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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 Opinion number: _____

3 Filing Date: June 8, 2022

4 **No. A-1-CA-38870**

5 **CITY OF LAS CRUCES,**

6 Plaintiff-Appellant,

7 v.

8 **RENEE APODACA,**

9 Defendant-Appellee.

10 **APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY**

11 **Conrad F. Perea, District Judge**

12 City of Las Cruces

13 Jennifer Vega-Brown, City Attorney

14 Jocelyn A. Garrison, Senior Assistant City Attorney

15 Las Cruces, NM

16 for Appellant

17 Bennett J. Baur, Chief Public Defender

18 Joelle N. Gonzales, Assistant Appellate Defender

19 Santa Fe, NM

20 for Appellee

1 **OPINION**

2 **YOHALEM, Judge.**

3 {1} The opinion filed May 17, 2022, is hereby withdrawn, and this opinion is
4 substituted in its place. This is an appeal by the City of Las Cruces (the City), from
5 the district court’s decision granting Defendant’s motion to dismiss and to bar retrial
6 under the double jeopardy clause of Article II, Section 15, of the New Mexico
7 Constitution, based on judicial and prosecutorial misconduct in municipal court.

8 {2} The City raises two issues on appeal:¹ (1) whether the district court had
9 authority to hear and decide Defendant’s motion to dismiss and to bar retrial based
10 on alleged official misconduct in the municipal court; and (2) whether the district
11 court erred in relying on the limited record in the municipal court and the arguments
12 of counsel to reconstruct the events at trial in a court not of record. Finding no error
13 by the district court, we affirm.

¹We note that the briefs on appeal raised a jurisdictional issue. We agreed with the City that the municipal court’s order of conviction was not a final, appealable order. We remanded for entry of final orders by the municipal and district courts, with leave for the City to reinstate its appeal upon the entry of those orders. Final orders having been entered, the jurisdictional issue resolved, and the City’s appeal reinstated, we now address the City’s remaining arguments.

1 **BACKGROUND**

2 {3} We describe the municipal court proceedings based on the municipal court
3 record and the arguments of counsel, which were accepted by the district court as
4 the facts on which it based its decision.

5 {4} Defendant was charged with five misdemeanors in the City of Las Cruces
6 Municipal Court arising from a single incident, (1) aggravated driving while
7 intoxicated, (2) driving on the wrong side of the street, (3) improper turn, (4) open
8 container, and (5) driving without a license. The municipal court dismissed the
9 driving without a license charge before trial. The City produced four DVD's (video
10 recordings) to Defendant without identifying what it intended to introduce at trial.
11 All four contained multiple video clips. The City's pretrial list of exhibits indicated
12 that the City intended to introduce "[a]ny and all videos and photos produced by
13 Plaintiff or Defendant," without further specification.

14 {5} At trial, the City called Officer Albert Garcia as a witness, and moved to admit
15 one of the video recordings into evidence through his identification. The City did
16 not clarify to Defendant or to the municipal court which of the four video recordings
17 the City was attempting to admit at trial, but indicated only that it was one of the
18 four that had been disclosed to the defense.

19 {6} Defendant objected to the admission of the video recording, stating that
20 counsel had no way of knowing which of the previously disclosed four recordings

1 the City was moving to admit, or whether the video recording at issue was in fact a
2 true and accurate copy of one of the recordings that had been previously disclosed.
3 Defendant further objected to the admission of the video recording without it being
4 played in open court on hearsay and confrontation grounds. Defendant argued she
5 would have no opportunity to object to the admission of hearsay and violation of
6 Defendant’s right to confrontation without the video being played in open court. The
7 City agreed that the video recording contained both admissible evidence and
8 inadmissible hearsay “that was probably probative” on the recording and did not
9 deny that there were statements on the video made by individuals who testified at
10 trial, as well as by individuals not called by the City as witnesses.

11 {7} The City claimed that it sought to admit only the nonhearsay portions of the
12 video recording but failed to identify with time stamps or otherwise the admissible
13 and inadmissible portions of the video.

14 {8} The municipal court admitted the video recording over Defendant’s
15 objection.² The City did not play the recording in whole or in part during trial. The

²The City claims, for the first time in its brief on appeal to this Court, that defense counsel stipulated to the admission of the video recording. The record in the district court shows that the City agreed with defense counsel that the video recording was admitted over her objection. Because the district court was not alerted—by objection, by the admission of conflicting evidence, or by a proposed finding—to the City’s claim, we will not review it on appeal. *See* Rule 12-321(A) NMRA (“To preserve an issue for review, it must appear that a ruling or decision by the trial court was fairly invoked.”). We accept and rely on the facts found by the district court in determining what happened in the municipal court for purposes of

1 police officers called by the City as witnesses testified briefly, and then relied on the
2 recording to flesh out their testimony. Defendant repeatedly objected, arguing that
3 she was unable to cross-examine the police officers about the recorded statements
4 because her counsel had no information identifying what was on the recording.

5 ¶ During closing argument the City relied on the unplayed video recording as
6 evidence of Defendant’s guilt. Defendant once again objected, noting that the
7 defense did not have an opportunity to object to the inadmissible evidence on the
8 recording or cross-examine the officers who testified in court with reference to the
9 video evidence. Defense counsel asked the municipal court to grant a directed
10 verdict on the aggravated DWI charge, pointing out that the City failed to elicit
11 testimony from the witnesses at trial on a required element of the charge: that
12 Defendant had been advised, at the time of her traffic stop, that refusal to submit to
13 alcohol breath testing “could result in the revocation of [D]efendant’s privilege to
14 drive.” UJI 14-4510 NMRA. In response to that motion, the City claimed, without
15 reference to a time-stamp, that the advisement could be heard on one of the four
16 video tracks admitted into evidence, but not played at trial. The municipal court

this appeal. *See State v. Baca*, 2015-NMSC-021, ¶ 25, 352 P.3d 1151 (holding that the appellate court defers to the facts found by the district court concerning the inferior court proceedings in reviewing a dismissal for double jeopardy).

1 denied Defendant's motion for directed verdict on the basis that the video provided
2 the missing evidence.

3 {10} At the conclusion of the closing arguments, the municipal court judge stated
4 that he would review the video recording in chambers, without either party present.
5 Defendant's counsel objected, citing confrontation clause violations, the improper
6 admission of hearsay, and Defendant's due process right to be present and have the
7 assistance of counsel at all critical stages of the proceedings. The municipal court
8 again overruled Defendant's objection, took the video recording into chambers and
9 reviewed it privately after the conclusion of the trial. Defendant's counsel was not
10 given a copy of the video or otherwise permitted to review it. Six days after trial, the
11 municipal court entered a verdict of guilty on the four remaining counts.

12 {11} Defendant filed a post-trial motion to dismiss with prejudice and to bar retrial
13 alleging prosecutorial and judicial misconduct. Defendant argued that the municipal
14 court's admission into evidence of and reliance on the video recording to convict
15 Defendant of the charges against her violated her right to confront the witnesses
16 against her, denied her due process, and denied her the right to assistance of counsel.

17 {12} Without waiting for a ruling on her post-trial motion, Defendant appealed to
18 the district court. Relying on the limited record of the municipal court proceedings
19 filed in the district court, including the video recording introduced at trial and the
20 statement of facts in defense counsel's post-trial motion, Defendant filed a pretrial

1 motion in the district court to dismiss and to bar retrial. Defendant relied on the
2 holding of our Supreme Court in *State v. Breit*, 1996-NMSC-067, 122 N.M. 655,
3 930 P.2d 792, to argue that misconduct by the prosecutor and the municipal court
4 judge violated the double jeopardy clause of the New Mexico Constitution, and,
5 therefore, precluded retrial in the district court.

6 {13} After the hearing on Defendant’s pretrial motion and a thorough review of the
7 entire record on appeal from the municipal court, including the video recording
8 admitted into evidence in the municipal court, the district court agreed with
9 Defendant that misconduct barred retrial. The City appealed to this Court.

10 **DISCUSSION**

11 **I. The District Court Was Authorized to Hear and Decide Defendant’s** 12 **Dispositive Pretrial Motion to Dismiss and Bar Retrial**

13 {14} The City contends that, in an appeal from Defendant’s conviction in municipal
14 court, the district court lacked authority to hear and decide Defendant’s pretrial
15 motion. The City claims that the district court erroneously applied the limited
16 exception identified by our Supreme Court in *City of Farmington v. Piñon-Garcia*,
17 2013-NMSC-046, ¶ 11, 311 P.3d 446, by conducting a hearing de novo and deciding
18 Defendant’s motion, when instead it should have proceeded to conduct a trial de
19 novo. The City supports its claim by characterizing Defendant’s motion as a request
20 to the district court to review an evidentiary decision by the municipal court for
21 reversible error.

1 {15} Although the City is correct that the district court does not act as a typical
2 appellate court in an appeal from a municipal court conviction and generally
3 conducts the appeal by trial de novo, the authority of the district court on appeal
4 from a court not of record extends to hearing and deciding certain pretrial motions
5 that require review of the proceedings in the municipal court. *See id.* ¶¶ 11-12. We
6 look to the nature of the motion filed in the district court to determine whether the
7 motion is subject to a de novo hearing in the district court under our Supreme Court’s
8 decision in *Piñon-Garcia*. *See id.* ¶ 12.

9 {16} We are not persuaded by the City’s contention that Defendant’s motion seeks
10 reversal based on a claim of evidentiary error in the municipal court. Although the
11 municipal court’s decision to admit the video recording into evidence over
12 Defendant’s objection played a role in the events which underpin Defendant’s
13 motion, the motion does not seek reversal and remand for retrial on the basis of the
14 municipal court’s abuse of discretion in admitting that evidence. Defendant’s motion
15 focused instead on the prejudicial impact on the defense of the prosecution’s conduct
16 in failing to identify the recording and to identify the portions of the recording it
17 sought to introduce into evidence; the erroneous admission into evidence of the
18 entire video recording without allowing the defense to object to hearsay; the judge’s
19 repeated refusal to allow the video recording to be played in open court; the inability
20 of the defense to cross-examine witnesses concerning the video evidence; and the

1 judge's reliance on a private review of the video recording in chambers as evidence
2 supporting conviction. The basis for Defendant's double jeopardy motion was not
3 simply (or even primarily) the evidentiary error that occurred below, but the repeated
4 refusal of the prosecution and the municipal court judge to consider the prejudicial
5 impact of improper judicial decisions and prosecutorial failures on Defendant's right
6 to defend herself, to confront the witnesses against her, and to appear and be
7 defended by counsel at all critical stages of the proceedings.

8 {17} Alleging misconduct in the municipal court by both prosecutor and judge,
9 Defendant sought in the district court to bar retrial, pursuant to her right not to be
10 tried twice under the double jeopardy clause of the New Mexico Constitution.
11 Misconduct by the prosecution and judge that prejudice a defendant's right to a fair
12 trial has been held by our Supreme Court in *Breit*, and most recently in *State v.*
13 *Hildreth*, 2022-NMSC-012, 506 P.3d 354 (which expressly extends *Breit* to judicial
14 misconduct) to bar retrial under Article II, Section 15 of the New Mexico
15 Constitution, the double jeopardy clause. The Court in *Breit* found that retrial is
16 barred

17 when improper official conduct is so unfairly prejudicial to the
18 defendant that it cannot be cured by means short of a mistrial or a
19 motion for a new trial, and if the official knows that the conduct is
20 improper and prejudicial, and if the official either intends to provoke a
21 mistrial or acts in willful disregard of the resulting mistrial, retrial, or
22 reversal.

23 1996-NMSC-067, ¶ 32.

1 {18} The nature of Defendant’s motion fits squarely within the *Piñon-Garcia*
2 exception to proceeding with a trial de novo on appeal in the district court from an
3 inferior court not of record. *See* 2013-NMSC-046, ¶ 13. It is exactly this sort of
4 potentially dispositive pretrial motion that *Piñon-Garcia* holds demands review by
5 a hearing de novo in the district court. Defendant’s motion stated a claim for official
6 misconduct at trial, which, if established at a hearing de novo in the district court,
7 would fully dispose of the charges against Defendant and bar retrial in the district
8 court. Indeed, our Supreme Court specifically includes double jeopardy violations
9 along with speedy trial and discovery rule violations as examples of the violations
10 of “constitutional safeguards and procedural rules” in an inferior court not of record
11 that must be reviewed by the district court by hearing de novo upon the request of
12 counsel in a pretrial motion. *Id.* ¶ 2. We conclude, therefore, that the district court
13 acted well within its authority in considering and deciding Defendant’s motion to
14 dismiss and to bar retrial on its merits.³

³We note that the City does not claim error in the district court’s ruling on the merits of the court’s application of the *Breit* factors. We, therefore, do not review this issue on appeal.

1 **II. The District Court Properly Reconstructed the Record in the Municipal**
2 **Court**

3 {19} The City’s remaining claim on appeal is that the district court erred in relying
4 on the limited record on appeal and the proffers of counsel to reconstruct the
5 challenged events in the municipal court, a court not of record.

6 {20} In *Piñon-Garcia*, our Supreme Court emphasized that the district court cannot
7 disregard the history of the case in municipal court when called upon to decide a
8 dispositive pretrial motion involving the compliance of municipal court proceedings
9 with the constitution or court rules. *See* 2013-NMSC-046, ¶ 12. Acknowledging that
10 the record on appeal from a municipal court is limited and generally does not include
11 a trial transcript, our Supreme Court directed the district court to rely on the
12 pleadings, other written documents prepared in the municipal court, and exhibits that
13 constitute the municipal court record on appeal, together with the stipulations of
14 counsel. *See id.*; *see also State v. Vanderdussen*, 2018-NMCA-041, ¶ 2, 420 P.3d
15 609 (explaining that the district court “was bound by events that transpired in [the]
16 magistrate court and therefore was required to base its independent judgment on the
17 limited record brought before it and the arguments made by counsel in district
18 court”).

19 {21} At the hearing on Defendant’s motion to dismiss and bar retrial, the district
20 court noted that it had reviewed the entire municipal court record, including the
21 video recording, and indicated that it would review the entire municipal court record

1 again before making a decision. Although claiming the record was inadequate, the
2 City agreed with the defense that (1) the defense had objected to the admission of
3 the unidentified video recording repeatedly at trial; (2) the defense had repeatedly
4 requested that the recording be played in open court, and the court refused the
5 request; (3) the video recording mixed probative hearsay statements with admissible
6 evidence; and (4) the municipal court overruled Defendant's objection to the court
7 reviewing the video recording privately outside the presence of counsel. The City
8 offered no affidavits or evidence that conflicted with this description of the events
9 at trial, or the description found in Defendant's post-trial motion, and repeated in her
10 motion in the district court. Although Defendant's post-trial motion was withdrawn
11 and was not decided by the municipal court, it was prepared contemporaneously with
12 the events in the municipal court by the municipal court defense counsel (who also
13 argued the double jeopardy motion before the district court), it was served on the
14 City and was included in the municipal court record on appeal. We see no error in
15 the district court's reliance on the limited municipal court record and the facts agreed
16 upon by counsel at the hearing in district court to reconstruct the record and then to
17 render a de novo decision on Defendant's motion.

1 **CONCLUSION**

2 {22} Finding no error by the district court, we affirm the district court's dismissal
3 of the charges against Defendant for violation of the double jeopardy clause of
4 Article II, Section 15 of the New Mexico Constitution.

5 {23} **IT IS SO ORDERED.**

6
7

JANE B. YOHALEM, Judge

8 **WE CONCUR:**

9
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KRISTINA BOGARDUS, Judge

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12

MEGAN P. DUFFY, Judge