STATE V. PALMA

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STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
REIDESEL O. PALMA,
Defendant-Appellant.

No. A-1-CA-35401

COURT OF APPEALS OF NEW MEXICO

December 19, 2018

APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY, Matthew E. Chandler, District Judge

COUNSEL

Hector H. Balderas, Attorney General, Santa Fe, NM, Charles J. Gutierrez, Assistant Attorney General, Albuquerque, NM, for Appellee

Bennett J. Baur, Chief Public Defender, Mary Barket, Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

HENRY M. BOHNHOFF, Judge. WE CONCUR: MICHAEL E. VIGIL, Judge, EMIL J. KIEHNE, Judge

AUTHOR: HENRY M. BOHNHOFF

MEMORANDUM OPINION

BOHNHOFF, Judge.

{1} Defendant Reidesel O. Palma appeals from his conviction for conspiracy to commit trafficking by distribution of methamphetamine, contrary to NMSA 1978, Section 30-28-2 (1979). We affirm.

BACKGROUND

{2} Defendant was arrested in connection with a drug trafficking sting operation. A confidential informant (CI) informed law enforcement that he had arranged to purchase a pound of methamphetamine from Estevan Garcia. The CI and Garcia were to meet at an Allsup's gas station in Clovis, New Mexico. Sergeant Rodriguez drove the CI to the Allsup's in an unmarked vehicle. After the CI and Sergeant Rodriguez arrived at the Allsup's the CI got out of the vehicle and stood next to an ice machine. Garcia approached the CI; Garcia made a phone call and then spoke to the CI for several minutes. Defendant then pulled up in a brown Jeep and parked two spots away from Sergeant Rodriguez. The CI and Garcia then approached Defendant's Jeep. Garcia approached the passenger-side front door and got into the Jeep and the CI walked toward the back passenger side of the vehicle. Defendant, who remained sitting in the driver's seat, reached into the back of the Jeep and then handed something to Garcia. At that point the CI gave the "move in signal" to Sergeant Rodriguez who called in other law enforcement officers. Garcia walked toward an alley, but Sergeant Rodriguez ordered him to stop; Garcia reached into his right coat pocket, pulled out a bag, and threw it toward a dumpster. When tested, the substance inside the bag was determined to be methamphetamine. A jury acquitted Defendant of trafficking but convicted him of conspiracy to commit trafficking. Defendant now appeals.

DISCUSSION

{3} Defendant makes four arguments on appeal: (1) there was insufficient evidence to convict him of conspiracy to commit trafficking by distribution of methamphetamine; (2) the district court erred in limiting defense counsel's cross-examination of Lieutenant Wayland Rains; (3) the State violated Defendant's right to a speedy trial; and (4) the district court erred in denying defense counsel's request to dismiss Defendant's charges based on the State's failure to timely disclose evidence—inculpatory statements made by Defendant following his arrest—and instead ordering only partial suppression of the statements.

I. Sufficient Evidence Supported Defendant's Conviction for Conspiracy to Commit Trafficking by Distribution of Methamphetamine

{4} "We review the evidence introduced at trial to determine whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Gipson*, 2009-NMCA-053, ¶ 4, 146 N.M. 202, 207 P.3d 1179 (internal quotation marks and citation omitted). "We do not reweigh the evidence or substitute our judgment for that of the fact[-]finder as long as there is sufficient evidence to support the verdict." *Id.* ¶ 4. 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. "So long as a rational jury could have found beyond a reasonable doubt the essential facts required for a conviction, we will not upset a jury's conclusions." *State v. Garcia*, 2011-NMSC-003, ¶ 5, 149 N.M. 185, 246 P.3d 1057 (emphasis, internal quotation marks, and citation omitted).

{5} "Jury instructions become the law of the case against which the sufficiency of the evidence is to be measured." *State v. Smith*, 1986-NMCA-089, ¶ 7, 104 N.M. 729, 726 P.2d 883. Thus, to convict Defendant of conspiracy to commit trafficking of a controlled substance, the jury had to find that:

> 1. [D]efendant and another person by words or acts agreed together to commit Trafficking of Controlled Substance;
>
> 2. [D]efendant and the other person intended to commit Trafficking of Controlled Substance.

UJI 14-2810 NMRA. The instruction setting forth the elements of trafficking a controlled substance by distribution stated that the jury had to find that on or about November 18, 2014, "(1) Defendant attempted to transfer methamphetamine to another; and (2) [Defendant] knew it was methamphetamine or believed it to be some drug or other substance the possession of which is regulated or prohibited by law." UJI 14-3110 NMRA.

{6} "Conspiracy consists of knowingly combining with another for the purpose of committing a felony within or without this state." *State v. Johnson*, 2004-NMSC-029, ¶ 49, 136 N.M. 348, 98 P.3d 998 (internal quotations and citation omitted). "An overt act is not required; the crime is complete when the felonious agreement is reached." *Id.* "Such an agreement need not be proven by direct evidence; the agreement may be in the form of a mutually implied understanding and may be inferred from circumstantial evidence." *Id.* Furthermore, "intent can rarely be proved directly and often is proved by circumstantial evidence." *State v. Durant*, 2000-NMCA-066, ¶ 15, 129 N.M. 345, 7 P.3d 495. "A defendant's knowledge or intent generally presents a question of fact for a jury to decide." *State v. Wasson*, 1998-NMCA-087, ¶ 12, 125 N.M. 656, 964 P.2d 820.

{7} Defendant argues that the State's evidence failed to establish anything beyond Defendant's presence at the scene and a mere association with Garcia. We disagree. The State's theory was supported by the following testimony: (1) Sergeant Rodriguez, who was in the undercover vehicle with the CI and who drove the CI to the Allsup's, and Sergeant Rains, who supervised the operation, testified that the CI negotiated a transaction to purchase methamphetamine from Garcia at the Allsup's. (2) Sergeant Rodriguez testified that upon meeting with the CI, Garcia spoke with him then made a brief phone call and the two waited. (3) Sergeant Rodriguez then testified that Defendant arrived at the Allsup's shortly after Garcia made the phone call—evincing that he spoke with Defendant and that Garcia and the CI were awaiting Defendant's

arrival to complete the transaction. (4) Sergeant Rodriguez testified that once Defendant arrived, Garcia immediately got inside Defendant's Jeep and the CI also approached the vehicle. (5) Sergeant Rodriguez testified that Defendant reached into the back of the Jeep and handed something to Garcia, which triggered the CI to give the bust signal. (6) Sergeant Rodriguez testified that Garcia got out of the Jeep possessing methamphetamine. (7) Sergeant Raphael Aguilar, who provided back up surveillance during the operation, testified that officers found an open, large silver container in the back of the Jeep that he found odd considering there was nothing else in the vehicle. (8) Sergeant Rains and Sergeant Rodriguez testified that after the CI gave the bust signal they witnessed Garcia throw the bag of methamphetamine into the dumpster before he was detained.

{8} This evidence was sufficient to meet the elements required by the jury instructions: (1) Defendant and another, Garcia, by words or acts agreed together to commit trafficking of methamphetamine; and (2) Defendant and Garcia intended to commit trafficking of methamphetamine. UJI 14-2810. A jury reasonably could infer that Defendant was the individual who had communicated with Garcia with respect to facilitating the methamphetamine transaction. Perhaps most significantly, the jury was free to reject Defendant's version of the facts. *State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829. We "will not invade the jury's province as fact-finder by second-guessing [its] decision concerning the credibility of witnesses, reweighing the evidence, or [otherwise] substituting our judgment for that of the jury." *See State v. Cabezuela*, 2015-NMSC-016, ¶ 23, 350 P.3d 1145 (alterations, internal quotation marks, and citation omitted).

II. The District Court Did Not Err in Limiting Defense Counsel's Cross-Examination of Sergeant Rains

{9} Defendant argues that the district court's restriction of defense counsel's cross-examination of Sergeant Rains (1) prevented counsel from confronting Sergeant Rains and (2) prevented him from impeaching Sergeant Rains' testimony and character for truthfulness.

{10} We generally review confrontation clause claims de novo. *See State v. Lasner*, 2000-NMSC-038, ¶ 24, 129 N.M. 806, 14 P.3d 1282. However, this issue does not appear to have been raised below and Defendant also fails to indicate how this issue was preserved for our review. *See* Rule 12-213(A)(4) NMRA 1999 (requiring that appellant's brief-in-chief set forth argument "with respect to each issue presented . . . and a statement explaining how the issue was preserved in the court below, with citations to authorities [and parts of the] record proper, transcript of proceedings or exhibits relied on"). Because this claim was not preserved and Defendant does not argue fundamental error on appeal, he has waived review of the confrontation clause argument. *See State v. Joanna V.*, 2003-NMCA-100, ¶ 10, 134 N.M. 232, 75 P.3d 832 (declining to "apply the preservation exceptions when they were not argued on appeal"), *aff'd*, 2004-NMSC-024, ¶ 10, 136 N.M. 40, 94 P.3d 783; *State v. Lucero*, 1986-NMCA-

085, ¶ 12, 104 N.M. 587, 725 P.2d 266 (concluding that confrontation issue was not preserved because the defendant's objection asked merely for an evidentiary ruling and did not alert the trial court to a constitutional error).

{11} "We review the admission of evidence under an abuse of discretion standard and will not reverse in the absence of a clear abuse." *State v. Sarracino*, 1998-NMSC-022, ¶ 20, 125 N.M. 511, 964 P.2d 72. "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the trial court abused its discretion by its ruling unless we can characterize [the ruling] as clearly untenable or not justified by reason." *Rojo*, 1999-NMSC-001, ¶ 41 (internal quotation marks and citation omitted). Defendant preserved this portion of his argument—evidentiary error—during a bench conference when he discussed his inability to impeach Sergeant Rains.

{12} During Sergeant Rains' cross-examination, defense counsel questioned him about his past cases, conviction rate, and if evidence had ever been suppressed in those cases based on his actions, matters that the prosecutor had not raised in his direct examination. Sergeant Rains responded that he had one instance of suppression that he recalled although there had been several suppression motions in cases he was involved in. Defense counsel and the prosecutor then approached the bench. Much of the discussion is inaudible; however, the judge can be heard saying that defense counsel's line of questioning was not relevant to Sergeant Rains' observations and risked causing confusion and a possible Rule 11-404(B) NMRA violation. The judge further stated that commenting on previous cases and evidence that had been suppressed in those cases was a slippery slope and that he was not going to allow defense counsel to go down that road. The judge instructed defense counsel that he could only ask Sergeant Rains about other suppressions that he might remember. Sergeant Rains then testified that it was possible he had been involved in other cases in which evidence had been suppressed.

{13} Defendant argues that Sergeant Rains' testimony was "vital" to the State's case, because he had testified "that it was common for the drugs to be brought to the scene after the initial contact, making [Defendant]'s arrival evidence of his complicity in the trafficking venture." Thus, Defendant further reasons,

> it was equally vital that defense counsel be able to attack [Lieutenant] Rains' credibility as a witness. Counsel tried to do this by asking about or showing [Lieutenant] Rains a suppression order from a different case in order to contradict testimony [Lieutenant] Rains had given, but the district court refused to allow counsel to pursue such questioning. As a result, the jury was left with an improper view of [Lieutenant] Rains as having a virtually perfect prosecution record and never engaging in dishonest or improper conduct.

{14} "Cross-examination should not go beyond the subject matter of the direct examination and matters affecting a witness's credibility." Rule 11-611(B) NMRA. In addition, the district court has broad discretion to control the scope of cross-

examination, *see State v. Martin*, 1984-NMSC-077, ¶ 20, 101 N.M. 595, 686 P.2d 937, including the discretion to control cross-examination to ensure a fair and efficient trial. *See Sanchez v. State*, 1985-NMSC-060, ¶ 6, 103 N.M. 25, 702 P.2d 345, *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, 275 P.3d 110; *see also State v. Wesson*, 1972-NMCA-013, ¶ 12, 83 N.M. 480, 493 P.2d 965 ("The limits of cross-examination are within the discretion of the [district] court and will be disturbed on appeal only if that discretion is abused.").

{15} "[I]mpeachment testimony must be relevant to an issue in the case." *Weiland v. Vigil*, 1977-NMCA-003, ¶ 34, 90 N.M. 148, 560 P.2d 939. It is generally inadmissible to impeach a witness upon a collateral and immaterial issue. *Martin*, 1984-NMSC-077, ¶ 20. "[T]he extent that evidence on a collateral issue is to be permitted is within the [district] court's discretion." *State v. Davis*, 1979-NMCA-015, ¶ 51, 92 N.M. 563, 591 P.2d 1160; *State v. Hargrove*, 1970-NMCA-006, ¶ 7, 81 N.M. 145, 464 P.2d 564 ("Although proof of a witness's misconduct is permissible for the purpose of attacking credibility, the extent of such showing is controllable through the exercise of judicial discretion.").

{16} Defense counsel was not directly impeaching Sergeant Rains' experience investigating drug trafficking transactions and his testimony about how drug deals typically play out. Instead, defense counsel apparently was attempting to suggest that, through court rulings suppressing the introduction of evidence, Rains' conduct in connection with previous investigations had been called into question, and that not all of his drug trafficking arrests had resulted in convictions. But these issues were entirely collateral to the issues in Defendant's trial. There was no issue regarding suppression of any evidence offered against Defendant based on alleged misconduct by Sergeant Rains or any of the other officers involved in the sting operation. Therefore, other instances of suppression of evidence would have no relevance to Defendant's trial except for the possible purpose of questioning Rains' memory. But whether Rains accurately remembered the number of his previous cases in which evidence had been suppressed, or the particulars of any of those cases, had only de minimis—if any—relevance to his testimony that, in his experience, it would not be unusual for the seller in a drug transaction to not show up until some passage of time after the transaction begins.

{17} In deciding whether a matter pursued on cross-examination for the purposes of impeachment is irrelevant or collateral, courts will consider whether the cross-examining party would have been entitled to prove it as part of his case in chief. *State v. Ross*, 1975-NMCA-056, ¶ 7, 88 N.M. 1, 536 P.2d 265. "If this test is not met, the tender is immaterial and irrelevant to the case at bar, and generally ought not to be admitted for reasons of litigational fairness and judicial economy." *Id.* Here, defense counsel's questioning of Sergeant Rains about what past cases he was involved in that had evidence suppressed and the basis for the suppression were wholly distinct matters that had no relevance to the case here where no suppression concerns were at issue. As the district court pointed out, defense counsel's line of questioning was nothing more than an attempt at impeaching Rains' credibility through improper propensity evidence

regarding his previous investigations, which risked confusing the jury and was not relevant. *See* Rule 11-404(B). Because it would have concerned matters unconnected with the time, place, and circumstances of the crime at bar, defense counsel would not have been entitled to address Sergeant Rains' previous involvement with suppression rulings as part of his case in chief. *See Ross*, 1975-NMCA-056, ¶ 8 (holding testimony was collateral because it "concerned matters unconnected with the time, place, and circumstances of the crime at bar").

{18} Sergeant Rains' testimony about specific past instances of suppression was tangential and collateral, and thus irrelevant, and the district court did not abuse its discretion in limiting further cross-examination of him regarding that subject.[1]

III. The State Did Not Violate Defendant's Right to a Speedy Trial

{19} Defendant was arrested on November 18, 2014, and the jury trial took place on January 21, 2016. Thus, the trial took place a year plus 64 days after Defendant's arrest. Defendant contends that the State violated his right to a speedy trial, and the district court erred in denying his motion to dismiss on that ground.

{20} "[T]he initial inquiry in speedy trial analysis is a determination as to whether the length of pretrial delay is presumptively prejudicial." *State v. Montoya*, 2011-NMCA-074, ¶ 10, 150 N.M. 415, 259 P.3d 820 (internal quotation marks omitted). The presumptively prejudicial period of delay constitutes a "threshold of reasonable delay." *State v. Garza*, 2009-NMSC-038, ¶ 42, 146 N.M. 499, 212 P.3d 387; *see also State v. Vigil-Giron*, 2014-NMCA-069, ¶ 48, 327 P.3d 1129 ("The effect of a 'triggering date' comports with the notion that pending criminal charges are naturally associated with some degree of stress, anxiety, and adverse social and familial effects, and therefore, until that suffering is protracted *beyond the date that it is reasonable to expect a resolution*, such suffering will not be weighed in the defendant's favor." (emphasis added)). "A delay of trial of one year is presumptively prejudicial in simple cases, fifteen months in intermediate cases, and eighteen months in complex cases." *State v. Spearman*, 2012-NMSC-023, ¶ 21, 283 P.3d 272.

{21} "If the delay is presumptively prejudicial, we balance . . . four factors to determine whether a speedy trial violation has occurred." *State v. Fierro*, 2014-NMCA-004, ¶ 6, 315 P.3d 319. "The factors to be considered are (1) the length of delay, (2) the reason for delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant." *Id.* (internal quotation marks and citation omitted). We give deference to the district court's factual findings, "but we review the weighing and the balancing of the *Barker* factors de novo." *Spearman*, 2012-NMSC-023, ¶ 19 (alteration, internal quotation marks, and citation omitted).

{22} We normally defer to the district court's determination of complexity if it is supported by substantial evidence; however, in the absence of a specific finding, we will make our own determination. *State v. O'Neal*, 2009-NMCA-020, ¶ 16, 145 N.M. 604, 203 P.3d 135; *see State v. Coffin*, 1999-NMSC-038, ¶ 57, 128 N.M. 192, 991 P.2d 477.

Here, the district court did not make a specific finding and instead simply commented at the hearing on Defendant's speedy trial motion that the complexity of the case was within the gray area between a simple and intermediate case.

{23} Simple cases "require less investigation and tend to involve primarily police officer testimony during the trial." *State v. LeFebre*, 2001-NMCA-009, ¶ 11, 130 N.M. 130, 19 P.3d 825. Intermediate cases "seem to involve numerous or relatively difficult criminal charges and evidentiary issues, numerous witnesses, expert testimony, and scientific evidence." *State v. Laney*, 2003-NMCA-144, ¶ 14, 134 N.M. 648, 81 P.3d 591. Here, the State presented roughly two hours of testimony through three officers and a crime lab analyst. Although the crime lab analyst was an expert witness, the main purpose of his testimony was to identify the methamphetamine and his testimony lasted approximately fifteen minutes. Other than the discovery violation discussed below, the State does not assert that there were any difficult evidentiary issues. Under these circumstances, for purposes of speedy trial analysis we will treat this case as simple and therefore proceed with the *Barker* balancing test. However, we will defer to the district court's assessment that the case fell within the gray area of complexity and, as discussed below, this consideration enters into our ultimate determination whether Defendant's speedy trial right was violated.

Length of Delay.

{24} This Court has previously held that a delay of 62 days past the minimum presumptively prejudicial delay date had "little practical effect on the balancing." *Laney*, 2003-NMCA-144, ¶ 16. We reach the same conclusion here, where the delay in trying Defendant was only 64 days past the twelve-month presumptively prejudicial period of delay for a simple case. *See, e.g.*, *Garza*, 2009-NMSC-038, ¶ 24 (one-month and six-day delay beyond triggering date did not weigh heavily in defendant's favor).

Reasons for Delay.

{25} We classify delay as a (1) deliberate attempt to impede the defense; (2) negligent or administrative delay; or (3) valid reason for the delay. *Garza*, 2009-NMSC-038, ¶¶ 25-27.

{26} Immigration and Customs Enforcement (ICE) agents had arrested and detained Defendant on December 5, 2014, which prevented him from attending his initial arraignment on February 9, 2015. Because Defendant failed to show, the district court issued a bench warrant. The State took Defendant into custody on June 9, 2015, and he subsequently pled not guilty at a June 22, 2015, arraignment. Thus, there is approximately a four and a half month delay in arraigning Defendant caused by Defendant's detention by ICE. Whether the State was responsible for this delay is dependent on its ability to remove him from ICE custody and bring him to trial. "Where a mechanism exists to bring a defendant to trial, the state has a duty to use it." *See State v. Palacio*, 2009-NMCA-074, ¶ 18, 146 N.M. 594, 212 P.3d 1148 (alterations, internal quotation marks, and citation omitted). We will charge this time against the State

because it failed to demonstrate that it could not have gained custody of Defendant during this period and the question is otherwise unclear from the record. *See id.* ¶¶ 13-16 (holding that bureaucratic indifference weighs against the state).

{27} On June 30, 2015, Defendant exercised a peremptory challenge against the original judge and the case was reassigned to a new judge on July 15, 2015. We weigh this half month against the Defendant. *See State v. Brown*, 2017-NMCA-046, ¶ 21, 396 P.3d 171.

{28} Defendant's trial was originally scheduled for November 5, 2015, but was postponed twice. The district court vacated Defendant's case in order to try an older case and then subsequently postponed the trial date again based on the State's discovery violation (discussed below). We weigh the approximately two and a half months from November 5, 2015, until the eventual trial date on January 21, 2016, against the State because it constituted both negligent and administrative delay. *See State v. Flores*, 2015-NMCA-081, ¶ 30, 355 P.3d 81.

{29} In sum, we weigh approximately seven months of delay against the State, a half month against Defendant, and the rest against neither party. *See State v. Maddox*, 2008-NMSC-062, ¶ 27, 145 N.M. 242, 195 P.3d 1254 (period during which case is moving forward to trial with customary promptness is weighed neutrally between the parties). Therefore, this factor weighs in favor of Defendant, although not heavily. *See State v. Suskiewich*, 2016-NMCA-004, ¶ 9, 363 P.3d 1247 (holding that negligent or administrative delay weighs against the state, but not heavily).

Defendant's Assertion of Speedy Trial Right.

{30} When weighing this factor, we assess the timing of Defendant's assertion of his right to a speedy trial and the manner in which the right was asserted. *See Garza*, 2009-NMSC-038, ¶ 32. We accord weight to the frequency and force with which thedefendant objected to the delay and analyze the defendant's actions with regard to the delay. *Id.*

{31} Defendant made assertions of his right to a speedy trial five times in the district court. Defendant's initial counsel filed a speedy trial demand with her entry of appearance and subsequently filed two more demands for a speedy trial. Upon substitution of counsel, Defendant's second attorney made an additional speedy trial demand with his entry of appearance and eventually filed a motion to dismiss on speedy trial grounds.

{32} We afford little weight to the demands and the motion to dismiss filed just two weeks before trial. *See State v. Urban*, 2004-NMSC-007, ¶ 16, 135 N.M. 279, 87 P.3d 1061; *State v. Gallegos*, 2016-NMCA-076, ¶ 25, 387 P.3d 296. Only a week after filing the first reassertion, Defendant excused the original judge assigned to the case, causing delay and weakening that assertion. However, Defendant did not file any other motions that would have slowed down the proceedings. *See Garza*, 2009-NMSC-038, ¶ 32. Nor did Defendant acquiesce to any further delay, other than the delay that resulted

from the State's discovery violation, which we do not hold against him. Thus, considering the relevant factual circumstances, we weigh this factor in Defendant's favor, although not heavily.

Prejudice to Defendant.

{33} We assess this factor based on interests that the right to speedy trial seeks to protect: preventing oppressive pretrial incarceration, minimizing anxiety and concern of the accused, and limiting the possibility that the defense will be impaired. *See Barker v. Wingo*, 407 U.S. 514, 532 (1972). Defendant has the burden of presenting evidence of "particularized prejudice" in the form of affidavits, testimony, or documentation to show that the delay in trial beyond the presumptive period caused the alleged prejudice. *See Garza*, 2009-NMSC-38, ¶ 1.

{34} Defendant claims that he experienced prejudice to the first two interests, which requires a showing of "undue" prejudice. *See Garza*, 2009-NMSC-038, ¶ 40. Defendant argues he suffered oppressive pretrial incarceration for two reasons. First, Defendant contends that he lost out on concurrent sentencing time because the State failed to obtain custody over him during the period he was detained by ICE. Although a lost opportunity to serve sentences concurrently is a cognizable form of prejudice, our Supreme Court has held that it cannot amount to "undue prejudice because it is speculative as to how the district court may choose to exercise its discretion in sentencing." *Maddox*, 2008-NMSC-062, ¶ 35.

{35} Second, Defendant argues that he suffered oppressive pretrial incarceration based on the State's stance on bail, requiring him to remain incarcerated for most of the time between his arraignment and trial. The State incarcerated Defendant from June 9, 2015, until December 7, 2015. *See State v. Estrada*, 2016-NMCA-066, ¶ 69, 377 P.3d 476 (refusing to consider time spent incarcerated on unrelated charges in determining prejudice). This period of approximately six months is insufficient on its own to establish prejudice. *See id.* ¶¶ 69, 71.

{36} Defendant also contends that he suffered anxiety and concern because he lost his job, his home, and his family experienced financial anxiety because of his incarceration. In support of this assertion, Defendant points to testimony from Defendant's sentencing hearing. However, this testimony did not establish that these adverse effects are specifically attributable to the delay in bringing this matter to trial. That is, Defendant did not show that he would not have experienced these problems had his case been tried within twelve months of his arrest. *See Spearman*, 2012-NMSC-023, ¶¶ 37-39 (acknowledging that adverse effects such as loss of job opportunities and disruption of family life may constitute prejudice, but ultimately declining to weigh the fourth speedy trial factor against the state where the record failed to establish that the defendant suffered such effects specifically as a result of the delay in bringing the matter to trial); *Garza*, 2009-NMSC-038, ¶ 35 (holding that some degree of anxiety is inherent for every defendant who is jailed while awaiting trial). We therefore conclude

that Defendant has not made a cognizable showing of undue prejudice. *See Garza*, 2009-NMSC-038, ¶ 35.

Speedy Trial Analysis Conclusion

{37} As stated, the length of delay has "little practical effect on the balancing," *Laney*, 2003-NMCA-144, ¶ 16, the reasons for delay weigh slightly in the defendant's favor, the assertion of the right weighs slightly in the defendant's favor, and the defendant has failed to show prejudice. A showing of particularized prejudice is not required for Defendant to succeed on his speedy trial claim. *See Garza,* 2009-NMSC-038, ¶ 39. However, if no such showing is made, the other three factors must "weigh heavily" in Defendant's favor. *See id.* ¶ 39. As we have noted, this is not the case here.

{38} Whether a defendant's speedy trial rights are violated depends on an analysis of the particular facts and circumstances of each case. *See Spearman*, 2012-NMSC-023, ¶ 16. Here, the case was of borderline complexity, between simple and intermediate. In addition, the delay beyond the twelve-month presumptively prejudicial period of delay for simple cases was only sixty-four days. "A delay that scarcely crosses the bare minimum needed to trigger judicial examination of the claim is of little help to a defendant claiming a speedy trial violation." *State v. Serros*, 2016-NMSC-008, ¶ 26, 366 P.3d 1121 (internal quotation marks and citation omitted). Further, Defendant was responsible for a half month of delay, approximately one fourth of the two-month delay that exceeded the twelve-month "reasonable" period of delay. Finally, the State was responsible for only seven months of delay. *Cf. Gallegos*, 2016-NMCA-076, ¶ 31 (declining to weigh nearly fifteen months of negligent and administrative delay heavily against the state). On balance, we conclude that under these circumstances Defendant's right to a speedy trial was not violated.

IV. The District Court Did Not Abuse Its Discretion in Assessing the Discovery Sanction

{39} After jury selection and in a hearing immediately preceding trial, the State disclosed that Defendant had made inculpatory statements to law enforcement after his arrest; the State sought to admit the statements at the impending trial. The prosecutor first learned about the statements during his trial preparation the night before. The district court concluded that the State failed in its discovery obligations under Rule 5-501(A) NMRA to disclose the statements and that disclosure just before trial prejudiced Defendant. However, the district court also determined that there was no bad faith by the State. The district court declined to dismiss the case, but did rule that it would permit the statements to be used only for impeachment of Defendant in the event he testified.

{30} Defendant asserts that the district court erred in denying defense counsel's request to dismiss Defendant's charges. We review a district court's choice of sanctions for discovery misconduct for an abuse of discretion. *State v. Cazares,* 2018-NMCA-012, ¶ 7, 409 P.3d 978. "An abuse of discretion occurs when the ruling is clearly against the

logic and effect of the facts and circumstances of the case.” *Rojo*, 1999-NMSC-001, ¶ 41 (internal quotation marks and citations omitted).

{31} “A court has the discretion to impose sanctions for the violation of a discovery order that results in prejudice to the opposing party.” *State v. Harper*, 2011-NMSC-044, ¶ 16, 150 N.M. 745, 266 P.3d 25. But “the mere showing of violation of a discovery order, without a showing of prejudice, is not grounds for sanctioning a party.” *Id.* Once prejudice is shown, any sanction should “affect the evidence at trial and the merits of the case as little as possible.” *Id.*. “Our case law generally provides that the refusal to comply with a district court’s discovery order only rises to the level of exclusion or dismissal where the [s]tate’s conduct is especially culpable, such as where evidence is unilaterally withheld by the [s]tate in bad faith, or all access to the evidence is precluded by [s]tate intransigence.” *Id.* ¶ 17.

{32} The district court’s ruling was not clearly against the logic and effect of the facts and circumstances of the case. There was no showing below that the State acted in bad faith or was otherwise “especially culpable,” as contemplated by *Harper*. *See id.* ¶¶ 16, 17 (“Extreme sanctions such as dismissal are to be used only in exceptional cases.” (internal quotation marks and citation omitted)). Instead, it appears that the prosecutor was not even aware of these statements until shortly before trial, in that the law enforcement officers did not inform him of their existence. The district court's sanction reasonably balanced prejudice to Defendant against the absence of intentional misconduct by the State. We conclude the district court did not abuse its discretion.

CONCLUSION

{33} We affirm Defendant’s conviction for conspiracy to commit trafficking by distribution of methamphetamine contrary to Section 30-28-2.

{34} IT IS SO ORDERED.

HENRY M. BOHNHOFF, Judge

WE CONCUR:

MICHAEL E. VIGIL, Judge

EMIL J. KIEHNE, Judge

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[1]Concurrent with filing his appellate reply brief, Defendant filed a motion to supplement the record with stipulation by the trial court asking this Court to supplement the record with a stipulation signed by both trial counsel that during the subject bench conference the parties had been referring to a past suppression order by Judge Tatum in *State v.*

Castillo, D-905-CR-2014-00311. The motion to supplement is untimely under Rule 12-211(I). Further, given our analysis and conclusion that the district court did not err in barring further cross-examination of the underlying issue of suppression rulings in Sergeant Rains' previous investigations, the motion is moot.