50). With these principles in mind, we consider the following  
2 ineffective assistance claims raised by Defendants.

3 First, Defendants claim that counsel was ineffective for failing to move for a  
4 mistrial or ask for a curative instruction after Grandfather's outburst about uncharged  
5 acts. As discussed above, the referenced comment was too ambiguous to warrant  
6 corrective action. Given the ambiguity, it would make tactical sense not to object to  
7 it, to prevent the impression that it was a reference to Defendant Gallegos's past  
8 conduct or to otherwise focus the jury's attention on the comment. *See Swavola*, 114  
9 N.M. at 475, 840 P.2d at 1241 (noting that "acquiescence to the introduction of  
10 inadmissible evidence may sometimes be tactically advantageous"). In addition, as  
11 set forth in our analysis above, it is too speculative to say that Defendants were  
12 prejudiced.

13 Defendants second claim of ineffective assistance of counsel concerns the  
14 possible failure to preserve the individual challenges to the limitation on cross-  
15 examination. Because we have presumed that these challenges were preserved, and  
16 no error occurred, Defendants have not made the requisite showing of prejudice.

## 17 **CONCLUSION**

18 For the reasons set forth above, we affirm.

19 **IT IS SO ORDERED.**

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**MICHAEL E. VIGIL, Judge**

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**WE CONCUR:**

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**CELIA FOY CASTILLO, Judge**

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**LINDA M. VANZI, Judge**