STATE V. DOLPHUS

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
THOMAS DOLPHUS,
Defendant-Appellant.

No. A-1-CA-35114

COURT OF APPEALS OF NEW MEXICO

December 28, 2018

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Judith K. Nakamura, District Judge

COUNSEL

Hector H. Balderas, Attorney General, Marko D. Hananel, Assistant Attorney General, Santa Fe, NM, for Appellee

L. Helen Bennett, P.C., L. Helen Bennett, Santa Fe, NM, for Appellant

JUDGES

DANIEL J. GALLEGOS, Judge. WE CONCUR: LINDA M. VANZI, Chief Judge, EMIL J. KEIHNE, Judge

AUTHOR: DANIEL J. GALLEGOS

MEMORANDUM OPINION

GALLEGOS, Judge.

{1} Defendant appeals his convictions for one count of possession of child pornography, contrary to NMSA 1978, Section 30-6A-3(A) (2007, amended 2016), and two counts of manufacture of child pornography, contrary to Section 30-6A-3(D).

Defendant raises four points of error on appeal, which we have reordered for ease of review: (1) his right to a speedy trial was violated; (2) the Legislature did not intend for Section 30-6A-3(D) to apply to the act of creating compact disc ("CD") compilations of prohibited material for personal use; (3) there was insufficient evidence to convict him of manufacturing child pornography; and (4) his convictions for both possessing and manufacturing child pornography violate double jeopardy. Not persuaded, we affirm.

BACKGROUND

{2} In the fall of 2009, Defendant moved into his girlfriend's home in Albuquerque, where he stored a safe and a computer in a spare room. In 2012 Defendant's girlfriend discovered two suspicious CDs labeled "Child's Play" and "CP Only" in the spare room. She opened the CDs on her own computer and discovered images of children engaged in obscene sexual acts. She reported her findings to the police. The police obtained a search warrant. The search led to the discovery of the safe, with Defendant's name on it, which contained several more CDs containing similarly obscene images involving children. In all, the State recovered more than 100,000 images and classified more than one thousand of them as child pornography.

{3} Defendant was arrested on April 26, 2012, and a formal grand jury indictment was filed against him on May 18, 2012. The indictment charged Defendant with forty-five counts of possession of child pornography and fourteen counts of manufacturing child pornography. Approximately three months before trial—nearly three years after his arrest—Defendant moved to dismiss the case for violation of his right to a speedy trial. Defendant's motion was denied, and his bench trial ultimately took place on May 4-5, 2015. The district court found Defendant guilty of one count of possession of child pornography and two counts of manufacturing child pornography. This appeal followed. We consider each of Defendant's appellate issues in turn, providing additional procedural and factual background as necessary.

DISCUSSION

I. Speedy Trial

{4} Based on his three years of pretrial incarceration, Defendant contends that his right to a speedy trial was violated. Both the Federal Constitution and New Mexico Constitution guarantee an accused the right to a speedy trial, recognizing a societal interest in bringing an accused to trial and in preventing prejudice to the accused. *See State v. Brown*, 2017-NMCA-046, ¶ 12, 396 P.3d 171. When reviewing a district court's speedy trial decision, we weigh and balance de novo four factors, derived from *Barker v. Wingo*, 407 U.S. 514, 529-30 (1972): "(1) the length of delay, (2) the reasons for the delay, (3) the defendant's assertion of his right, and (4) the actual prejudice to the defendant that, on balance, determines whether a defendant's right to a speedy trial has been violated." *State v. Garza*, 2009-NMSC-038, ¶ 13, 146 N.M. 499, 212 P.3d 387 (internal quotation marks and citation omitted). "[O]ur courts have endeavored to adapt the *Barker* analysis to the unique factual circumstances presented in each case." *Id.* ¶

14. In doing so, we defer to the district court's factual findings. *See State v. Ochoa*, 2017-NMSC-031, ¶ 4, 406 P.3d 505.

A. Length of Delay

{5} We begin by determining whether the length of delay is presumptively prejudicial—if it is, a speedy trial analysis is warranted. *See State v. Serros*, 2016-NMSC-008, ¶ 22, 366 P.3d 1121 (noting that length of delay, the first factor in speedy trial analysis, "acts as a triggering mechanism for considering the four *Barker* factors if the delay crosses the threshold of being 'presumptively prejudicial,' and it is an independent factor to consider in evaluating whether a speedy trial violation has occurred"). A delay is presumptively prejudicial if it extends beyond one year for a simple case, fifteen months for an intermediate case, and eighteen months for a complex case. *Garza*, 2009-NMSC-038, ¶ 2. "In determining what weight to give the length of any delay, we consider the extent to which the delay stretched beyond the presumptively prejudicial period." *State v. Lujan*, 2015-NMCA-032, ¶ 11, 345 P.3d 1103. Greater delays will potentially weigh more heavily against the state, and delay amounting to little more than the minimum needed to trigger a speedy trial analysis will not weigh heavily in a defendant's favor. *Id*.

{6} Here, the district court found that the volume of prohibited images and numerous witnesses made Defendant's case complex. Defendant takes issue with the district court's determination, arguing that his case was one of intermediate complexity. Specifically, Defendant contends that the State tactically overcharged him with forty-five counts of possession and fourteen counts of manufacturing child pornography, of which only one count of possession and two counts of manufacture survived until the time of trial, resulting in a false appearance of complexity.

{7} We observe, however, that Defendant had more than 100,000 images saved on the CDs found at his residence. Of those images, the State classified more than a thousand as child pornography. Of the forty-five possession counts with which Defendant was originally charged, all but one was dismissed after our Supreme Court decided *State v. Olsson*, 2014-NMSC-012, 324 P.3d 1230. In *Olsson*, decided approximately two years after Defendant was indicted and charged with multiple counts of possession, our Supreme Court concluded that the possession statute, Section 30-6A-3(A), was unclear as to whether the unit of prosecution should be each individual image of child pornography or an entire compilation. *Olsson*, 2014-NMSC-012, ¶¶ 2, 45. Due to this insurmountable ambiguity, the Court applied the rule of lenity and determined that the defendant could be charged with only a single count of possession for the multiple images. *Id*. In order to comply with *Olsson*, the district court here dismissed all but one of the possession counts against Defendant. With respect to the manufacturing charges, the State eventually filed a nolle prosequi on eleven of the thirteen counts because the majority of the CDs containing prohibited images either fell outside the statute of limitations or were manufactured outside of New Mexico, as urged by Defendant.

{8} In this context, where several charges were dismissed as a result of an intervening decision by our Supreme Court and where a number of other charges were dismissed based in large part on Defendant's tenacious legal defense, we see no reason to depart from our usual deference to the district court's determination that this case was complex, especially in light of the district court's findings regarding the sheer volume of evidence and number of witnesses involved. *See State v. Moreno*, 2010-NMCA-044, ¶ 11, 233 P.3d 782 (deferring to the district court's complexity finding and parenthetically noting that the district court is in the best position to determine the complexity of a case).

{9} Defendant was arrested on April 26, 2012. He was continuously incarcerated until he was convicted on May 5, 2015. The three-year delay between his arrest and his bench trial thus surpassed the eighteen-month point at which a complex case becomes presumptively prejudicial by an additional eighteen months and triggers "further inquiry into the *Barker* factors." *Garza*, 2009-NMSC-038, ¶ 21. Furthermore, we conclude that the overall length of delay of thirty-six months weighs moderately against the State. *See id.* ¶ 24 (indicating that a three-year and nine-month delay is too short to weigh heavily in a defendant's favor); *cf. State v. Steinmetz*, 2014-NMCA-070, ¶ 6, 327 P.3d 1145 (holding that a twenty-eight-month delay beyond the date of presumptive prejudice in a case of intermediate complexity weighs moderately against the state).

B. Reasons for the Delay

{10} After determining that there was a delay, the court is to consider "the reason the government assigns to justify the delay." *Garza*, 2009-NMSC-038, ¶¶ 25-27 (internal quotation marks and citation omitted). "[D]ifferent weights should be assigned to different reasons for the delay." *Id.* ¶ 25 (internal quotation marks and citation omitted). The reason for the delay "may either heighten or temper the prejudice to the defendant caused by the length of the delay." *Id.* (internal quotation marks and citation omitted).

{11} There are three types of delay attributable to the state, each carrying varying weight in a reviewing court's analysis. *See Serros*, 2016-NMSC-008, ¶ 29. The first type is "a deliberate attempt to delay the trial in order to hamper the defense," which is weighed heavily against the state. *Id.* The amount of weight we assign against the state for the second type of delay—"negligent or administrative delay"—is "closely related to the length of delay." *Garza*, 2009-NMSC-038, ¶¶ 26, 29 (identifying "burdens on the criminal justice system, such as overcrowded courts, congested dockets or the unavailability of judges" as negligent or administrative delay (citation omitted)). "Negligent or administrative delay is weighed against the prosecution because the ultimate responsibility for such circumstances rests with the government rather than with the defendant." *Steinmetz*, 2014-NMCA-070, ¶ 7 (alteration, internal quotation marks, and citation omitted). Finally, where the delay is due to "a valid reason, such as a missing witness," it is often "inevitable and wholly justifiable," and we therefore balance the reasonableness of the state's efforts to move a case toward trial against the perils of conducting a trial "whose probative accuracy the passage of time has begun by degrees to throw into question." *Garza*, 2009-NMSC-038, ¶ 27 (internal quotation marks and

citation omitted). Thus, "certain periods of time during a case which the State can demonstrate are 'inevitable' or periods during which the case is moved 'toward trial with customary promptness' are not to be weighed against the State." *State v. Wilson*, 2010-NMCA-018, ¶ 34, 147 N.M. 706, 228 P.3d 490. This includes time spent collecting witnesses against the accused, opposing a defendant's pretrial motions, or other periods of delay which are customary. *See Garza*, 2009-NMSC-038, ¶ 27; *see also State v. Parrish*, 2011-NMCA-033, ¶ 25, 149 N.M. 506, 252 P.3d 730 (determining that the four-and-a-half-month period from the initial indictment, which included reassignment of judges, discovery and identification of witnesses, was neutral because the "case progressed with customary promptness during this period").

{12} Additionally, "delay initiated by defense counsel generally weighs against the defendant." *Ochoa*, 2017-NMSC-031, ¶ 18. Similarly, issues between a defendant and counsel may be held against the accused if it "can reasonably be viewed as causing or contributing to the delay[.]" *Steinmetz,* 2014-NMCA-070, ¶¶ 14-15.

{13} We now look at the identifiable periods involved in this case and determine the weight to be given to each.

1. The Eight Months Between April 26, 2012, and January 22, 2013, Weigh Neutrally

{14} From Defendant's arrest on April 26, 2012, until September 2012, pretrial litigation proceeded normally. The district court initially set a cash-only bond of $75,000 and attorneys for the State, represented by assistant attorney general Clara Moran, and Defendant, represented by Kelly Alexis Golightley, entered appearances. Defendant made a pro forma speedy trial demand and requested discovery. Defendant filed his first motion to review the conditions of release on August 9, 2012. A hearing on the motion was set for August 30, 2012. At the hearing, at Defendant's request, Judge Loveless recused himself. He was replaced by Judge Sanchez on September 17, 2012. It also appears that during this time, Ms. Golightley viewed the alleged child pornography and conducted an interview of the primary detective.

{15} At some point in September, however, Defendant became dissatisfied with the counsel of Ms. Golightley, who withdrew from the case due to intimidating and aggressive behavior exhibited by Defendant. Houston Ross made his entry of appearance as Defendant's counsel on September 20, 2012. A hearing on Defendant's motion to review his conditions of release was held on September 28, 2012, at which the district court maintained the $75,000 cash-only bond.

{16} During a hearing on October 4, 2012, on Defendant's pro se motion to substitute counsel, Defendant expressed to the district court that he did not believe Mr. Ross was working in his best interest. After hearing from Mr. Ross, the district court rejected Defendant's request to change counsel a second time. Instead, the district court scheduled a guilty plea hearing for January 4, 2013.

{17} Although Defendant replaced one attorney and sought to replace another during the period from September to January, we cannot say that Defendant's issues with his counsel caused any delay in the proceedings. Thus, the case appears to have been progressing normally between April 26, 2012, and January 4, 2013, and weighs neutrally. *See Parrish*, 2011-NMCA-033, ¶ 25 (weighing neutrally a period of time in which the case progressed with customary promptness).

2. During the Plea Negotiations Between January 4 and October 10, 2013, Three Months Weigh Against the State, Five Months Weigh Against Defendant, and Two Months Weigh Neutrally

{18} Although the record is unclear as to when a plea deal was actually proffered to Defendant, the district court scheduled a guilty plea hearing for January 4, 2013. However, the record does not indicate that a hearing was held on January 4. Instead, the next filing occurred on January 11, 2013, wherein the State requested a continuance of a pretrial conference. The district court rescheduled the conference for February 27, 2013. In the interim, on January 22, 2013, Mathew Huggins, Defendant's third defense counsel, entered a substitution of counsel. We conclude that the time between the January 4, 2013 hearing that did not occur and the February 27, 2013 hearing weighs against the State as a result of both negligent delay and the delay occasioned by the continuance.

{19} At the February 27, 2013 hearing, Mr. Huggins indicated that the parties were at an impasse in plea negotiations. He stated that he would need six to eight months to fully prepare for trial, and requested a trial setting. He also indicated that although both Ms. Golightley and Mr. Ross had viewed the child pornography evidence, he would also need to arrange with the State to set up another viewing. The district court set a status conference a month out to ensure that the viewing took place.

{20} At the April 30, 2013 status conference, the parties informed the district court that they were still negotiating a possible plea deal. The State expressed that it was ready for a plea or a trial. Defense counsel "acknowledge[d] that the delay at this point [was] attributable to the Defense[.]" The district court granted a continuance to June 28, 2013, upon the condition that Defendant waive this period of delay for speedy trial purposes. The four-month period between February 27, 2013 through June 28, 2013, including the time necessary for Defendant's third counsel to review the evidence and the time covered by Defendant's waiver, weighs against Defendant.

{21} It does not appear that a hearing was held on June 28, 2013. Instead, on August 5, 2013, Defendant made a motion to compel evidence. This particular motion was to allow Defendant to view the child pornography evidence himself. During the hearing on the motion, held September 4, 2013, the district court granted Defendant's request. Additionally, the State put its plea offer on the record. Defendant rejected the plea offer, against the advice of his attorney, stating during the hearing that "[t]he evidence against [him] is weak."

{22} At a hearing on September 26, 2013, the State asked the district court for a trial setting due to Defendant's rejection of the plea offer. Defendant's counsel, Mr. Huggins, was not present. Around this time, the relationship between Defendant and his counsel Mr. Huggins unraveled, resulting in Mr. Huggins filing a motion for withdrawal of counsel on October 10, 2013. Jonathan Miller entered his appearance on behalf of Defendant on October 21, 2013. We weigh the one month period between June 28, 2013, when the status hearing was supposed to have been held, but was not, and August 3, 2013, slightly against the State as administrative delay. We weigh the nearly two-month period between August 3, 2013 and September 26, 2013, neutrally, because the delay during this time was attributable to Defendant's motion to personally view the child pornography evidence. The delay from September 26, when defense counsel was not present at the hearing until October 21, when yet another defense counsel entered an appearance, is weighed against Defendant, because it is attributable to Defendant's deteriorating relationship with his counsel. Therefore, during this period, three months weigh against the State, five months weigh against Defendant, and two months are neutral.

3. The Four-and-a-Half Month Delay Between October 21, 2013, and March 7, 2014, Weighs Neutrally

{23} Along with Mr. Miller's entry of appearance on October 21, 2013, Defendant filed another motion to review his conditions of release. The district court granted the motion on November 6, 2013, modifying Defendant's bond to $100,000 cash or surety, plus ten percent to the court. However, Defendant remained incarcerated, apparently unable to take advantage of the reduction of his bond. Also, on October 24, 2013, assistant attorney general Kevin Graham entered as counsel for the State.

{24} On November 25, 2013, Defendant filed an amended motion to review conditions of release, and the district court set a hearing on the motion for January 15, 2014. Defendant's motion was denied after the hearing. No further action was taken on the case until March 7, 2014. It appears that the new attorneys on both sides were familiarizing themselves with the case, as well as working on the conditions of release issue, during the four-and-a-half months between October 21, 2013, and March 7, 2014. We weigh this time neutrally.

4. The Five-Month Delay Between March 7, 2014, and August 20, 2014, Weighs Neutrally

{25} Between March 7 and August 20, 2014, there was significant motion practice on the part of Defendant. On March 7, 2014, Defendant's counsel filed a motion to dismiss thirteen manufacturing counts for lack of venue. The State filed a response on April 9, 2014, and the district court denied the motion following a hearing on May 29, 2014.

{26} Around the same timeframe, on May 2, 2014, Defendant's counsel filed a motion to consolidate the possession counts, one through forty-five, based on our Supreme Court's decision in *Olsson*, 2014-NMSC-012. Counsel for Defendant also filed another

motion to review the conditions of release on June 10, 2014. On June 17, 2014, the district court granted Defendant's *Olsson* motion, dismissing all but a single possession count. The same day, the district court set a hearing on Defendant's motion to review conditions of release for August 20, 2014.

{27} On August 1, 2014, Defendant again moved to dismiss manufacturing counts forty-six through fifty-nine for lack of venue, or in the alternative to give notice of alibi, both of which were denied by the district court on August 20, 2014, with Judge Hadfield now presiding over the case. Due to Defendant's heavy motion practice, this five-month period weighs neutrally. *See Garza*, 2009-NMSC-038, ¶ 27 (recognizing that the time spent opposing a defendant's pretrial motions is often both inevitable and wholly justifiable).

5. The Eight-and-a-Half Month Delay Between August 20, 2014, to May 5, 2015, Weighs Slightly Against the State, With the Exception of One Week That Weighs Against Defendant

{28} On August 20, 2014, Judge Hadfield entered a pretrial order, setting docket calls for October 8, 2014, and February 3, 2015, with a three-day trial to begin on either February 16, February 23, or March 2, 2015. Defendant then filed a series of motions: an amended motion to review conditions of release; a *pro se* motion to dismiss the manufacturing charges; a motion for a continuance; another motion to review his conditions of release; a motion to suppress evidence and to question the investigating officer at trial; a motion to dismiss for speedy trial; and a motion for emergency furlough to tend to family affairs following the death of Defendant's father. Aside from the continuance, the district court denied all of Defendant's motions.

{29} On February 2, 2015, during this period of extensive motions practice, Judge Nakamura replaced Judge Hadfield to preside over this case. The same day, the district court issued a new scheduling order, setting trial for April 27, 2015. The district court set a hearing on all pending motions for March 25, 2015. Defendant then filed an emergency motion to personally reexamine the evidence against him and to question the officer at trial pro se, asserting that the State may have tampered with the evidence to bring it within the statute of limitations and venue requirements. Around the same time, both the State and Defendant filed several other notices regarding witnesses. Finally, the State and Defendant filed certificates of readiness for trial on March 18 and 24, 2015, respectively.

{30} At the March 25, 2015 hearing on all the pending motions, the district court denied Defendant's emergency motion. The district court, however, adjusted Defendant's bond to $100,000 cash or surety. The district court also heard argument on the speedy trial motion. The State, now represented by assistant attorney general Anthony W. Long, filed a nolle prosequi on manufacturing counts forty-six through fifty-seven for insufficient evidence, leaving Defendant to face a total of two counts of manufacturing and one count of possession.

{31} On April 14, 2015, the district court denied Defendant's speedy trial motion. Following Defendant's waiver of jury trial, a notice of non-jury trial went out April 20, 2015, pushing the trial date to May 4-5, 2015. At the conclusion of the bench trial, Defendant was found guilty of one count of possession and two counts of manufacturing child pornography.

{32} While there was significant delay in these final months, it was not for lack of activity. On August 20, 2014, Judge Hadfield entered a scheduling order, setting trial in early February 2015. However, in early February, the case was administratively reassigned to Judge Nakamura, and Defendant's trial was ultimately pushed back to May 2015. Despite Defendant's heavy motion practice, there is no indication that the filing of the motions delayed the first trial setting. However, at the docket call held on April 20, 2015, Defendant's stand-in counsel indicated that Mr. Miller could not start trial on April 27, 2015, as the second trial setting called for. Instead, Defendant agreed to start trial on May 4, 2015. Thus, the approximately eight-month and one-week period from August 20, 2014 to April 27, 2015—from scheduling order until the originally scheduled trial date—constitutes administrative delay and weighs slightly against the State. The one-week period from the date trial should have commenced until trial actually took place weighs against Defendant, because the delay was attributable to his counsel's request.

{33} Looking at the entire three years of pretrial delay, we count that nineteen-and-a-half months weigh neutrally, approximately five months weigh against Defendant, and approximately thirteen months weigh against the State. Overall, we weigh this factor slightly to moderately against the State, taking into account the fact that the vast majority of the State's delay was negligent due to administrative delay, but also recognizing that the longer the overall delay, heavier is the weight ascribed to the State. *See Steinmetz*, 2014-NMCA-070, ¶ 7 ("The degree of weight we assign against the prosecution for negligent delay is closely related to the length of the delay; the longer the delay, or the greater the threat to the fairness to the defendant, the less tolerant we are of the delay." (alteration, internal quotation marks, and citations omitted)).

C. Assertion of the Right

{34} "The timeliness and vigor with which the right to a speedy trial is asserted may be considered as an indication of whether a defendant was denied the right to a speedy trial over his objection or whether the issue was raised on appeal as an afterthought." *State v. Brown*, 2017-NMCA-046, ¶ 29, 396 P.3d 171 (alterations, internal quotation marks, and citation omitted). "Pro forma assertions are sufficient to assert the right, but are given little weight in a defendant's favor[,]" and "a defendant's assertion [of the right] can be weakened by acquiescence to the delay." *Ochoa*, 2017-NMSC-031, ¶¶ 41-42.

{35} From the record, it appears that each of Defendant's attorneys asserted the right to a speedy trial. Three of them were pro forma assertions filed with the entry or substitution of counsel. In January 2015, three and a half months before the date of trial, Defendant's final attorney moved to dismiss on speedy trial grounds. We note, however,

that Defendant agreed in August 2014 to the original February 2015 trial setting. Therefore, we conclude that Defendant's assertion of the right weighs only slightly in his favor. *See State v. Moreno*, 2010-NMCA-044, ¶ 33, 148 N.M. 253, 233 P.3d 782 (discussing that the pro forma assertion of the right with the entry of counsel and assertions made close to the date of trial are given less weight); *see also Ochoa*, 2017-NMSC-031, ¶¶ 41-42 (recognizing that a defendant's assertion of the right can be weakened by acquiescence to the delay).

D. Prejudice

{36} We analyze prejudice according to three overarching interests: (1) preventing oppressive pretrial incarceration, (2) minimizing anxiety and concern of the accused, and (3) limiting the possibility that the defense will be impaired. *Garza*, 2009-NMSC-038, ¶ 35. "[W]e recognize that the criminal process inevitably causes anxiety for defendants, but we focus only on undue prejudice." *State v. Castro*, 2017-NMSC-027, ¶ 27, 402 P.3d 688. Prejudice becomes undue when it is "excessive or unwarranted[.]" *State v. Thomas*, 2016-NMSC-024, ¶ 15, 376 P.3d 184. A defendant should show particularized prejudice with "actual evidence in the form of affidavits, testimony, or documentation in support" thereof. *State v. Spearman*, 2012-NMSC-023, ¶ 39, 283 P.3d 272. "[W]ithout a particularized showing of prejudice, we will not speculate as to the impact of pretrial incarceration on a defendant or the degree of anxiety a defendant suffers." *Garza*, 2009-NMSC-038, ¶ 35.

{37} In instances where "the length of delay and the reasons for the delay weigh heavily in the defendant's favor and the defendant has asserted his right and not acquiesced to the delay, then the defendant need not show prejudice for a court to conclude that the defendant's right has been violated." *Brown*, 2017-NMCA-046, ¶ 33 (alteration, internal quotation marks, and citation omitted). In this case, because the length of delay weighed only moderately in Defendant's favor, the reasons for the delay weighed at most moderately in favor of Defendant, Defendant's assertion of the right was largely pro forma and he in fact acquiesced in long portions of delay, a particularized showing of undue prejudice must be presented.

{38} Defendant claims he suffered prejudice because of his three years of pretrial incarceration and because he was denied a one week furlough to attend to his deceased father's affairs. In reviewing these claims of prejudice, *Ochoa* is instructive. We start our analysis from a position similar to that of our Supreme Court in *Ochoa*: first, Defendant here was incarcerated for three years prior to his conviction (the defendant in *Ochoa* was incarcerated for two years); and second, Defendant did not offer proof in the form of affidavits, testimony, or other documentation to support his prejudice claim. *See* 2017-NMSC-031, ¶ 49.

{39} In *Ochoa*, our Supreme Court stated, "[t]hough it is obvious that [the d]efendant was prejudiced by virtue of his continuous incarceration, absent affirmative proof, we can only speculate as to the specific circumstances of his incarceration." *Id.* ¶ 60. "Similarly, we can presume that Defendant suffered some degree of anxiety and

concern, but can only speculate as to whether such prejudice was undue." *Id.* ¶ 61 (emphasis omitted); *see also Spearman*, 2012-NMSC-023, ¶ 39 (declining to hold that the defendant suffered undue anxiety based on the bare allegations of defense counsel); *Garza*, 2009-NMSC-038, ¶ 35 (requiring the anxiety to be undue in order to weigh in the defendant's favor). Thus, despite several inquiries from the district court as to whether he wished to present evidence, Defendant here did not provide any affidavits, testimony, or documentation to support his claim, and we will not speculate about the circumstances of his incarceration or the degree of anxiety or concern he suffered.

{40} Finally, we can presume that there was some impairment to the defense. *See Ochoa*, 2017-NMSC-031, ¶ 62. However, Defendant failed to state "with particularity what exculpatory evidence would have been offered" as he was obligated to. *Serros*, 2016-NMSC-008, ¶ 85 (alteration, internal quotation marks, and citations omitted).

{41} Therefore, we presume that Defendant was prejudiced by his three years of continuous incarceration. *See Ochoa*, 2017-NMSC-031, ¶ 64. However, presumptive prejudice is not dispositive of a speedy trial claim and "cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria." *Doggett v. United States*, 505 U.S. 647, 656 (1992). And without a showing of particularized prejudice, we are hard pressed to weigh this factor heavily in Defendant's favor.

E. Balancing the Factors

{42} Overall, the primary factor weighing against the State is the three-year delay, which we have weighed moderately against the State. However, looking at the reasons for delay, we have determined that a total of five months of delay weigh against Defendant and thirteen months weigh against the State, with the remainder of the delay weighed neutrally, and that such delay weighs slightly to moderately against the State. Defendant's assertions of his speedy trial rights weigh only slightly in his favor, especially where he acquiesced to months of delay in setting a trial date. Consequently, despite the prejudice to Defendant by his pretrial incarceration, we conclude that the other factors do not weigh so strongly in his favor as to establish a speedy trial violation. We therefore affirm the district court's denial of Defendant's motion to dismiss for violation of his speedy trial rights.

II. Manufacturing Under Section 30-6A-3(D)

{43} Defendant asserts that his conviction for manufacturing child pornography cannot stand because the Legislature sought only to criminalize those persons who manufacture child pornography for commercial sale or display, or those who actually perpetrate the abuse by creating new child pornography in the original instance. In the same vein, Defendant contends that the Legislature did not intend to punish persons who create CDs containing a compilation of prohibited material for personal possession.

{44} We review the meaning of a statute de novo. *See State v. Bernard*, 2015-NMCA-089, ¶ 6, 355 P.3d 831. "Our primary goal when interpreting statutory language is to give effect to the intent of the Legislature. We look first to the words chosen by the Legislature and the plain meaning of the Legislature's language. When the language in a statute is clear and unambiguous, we give effect to that language and refrain from further statutory interpretation." *State v. Smith*, 2009-NMCA-028, ¶ 8, 145 N.M. 757, 204 P.3d 1267 (internal quotation marks and citations omitted).

{45} We therefore begin by looking at the language used by the Legislature. Section 30-6A-3(D) states that

> [i]t is unlawful for a person to intentionally manufacture any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if one or more of the participants in that act is a child under eighteen years of age.

Section 30-6A-3(D) makes no mention that the *mens rea* for manufacturing child pornography is contingent upon the intended use—whether for personal consumption, commercial distribution, or otherwise. The *mens rea* is satisfied by intentionally undertaking of the act of manufacturing. *See id*.

{46} For purposes of the Sexual Exploitation of Children Act, NMSA 1978, Sections 30-6A-1 to -4 (1984, as amended through 2016), our Legislature has defined "manufacturing" as the "production, processing, copying by any means, printing, packaging or repackaging of any visual or print medium depicting any prohibited sexual act or simulation of such an act if one or more of the participants in that act is a child under eighteen years of age[.]" Section 30-6A-2(D). In *Smith*, 2009-NMCA-028, ¶ 15, the defendant copied pornographic images of children from his computer onto a flash drive and a CD. We determined that "copying the digital images to a portable storage device creates a new digital copy of the prohibited image sufficient to constitute manufacturing under the definition of manufacturing found in" Section 30-6A-2(D). *Smith*, 2009-NMCA-028, ¶ 2. The case before us presents essentially the same situation as in *Smith* and we conclude that the act of copying child pornography from a computer onto CDs constitutes the act of manufacturing under Sections 30-6A-2(D) and 3(D).

{47} We note that Defendant argues in his brief in chief that the dictionary defines "manufacture" as "to make or process a raw material into a finished product, especially by means of a large scal[e] industrial operation[.]" Defendant also argues that "production" is defined as "the act of producing and creating value or wealth by producing goods and services." In light of these two dictionary definitions, Defendant contends that the plain meaning of Section 30-6A-3(D) demonstrates an intent on the part of the Legislature to only punish those engaged in the creation of child pornography for commercial sale or display. Given the Legislature's definition of manufacturing as set forth in Section 30-6A-2(D), and our case law construing it, Defendant's dictionary definition argument is unavailing. *See Smith*, 2009-NMCA-028, ¶ 13 (recognizing that "where a statute specifically defines a term, we interpret the statute according to those

definitions, because those definitions reflect legislative intent"); *see also id.* ¶ 12 ("[I]f the language of the statute is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." (internal quotation marks and citation omitted)). Therefore, we conclude that to the extent Defendant was alleged to have copied child pornography from his computer to CDs, such acts fell within Section 30-6A-2(D)'s definition of "manufacture."

III. Sufficiency of the Evidence

{48} Defendant claims that the evidence was insufficient to convict him of two counts of manufacturing because there was no evidence to prove beyond a reasonable doubt that he created the CDs containing prohibited content.[1] Specifically, Defendant argues that the act of manufacturing cannot be inferred from simple possession.

{49} " 'The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction.' " *State v. Montoya*, 2015-NMSC-010, ¶ 52, 345 P.3d 1056 (quoting *State v. Guerra*, 2012-NMSC-027, ¶ 10, 284 P.3d 1076). The reviewing court "view[s] the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176.

{50} With respect to the manufacturing counts, the district court laid out the required elements the State must prove as follows: (1) Defendant intentionally manufactured (2) obscene visual print media (3) that depicted a prohibited sexual act and (4) one or more of the participants was under the age of eighteen. *Accord* Section 30-6A-3(D). There is no challenge on appeal as to the propriety of these elements; instead, Defendant challenges the sufficiency of the evidence on the first element—that Defendant *intentionally manufactured* child pornography.

{51} The district court made the following factual findings with respect to intentional manufacture: Defendant admitted during his interrogation to searching the Internet for child pornography; the writing on the labels on the CDs containing child pornography is "uncann[ily]" similar to Defendant's handwriting; the numbering system used on the CD labels is similar to numbering used by Defendant on his homework assignments; and the CDs were found in Defendant's safe in the spare room among other CDs that contained pornography and child pornography. From these facts, the district court reasoned that Defendant must have downloaded child pornography to his computer, placed a CD inside the computer's disk tray, intentionally copied the child pornography to the CD, and labeled the CD.

{52} Defendant contends that these facts are insufficient to establish beyond a reasonable doubt that he actually manufactured the child pornography. Given our standard of review, we disagree. Viewing the evidence in the light most favorable to the guilty verdicts, indulging all reasonable inferences and resolving all conflicts in the

evidence in favor of the verdict, *Cunningham*, 2000-NMSC-009, ¶ 26, we conclude that a reasonable fact-finder could find that Defendant searched for child pornography, downloaded the images to his computer, copied the images to CDs, labeled the CDs, and stored the CDs in his safe among his other possessions. Consequently, we hold that sufficient evidence supports Defendant's convictions for manufacturing child pornography.

IV. Double Jeopardy

{53} Defendant's final argument is that his conviction for both manufacturing and possessing CDs containing child pornography violates double jeopardy.

> The Double Jeopardy Clause of the United States Constitution guarantees: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. This terse prohibition often presents difficulties in analysis, in part because it has been held to incorporate a broad and general collection of protections against several conceptually separate kinds of harm: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.

State v. Montoya, 2013-NMSC-020, ¶ 23, 306 P.3d 426 (alteration, internal quotation marks, and citations omitted). Our analysis comes under the purview of the third category, prohibiting multiple punishments for the same offense, and is a "double description" case. *See State v. Gwynne*, 2018-NMCA-033, ¶ 9, 417 P.3d 1157 (stating that there are two types of "multiple punishments" cases, including "double description" cases in which the defendant is charged with violations of multiple statutes or statutory subsections); *see also State v. Franco*, 2005-NMSC-013, ¶ 14, 137 N.M. 447, 112 P.3d 1104 (observing that the courts "treat statutes written in the alternative as separate statutes" for double jeopardy purposes); *Gwynne*, 2018-NMCA-033, ¶ 10 (stating that a challenge to convictions under two different subsections of Section 30-6A-3 constitutes a "double description" case). In analyzing a double description case, "we first examine whether the defendant's conduct was unitary, meaning that the same criminal conduct is the basis for both charges." *State v. Contreras*, 2007-NMCA-045, ¶ 20, 156 P.3d 725 (internal quotation marks and citation omitted). "If the conduct is not unitary, then the inquiry is at an end and there is no double jeopardy violation." *Id.* (internal quotation marks and citation omitted). If the conduct is unitary, however, then the second part of the analysis is to determine if the Legislature intended to punish the offenses separately. *See id.* This is a question of law that we review de novo. *Montoya*, 2013-NMSC-020, ¶ 22.

{54} This Court recently addressed a similar double jeopardy argument in *Gwynne*. In that case, the defendant had taken cell phone videos of himself having sex with a sixteen-year-old minor. 2018-NMCA-033, ¶¶ 2-8. He asserted that the conduct underlying his convictions for manufacturing child pornography and for possession of child pornography was unitary because the moment he created the video on his phone,

he was instantly in possession. *See id.* ¶ 16. This Court first pointed out that "[i]n analyzing whether a defendant's conduct [was] unitary, we look to whether [the] defendant's acts have sufficient indicia of distinctness." *Id*. ¶ 12 (internal quotation marks and citation omitted). We then determined that the "proper analytical framework is whether the facts presented at trial establish that the jury reasonably could have inferred independent factual bases for the charged offenses." *Id*. (internal quotation marks and citation omitted). We concluded under the facts of that case that the acts of manufacturing and possession could be distinguished as separate acts by the passage of time and by further duplication of the video. *Id*. ¶ 16.

{55} As in *Gwynne*, there was distinct evidence in this case from which the district court, sitting as fact-finder, "reasonably could have inferred independent factual bases for the charged offenses." *Id*. at ¶ 17 (internal quotation marks and citation omitted). Specifically, the district court found that Defendant had fourteen CDs containing child pornography in his safe in the spare room on April 26, 2012. The district court also found that Defendant manufactured one of those CDs on March 28, 2010, and another on October 22, 2010. Given the passage of time between the manufacture of the CDs and the possession of the CDs (among the fourteen total CDs found in Defendant's possession), and the distinct factual bases to prove each charge, we conclude that the acts of manufacturing and possessing the CDs were not unitary. Therefore, there is no violation of double jeopardy.

CONCLUSION

{56} For these reasons, we affirm.

{57} IT IS SO ORDERED.

DANIEL J. GALLEGOS, Judge

WE CONCUR:

LINDA M. VANZI, Chief Judge

EMIL J. KEIHNE, Judge

---

[1] Despite indicating in his brief-in-chief's subheading that he is also challenging the possession conviction, Defendant limited the substance of his challenge to the manufacturing convictions. Therefore, we do not address sufficiency of the evidence as it relates to possession of child pornography. *See In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 ("We have long held that to present an issue on appeal for review, an appellant must submit argument and authority as required by rule." (emphasis omitted)).