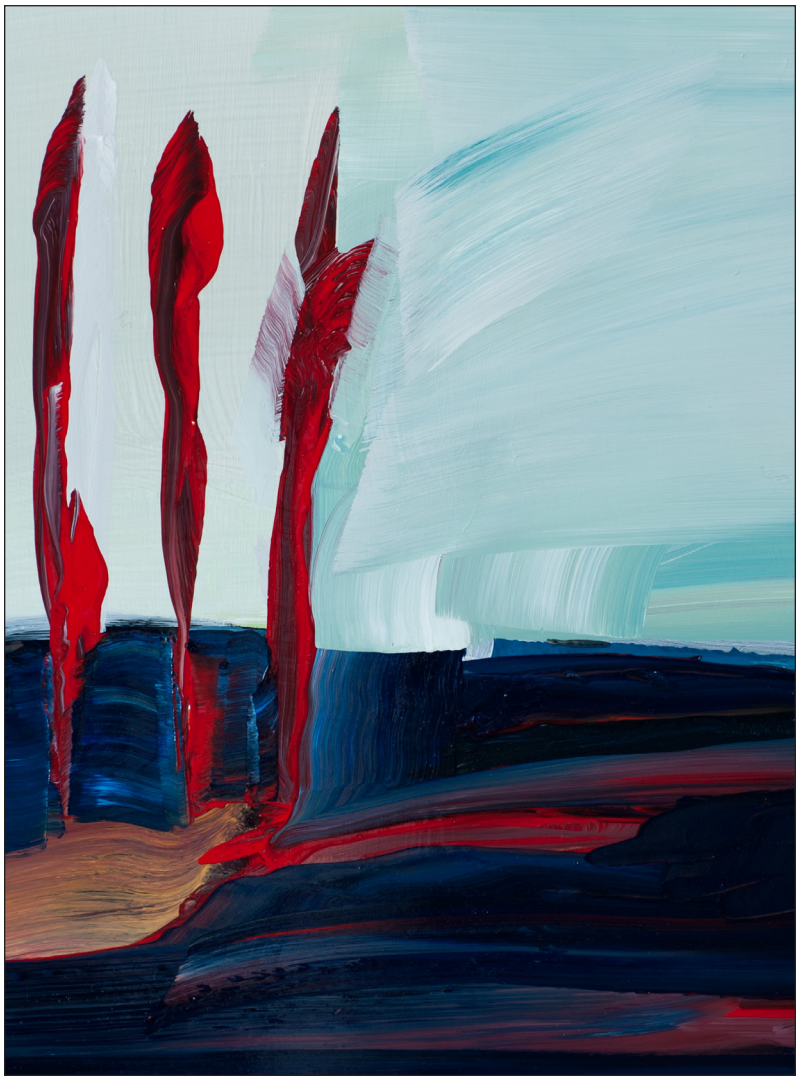
Official Publication of the State Bar of New Mexico

Bar Bulletin

April 4, 2018 • Volume 57, No. 14



Trio, by Dick Evans ARTWORKinternational, INC.

Inside This Issue

-State Bar of New Mexico-

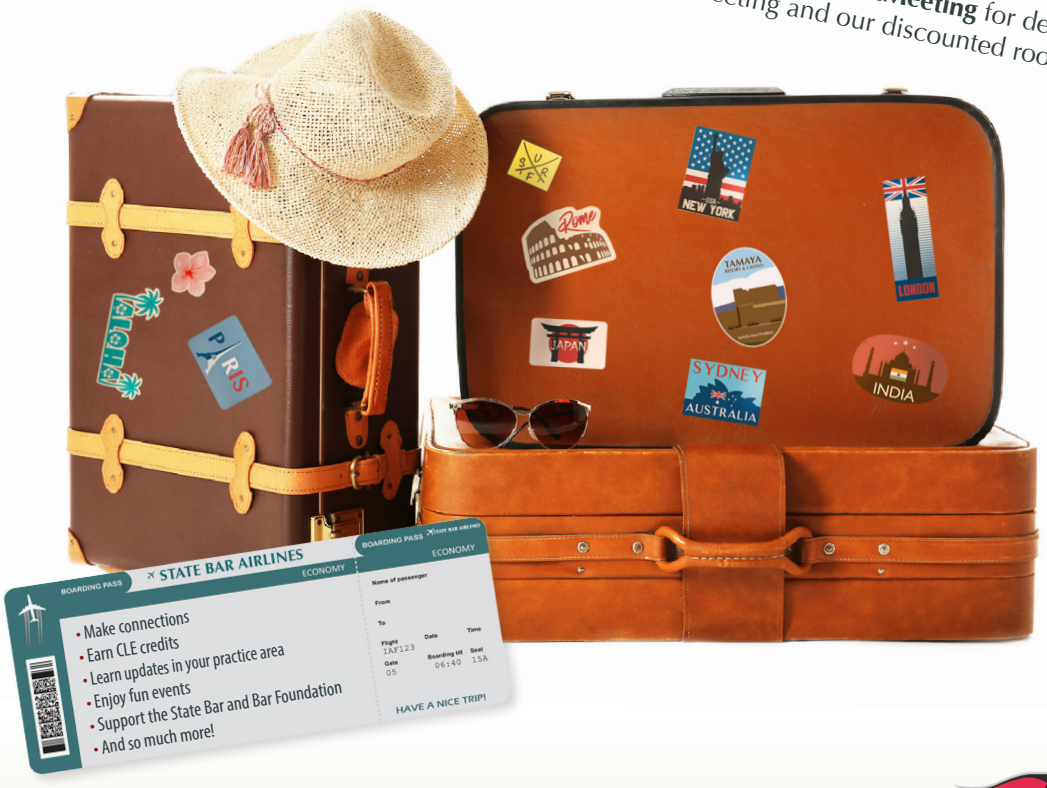
2018 Annual Meeting

Hyatt Regency
TAMAYA RESORT & CASINO
Santa Ana Pueblo

Aug. 9-11

Reserve your hotel room today!

Rates start at $179/night at the Hyatt Regency Tamaya Resort & Casino. Visit **www.nmbar.org/AnnualMeeting** for details about the Annual Meeting and our discounted room block.



Red Raider Hospitality Lounge

— Sponsored by the Texas Tech School of Law —

The Texas Tech University School of Law continues to show their support of the State Bar of New Mexico as the proud sponsor of the 2018 Red Raider Hospitality Lounge!

State Bar of New Mexico

The $26 resort fee has been waived for State Bar of New Mexico Annual Meeting attendees.

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505-797-6000 • 800-876-6227 • Fax: 505-828-3765
address@nmbar.org • www.nmbar.org

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4 p.m., Teleconference

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17
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April

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6–8 p.m., State Bar Center, Albuquerque, 505-797-6022

4
Civil Legal Clinic
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

11
Common Legal Issues for Senior Citizens Workshop
10–11:15 a.m., Mora Senior Center, Mora, 1-800-876-6657

13
Civil Legal Clinic
10 a.m.–1 p.m., Bernalillo County Metropolitan Court, Albuquerque, 505-841-9817

18
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10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

About Cover Image and Artist: Dick Evans was born in the Land of Enchantment and grew up in a rural farming community in the panhandle of Texas with no exposure to art until he started college. He graduated from the University of Utah with a BFA in Drawing and Painting and an MFA in Ceramics and Sculpture. Evans has taught art, primarily in ceramics, which is his primary form of expression. He has also produced sculpture in welded steel and cast bronze. Evans' art is found in many art museums, corporate collections and publications. He feels that the more personal the statement is, the more universal it may be. By avoiding the visually expected, his art often aids the viewer to see surroundings in a different and richly rewarding manner. To view more of Evans' work, visit www.dickevansart.com.

Notices

Court News

New Mexico Supreme Court Judicial Standards Commission

Seeking Commentary on Proposed Amended Rules

The Commission has completed a comprehensive review and revision of its procedural rules. Commentary on the proposed amendments is requested from the bench, bar and public. The deadline for public commentary has been extended to May 18. To be fully considered by the Commission, comments must be received by that date and may be sent either by email to rules@nmjsc.org or by mail to Judicial Standards Commission, PO Box 27248, Albuquerque, NM 87125-7248. To download a copy of the proposed amended rules, visit nmjsc.org/recent-news/.

Tenth Judicial District Court

Destruction of Exhibits

The Tenth Judicial District court County of Quay will destroy exhibits in domestic relations cases for years 1979-2013. Exhibits may be retrieved through April 30 by calling 575-461-4422.

U.S. Bankruptcy Court District of New Mexico

New Location and Phone Numbers

Effective Feb. 20, the Bankruptcy Court is at a new location: Pete V. Domenici U.S. Courthouse, 333 Lomas Boulevard NW, Suite 360, Albuquerque, NM 87102. The Bankruptcy Court customer service counter is located on the third floor of the Lomas Courthouse. Bankruptcy courtrooms and hearing rooms are located on the fifth floor of the courthouse. All Bankruptcy Court phone numbers have changed as part of this move. The new main line phone number is 505-415-7999. Note that 341 meeting locations did not change as part of the Bankruptcy Court relocation.

State Bar News

Attorney Support Groups

- April 9, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets on the second Monday of the month.) Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#.
- April 16, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets the third Monday of the month.) Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#.
- May 7, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)

For more information, contact Latisha Frederick at 505-948-5023 or 505-453-9030 or Bill Stratvert at 505-242-6845.

Professionalism Tip

With respect to my clients:

I will advise my client that civility and courtesy are not weaknesses.

ADR Committee

Reframing Presentation

Reframing, like mediation, is an art unto itself. As an art, and as one of the most valuable tools we have as mediators, reframing takes practice and ongoing refinement. Join The ADR committee at noon on April 26 at the State Bar Center in Albuquerque where Diane Grover and Kathleen Oweegon will take us on the adventure of "Wrangling With Reframes". This highly interactive 1-hour learning and practice session is a great opportunity for us to have some fun and get some practice in this challenging and vital skill. Lunch will be provided during the presentation. R.S.V.P. to Breanna Henley at bhenley@nmbar.org. The Committee will meet from 11:30-noon in advance of the presentation.

Animal Law Section

Animal Talk: Tethering

During the 2007 Legislative Session, the New Mexico House of Representatives issued House Memorial 19 which requested that the Department of Public Safety study the public safety and humane implications of persistently tethering dogs. Join the Alan Edmonds, the high-energy force behind Animal Protection of New Mexico's animal cruelty hotline at noon, April 27, at the State Bar Center for an Animal Talk covering an overview of a 2008 report that was produced by DPS to the Consumer and Public Affairs Committee as a result of House Memorial 19, current statutes and ordonnances in N.M. addressing tethering and a comparison of N.M. laws to other states, and efforts in community education on dog behavior, outreach and alternatives to tethering. R.S.V.P. to bhenley@nmbar.org

Board of Bar Commissioners

ABA House of Delegates

The Board of Bar Commissioners will make one appointment to the American Bar Association House of Delegates for a two-year term, which will expire at the conclusion of the 2020 ABA Annual Meeting. The delegate must be willing to attend meetings or otherwise complete his/her term and responsibilities without reimbursement or compensation from the State Bar. However, the ABA provides reimbursement for expenses to attend the ABA mid-year meetings. Members who want to serve on the board must be a current ABA member in good standing and should send a letter of interest and brief résumé by May 4 to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

Judicial Standards Commission

The Board of Bar Commissioners will make one appointment to the Judicial Standards Commission for a four-year term. The responsibilities of the Judicial Standards Commission are to receive, review and act upon complaints against state judges, including supporting documentation on each case as well as other issues that may surface. Experience with receiving, viewing and preparing for meetings and trials with substantial quantities of electronic documents is necessary. The Commission meets once every eight weeks in Albuquerque and additional hearings may be held as many as 4-6 times a year. The time commitment to serve on this Commission is significant and the workload is voluminous. Applicants should consider all potential conflicts caused by service on this Commission. Members who want to serve on the Commission should send a letter of interest and brief résumé by May 4 to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

Solo and Small Firm Section
Monthly Luncheon with Senator Harris

The Solo and Small Firm Section wraps up its spring luncheon presentations at noon on April 17 at the State Bar Center. The luncheon will feature one of the state's genuine natural wonders, Senator Fred Harris, former United States Senator and UNM associate professor, on "Being Fred Harris." As the only surviving member of the 1967 Kerner Commission on racial violence, he will discuss his new book on that subject, his 60 years of public service, and whatever else his audience wishes to raise. All members of the bar, including judges, are invited to attend, enjoy a complimentary lunch and engage in vigorous discussion. R.S.V.P. to Breanna Henley at bhenley@nmbar.org.

Public Law Section
Accepting Award Nominations

The Public Law Section is accepting nominations for the Public Lawyer of the Year Award, which will be presented at the state capitol at 4 p.m. on April 27. Visit www.nmbar.org/publiclaw to view previous recipients and award criteria. Nominations are due no later than 5 p.m. on April 9. Send nominations to Section Chair Chris Melendrez at cmelendrez@cabq.gov. The selection committee will consider all nominated candidates and may nominate candidates on its own.

Trial Practice Section
Social Get-Together

Join the Trial Practice Section for a quarterlyish get-together on from 5:30-7:30 p.m. on April 19, at The Hotel Andaluz, located at 125 Second Street NW in Albuquerque. We want to provide a forum to get to know each other a bit, or to make up interesting stories about ourselves. Hor d'oeuvres, great atmosphere, good conversation and charming personalities provided. Beverages on you or your generous colleagues. R.S.V.P.s are appreciated but not a prerequisite. Let Breanna Henley know at bhenley@nmbar.org if you think about it in advance, but don't let that keep you from stopping by on a whim.

UNM School of Law
Law Library Hours

Through May 12

Building and Circulation

Monday–Thursday	8 a.m.–8 p.m.
Friday	8 a.m.–6 p.m.
Saturday	10 a.m.–6 p.m.
Sunday	noon–6 p.m.

Reference

Monday–Friday	9 a.m.–6 p.m.

Albuquerque Lawyers Club
Monthly Lunch Meeting

The Albuquerque Lawyers Club invites members of the legal community to its April meeting. Dr. Sam Roll will present "Joy: A Guide for Attorneys." The lunch meeting will be held at noon, April 4, at Seasons Restaurant, located at 2031 Mountain Road. It is free to members/ $30 non-members in advance/$35 at the door. For more information, email ydennig@yahoo.com or call 505-844-3558.

New Mexico Criminal Defense Lawyers Association
Trial Skills College

NMCDLA's Trial Skills College returns this year with some new features including forensic pathology fellows who will act as experts during the cross and direct examination segments, as well as a new case file on eyewitness ID. It is approved for 15 general hours of CLE credit. This is a great opportunity to develop skills in every aspect of trial—for new and seasoned practitioners alike. From jury selection to closing arguments, participants work with some of the best trial attorneys in the state as faculty, dedicated to helping you step up your trial game. This 2+ day hands-on workshop begins the evening of April 5 through April 7. It is limited to 36 participants, with some spots open to civil practice attorneys as well. Visit nmcdla.org to register.

New Mexico Defense Lawyers Association
Save the Date - Women in the Courtroom VII CLE Seminar

The New Mexico Defense Lawyers Association proudly presents Part VII of "Women in the Courtroom," a dynamic seminar designed for New Mexico lawyers. Join us Aug. 17 at the Jewish Community Center of Greater Albuquerque for this year's full-day CLE seminar. Registration will be available online at nmdla.org in July. For more information contact nmdefense@ nmdla.org.

New Mexico Women's Bar Association
2018 Henrietta Pettijohn Reception

The New Mexico Women's Bar Association invites members of the legal profession to attend its annual Henrietta Pettijohn Reception Honoring the Honorable Sharon Walton. The 2018 Supporting Women in the Law Award will be presented to Little, Gilman-Tepper & Batley, PA. The Exemplary Service Award will be presented to Sarita Nair and the Outstanding Young Attorney Award will be presented to Emma O'Sullivan. The reception will be 6–9:30 p.m., May 10, Hyatt Regency Albuquerque. Tickets are $25 for law students, $50 for members, $60 for non-members. Contact Libby Radosevich, eradosevich@peiferlaw.com to purchase tickets and sponsorships.

Legal Education

April

4 **Drafting Employment Agreements, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

5 **Veterans Disability Law Bootcamp**
4.7 G
Live Seminar, Albuquerque
Vet Defender
www.lawyershelpingwarriors.com

5-7 **Trial Skills College**
15.0 G
Live Seminar,
Albuquerque
New Mexico Criminal Defense
Lawyers Assocaition
www.nmcdla.org

6 **2017 Business Law Institute**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

6 **2017 Health Law Symposium**
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

6 **Uncovering and Navigating Blind Spots Before They Become Land Mines (2017)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

6 **Deposition Practice in Federal Cases (2016)**
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

6 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

10 **Closely Held Stock Options, Restricted Stock, Etc.**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

12 **Domestic Self-Settled Trusts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

13 **Diversity Issues Ripped from the Headlines, II**
5.0 G, 1.0 EP
Live Webcast/Live Seminar,
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

17 **Protecting Client Trade Secrets & Know How from Departing Employees**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

18 **Equipment Leases: Drafting & UCC Article 2A Issues**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

19 **Advanced Mediation**
10.2 G
Live Seminar, Santa Fe
David Levin and Barbara Kazen
505-463-1354

20 **Ethically Managing Your Practice (2017 Ethicspalooza)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **Pro Bono Representation: Managing the Legal and Ethical Issues**
3.0 G, 1.0 EP
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

24 **Drafting Ground Leases, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

25 **Drafting Ground Leases, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

26 **Defined Value Clauses: Drafting & Avoiding Red Flags**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

26 **Oil and Gas: From the Basics to In-Depth Topics (2017)**
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

26 **Ethics for Government Attorneys (2017)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

26 **Add a Little Fiction to Your Legal Writing (2017)**
2.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

26 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

27 **Lawyer Ethics in Real Estate Practice**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **Legal Rights and Issues Affecting Pregnant and Parenting Teens in New Mexico**
1.0 G
Live Seminar, Albuquerque
Southwest Women's Law Center
swwomenslaw.org

27 **How to Practice Series: Demystifying Civil Litigation, Pt. I**
6.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

30 **Bankruptcy Fundamentals for the Non-Bankruptcy Attorney**
3.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

May

1 **The Law of Consignments: How Selling Goods for Others Works**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

2 **Valuation of Closely Held Companies**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

8 **Ownership of Ideas Created on the Job**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **2018 Trust Litigation Update**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

11 **How Ethics Rules Apply to Lawyers Outside of Law Practice**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

15 **Reps and Warranties in Business Transactions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

16 **The Ethics of Confidentiality**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

17 **2018 Wrongful Discharge & Retaliation Update**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

18 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

18 **The Basics of Family Law (2017)**
5.2 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

18 **A Little Planning Now, A Lot Less Panic Later: Practical Succession Planning for Lawyers (2017)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

22 **Escrow Agreements in Real Estate Transactions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

23 **Reforming the Criminal Justice System (2017)**
6.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **The Cyborgs are Coming! The Cyborgs are Coming! Ethical Concerns with the Latest Technology Disruptions (2017)**
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **Ethics and Digital Communications**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

23 **33rd Annual Bankruptcy Year in Review Seminar (2018)**
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

24 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

30 **Basics of Cyber-Attack Liability and Protecting Clients s**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

31 **Professionalism for the Ethical Lawyer**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

June

1 **Choice of Entity for Service Businesses**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

5 **2018 Ethics in Litigation Update, Part 1**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

6 **2018 Ethics in Litigation Update, Part 2**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

8 **Text Messages & Litigation: Discovery and Evidentiary Issues**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

12 **Closely Held Company Merger & Acquisitions, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

13 **Closely Held Company Merger & Acquisitions, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

15 **My Client's Commercial Real Estate Mortgage Is Due, Now What**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

19 **Ethics and Email**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **Director and Officer Liability**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

21 **Holding Business Interests in Trusts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

22 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

25 **The Ethics of Bad Facts and Bad Law**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

26 **Classes of Stock: Structuring Voting and Non-voting Trusts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **Roadmap/Basics of Real Estate Finance, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **Roadmap/Basics of Real Estate Finance, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

29 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

Opinions

As Updated by the Clerk of the New Mexico Court of Appeals

Mark Reynolds, Chief Clerk New Mexico Court of Appeals
PO Box 2008 • Santa Fe, NM 87504-2008 • 505-827-4925

Effective March 23, 2018

PUBLISHED OPINIONS

A-1-CA-35186	Princeton v. HSD	Reverse/Remand	03/19/2018

UNPUBLISHED OPINIONS

A-1-CA-36114	B Wall v. A Ross	Dismiss	03/19/2018
A-1-CA-36306	State v. I Gonzales	Affirm	03/19/2018
A-1-CA-36514	State v. T Romero	Affirm	03/19/2018
A-1-CA-36540	State v. B Romero	Affirm	03/19/2018
A-1-CA-36541	State v. R Johnson	Affirm	03/19/2018
A-1-CA-36590	State v. D Zavala	Affirm	03/19/2018
A-1-CA-36616	State v. J Ortega	Affirm	03/19/2018
A-1-CA-36651	HSBC v. P Chandhok	Affirm	03/19/2018
A-1-CA-36806	K Davis v. D. Davis	Affirm	03/19/2018
A-1-CA-35171	R Lucero v. R Sutten	Reverse/Remand	03/20/2018
A-1-CA-35671	State v. C Etcitty	Affirm/Remand	03/20/2018
A-1-CA-36549	State v. L Reavis	Affirm	03/20/2018
A-1-CA-36691	State v. J Frohnhofer	Affirm/Remand	03/20/2018
A-1-CA-36715	R Aragon v. Allstate Insurance Company	Affirm	03/20/2018
A-1-CA-36414	State v. L Lee	Affirm	03/21/2018
A-1-CA-36425	CYFD v. Crystal J E	Affirm	03/21/2018
A-1-CA-36623	In the Matter of H Stewart	Affirm	03/21/2018
A-1-CA-36638	State v. M Hammond	Affirm	03/21/2018
A-1-CA-36743	State v. D Rascon	Affirm	03/21/2018
A-1-CA-36802	CYFD v. Juan F	Affirm	03/21/2018
A-1-CA-36995	B Wall v. S Gerard	Dismiss	03/21/2018

Slip Opinions for Published Opinions may be read on the Court's website:
http://coa.nmcourts.gov/documents/index.htm

Call for Nominations

2018 STATE BAR OF NEW MEXICO *Annual Awards*

Nominations are being accepted for the **2018 State Bar of New Mexico Annual Awards** to recognize those who have distinguished themselves or who have made exemplary contributions to the State Bar or legal profession in 2017 or 2018. The awards will be presented during the 2018 Annual Meeting, Aug. 9-11 at the Hyatt Regency Tamaya Resort, Santa Ana Pueblo. All awards are limited to one recipient per year, whether living or deceased. Previous recipients for the past three years are listed below. To view the full list of previous recipients, visit **www.nmbar.org/Awards**.

{ Distinguished Bar Service Award–Lawyer }

Recognizes attorneys who have provided valuable service and contributions to the legal profession and the State Bar of New Mexico over a significant period of time.

Previous recipients: *Scott M. Curtis, Hannah B. Best, Jeffrey H. Albright*

{ Distinguished Bar Service Award–Nonlawyer }

Recognizes nonlawyers who have provided valuable service and contributions to the legal profession over a significant period of time.

Previous recipients: *Cathy Ansheles, Tina L. Kelbe, Kim Posich*

{ Justice Pamela B. Minzner* Professionalism Award }

Recognizes attorneys or judges who, over long and distinguished legal careers, have by their ethical and personal conduct exemplified for their fellow attorneys the epitome of professionalism.

Previous recipients: *Hon. Elizabeth E. Whitefield, Arturo L. Jaramillo, S. Thomas Overstreet*

*Known for her fervent and unyielding commitment to professionalism, Justice Minzner (1943–2007) served on the New Mexico Supreme Court from 1994–2007.

{ Outstanding Legal Organization or Program Award }

Recognizes outstanding or extraordinary law-related organizations or programs that serve the legal profession and the public.

Previous recipients: *Young Lawyers Division Wills for Heroes Program, Self Help Center at the Third Judicial District Court, Pegasus Legal Services for Children*

{ Outstanding Young Lawyer of the Year Award }

Awarded to attorneys who have, during the formative stages of their legal careers by their ethical and personal conduct, exemplified for their fellow attorneys the epitome of professionalism; nominee has demonstrated commitment to clients' causes and to public service, enhancing the image of the legal profession in the eyes of the public; nominee must have practiced no more than five years or must be no more than 36 years of age.

Previous recipients: *Spencer L. Edelman, Denise M. Chanez, Tania S. Silva*

{ Robert H. LaFollette* Pro Bono Award }

Presented to an attorney who has made an exemplary contribution of time and effort, without compensation, to provide legal assistance over his or her career to people who could not afford the assistance of an attorney.

Previous recipients: *Stephen. C. M. Long, Billy K. Burgett, Robert M. Bristol*

*Robert LaFollette (1900–1977), director of Legal Aid to the Poor, was a champion of the underprivileged who, through countless volunteer hours and personal generosity and sacrifice, was the consummate humanitarian and philanthropist.

{ Seth D. Montgomery* Distinguished Judicial Service Award }

Recognizes judges who have distinguished themselves through long and exemplary service on the bench and who have significantly advanced the administration of justice or improved the relations between the bench and the bar; generally given to judges who have or soon will be retiring.

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*Justice Montgomery (1937–1998), a brilliant and widely respected attorney and jurist, served on the New Mexico Supreme Court from 1989–1994.

A letter of nomination for each nominee should be sent to Kris Becker, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; fax 505-828-3765; or email kbecker@nmbar.org. Please note that we will be preparing a video on the award recipients which will be presented at the awards reception, so please provide names and contact information for three or four individuals who would be willing to participate in the video project in the nomination letter.

Deadline for Nominations: June 1

For more information or questions, please contact Kris Becker at 505-797-6038.

STATE BAR of NEW MEXICO

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From the Clerk of the New Mexico Supreme Court

Joey D. Moya, Chief Clerk New Mexico Supreme Court
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CLERK'S CERTIFICATE OF ADMISSION

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CLERK'S CERTIFICATE OF REINSTATEMENT TO ACTIVE STATUS

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CLERK'S CERTIFICATE OF REINSTATEMENT TO ACTIVE STATUS AND CHANGE OF ADDRESS

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CLERK'S CERTIFICATE OF NAME AND CHANGE OF ADDRESS AND TELEPHONE NUMBER

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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

Joey D. Moya, Chief Clerk New Mexico Supreme Court
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

Effective April 4, 2018

Pending Proposed Rule Changes Open for Comment:

Comment Deadline

Please see the special summary of proposed rule amendments published in the March 21, 2018, issue of the Bar Bulletin. The actual text of the proposed rule amendments can be viewed on the Supreme Court's website at the address noted below. The comment deadline for those proposed rule amendments is April 11, 2018.

Recently Approved Rule Changes Since Release of 2018 NMRA:

		Effective Date
Rules of Civil Procedure for the District Courts		
1-088.1	Peremptory excusal of a district judge; recusal; procedure for exercising	03/01/2018

To view all pending proposed rule changes (comment period open or closed), visit the New Mexico Supreme Court's website at http://nmsupremecourt.nmcourts.gov. To view recently approved rule changes, visit the New Mexico Compilation Commission's website at http://www.nmcompcomm.us.

From the New Mexico Supreme Court

Official Citation: 2016-NMSC-037

NO. S-1-SC-35614 (filed August 24, 2016)

STATE OF NEW MEXICO,
Plaintiff-Petitioner,
v.
PETER CHAVEZ,
Defendant-Respondent.

AMENDED ORDER

WHEREAS, this matter came on for consideration by the Court upon motion to abate proceedings to their inception upon suggestion of death and response thereto, the Court having considered said pleadings and being sufficiently advised, Chief Justice Charles W. Daniels, Justice Petra Jimenez Maes, Justice Edward L. Chavez, Justice Barbara J. Vigil, and Justice Judith K. Nakamura concurring;

NOW, THEREFORE, IT IS ORDERED that the motion is GRANTED and the matter shall be remanded for abatement of the proceedings from their inception;

IT IS FURTHER ORDERED that the Court of Appeals opinion shall be vacated and shall not be published nor cited as precedent; and

IT IS FURTHER ORDERED that an amended mandate shall issue immediately and the record proper, transcript of proceedings, and exhibits shall be returned to the New Mexico Court of Appeals.

IT IS SO ORDERED.

WITNESS, Honorable Chief Justice Charles W. Daniels of the Supreme Court of the State of New Mexico, and the seal of said Court this 24th day of August, 2016.

Joey D. Moya, Chief Clerk of the Supreme Courtof the State of New Mexico

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An additional header has been added to 2016-NMCA-016 stating, "Pursuant to 2016-NMSC-037, State v. Chavez, 2016-NMCA-016, is vacated and shall not be published nor cited as precedent.".

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-012

No. A-1-CA-34387 (filed August 22, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
PEDRO CAZARES, a/k/a
PEDRO LUIS CASARES,
Defendant-Appellee.

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

Robert E. Tangora
Robert E. Tangora, L.L.C.
Santa Fe, New Mexico
for Appellee

HECTOR H. BALDERAS,
Attorney General
MARIS VEIDEMANIS,
Assistant Attorney General
Santa Fe, New Mexico
for Appellant

Opinion

M. Monica Zamora, Judge

{1} The State appeals from the district court's order excluding witnesses resulting in the dismissal of the case. This order was entered because of discovery rule violations by the State. The exclusion included the State's witnesses that Defendant requested to interview, but had not been given the opportunity to interview before the district's scheduling deadline. Defendant's motion to dismiss was granted once the State conceded it could not proceed to trial without the excluded witness testimony. We affirm the district court's order.

BACKGROUND

{2} Defendant was charged with drug trafficking and possession of drug paraphernalia. A scheduling order was entered on August 20, 2014, that set forth various deadlines, including witness interviews to be conducted by October 24, 2014, and substantive motions to be filed by November 7, 2014. The prosecutor filed a "State's Addendum Witness & Exhibit List" on August 27, 2014, listing eight law enforcement officers and the names of three chemists. Of the three chemists listed by the State, it was the chemist who analyzed the drugs, Manuel Gomez (Gomez) who would be testifying at trial. On the same day, the prosecutor sent an email to defense counsel stating, "Please provide me with dates and times that are convenient for you for witness interviews." Defense counsel responded by providing three dates of availability in September for interviews, and stated, "Please let me know, immediately, when the interviews are scheduled or if these dates don't work." The prosecutor subsequently informed defense counsel that "witness interviews" were scheduled for September 23, 2014. Only two officers appeared for interviews on that date. Defense counsel made another request to schedule interviews for the remaining nine witnesses. The interviews were scheduled for October 14, 2014, at which only two more officers appeared.

{3} Gomez did not show up on either September 23, 2014 or October 14, 2014. On October 16, 2014, defense counsel informed the prosecutor that she was only available on October 21, 2014, for the remaining interviews because she was going to be on vacation after that date. The prosecutor informed defense counsel that a telephonic interview with Gomez would be set up for that date. On October 17, 2014, the prosecutor discovered that Gomez would be out of town and would not be available to be interviewed; however, he did not pass along this information to defense counsel. The prosecutor never sought an extension of the district court's interview deadline. The State asserts that emails were sent to defense counsel one day before the deadline on October 23, 2014, and one week after the deadline had passed on October 30, 2014. The prosecutor received no response from defense counsel to his emails.

{4} On October 31, 2014, defense counsel filed a motion to exclude witnesses from the State's list who were not made available to be interviewed before the district court's October 24, 2014 deadline. Defense counsel stated that Defendant was prejudiced due to an inability to conduct witness interviews and prepare substantive motions prior to a court ordered deadline of November 7, 2014. The prosecutor claimed that it made a good faith effort to comply with the court deadlines, and any violation of the district court's order was not intentional.

{5} A hearing was held on December 2, 2014. At that hearing the district court specifically asked the prosecutor why the district attorney's office did not set up an interview for Gomez with the first interviews scheduled for September 23, 2014. The prosecutor informed the court that a chemist's interview is typically set up last, because the interviews with law enforcement officers give the State a sense of the sufficiency of its evidence, or the strengths and weaknesses of the State's case, and whether there is a possibility of reaching an agreement in a case. The prosecutor also stated that, since the "trial [was] not scheduled until April[2015 he] relaxed a little bit." It was also revealed during the motion hearing that while three chemists had been identified and because Defendant had not received the drug analyst's report, defense counsel did not know if one or all three chemists would actually be testifying. The district court entered an order excluding those witnesses that had not been interviewed and ultimately dismissed the case. The State appeals. On appeal, the State informs this Court that of the witnesses excluded under the district court's order, only Gomez, the chemist, would have been called to testify at trial.

DISCUSSION

{6} It is within a trial court's discretion to impose sanctions for violation of a discovery order when the violation results in prejudice to the opposing party. *State v. Bartlett*, 1990-NMCA-024, ¶ 4, 109 N.M. 679, 789 P.2d 627. To determine whether imposition of the sanction of excluding witnesses was proper in this case, we must look at: (1) the culpability of the State,

(2) the prejudice to Defendant, and (3) the availability of lesser sanctions. *See State v. Le Mier*, 2017-NMSC-017, ¶ 15, 394 P.3d 959 (citing to *State v. Harper*, 2011-NMSC-044, ¶ 15, 150 N.M. 745, 266 P.3d 25). Our Supreme Court clarifying *Harper* proclaimed that these applicable standards are not "so rigorous" that a trial court may only impose sanctions for discovery violations that are "egregious, blatant, and an affront to their authority." *Le Mier*, 2017-NMSC-017, ¶ 16. Rather, in order to promote efficiency, manage its docket, and ensure that judicial resources are not wasted, a court may impose "meaningful sanctions where discovery orders are not obeyed and a party's conduct injects needless delay into the proceedings." *Id.* ¶¶ 16, 19. Our Supreme Court further articulated that "our courts are encouraged to ensure the timely adjudication of cases, to proactively manage their dockets, and to utilize appropriate sanctions to vindicate the public's interest in the swift administration of justice." *Id.* ¶ 29.

{7} The district court has broad discretionary power to impose sanctions for discovery violations, and there is no abuse of that discretion unless the court's ruling is "clearly against the logic and effect of the . . . circumstances of the case[,]" and not justified by reason. *Id.* ¶ 22. "In reviewing the district court's decision, [appellate courts] view[] the evidence . . . and all inferences . . . in the light most favorable to the district court's decision." *Id.* We now turn to the considerations set out in *Harper* and quantified by *Le Mier*.

Culpability of the State

{8} By entering the scheduling order with the requisite deadlines, the district court was exercising its authority to ensure the timely adjudication of the case and was proactively managing its docket. *See Le Mier*, 2017-NMSC-017, ¶ 29. The scheduling order with the appropriate deadlines was clear and unambiguous. The prosecution's failure to: (a) follow the clear and unambiguous witness-interview deadline, (b) seek an extension of that deadline, (c) identify the witnesses it actually intended to call at trial, and (d) ensure defense counsel was provided with a copy of the drug analyst's report, is more than enough proof of the State's culpable conduct.

{9} Immediately following the filing of the amended witness list by the State, defense counsel made attempts to interview all of the witnesses on the list. She made herself available to conduct interviews on three separate dates. When only four of the eight officers and none of the three chemists appeared for the interviews set on September 23, 2014 and October 14, 2014, defense counsel once again made herself available for witness interviews before the discovery deadline. Unbeknownst to defense counsel, Gomez was a critical witness for the State's case against Defendant. However, the State specifically failed to schedule an interview with Gomez for either of those dates.

{10} The prosecutor apprised the district court that the witness list included every possible witness, but explained that the witnesses "gradually either come in for the interview or eliminate themselves." For example, two Homeland Security officers were difficult to schedule because of their positions, and two deputies said they had nothing to do with the case. Despite knowing that some of the original eleven witnesses listed by the State would not be called to testify at trial, the prosecutor did not file an amended witness list at any time. It was not until the motion hearing that the State conceded that the only witnesses that needed to be interviewed were the four that defense counsel had already interviewed and Gomez.

{11} The prosecutor contended that he made a good faith effort to reschedule an interview with Gomez, and "made attempts to comply with the court imposed deadlines." Although the prosecution worked with defense counsel to schedule Gomez's telephonic interview on October 21, 2014, the State knew as of October 17, 2014, that Gomez was not available on October 21, 2014. However, the prosecutor failed to inform defense counsel until October 21, 2014. It was not until October 23, 2014, two days after the cancellation of Gomez's telephonic interview, and one day before the witness-interview deadline, that the State made an attempt to contact Gomez and defense counsel to reschedule the interview. He then waited another week, well after the deadline had passed and while defense counsel was on vacation, to send another email to attempt to reschedule the interview.

{12} In the State's response to Defendant's motion to exclude witnesses, the prosecutor disingenuously states that he "attempted to reschedule the interview with [Gomez] but did not receive a response from defense counsel." When asked by the district court if there was a reason why the State did not seek an extension of the deadline, the prosecutor did not provide an explanation. *See Harper*, 2011-NMSC-044, ¶ 22 (stating that where the state assumed responsibility of scheduling interviews with witnesses, the state had an obligation to follow through in good faith). Additionally, the State admitted that it delayed scheduling Gomez for an interview because of the internal policy of the district attorney's office and he "relaxed" because the trial date was approximately four months away.

Prejudice to Defendant

{13} As of the deadline for witness interviews, even though defense counsel provided a number of dates that she would be available, she had been able to interview only four witnesses out of eleven witnesses on the State's list. In particular, defense counsel was not able to interview Gomez, a witness critical to the State's case. As a result of the State's actions and inactions, defense counsel was unable to interview Gomez in a timely fashion and could not comply with some of the existing deadlines for filing substantive motions—particularly fact specific motions pertaining to several of the State's witnesses who had not been interviewed and the drug analysis report that had not been received. *See id.* ¶ 19 (noting that delayed disclosure results in prejudice when the delay prevents defense counsel from effectively preparing and presenting the defendant's case); *see also Le Mier*, 2017-NMSC-017, ¶ 25 ("When a court orders a party to provide discovery within a given time frame, failure to comply with that order causes prejudice both to the opposing party and to the court.").

{14} It is important to note that since defense counsel was not provided with the drug analyst's report, she had no information as to which chemist prepared the report or what information to review in preparation of the chemist's interview. Although the prosecutor stated that defense counsel was provided with a copy of the drug analyst's report, he did not have an email receipt and the discovery receipt for the report was not signed, indicating that it was never received by defense counsel.

{15} The State sidestepped its responsibility to comply with the scheduling order and is now suggesting that it was Defendant's responsibility to file a request for "a brief extension of the pretrial deadlines" to allow for time to interview Gomez and to be able to file a motion based on the interview without delaying the trial, which was scheduled "four months away when the [district] court dismissed the case." The State did not make such a suggestion to the district court, and the district court

was not required to sua sponte conceive of a means of alleviating the prejudice caused by the State's discovery violations. *Cf. State v. Martinez*, 1998-NMCA-022, ¶ 13, 124 N.M. 721, 954 P.2d 1198 (noting that, while a continuance might resolve prejudice to the moving party, the district court is not required to "cure" a discovery violation by continuing a trial (internal quotation marks and citation omitted)). The State neither has the authority, nor is in a position to delegate its responsibility to follow the clear and unambiguous scheduling order issued by the district court. Blaming defense counsel in this case was not warranted. The State recognized and accepted the deadlines imposed by the district court, only to fail to comply with them and expend the court's time and judicial resources to address those failures. *See Le Mier*, 2017-NMSC-017, ¶ 26.

Availability of Lesser Sanctions

{16} Defendant argues that the State failed to properly preserve the issue of "whether the district court's discovery sanction is too severe" because the State did not request a lesser sanction. The State does not argue that the district court should have imposed a lesser sanction, but instead argues that it was an abuse of discretion to sanction the State by excluding Gomez as a witness. Nonetheless, the district court found that it had considered lesser sanctions and determined that exclusion was the appropriate remedy. No argument regarding the consideration of lesser sanctions has been made to this Court, therefore we will not consider it. *See Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 70, 309 P.3d 53 (holding that appellate courts will not raise or guess at a party's arguments); *cf. Le Mier*, 2017-NMSC-017, ¶ 27 (stating that the court is not required to consider every possible lesser sanction before deciding on witness exclusion; the court is only required to determine the least severe sanction for the situation that accomplishes the desired result).

CONCLUSION

{17} The State's disregard of the district court's order was appropriately addressed by the district court with its sanction of excluding the witnesses testimony, resulting in the dismissal of the case, thereby "ensur[ing] . . . the [district] court's authority to efficiently administer the law and . . . compliance with its orders[.]" *Le Mier*, 2017-NMSC-017, ¶ 29. The State took on the responsibility of scheduling interviews, but failed to ensure that all listed witnesses would attend the interviews, failed to inform defense counsel that most of the witnesses would not be called at trial, delayed scheduling an interview for a critical witness until the deadline was looming, and then failed to inform defense counsel until the date of the interview that the critical witness was unavailable. Additionally, the State did not adequately provide defense counsel with the drug analyst's report.

{18} The State attempted to partially excuse its behavior by referring to an internal policy of delaying interviews for certain witnesses in order to assess the strength of the case based on any other interviews. The prosecutor's decision not to be diligent with his discovery obligations because the trial was four months away was a reckless rationale for failing to abide by the district court's ordered discovery deadline. The State's conduct resulted in prejudice to Defendant and to the district court. The decision to impose the sanction of exclusion of the State's witnesses is not clearly against the logic and effect of the circumstances in this case. The district court did not abuse its discretion in excluding all non-interviewed witnesses, and in particular Gomez, or by ultimately dismissing the case.

{19} For the foregoing reasons, we affirm the district court's order.

{20} IT IS SO ORDERED.
M. MONICA ZAMORA, Judge

I CONCUR:
STEPHEN G. FRENCH, Judge
TIMOTHY L. GARCIA, Judge (specially concurring).

GARCIA, Judge (specially concurring).

{21} I write to specially concur with the result reached by the majority but disagree with various negative references used by the majority regarding the prosecutor's decisions and behavior in this case. *See* Majority Opinion ¶¶ 12, 17-18. Clearly the State took a risk by allowing the interview deadline to pass without having Gomez interviewed by defense counsel. However, this occurred with over four months remaining before trial—enough time for the district court to take action to rectify the error and resolve any prejudice to Defendant prior to trial.

{22} I consider the State's failure to ask the district court to extend the original interview deadlines or impose a less severe sanction to eliminate any pretrial prejudice to Defendant as the critical errors in this case. This tactical decision proved to be fatal to the State's position. Clearly the district court had the discretion and responsibility to consider and impose a less severe sanction against the State. *See Harper*, 2011-NMSC-044, ¶¶ 16, 20-27. Without even requesting that the district court consider other options or less severe sanctions, the majority is correct—the district court did not abuse its discretion in this particular case by imposing a more severe sanction—excluding testimony by the State's witnesses who had not been interviewed, specifically Gomez.

{23} Without adopting all the language and reasoning used by the majority, I specially concur with the decision to affirm the district court's order.

TIMOTHY L. GARCIA, Judge

Certiorari Denied, December 5, 2017, No. S-1-SC-36748

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-013

No. A-1-CA-34597 (filed October 12, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
BRIAN ADAMO,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY
Raymond L. Romero, District Judge

HECTOR H. BALDERAS,
Attorney General
MARIS VEIDEMANIS,
Assistant Attorney General
Santa Fe, New Mexico
for Appellee

BENNETT J. BAUR,
Chief Public Defender
MARY BARKET,
Assistant Appellate Defender
Santa Fe, New Mexico
for Appellant

Opinion

Michael E. Vigil, Judge

{1} The motion for rehearing is denied. The formal opinion filed in this case on August 31, 2017, is hereby withdrawn, and this opinion is substituted in its place.

{2} A jury found Defendant Brian Adamo guilty of one count of sexual exploitation of children (possession) in violation of NMSA 1978, Sections 30-6A-3(A) (2007, amended 2016), under the Sexual Exploitation of Children Act (the Act), NMSA 1978, §§ 30-6A-1 to -4 (1984, as amended through 2016). This is commonly known as possession of child pornography. Defendant appeals, and concluding there was no reversible error in Defendant's trial, we affirm.

BACKGROUND

{3} Following a preliminary hearing in the magistrate court in Carlsbad, New Mexico, the district attorney filed a criminal information in the district court charging Defendant with eighteen counts of sexual exploitation of children (possession) in violation of Section 30-6A-3(A). Pursuant to *State v. Olsson*, 2014-NMSC-012, 324 P.3d 1230, an amended criminal complaint was then filed charging Defendant with a single count of sexual exploitation of children (possession). At trial, the evidence established the following facts.

{4} Every internet subscriber has a unique Internet Protocol (IP) address that is assigned by the subscriber's internet provider and corresponds with the subscriber's residential address. Carlsbad Police Department Detective Blaine Rennie, who investigates crimes against children, testified that in March 2012, using software that detects IP addresses that have downloaded images of suspected child pornography and computers that are sharing such files, he detected "an exorbitant amount of downloads" of images that were identified as child pornography. The software monitors "SHA1 numbers," unique number-letter combinations that are assigned to images when they are uploaded to the internet. Specifically, the software detects SHA1 numbers that are associated with child pornography and computers that are sharing such files, known as "peer-to-peer sharing." The downloads belonged to an IP address where similar downloads had been detected in March 2011. There were more than nine hundred downloads of suspected child pornograpy in a year at this IP address, and the majority were determined to be images of child pornography.

{5} Detective Rennie contacted Agent Owen Pena of the New Mexico Attorney General's Office and asked him to try to obtain images from a single source at that IP address. This is possible because images that one is willing to share with others are downloaded and stored in the shared folder of the owner's computer using peer-to-peer software. Agent Pena explained that a person using peer-to-peer software must download an image to the owner's computer, then direct that the image be placed in the shared folder of the computer; otherwise, the image cannot be accessed by another party. The image may be seen before it is downloaded and then saved in the shared folder.

{6} On April 6, 2012, Agent Pena succeeded in downloading five images of child pornography from the shared folder of a computer at the IP address. Four of these images were admitted into evidence, and all of them had the same "pre-teen hard core" (PTHC) search term. Agent Pena said that images such as those he retrieved would be found in a file-sharing network, using known search terms for child pornography such as "PTHC." Normal search engines such as Google or Yahoo filter and "block" search terms for hard core child pornography images. With assistance from Agent Lisa Keyes of the Department of Homeland Security, Detective Rennie learned that the name and address of the account holder was Defendant's mother at a residential address in Carlsbad.

{7} On June 19, 2012, a search warrant was executed at the home associated with the IP address. Defendant, his mother, and his father were at home. Defendant's bedroom appeared as if he did not often leave the room, and it was described as messy, in "disarray," with pizza boxes, tissues, food items, clothes strewn about, and sexual paraphernalia consisting of penile extenders, penile pumps, sex toys, and pills. Defendant also had an operating computer in his bedroom with two hard drives, one of which was an external hard drive. The computer was on at the time, depicting a story with child characters and "sexual overtones."

{8} There were many computers in the home because Defendant's father operated a computer repair business, and all the computers were seized. While some were non-functional and could not be analyzed, Agent Victor Sanchez of the New Mexico Department of Homeland Security

searched all of the undamaged computers and devices for pornography and child pornography. The only pornography he found was on the external hard drive from Defendant's room. Agent Sanchez testified that the external hard drive contained massive amounts of non-child pornography, including bestiality and cartoon pornography, which was highly organized and categorized by type, actors, and the like. Agent Sanchez did not find a category for child pornography, nor did he find evidence that there ever had been one.

{9} Agent Sanchez did not find any active or accessible child pornography when he searched the external drive. However, using a process called "data carving," he did find child pornography in the deleted files. Agent Sanchez described "data carving" in layman's terms. He said to think of a computer as a library with books. The computer's master file table (MFT) is analogous to the card catalog in a library and it tells the computer where the books are in the library. When the computer wants to find something, it does not go through all its rows looking for the book, but it goes to the MFT (the card catalog) that points to where the book is supposed to be, and gets it. When a file is "deleted," people have a misconception that the file is gone, but it isn't. The computer only goes into the card catalog and rips up the index card that told the computer where the file could be found. The book is still in the library, but the function of the card catalog telling the computer where the book is located is gone. Data carving tells the computer to go through every aisle in the library and look for images that were deleted, and the images are then recovered. Using this process, Agent Sanchez was able to retrieve approximately fifty-two images containing child pornography, and twelve were admitted into evidence. These were different from the four images admitted into evidence that were obtained by Agent Pena. The same analysis was performed on the computer belonging to Defendant's parents, and no images of child pornography were found.

{10} Defendant did not testify, and he did not present any evidence. Additional facts, necessary to address Defendant's arguments, are set forth in our analysis of Defendant's arguments.

II. DISCUSSION

{11} Defendant argues on appeal that the judgment and sentence must be reversed because: (1) there was insufficient evidence to support the verdict; (2) there was fundamental error in the jury instructions; (3) the district court abused its discretion in admitting sexual items found in Defendant's bedroom; (4) the evidence about Defendant refusing to speak to the police was improperly admitted; (5) ineffective assistance of counsel; and (6) other errors. We address each argument in turn.

1. Sufficiency of the Evidence

{12} Defendant contends that the evidence was not sufficient for a rational jury to conclude beyond a reasonable doubt that Defendant intentionally possessed child pornography, as required by Section 30-6A-3(A). We disagree.

{13} "Evidence is sufficient to sustain a conviction when there exists substantial evidence of a direct or circumstantial nature to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Smith*, 2016-NMSC-007, ¶ 19, 367 P.3d 420 (internal quotation marks and citation omitted). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Largo*, 2012-NMSC-015, ¶ 30, 278 P.3d 532 (internal quotation marks and citation omitted). "In reviewing whether there was sufficient evidence to support a conviction, [appellate courts] resolve all disputed facts in favor of the [s]tate, indulge all reasonable inferences in support of the verdict, and disregard all evidence and inferences to the contrary." *Id.* (internal quotation marks and citation omitted); *see State v. Myers*, 2009-NMSC-016, ¶¶ 7, 13, 146 N.M. 128, 207 P.3d 1105 (setting forth the standard for reviewing evidence for sufficiency in a bench trial). We have already set forth what the pertinent evidence was at trial.

{14} The evidence supports the jury's finding that sometime in the past Defendant knowingly possessed child pornography. The evidence showed that there were more than nine hundred downloads of suspected child pornography in a year to the IP address used by Defendant's computer, and most were determined to be images of child pornography. In March 2012, exorbitant amounts of child pornography were being downloaded to that same IP address. Images of child pornography can only be obtained from a file sharing network where search terms such as "PTHC" are used. The following month, on April 6, 2012, Agent Pena used peer-to-peer software to retrieve five images of child pornography from the shared folder of a single computer at the same IP address. A person using peer-to-peer software downloads the image to the owner's computer where it can be viewed. Then, in order to share the image with other computers, the owner either purposefully directs the image to be saved in the shared folder of the computer, or sets up the peer-to-peer software to automatically save images to the shared folder. The image can then be accessed by other computers with peer-to-peer software, such as Agent Pena's. Four of the images Agent Pena obtained were admitted into evidence, and all of them had the same search term "PTHC."

{15} Two months later, on June 19, 2012, a search warrant was executed at the physical address where the IP address was located. There were several computers at the home because Defendant's father operated a computer repair business at the home. Agent Sanchez searched all of the undamaged computers and devices for pornography and child pornography, and pornography was found only on the external hard drive of Defendant's computer. The external drive had massive amounts of non-child pornography, which was highly categorized. Although Agent Sanchez did not find any active child pornography that could be accessed on the computer, by using a process called "data carving" he was able to retrieve approximately fifty-two images of child pornography that had been "deleted" from the hard drive, and twelve of these images were admitted into evidence. A similar process failed to disclose any child pornography images on the computer belonging to Defendant's parents.

{16} A rational jury could fairly conclude from the foregoing evidence that there was a single computer at the IP address downloading massive amounts of pornography. Child pornography was also downloaded using peer-to-peer software. Child pornography is only accessible through a file sharing network with search terms specific to child pornography, and it can only be accessed by other users of peer-to-peer software if it is purposefully stored in a shared folder. From the shared folder of that single computer at the IP address, Agent Pena was able to retrieve five images of child pornography using peer-to-peer software on April 6, 2012. Two months later, on June 19, 2012, approximately fifty-two deleted images of child pornography were found

on the external hard drive of Defendant's computer. The jury was able to look at the images retrieved by Agent Pena and Agent Sanchez, and following the instructions given by the district court, determine for itself whether the images were child pornography.

{17} We cannot overlook the fact that when the search warrant was executed, and an agent went into Defendant's room, his computer was on, depicting children in a story with "sexual overtones." In *People v. Jaynes*, 2014 IL App (5th) 120048, ¶ 57, 11 N.E.3d 431, the court held that such evidence was admissible "to show intent, knowledge, and absence of mistake or accident." "The defendant's demonstrated interest in materials dealing with children engaged in sexual acts tended to show that his accessing illicit images was knowing and voluntary rather than inadvertent." *Id.*

{18} Under all the evidence, a fair inference is that the sole computer at the IP address that was used to download and share child pornography was Defendant's, and that Defendant had knowingly obtained, manipulated, stored, and shared the child pornography using his computer.

> In the context of prior possession of child pornography, a computer user knowingly possesses the contraband when the user intentionally downloads child pornography to the computer but later deletes the file or when he or she performs some function to reach out and select the image from the Internet. Indeed, a computer user who intentionally accesses child pornography images on a website gains actual control over the images, just as a person who intentionally browses child pornography in a print magazine knowingly possesses those images, even if he later puts the magazine down.

New v. State, 755 S.E.2d 568, 575 (Ga. Ct. App. 2014) (footnotes and internal quotation marks omitted); *see State v. Santos*, 2017-NMCA-___, ¶ 14, ___ P.3d ___, (No. 35,175, June 21, 2017) (concluding that by downloading, viewing, and deleting videos on his computer, the defendant possessed child pornography); *Wise v. State*, 364 S.W.3d 900, 907 (Tex. Crim. App. 2012) (concluding that the evidence was sufficient for the jury to find that the defendant knowingly and intentionally possessed child pornography images before they were deleted); *see also State v. Brown*, 1984-NMSC-014, ¶ 12, 100 N.M. 726, 676 P.2d 253 ("A material fact may be proven by inference."); *State v. Stefani*, 2006-NMCA-073, ¶ 39, 139 N.M. 719, 137 P.3d 659 (stating that a jury is free to draw inferences from the facts necessary to support a conviction).

{19} Defendant argues that because experts conceded that, in certain instances, it is possible for child pornography to be "unwittingly" downloaded; that Defendant's computer was not directly tied to the images Agent Pena downloaded; that it was possible for Agent Pena to have accessed any computer being repaired; that there is no evidence that the images retrieved by Agent Sanchez were the same ones Agent Pena downloaded; and that just because images had, at one time, been downloaded to the external drive, does not in and of itself demonstrate that they were knowingly or intentionally downloaded and then intentionally kept. In other words, Defendant asserts that the evidence was lacking. These are all matters that the jury was free to accept or reject in its consideration and weighing of the evidence. *See State v. Tapia*, 2015-NMCA-048, ¶ 12, 347 P.3d 738 (stating that determining the weight and effect of evidence is reserved to the jury as the fact-finder). In finding Defendant guilty, the jury rejected the propositions and conclusion that Defendant advances, and it is not within our purview to "re-weigh the evidence to determine if there was another hypothesis that would support innocence[.]" *State v. Garcia*, 2005-NMSC-017, ¶ 12, 138 N.M. 1, 116 P.3d 72. Defendant also argues that because Agent Sanchez conceded that there was no indication Defendant could retrieve the deleted files or that he had exercised any control over the deleted files other than to delete them, the evidence is insufficient. Under the totality of the evidence presented, we disagree. *See State v. Schuller*, 843 N.W.2d 626, 637 (Neb. 2014) ("It seems reasonable to infer that [the defendant] deleted the files to hide evidence of his earlier knowing possession" of child pornography).

{20} The jury was instructed that it had to find Defendant possessed child pornography on or about April 6, 2012, and/or June 12, 2012. We conclude that the evidence was sufficient for a rational jury to find beyond a reasonable doubt that Defendant intentionally possessed child pornography on both of these dates.

2. Fundamental Instructional Error

{21} Defendant did not object to the jury instructions in the district court, and he therefore waived his right to argue that reversible error in the instructions requires a new trial. *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."). Defendant can only prevail on appeal by demonstrating that the jury instructions as given constitute fundamental error. *See State v. Sandoval*, 2011-NMSC-022, ¶ 13, 150 N.M. 224, 258 P.3d 1016 (stating that if error in the jury instructions was not preserved in the district court, the appellate court reviews the instructions for fundamental error rather than reversible error).

{22} In *State v. Anderson*, 2016-NMCA-007, ¶ 9, 364 P.3d 306, this Court set forth the standard for determining whether a jury verdict may be set aside for fundamental error in jury instructions as follows:

> [W]e first apply the standard for reversible error by determining if a reasonable juror would have been confused or misdirected by the jury instructions that were given. Juror confusion or misdirection may stem from instructions which, through omission or misstatement, fail to provide the juror with an accurate rendition of the relevant law. If we determine that a reasonable juror would have been confused or misdirected by the instructions given, our fundamental error analysis requires us to then review the entire record, placing the jury instructions in the context of the individual facts and circumstances of the case, to determine whether the defendant's conviction was the result of a plain miscarriage of justice. If such a miscarriage of justice exists, we deem it fundamental error.

(Alteration, internal quotation marks, and citations omitted); *see also Sandoval*, 2011-NMSC-022, ¶¶ 13, 15, 20, 21 (describing the foregoing analytical framework for determining fundamental error in the jury instructions).

{23} We begin with an analysis of the statutory elements. The Act uses precisely defined terms to describe what is commonly understood to be pornography. Pornography under the Act is "any obscene

visual or print medium" that depicts "any prohibited sexual act[.]" Section 30-6A-3(A).[1] Using these defined terms, Section 30-6A-3(A) sets forth the elements of sexual exploitation of children (possession) as follows:

> It is unlawful for a person to intentionally possess any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act *if* that person knows or has reason to know that the obscene medium depicts any prohibited sexual act or simulation of such act *and if* that person knows or has reason to know that one or more of the participants in that act is a child under eighteen years of age.

(Emphasis added). Stated in plain language, and broken down into its constituent parts, Section 30-6A-3(A) makes it a crime to: (1) "intentionally possess" a "visual or print medium" such as a photograph or computer image that depicts pornography if: (2) a person "knows or has reason to know" that the medium depicts any "prohibited sexual act;" and (3) the person "knows or has reason to know that one or more of the participants in that act is a child under eighteen years of age." In other words, it is not a crime under Section 30-6A-3(A) to intentionally possess pornography. However, it is a crime if a person intentionally possesses pornography and that person "knows or has reason to know" that one or more of the participants in the pornography "is a child under eighteen years of age."

{24} The jury was instructed on the essential elements of possession of child pornography as follows:

> For you to find [D]efendant committed the act of sexual exploitation of children (possession) as charged in Count 1, the [S]tate must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
> 1. [D]efendant had any obscene visual medium in his possession;
> 2. [D]efendant knew the obscene medium depicted a prohibited sexual act[2];
> 3. [D]efendant knew or had reason to know that one of the participants was under the age of eighteen years of age;
> 4. This happened in New Mexico on or about the 6th day of April, 2012, and/or the 19th day of June, 2012.

Defendant contends the instructions suffer from fundamental error in three respects in that they do not: (1) require a finding that Defendant "intentionally possessed" child pornography as required by Section 30-6A-3(A); (2) require a finding of recklessness, the scienter required by the First Amendment; and (3) inform the jury that merely deleting the images from the computer is not legally sufficient to constitute possession. We now turn to these arguments.

A. Intentional Possession

{25} Defendant first argues that Section 30-6A-3(A) requires a person to "intentionally possess" child pornography and that the instructions erroneously omitted this *mens rea* requirement. Specifically, Defendant contends that because the instruction only required the jury to find that Defendant had child pornography "in his possession," rather than with a specific intent to "intentionally possess" child pornography, it is fundamentally flawed. We disagree.

{26} Defendant's argument overlooks the structure of the statute and other instructions given to the jury. The jury was instructed, first, that it had to find that Defendant "had any obscene visual medium in his possession[.]" There is no dispute that each of the computer images admitted into evidence constitute an "obscene visual medium" that depicts a "prohibited sexual act," that is, that they depict pornography. The jury was given an instruction on "possession" that conforms with UJI 14-130 NMRA as follows:

> A person is in possession of an obscene visual medium when, on occasion in question, he knows what it is, he knows it is on his person or in his presence and he exercises control over it.
> Even if the object is not in his physical presence, he is in possession if he knows what it is and where it is and he exercises control over it.

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[1]Section 30-6A-2 states:

As used in the Sexual Exploitation of Children Act . . . :
opposite sex;
A. "prohibited sexual act" means:
(1) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or
(2) bestiality;
(3) masturbation;
(4) sadomasochistic abuse for the purpose of sexual stimulation; or
(5) lewd and sexually explicit exhibition with a focus on the genitals or pubic area of any person for the purpose of sexual stimulation;
B. "visual or print medium" means:
(1) any film, photograph, negative, slide, computer diskette, videotape, videodisc or any computer or electronically generated imagery; or
(2) any book, magazine or other form of publication or photographic reproduction containing or incorporating any film, photograph, negative, slide, computer diskette, videotape, videodisc or any computer generated or electronically generated imagery;
. . . .
E. "obscene" means any material, when the content if taken as a whole:
(1) appeals to a prurient interest in sex, as determined by the average person applying contemporary community standards;
(2) portrays a prohibited sexual act in a patently offensive way; and
(3) lacks serious literary, artistic, political or scientific value.

[2]We note that this instruction required the jury to find that Defendant "knew" the obscene visual medium depicted a sexual act, a higher standard than what is required by Section 30-6A-3(A), that a person "knows or has reason to know" such a fact.

> A person's presence in the vicinity of the object or his knowledge of the existence or the location of the object is not, by itself, possession.

This instruction required the jury to find that Defendant knew he had pornographic computer images, that he knew they were on his person or in his presence, and that he exercised control over them. In order to find "possession" under this instruction, the jury necessarily had to find that the possession was "knowing." *See People v. Kent*, 970 N.E.2d 833, 839 (N.Y. 2012) (noting that "[t]he exercise of dominion or control is necessarily knowing" (alteration, internal quotation marks and citation omitted)). The jury was also instructed that it was required to find that Defendant "acted intentionally" and that "[a] person acts intentionally when he purposely does an act which the law declares to be a crime." This instruction therefore required the jury to additionally find that it was Defendant's purpose to possess the pornography. Taken together, these instructions required the jury to find that Defendant "intentionally" possessed the pornography; that is, Defendant's possession of the pornography was both intentional and knowing.

{27} It would have been preferable for the first paragraph of the jury instructions to require a finding that Defendant "intentionally had any obscene visual medium in his possession," but as we have pointed out, omitting the word "intentionally" would not cause jury confusion or misdirection because the instructions actually required the jury to find that Defendant's possession of the child pornography was intentional. Jury instructions are "sufficient if they fairly and correctly state the applicable law." *State v. Rushing*, 1973-NMSC-092, ¶ 20, 85 N.M. 540, 514 P.2d 297. Since there was no reversible error, it follows that there was no fundamental error in the instructions.

B. Scienter Requirement Under the First Amendment

{28} Secondly, Defendant argues that the essential elements instruction requiring the jury to find that Defendant "knew or had reason to know" that one of the participants was under the age of eighteen years is inconsistent with the requirement that he act intentionally and the minimum scienter required by the First Amendment to the United States Constitution, which Defendant contends is recklessness. We have already determined that the essential elements instruction complies with the statutory requirement of "intentional possession" of a medium, visual or print, that depicts obscenity. This is separate from the additional statutory requirement that a person "knows or has reason to know that one or more of the participants in that act is a child under eighteen years of age." Section 30-6A-3(A). We therefore turn to Defendant's argument that the instruction on this element is flawed with fundamental error because it does not require the jury to find recklessness, which Defendant contends the First Amendment requires.

{29} Possession of child pornography is not protected by the First Amendment. *See Osborne v. Ohio*, 495 U.S. 103, 111 (1990). States have a compelling interest in "safeguarding the physical and psychological well-being of a minor" and "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (internal quotation marks and citation omitted). Moreover, while pornography is entitled to First Amendment protection and can only be banned if deemed to be obscene under *Miller v. California*, 413 U.S. 15, 36-37 (1973), pornography that depicts minors can be proscribed, consistent with the First Amendment, whether or not the images are obscene. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 240 (2002). Nonetheless, the power to criminalize the possession of child pornography is not without limits. *See Ferber*, 458 U.S. at 764. Child pornography laws, like obscenity statutes, present a risk of self-censorship of constitutionally protected material. Therefore, "[a]s with obscenity laws, criminal responsibility [for possession of child pornography] may not be imposed without some element of scienter on the part of the defendant." *Id.* at 765. However, what level of scienter is constitutionally required, consistent with the First Amendment, to criminalize the possession of child pornography has not been decided by the United States Supreme Court. *See Commonwealth v. Kenney*, 874 N.E.2d 1089, 1102 (Mass. 2007) (noting the absence of a decision from the United States Supreme Court on what level of scienter is constitutionally required to convict a person of possession of child pornography); *State v. Mauer*, 741 N.W.2d 107, 113 (Minn. 2007) (noting that the minimum standard of scienter required for child pornography "remains unclear" because it has not yet been defined by the United States Supreme Court). Defendant would have us follow *Mauer*, however, we find *Kenney* more persuasive, and follow its reasoning.

{30} In *Mauer*, the Minnesota Supreme Court considered what level of scienter is required to satisfy the First Amendment under a Minnesota statute making it a crime to possess child pornography if the defendant "has reason to know" that the work involves a minor. 741 N.W.2d at 109 (internal quotation marks and citation omitted). The court concluded that the words "reason to know" are ambiguous in the context of the First Amendment, and resorted to rules of statutory construction to determine their meaning under its statute. *Id.* at 112-13. The court said that in *Osborne*, 495 U.S. at 115, the United States Supreme Court "approved a recklessness standard," and concluded that the phrase "has reason to know" in Minnesota's statute should likewise require a recklessness standard. *Mauer*, 741 N.W.2d at 115 (internal quotation marks and citation omitted). Following statutory and case law definitions of "recklessness" and "recklessly," the *Mauer* court held that, "a possessor of child pornography has 'reason to know' that a pornographic work involves a minor where the possessor is subjectively aware of a 'substantial and unjustifiable risk' that the work involves a minor." *Id.* (quoting Minn. Stat. § 617.247 subd. 4(a)).

{31} In our view, this standard is not constitutionally required, and unnecessarily confuses what is required under Section 30-6A-3(A). *Osborne* does hold that a finding of recklessness satisfies the constitutional requirement of "some element of scienter" in a statute criminalizing the possession of child pornography, 495 U.S. at 115, but *Osborne* does not require a finding of recklessness. Again, the United States Supreme Court has not established what level of scienter is required to make possession of child pornography a crime; it has only stated that "some element of scienter" is required. On the other hand, in *Ginsberg v. New York*, 390 U.S. 629, 633-34, 643 (1968), the United States Supreme Court approved of a scienter requirement expressed as a "reason to know" in a statute that made it a crime "knowingly to sell" material defined to be obscene to a minor under seventeen.

{32} We are more persuaded by *Kenney* in which the court held that Massachusetts's possession of child pornography scienter requirement that a defendant "knows or reasonably should know to be

under the age of [eighteen] years of age" is constitutionally sufficient. 874 N.E.2d at 1102-03 (internal quotation marks and citation omitted). Child pornography, by definition, depicts children performing sexual acts. In most cases, the image itself gives a person a "reason to know" that the person depicted is under eighteen years of age. *See United States v. Katz*, 178 F.3d 368, 373 (5th Cir. 1999) ("A case by case analysis will encounter some images in which the models are prepubescent children who are so obviously less than [eighteen] years old that expert testimony is not necessary or helpful to the fact finder."); *State v. Reinpold*, 824 N.W.2d 713, 723 & n.20, 724 (Neb. 2013) (noting that several courts have concluded that it is not always necessary for the prosecution to present expert testimony on the minor's age); *State v. May*, 829 A.2d 1106, 1118-19 (N.J. Super. Ct. App. Div. 2003) (stating that the images themselves that were admitted into evidence proved that the ages of those depicted were under sixteen years of age); *State v. Alinas*, 2007 UT 83, ¶ 31, 171 P.3d 1046 (stating that courts have generally recognized that, based on visual examination, jurors are capable of determining whether the children depicted are under eighteen years of age). The statutory requirement that a person "has reason to know" that a child depicted is under eighteen years of age requires "some element of scienter." The State's "burden of proof on that element may be satisfied with evidence that the physical disparity between the subject of the sexually explicit material and a person who is eighteen years of age is such that it would be obvious (beyond a reasonable doubt) to a reasonable person that the material was proscribed." *Kenney*, 874 N.E.2d at 1103. A defendant may present evidence that the defendant reasonably did not know the child's age, in which case the state will be required to "prove that no reasonable person would not have known that the child subject was under the age of eighteen." *Id.*

{33} No argument was made at trial that the children in the images admitted into evidence were not obviously under eighteen years of age, and there is no basis for us to conclude that the jury was misled or confused by the instructions they received.

{34} We hold that the scienter requirement in Section 30-6A-3(A) that a person "knows or has reason to know" that one or more of the participants depicted in the child pornography is under eighteen, is constitutionally sufficient.

> The fact that there will be very few cases at the margin raising doubt as to the age of the child, with the vast majority of cases being self-evident as to age, is sufficient, given the authority of the [l]egislature to regulate in this area, to conclude that the scienter requirement of the statute is constitutionally valid.

Kenney, 874 N.E.2d at 1103-04. Because there was no error in the jury instructions on this element of the crime, there was no fundamental error.

C. Deletion Does Not Equate With Possession

{35} This brings us to Defendant's last argument under this point, that the instructions suffered from fundamental error because they failed to include a statement that passing possession of the images for the sole purpose of deleting them from a computer is not legally sufficient to constitute possession. We disagree. The instructions required the jury to find that Defendant "intentionally possessed" the medium depicting the child pornography. Finding "intentional possession" under the instructions given required the jury to find that Defendant did more than exercise passing control over the images for the purpose of deleting them. We therefore reject Defendant's last argument of fundamental error.

3. Admission of Sexual Items Into Evidence

{36} Before beginning his opening statement, the prosecutor approached the bench and advised the court that he intended to discuss that the investigators found bestiality on Defendant's computer, together with sex toys and male enhancement products in Defendant's bedroom. The prosecutor argued that this evidence was probative of Defendant's intent and that he was a sexual deviant. Defense counsel objected to the sex toys and male enhancement products on grounds that it was prejudicial and irrelevant to whether Defendant possessed child pornography. The district court ruled that evidence of the sex toys and male enhancement products could be mentioned because it was relevant to showing a prurient interest, motive, and intent. The district court also ruled that this evidence could be mentioned because proving a prohibited sexual act under the child pornography statute requires proof of a sexually explicit exhibition for the purpose of sexual stimulation. Defendant contends that the district court erred in ruling that the evidence could be mentioned in the State's opening statement, and in subsequently allowing its admission into evidence under Rules 11-403 and 11-404 NMRA. We agree that the evidence was inadmissible but that its admission into evidence was harmless error under the circumstances.

{37} The admission of evidence under Rules 11-403 and 11-404(B) is reviewed for an abuse of discretion. *State v. Otto*, 2007-NMSC-012, ¶ 9, 141 N.M. 443, 157 P.3d 8 ("We review the [district] court's decision to admit evidence under Rule 11-404(B) for [an] abuse of discretion."). "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case." *Otto*, 2007-NMSC-012, ¶ 9 (internal quotation marks and citation omitted); *see State v. Chamberlain*, 1991-NMSC-094, ¶ 9, 112 N.M. 723, 819 P.2d 673 ("The [district] court is vested with great discretion in applying Rule [11-]403, and it will not be reversed absent an abuse of that discretion.").

{38} Rule 11-404(B)(1) directs that "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." However, such evidence "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Rule 11-404(B)(2). Rule 11-404(B)(1) articulates a principle that evidence of other crimes, wrongs, or acts should generally be excluded. *State v. Jones*, 1995-NMCA-073, ¶ 5, 120 N.M. 185, 899 P.2d 1139. However, if such evidence is offered for a proper purpose under Rule 11-404(B)(2), a district court is required to articulate or identify the consequential fact to which the proffered evidence is directed. *Jones*, 1995-NMCA-073, ¶ 5; *see State v. Aguayo*, 1992-NMCA-044, ¶ 18, 114 N.M. 124, 835 P.2d 840 ("The initial threshold for admissibility of prior uncharged conduct is whether it is [for a proper purpose] probative on any essential element of the charged crime."). Finally, even if the evidence is ruled admissible, a district court must engage in the balancing process under Rule 11-403. *See id.* ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

{39} We agree with Defendant that the sex toys and male enhancement products found in Defendant's bedroom had no particular relevance to any issue in the case. Rather, the evidence served no purpose other than to portray Defendant's character, in the words of the prosecutor, as a "sexual deviant." We therefore conclude that the evidence was not admissible under Rule 11-404(B). The district court's ruling was that the evidence was relevant. Rule 11-401 NMRA mandates that in order for evidence to be relevant, it must satisfy a two-part test: (1) it must have "any tendency to make a fact more or less probable than it would be without the evidence," and (2) the evidence "is of consequence in determining the action." A person's possession of sex toys and male enhancement products does not make it more likely that the person will search for, download, view, save, and delete child pornography using a computer. *Cf. United States v. Quarles*, 25 M.J. 761, 775 (N-M. Ct. Crim. App. 1987) ("We fail to see how possession of sexual aids and erotic magazines equates with being a sex fiend or deviant much less having any probative value" as to whether the defendant sodomized his children). In other words, the evidence was irrelevant and inadmissible. *See* Rule 11-402 NMRA ("Irrelevant evidence is not admissible."). We therefore conclude that the district court abused its discretion in admitting this evidence. *See State v. Perez*, 2016-NMCA-033, ¶ 11, 367 P.3d 909 (noting that an abuse of discretion arises from the exercise of discretion based on a misunderstanding of the law).

{40} We must still determine if the error in admitting the sex toys and male enhancement products into evidence was reversible error. The admission of evidence in violation of the Rules of Evidence is a non-constitutional error, and a non-constitutional error is harmless unless there is a "reasonable probability" that the error affected the verdict. *State v. Vargas*, 2016-NMCA-038, ¶ 24, 368 P.3d 1232. "To determine the likely effect of the error, courts must evaluate all of the circumstances. These circumstances include other evidence of the defendant's guilt, the importance of the erroneously admitted evidence to the prosecution's case, and the cumulative nature of the error." *Id.* (citation omitted); *see State v. Tollardo*, 2012-NMSC-008, ¶¶ 43-44, 275 P.3d 110 (setting forth considerations for reviewing courts when assessing whether the improper admission of evidence is harmless error). The evidence, not objected to, is that there were more than nine hundred downloads in a year, most of which were known images of child pornography, to the IP address used by Defendant's computer; that in March 2012, "exorbitant" amounts of child pornography were being downloaded to that same IP address; that in April 2012, child pornography was retrieved from a "shared" folder of a computer at that IP address; that when the search warrant was executed, "massive" amounts of non-child pornography, highly categorized, were found on Defendant's computer in addition to images of child pornography. This evidence evinces an intense, excessive interest in sex, and we fail to see any reasonable probability that admission of the sex toys and male enhancement products impacted the verdict. We therefore hold that the erroneous admission of this evidence was harmless.

4. Ineffective Assistance of Counsel

{41}Defendant argues that his attorney's ineffective assistance resulted in the admission of prejudicial, inadmissible evidence, and that he is therefore entitled to a new trial. The framework for deciding a claim of ineffective assistance of counsel is well settled.

> For a successful ineffective assistance of counsel claim, a defendant must first demonstrate error on the part of counsel, and then show that the error resulted in prejudice. Trial counsel is generally presumed to have provided adequate assistance. An error only occurs if representation falls below an objective standard of reasonableness. If any claimed error can be justified as a trial tactic or strategy, then the error will not be unreasonable. With regard to the prejudice prong, generalized prejudice is insufficient. Instead, a defendant must demonstrate that counsel's errors were so serious, such a failure of the adversarial process, that such errors undermine judicial confidence in the accuracy and reliability of the outcome. A defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. Bernal, 2006-NMSC-050, ¶ 32, 140 N.M. 644, 146 P.3d 289 (alterations, internal quotation marks, and citations omitted). We now turn to each claim Defendant makes.

A. Evidence of Bestiality

{42} After the prosecutor advised the district court that he wanted to tell the jury in his opening statement that bestiality was found on Defendant's computer, the district court disallowed the evidence of bestiality on grounds that it was too prejudicial. However, defense counsel said she did not object because it was found on Defendant's computer and because similar search terms are used to find material related to bestiality and child pornography. The district court therefore ruled that if defense counsel had no objection, the bestiality evidence could be mentioned as well. Agent Sanchez later testified in cross-examination from defense counsel that bestiality and child pornography search terms are mututally exclusive.

{43} Defendant argues that counsel was ineffective in allowing the highly inflammatory and prejudicial bestiality evidence to be admitted because there is "no doubt" it was inadmissible under Rules 11-404(B) and 11-403, and having agreed to its admission, she had an obligation to bring in evidence substantiating that search terms for bestiality and child pornography are similar. A reasonable trial strategy could be that the bestiality pornography evidence, together with the other evidence in the case, e.g., that Defendant had massive amounts of non-child pornography on the external hard drive to his computer, which included cartoon pornography, that was highly organized and categorized by type, actors, and the like, and that there was no active or accessible child pornography on the hard drive demonstrated that Defendant's interest in sexual matters, while extreme and outrageous, did not include an interest in child pornography. This argument was actually made in defense counsel's opening statement, as well as Defendant's brief to this Court. Counsel's alleged error in this instance can appropriately be justified as a trial tactic or strategy.

B. Sexual Child Story

{44} Agent Lea Whitis from the Department of Homeland Security was present during the search, primarily to catalogue the items seized, but she did walk through the house. Upon entering Defendant's room, she noted that the computer was on and that there was a story on it with child characters and what she characterized as "sexual overtones." When she was asked how the story affected her, defense counsel objected on the basis that the story was not produced in discovery and Agent Whitis did not mention it in her interview. The

prosecutor admitted that the story had not been disclosed or produced in discovery. The district court sustained the objection on relevancy grounds and because the story was not disclosed in discovery, while noting that some evidence relating to the story had already been admitted without objection.

{45} Defendant argues that the failure to object to evidence of the child sex story until after the State discussed it in their opening statement and the State had elicited testimony about the story's contents, constituted ineffective assistance of counsel, "as the evidentiary challenges [to its admission] were clearly meritorious." Whether the child sex story was admissible is, however, subject to debate. *See Jaynes*, 2014 IL App (5th) 120048, ¶¶ 55-57 (concluding that stories about underage sex found on the defendant's computer were admissible in a prosecution for possession of child pornography to show that the defendant sought out sexual material involving children and that it was knowing and voluntary, rather than inadvertent). We cannot conclude that defense counsel provided ineffective assistance by failing to object to its receipt in evidence.

Defendant's "Character"

{46} Agent Keyes from the Department of Homeland Security was also present when the search warrant was executed. She testified to the condition of Defendant's room and the presence of sex toys, male enhancement products, and a weapon inside the room. Asked if she also learned anything else about Defendant, Agent Keyes said that Defendant's mother described Defendant as someone who was not very social, did not have friends or go out, and spent most of his time in his room.

{47} Defendant contends that defense counsel's failure to object to the testimony about what Defendant's mother said rendered counsel's assistance ineffective. Defendant asserts the evidence was inadmissible hearsay of Defendant's character that was inadmissible under Rules 11-404(B) and 11-403. The State counters that this testimony was "merely cumulative" of the testimony of Agent Keyes and other agents describing Defendant's room, and therefore was not prejudicial. In any event, the failure to object may have resulted from a deliberate choice not to object in order to avoid bringing attention to the testimony. *See State v. Martinez*, 1996-NMCA-109, ¶ 26, 122 N.M. 476, 927 P.2d 31 ("Failure to object to every instance of objectionable evidence does not render counsel ineffective; rather, failure to object falls within the ambit of trial tactics." (internal quotation marks and citation omitted)).

{48} In conclusion, we are unable to adequately determine whether any of the foregoing alleged shortcomings of counsel deprived Defendant of constitutionally adequate and effective assistance of counsel. Concluding that Defendant has failed to present a prima facie case of ineffective assistance of counsel, we reject Defendant's claims without prejudice to Defendant pursuing habeas corpus proceedings based on these arguments. *See Bernal*, 2006-NMSC-050, ¶¶ 33, 36 (expressing a general preference for ineffective assistance of counsel claims to be brought and resolved in habeas corpus proceedings, and when a prima facie case is not made on appeal, the claim is rejected without prejudice to raise the claim in a habeas corpus proceeding).

5. Comment on Defendant's Silence

{49} In her opening statement, defense counsel discussed the execution of the search warrant. Defense counsel said that the jury would hear that Defendant's parents let the police into the home and were in fact cooperative in asking and answering questions, that there were no problems, and that Defendant "refused to talk without a lawyer."

{50} During his testimony, Detective Rennie was asked how cooperative Defendant and his parents were when the search warrant was executed. Detective Rennie said that Defendant's father was compliant and responsive, and that Defendant's mother was also cooperative and answered questions. The prosecutor asked if Defendant had been willing to talk to the officers, and Detective Rennie answered, "no." Defense counsel objected, the parties approached the bench, and the district court immediately sustained the objection and admonished the prosecutor not to comment on Defendant's silence. The district court noted defense counsel's opening statement and ruled that it would not declare a mistrial, even though none was requested. The district court told the prosecutor not to mention this again and instructed the jury to disregard the question and answer.

{51} Defendant contends that the district court committed error in refusing to declare a mistrial because the question asked of Detective Rennie and his answer constituted an unconstitutional comment on Defendant's silence. Because the facts are undisputed, our review of Defendant's claim is de novo. *See State v. Gutierrez*, 2003-NMCA-077, ¶ 9, 133 N.M. 797, 70 P.3d 787.

{52} Like the district court, we observe that the question to Detective Rennie apparently had its genesis in defense counsel's opening statement. New Mexico recognizes the doctrine of invited error. *State v. Jim*, 2014-NMCA-089, ¶ 22, 332 P.3d 870 ("It is well established that a party may not invite error and then proceed to complain about it on appeal."). This doctrine has been applied to the Fifth Amendment privilege to remain silent. *See, e.g.*, *State v. Crumley*, 625 P.2d 891, 894 (Ariz. 1981) (in banc); *Shingledecker v. State*, 734 So. 2d 483, 483-84 (Fla. Dist. Ct. App. 1999) (per curiam); *State v. Batchelor*, 579 S.E.2d 422, 428-29 (N.C. Ct. App. 2003); However, it is not necessary for us to consider whether the doctrine and any limits to that doctrine apply in this case. Assuming that Defendant's pre-arrest silence is entitled to constitutional protection, we conclude that Defendant's constitutional right to remain silent was not used against him.

{53} In *Greer v. Miller*, 483 U.S. 756, 759 (1987), the defendant testified in his own defense, and on cross-examination, he was asked, "Why didn't you tell this story to anybody when you got arrested?" Defense counsel immediately objected and requested a mistrial. *Id.* The trial judge denied the motion for mistrial, sustained the objection, and instructed the jury to disregard. *Id.* The prosecutor did not further pursue the matter, and did not mention it in his closing argument. *Id.* The United States Supreme Court held that, under the circumstances, the prosecutor had not used the defendant's silence. *Id.* at 764-65. Similarly, in *State v. Smith*, 2001-NMSC-004, ¶ 36, 130 N.M. 117, 19 P.3d 254, our Supreme Court held, "We hold that there was no violation of [the d]efendant's right to silence when the prosecutor's single question was not answered, defense counsel immediately objected, the prosecutor did not pursue the matter further, and defense counsel refused a curative instruction." There is no material difference here.

{54} Although Detective Rennie answered the question, there was an immediate objection that was sustained, the prosecutor was admonished not to mention Defendant's silence again, the prosecutor complied, and the jury was instructed to disregard the question and the answer. Under the circumstances, we hold that there was no unconstitutional, impermissible use made of Defendant's silence.

6. Remaining Arguments

{55} We summarily answer Defendant's remaining arguments. First, Defendant argues, pursuant to *State v. Franklin*, 1967-NMSC-151, 78 N.M. 127, 428 P.2d 982, and *State v. Boyer*, 1985-NMCA-029, 103 N.M. 655, 712 P.2d 1, that the district court lacked personal and subject matter jurisdiction. Defendant filed numerous pro se motions asserting that the district court lacked jurisdiction. Among the grounds asserted were that Defendant is a private American citizen, not a United States citizen, with a private rather than a public residence in New Mexico; that he is not the person named in the criminal information because his name is not spelled in capital letters; that the prosecution could not proceed because there is no "flesh and blood" victim. No authority is cited to us in support of Defendant's argument, and we do not consider it. *See State v. Ibarra*, 1993-NMCA-040, ¶ 13, 116 N.M. 486, 864 P.2d 302 ("We are entitled to assume, when arguments are unsupported by cited authority, that supporting authorities do not exist.").

{56} Secondly, Defendant argues that he was denied his right to conflict-free counsel because counsel did not agree with jurisdictional arguments asserted in Defendant's pro se motion to dismiss for lack of jurisdiction, or his motion to excuse the district court judge on the grounds that he was biased against pro se litigants. Defendant fails to cite to any authority supporting the legal validity of those motions, or to support his assertion that defense counsel has an obligation to argue in support of pro se motions that have no merit. We therefore decline to consider this argument any further. *See id.*

{57} Finally, Defendant argues that he was denied his constitutional right to represent himself. To determine if a defendant has made a valid, knowing, intelligent, and voluntary waiver of his constitutional right to counsel, *State v. Reyes*, 2005-NMCA-080, ¶¶ 4, 9, 137 N.M. 727, 114 P.3d 407, a district court is required to "inform itself regarding a defendant's competency, understanding, background, education, training, experience, conduct and ability to observe the court's procedures and protocol." *State v. Chapman*, 1986-NMSC-037, ¶ 10, 104 N.M. 324, 721 P.2d 392. Defendant prevented the district court from making that determination when he refused to answer any of the district court's questions relating to his ability to represent himself, and simply kept repeating that he is "standing on [his] documents." There was no error in denying Defendant's request to represent himself.

CONCLUSION

{58} The judgment and sentence of the district court is affirmed.

{59} IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

JONATHAN B. SUTIN, Judge

Certiorari Denied, December 14, 2017, No. S-1-SC-36756

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-014

No. A-1-CA-34014 (filed October 17, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
KENNETH TIDEY,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF LUNA COUNTY
Daniel Viramontes, District Judge

HECTOR H. BALDERAS,
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Santa Fe, New Mexico
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BENNETT J. BAUR,
Chief Public Defender
J.K. THEODOSIA JOHNSON,
Assistant Appellate Defender
Santa Fe, New Mexico
for Appellant

Opinion

Timothy L. Garcia, Judge

{1} Following a traffic stop that also resulted in an arrest and search, Defendant Kenneth Tidey was convicted of one count of possession of methamphetamine with intent to distribute, two counts of possession of drug paraphernalia, and one count of driving with a suspended or revoked license. Defendant raised two different challenges based upon double jeopardy grounds. First, Defendant challenges his two separate convictions of possession of drug paraphernalia. One conviction was based upon his possession of over ninety small plastic baggies and the second conviction was based upon his possession of a red straw with a burnt end. As a matter of first impression, we agree with Defendant that based upon the definition of containers used as drug paraphernalia statutes and the insufficient indicia of distinctness regarding the containers in his possession, the evidence does not support these two separate convictions for possession of drug paraphernalia. We vacate Defendant's conviction for possession of drug paraphernalia that was based upon the numerous small plastic baggies and affirm his conviction for possession of drug paraphernalia that was based upon the red straw with a burnt end. As a result, we determine that it is unnecessary to address Defendant's second double jeopardy argument. This second argument challenges whether his drug paraphernalia conviction for possession of the numerous small plastic baggies and his separate conviction for possession of methamphetamine that was contained in a small plastic baggie violate double jeopardy. Defendant's remaining arguments are unpersuasive and we affirm his remaining convictions.

BACKGROUND

{2} On March 17, 2012, Lieutenant Conrad Jacquez, with the Deming, New Mexico Police Department, stopped Defendant's vehicle in response to a tip advising that a driver of a gray Ford Crown Victoria was driving erratically, indicating a possible drunk or reckless driver. Lieutenant Jacquez requested Defendant's driver's license, registration, and insurance. Defendant handed Lieutenant Jacquez his New Mexico identification card. After running his identification, Lieutenant Jacquez determined that Defendant's license had been revoked. Lieutenant Jacquez asked Defendant to step out of the vehicle, he advised Defendant of the reason for his arrest, and placed him under arrest for driving on a revoked license. Defendant did not exhibit any signs of intoxication.

{3} Prior to placing Defendant in the back of the police car, Lieutenant Jacquez asked Defendant if he had anything on his person that could hurt him. Defendant responded that he had a knife in one of his pockets. In searching for the knife, Lieutenant Jacquez pulled from Defendant's left front pocket a large clear bag containing ninety-seven empty smaller clear bags with red lips painted on them, as well as an empty red straw with one burnt end. Not finding the knife, Lieutenant Jacquez then searched Defendant's right front pocket and found a similar small plastic bag containing a white powdery substance and the knife. Lieutenant Jacquez testified at trial that the small bags, one inch by one inch with a zip-lock top (the baggies), are commonly used to package methamphetamine. He also testified that straws with burnt ends are another way to package methamphetamine or other narcotics and are never used for smoking. Lieutenant Jacquez did not find any instruments on Defendant for ingesting methamphetamine, such as needles or pipes.

{4} Upon placing Defendant in the back of the police vehicle, Lieutenant Jacquez asked if he could search Defendant's vehicle. Around this time, the owner of the vehicle arrived, and she gave Lieutenant Jacquez consent to search the vehicle. Lieutenant Jacquez and a second officer searched the vehicle and found a pack of cigarettes under the armrest in the front seat. Inside the cellophane wrapper of the pack, the officers found three small baggies of the same type found in Defendant's pocket also containing a similar white powdery substance. At trial, a forensic crime expert testified that the four small baggies were tested and contained methamphetamine, but only three contained a "weighable amount."

{5} The State filed a criminal information on May 1, 2012, charging Defendant with the following four counts: (1) trafficking in a controlled substance (by possession with intent to distribute), pursuant to NMSA 1978, Section 30-31-20(A)(3) (2006); (2) possession of drug paraphernalia, "straws", pursuant to NMSA 1978, Section 30-31-25.1(A) (2001); (3) possession of drug paraphernalia, "plastic baggies," pursuant to Section 30-31-25.1(A); and (4) driving with a suspended or revoked license, pursuant to NMSA 1978, Section 66-5-39 (1993, amended 2013). Following a jury trial, the jury found Defendant guilty of

the lesser included offense of possession of a controlled substance (Count 1), both counts of possession of drug paraphernalia (Counts 2 and 3), and driving without a license (Count 4). Defendant now appeals.

DISCUSSION

{6} Defendant makes the following arguments on appeal: (1) Defendant's drug-related convictions violate double jeopardy, (2) the district court erred in denying Defendant's motion to suppress evidence for a lack of reasonable suspicion, (3) the evidence presented at trial was insufficient to support Defendant's convictions, and (4) Defendant's right to a speedy trial was violated.

I. Double Jeopardy

{7} Defendant makes two related double jeopardy arguments. First, he argues that his two convictions for possession of drug paraphernalia violate double jeopardy as the acts were not sufficiently distinct to warrant two separate charges. Second, he argues that his convictions for possession of methamphetamine and possession of drug paraphernalia violate double jeopardy because the jury instructions failed to distinguish between the empty baggies in Defendant's pocket and the baggies that contained the white powdery substance tested to be methamphetamine.

{8} "A double jeopardy challenge is a constitutional question of law which [the appellate courts] review de novo." *State v. Swick*, 2012-NMSC-018, ¶ 10, 279 P.3d 747. The Fifth Amendment of the United States Constitution, made applicable to New Mexico by the Fourteenth Amendment, prohibits double jeopardy. U.S. Const. amends. V & XIV, § 1. The prohibition "functions[,] in part[,] to protect a criminal defendant against multiple punishments for the same offense." *Swick*, 2012-NMSC-018, ¶ 10 (internal quotation marks and citation omitted). Double jeopardy cases involving multiple punishments are classified as either "double-description case[s], where the same conduct results in multiple convictions under different statutes[,]" or "unit-of-prosecution case[s], where a defendant challenges multiple convictions under the same statute." *Id.*

A. Defendant's Two Convictions for Possession of Drug Paraphernalia Violate Double Jeopardy

{9} Defendant challenges his two convictions for possession of drug paraphernalia, pursuant to Section 30-31-25.1(A)—one for possession of the small baggies and the other for the red straw with a burnt end. We apply a unit-of-prosecution analysis, as we are examining multiple convictions under the same statute. *See State v. Gallegos*, 2011-NMSC-027, ¶ 31, 149 N.M. 704, 254 P.3d 655. In such cases, the appellate courts seek to determine, "based upon the specific facts of each case, whether a defendant's activity is better characterized as one unitary act, or multiple, distinct acts, consistent with legislative intent." *State v. Bernal*, 2006-NMSC-050, ¶ 16, 140 N.M. 644, 146 P.3d 289. *Bernal* requires us to determine the unit-of-prosecution intended by the Legislature by employing a "two step" analysis. *Id.* ¶ 14.

> First, we review the statutory language for guidance on the unit[-]of[-]prosecution. If the statutory language spells out the unit[-]of[-]prosecution, then we follow the language, and the unit-of-prosecution inquiry is complete. If the language is not clear, then we move to the second step, in which we determine whether a defendant's acts are separated by sufficient 'indicia of distinctness' to justify multiple punishments under the same statute. In examining the indicia of distinctness, courts may inquire as to the interests protected by the criminal statute, since the ultimate goal is to determine whether the [L]egislature intended multiple punishments. If the acts are not sufficiently distinct, then the rule of lenity mandates an interpretation that the [L]egislature did not intend multiple punishments, and a defendant cannot be punished for multiple crimes.

Id. (internal quotation marks and citations omitted)

{10} This Court has not previously applied the unit-of-prosecution analysis to a possession of drug paraphernalia case involving the simultaneous possession of more than one form of a container used for holding illegal drugs. The statute prohibiting possession of drug paraphernalia states, in pertinent part, that "[i]t is unlawful for a person to use or possess with intent to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance[.]" Section 30-31-25.1(A). The New Mexico Controlled Substances Act defines "drug paraphernalia" as

> all equipment, products and materials of any kind that are used, intended for use or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body a controlled substance or controlled substance analog in violation of the Controlled Substances Act.

NMSA 1978 § 30-31-2(V) (2009). Neither the legislative definition nor Section 30-31-25.1 indicate whether "paraphernalia" was intended to be construed as a singular or plural noun. The dictionary defines "paraphernalia" as "personal belongings," both singular and plural in number. *Webster's Third New Int'l Dictionary* 1638 (3d ed. 1993). Seeing no clear indication of a unit-of-prosecution in the statute, we look to the indicia-of-distinctness factors to determine whether Defendant's convictions for two different types of containers violate double jeopardy.

{11} To determine distinctness, our appellate courts have generally looked to "time and space considerations" of the defendant's acts, and if such considerations proved unhelpful, whether the "quality and nature of the acts, or the objects and results involved" proved more useful. *Bernal*, 2006-NMSC-050, ¶ 16 (internal quotation marks and citation omitted). Our Supreme Court has summarized the factors to be considered as follows: "timing, location, and sequencing of the acts, the existence of an intervening event, the defendant's intent as evidenced by his conduct and utterances, and the number of victims." *State v. DeGraff*, 2006-NMSC-011, ¶ 35, 139 N.M. 211, 131 P.3d 61. However, "even when analyzing whether an indicium of distinctness sufficiently separates the acts of the accused to justify multiple punishment, we remain guided by the statute at issue, including its language, history, and purpose, as well as the quantum of punishment that is prescribed." *Gallegos*, 2011-NMSC-027, ¶ 33 (alteration, internal quotation marks, and citation omitted).

{12} In a somewhat analogous unit-of-prosecution case, the Kansas Court of Appeals determined that the defendant's multiple convictions for possession of drug paraphernalia arose from the same

conduct and violated double jeopardy. *See State v. Pritchard*, 184 P.3d 951, 954 (Kan. Ct. App. 2008) (involving various items of paraphernalia that were used with the intent to manufacture a controlled substance and also with the intent to package it for sale). The Kansas court looked at similar factors to those utilized by this Court for determining whether, under a unit of prosecution test, the charges violate double jeopardy. *See id.* at 957 (addressing "(1) whether the acts occur at or near the same time; (2) whether the acts occur at the same location; (3) whether there is a causal relationship between the acts, in particular whether there was an intervening event; and (4) whether there is a fresh impulse motivating some of the conduct"). The Kansas court first reasoned that because there were no factual findings to distinguish the two counts, the evidence was seized from the same location, at the same time, and was intended for the same purpose—manufacturing and storage of methamphetamine—the two convictions arose from the "same conduct." *Id.* at 957-58. Next, when the Kansas court interpreted its manufacturing statute, the two convictions were determined to be "multiplicitous" and were for the "same offense." *Id.* at 958-59. We agree with the logic applied by the Kansas court, especially where a defendant could face tens or even hundreds of counts of drug paraphernalia charges if each individual object or container found in a suspects possession during one encounter with law enforcement authorities constitutes a separate and distinct container-based paraphernalia offense.

{13} In this case, there was also an insignificant indicia of distinctness presented to justify convicting Defendant of two counts of possession of drug paraphernalia under Section 30-31-25.1(A). First, Lieutenant Jacquez simultaneously found the objects available for use as containers for methamphetamine together in Defendant's left front pocket, the empty baggies and the red straw with a burnt end. Both paraphernalia counts were based upon Lieutenant Jacquez's testimony that both objects were used for packaging, not for consumption or manufacturing. The single jury instruction given for both counts required the jury to find that Defendant intended to use the objects to "pack, repack, store, contain or conceal a controlled substance." Furthermore, there is no indication in the record of an intervening act, multiple victims, or any other factor that would distinguish Defendant's act of simply possessing separate containers for holding the methamphetamine that was also found in Defendant's possession.

{14} The State argues that the unit-of-prosecution language in this case is clear from the face of the statute and includes "every distinct item" that is used or intended to be used in violation of the Controlled Substance Act. The State primarily relies on our analysis in *State v. Leeson*, in which this Court concluded that the unit-of-prosecution for sexual exploitation of children, by manufacturing pornography, was clear from the statute. 2011-NMCA-068, ¶ 17, 149 N.M. 823, 255 P.3d 401. This Court reasoned that the Legislature's more specific definitions of the terms "manufacture," "obscene," and "visual or print medium" supported the conclusion that the scope of conduct constituting a violation of the statute was "readily discernible" so as to make each photograph manufactured by the defendant a separate and "discrete violation of the statute." *Id.* ¶¶ 16-17 (internal quotation marks omitted). However, the State neglects to address the clear distinction from *Leeson* that was recognized by our Supreme Court in cases involving the possession of child pornography. *See State v. Olsson*, 2014-NMSC-012, ¶¶ 1-2, 324 P.3d 1230 (recognizing that multiple images of child pornography contained in three separate binders and an external computer hard drive could only be charged as one count of possession under the applicable statute). The possession statute's ambiguity regarding pornographic images located in various types of containers and the application of the rule of lenity resulted in a single conviction in *Olsson*. *Id.* We recognize below that the statutory definitions applicable in the present drug paraphernalia case are distinguishable from the statutory wording that criminalizes the possession or manufacture of child pornography. *See* Section 30-31-2(V) (setting out a non-exclusive list of definitions for drug paraphernalia). As a result, it would be difficult to draw any strict analogies from the child pornography cases when addressing the distinct statutory wording used for drug paraphernalia under Section 30-31-2(V).

{15} The Legislature specifically included a comprehensive list of defined items, although not all inclusive, that constitute drug paraphernalia. *See* § 30-31-2(V)(1)-(12). Critical to the present case, one defined form of paraphernalia is "containers and other objects used, intended for use or designed for use in storing or concealing controlled substances or controlled substance analogs[.]" Section 30-31-2(V)(10). When we review the definitions contained in Section 30-31-2(V), they clearly fail to support the State's unit of prosecution argument. Instead, the plural words "containers and other objects used" as paraphernalia for storing a controlled substance support a single charge for Defendant's numerous containers—the empty baggies and the red straw with a burnt end. Section 30-31-2(V)(10). If we were to accept the State's argument that the Legislature intended to prosecute each individual object used as a "container" to hold the illegal controlled substance, then each small baggie in Defendant's pocket, all ninety-seven of them, would be the basis for a separate paraphernalia charge and conviction. Based upon the statutory language and definitions used by the Legislature, we agree with Defendant that the multiple containers available to hold the methamphetamine in Defendant's possession, must be charged as one single count of possession of drug paraphernalia. We reject the State's argument to the contrary.

{16} Alternatively, this Court could also recognize Defendant's argument that there is insufficient indicia of distinctness regarding the paraphernalia containers found in his pocket and apply the rule of lenity. *See State v. Barr*, 1999-NMCA-081, ¶ 15, 127 N.M. 504, 984 P.2d 185 ("[I]f the defendant commits discrete acts violative of the same statutory offense, but separated by sufficient indicia of distinctness, then a court may impose separate, consecutive punishments for each offense. With a sufficient showing of distinctness, application of the rule of lenity would not be required." (internal quotation marks and citation omitted)). "[T]he rule of lenity . . . favor[s] a single unit[-]of[-]prosecution and disfavor[s] multiple units of prosecution." *Id.* ¶ 22. The State did not argue that the two forms of paraphernalia containers found in Defendant's pocket could also be used for other distinct purposes such as ingesting, smoking, or injecting methamphetamine. If necessary, the rule of lenity would also support Defendant's argument that these two types of containers only supported one container-based count of possession of drug paraphernalia.

{17} We now reverse and vacate Defendant's conviction for possession of drug paraphernalia based upon the ninety-seven empty "baggies" in Defendant's pocket because they have the least indicia of distinctiveness from each other and

the similar baggies that contained a white powdery substance used as the substantive evidence in Defendant's conviction for possession of methamphetamine with intent to distribute. We affirm Defendant's drug paraphernalia conviction arising from the plastic straw with the burnt end—due to its more distinctive characteristics as another type of container to hold illegal drugs, as well as its distinguishment from the baggies actually used to hold Defendant's methamphetamine that was found in his right front pocket and the pack of cigarettes.

B. Defendant's Separate Convictions for Possession of Drug Paraphernalia and Possession of a Controlled Substance, Methamphetamine, Do Not Violate Double Jeopardy

{18} Defendant argues that his convictions for possession of drug paraphernalia, baggies, and possession of methamphetamine found inside similar baggies violate double jeopardy. Defendant asserts that if the jury based his conviction for possession of drug paraphernalia on the small baggies actually containing methamphetamine, then the convictions for possession of methamphetamine and possession of drug paraphernalia could violate double jeopardy under our decision in *State v. Almeida*. *See* 2008-NMCA-068, ¶ 21, 144 N.M. 235, 185 P.3d 1085 (concluding, in a double-description case, that "the [L]egislature did not intend to punish a defendant for possession of a controlled substance and possession of [drug] paraphernalia when the paraphernalia [charge] consists of only a container that is storing a personal supply of the charged controlled substance."); *see also State v. Foster*, 1999-NMSC-007, ¶ 27, 126 N.M. 646, 974 P.2d 140 (recognizing that "the Double Jeopardy Clause . . . require[s] a conviction under a general verdict to be reversed if one of the alternative bases for conviction provided in the jury instructions is legally inadequate because it violates a defendant's constitutional right to be free from double jeopardy" (internal quotation marks and citations omitted)), *abrogated on other grounds by State v. Montoya*, 2012-NMSC-010, ¶ 58, 345 P.3d 1056.

{19} In the present case, Defendant failed to assert that his second double jeopardy argument was based upon the drug paraphernalia conviction arising from red straw with a burnt end. As a result, we have now removed the factual predicate necessary for Defendant's argument that he premised on our holding in *Almeida*. *See* 2008-NMCA-068, ¶ 21 (focusing on the same pipe containing the defendant's controlled substance as the basis for both the possession of a controlled substance and the drug paraphernalia charges). Because Defendant does not argue that the jury was confused by the red straw evidence or that this evidence was an improper alternative basis to convict Defendant for possession of drug paraphernalia, it is unnecessary to address Defendant's second argument—a reversal of the second drug paraphernalia conviction that was based upon the jury instruction and the jury's potential confusion with the small baggies that were both empty and full. *See Foster*, 1999-NMSC-007, ¶ 27 (holding that "due process does not require a general verdict of guilty to be set aside so long as one of the two alternative bases for conviction is supported by substantial evidence[.]" (emphasis, internal quotation marks, and citation omitted)).

II. The District Court Did Not Err in Denying Defendant's Motion to Suppress

{20} Defendant argues that the district court erred in denying his motion to suppress because Lieutenant Jacquez lacked reasonable suspicion to stop Defendant's vehicle. "The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures by the Government, and its protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest." *State v. Neal*, 2007-NMSC-043, ¶ 18, 142 N.M. 176, 164 P.3d 57 (internal quotation marks and citation omitted). In appropriate circumstances, a police officer may "approach a person for purposes of investigating possible criminal behavior" even if there is insufficient probable cause to make an arrest. *State v. Contreras*, 2003-NMCA-129, ¶ 5, 134 N.M. 503, 79 P.3d 1111 (internal quotation marks and citation omitted). Looking at the totality of the circumstances, the officer must have a reasonable suspicion that the person is or is about to be "engaged in criminal activity." *Id.* "Reasonable suspicion must be based on specific articulable facts and the rational inferences that may be drawn from those facts." *State v. Flores*, 1996-NMCA-059, ¶ 7, 122 N.M. 84, 920 P.2d 1038. An anonymous tip "must be suitably corroborated or exhibit sufficient indicia of reliability to provide the police reasonable suspicion to make an investigatory stop." *Contreras*, 2003-NMCA-129, ¶ 5. We review de novo whether Lieutenant Jacquez's conduct was objectively reasonable. *See Neal*, 2007-NMSC-043, ¶ 19.

{21} In *Contreras*, this Court reversed the district court's order suppressing evidence obtained following a traffic stop of the defendant. 2003-NMCA-129, ¶ 1. The defendant was stopped and subsequently arrested and charged with aggravated driving while under the influence following an anonymous call to police. *Id.* ¶ 2. The caller informed dispatch of a possible drunk driver and described the vehicle as a gray van, towing a red Geo, and driving erratically. *Id.* Dispatch informed police who subsequently stopped the defendant's vehicle that matched the description. *Id.* This Court reasoned that, under the totality of the circumstances, the tip from the caller "contained sufficient information and was sufficiently reliable to provide the deputies with reasonable suspicion that a crime was being or was about to be committed" and that "the possible danger to public safety was sufficient for the deputies to conduct the . . . stop." *Id.* ¶ 7. This Court further stated that the facts supported the inference that "the anonymous caller was a reliable concerned motorist; the information given was detailed enough for the deputies to find the vehicle in question and confirm the description; and the caller was an apparent eyewitness[.]" *Id.* ¶ 21.

{22} We conclude there were sufficient facts to provide Lieutenant Jacquez with reasonable suspicion that a crime was being or about to be committed. On March 17, 2012, a concerned citizen called the central dispatch of the Deming Police Department to report that a big gray or silver vehicle, with a male driver, was unable to control his lanes, was driving recklessly, and the caller believed the driver was possibly under the influence. At the hearing on the motion to suppress, Lieutenant Jacquez testified that dispatch sent out the details of the call, advising all units of a possible drunk driver in a residential area, heading northbound on Copper Street. Lieutenant Jacquez was two blocks away from the area, and when he entered Florida Street, he saw Defendant's vehicle, which matched the description sent out by dispatch. Lieutenant Jacquez activated his emergency equipment, and Defendant pulled his vehicle over after proceeding another block or two. Lieutenant Jacquez approached the vehicle, informed Defendant of the reason for the stop, and proceeded with his investigation.

{23} As in *Contreras*, the anonymous tip given to the police in this case provided sufficient information describing the color and model of the vehicle, its location and direction on a specific street so that Lieutenant Jacquez could reliably identify Defendant's vehicle moments later. Under the circumstances, the caller's tip met the criteria discussed in *Contreras* for determining that the anonymous citizen tip was sufficiently reliable. *See id.* ¶ 10 ("In New Mexico, a citizen-informant is regarded as more reliable than a police informant or a crime-stoppers informant[.]"). Although Lieutenant Jacquez did not testify that he observed Defendant driving erratically, it is sufficient that the caller was an eyewitness to Defendant's reckless driving. *See id.* (stating that a tip is more reliable if it is apparent the informant witnessed or observed the details personally). Finally, the possible danger to the public of a drunk driver presents an exigent circumstance that can tip the balance in favor of a stop. *See id.* ¶ 13 ("The reasonableness of seizures that are less intrusive than a traditional arrest depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law [enforcement] officers." (internal quotation marks and citation omitted)). Under the totality of the circumstances, the stop of Defendant's vehicle was reasonable as there are articulable facts that Defendant was engaged in criminal behavior by driving while under the influence. *See id.* ¶ 5 (stating that the facts surrounding a tip are viewed in light of the totality of the circumstances). As a result, the district court did not error in denying Defendant' motion to suppress.

III. There is Sufficient Evidence to Support Defendant's Conviction for Possession of Methamphetamine

{24} Defendant argues that the evidence was not sufficient to support his conviction for possession of methamphetamine and "that no rational trier of fact could have found him guilty beyond a reasonable doubt." "The test for sufficiency of the evidence is 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. Duran*, 2006-NMSC-035, ¶ 5, 140 N.M. 94, 140 P.3d 515 (internal quotation marks and citation omitted). Viewing the evidence in the light most favorable to the verdict, the appellate courts "indulg[e] in all reasonable inferences and resolv[e] all conflicts in the evidence in favor of the verdict." *Id.* (internal quotation marks and citation omitted). The appellate courts do "not substitute [their] judgment for that of the fact[-]finder, nor [do they] reweigh the evidence." *State v. Smith*, 2001-NMSC-004, ¶ 7, 130 N.M. 117, 19 P.3d 254.

{25} To find Defendant guilty of possession of methamphetamine, the jury was instructed that: "the [S]tate must prove to your satisfaction beyond a reasonable doubt [that]: 1. [D]efendant had methamphetamine in his possession. . . . 2. [D]efendant knew it was methamphetamine or believed it to be methamphetamine or believed it to be some drug or other substance the possession of which is regulated or prohibited by law[.] . . . 3. This happened in New Mexico on or about the 17th day of March, 2012."

{26} After placing Defendant under arrest, Lieutenant Jacquez found ninety-seven empty small baggies with red lips printed on them and the straw with a burnt end in Defendant's left pocket. Lieutenant Jacquez testified that the small baggies and the straw with a burnt end are commonly used to package methamphetamine. In Defendant's right pocket, Lieutenant Jacquez found another small plastic bag with a white powdery substance, later identified as methamphetamine. After the owner of the vehicle arrived and consented to a search of the vehicle, officers found three additional baggies imprinted with the same red lips in a cigarette pack under the armrest. Each baggie contained what was identified in a field test as methamphetamine, later confirmed by the forensic crime expert as a "weighable amount" of methamphetamine. Defendant testified and argues on appeal that the cigarette pack did not belong to him. However, "[c]ontrary evidence supporting acquittal does not provide a basis for reversal because the jury is free to reject [the d]efendant's version of the facts." *Duran*, 2006-NMSC-035, ¶ 5 (internal quotation marks and citation omitted). Furthermore, Defendant does not contest that the methamphetamine found on his person was also in his possession or that he did not know that the substance on his person was methamphetamine. As a result, there was sufficient evidence for the jury to find Defendant guilty beyond a reasonable doubt of possession of methamphetamine.

IV. Defendant's Right to a Speedy Trial Was Not Violated

{27} The Sixth Amendment to the United States Constitution and Article II, Section 14 of the New Mexico Constitution guarantees the right to a speedy trial. *See State v. Garza*, 2009-NMSC-038, ¶ 10, 146 N.M. 499, 212 P.3d 387. To determine whether the right has been violated, we examine four factors: "(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[.]" *Id.* ¶ 13 (internal quotation marks and citation omitted). "[T]he factors have no talismanic qualities, and none of them are a necessary or sufficient condition to the finding of a violation of the right of speedy trial." *State v. Spearman*, 2012-NMSC-023, ¶ 18, 283 P.3d 272 (alteration, internal quotation marks, and citation omitted). This Court examines the complexity of the case to determine whether a delay triggers a presumption of prejudice. *See Garza*, 2009-NMSC-038, ¶ 23. "[A] 'presumptively prejudicial' length of delay is simply a triggering mechanism, requiring further inquiry into the [other *Barker v. Wingo*, 407 U.S. 514, 530 (1972)] factors." *Garza*, 2009-NMSC-038, ¶ 21. When specifically analyzing the four factors, we review the weight attributed to each factor de novo but defer to the district court's findings of fact. *Id.* ¶¶ 19, 24.

{28} Here, Defendant's right to a speedy trial was not violated. First, assuming the Defendant's case was simple, the ten-month delay between Defendant's arrest in March 2012 and trial in January 2013 does not meet the minimum length of delay to be considered presumptively prejudicial. *See id.* ¶ 41 (stating that the minimum length of delay in a simple case to be considered "presumptively prejudicial" is one year); *see also State v. Maddox*, 2008-NMSC-062, ¶ 10, 145 N.M. 242, 195 P.3d 1254 (indicating that the right to a speedy trial attaches "when the defendant becomes an accused, that is, by a filing of a formal indictment or information or arrest and holding to answer" (internal quotation marks and citation omitted)), *abrogated on other grounds by Garza*, 2009-NMSC-038, ¶¶ 46-48. Although the "presumptively prejudicial" guidelines set by the appellate courts are not bright-line rules, Defendant does not present an argument that would otherwise require us to independently analyze the four speedy trial factors. *See Garza*, 2009-NMSC-038, ¶ 49 ("The situation may arise where a defendant alerts the district court to the possibility of prejudice to his defense and the need for increased speed in bringing the case to trial, i.e., the impending death of a key witness. Where that possibility is realized and the defendant suffers actual prejudice as a result

of delay, these guidelines will not preclude the defendant from bringing a motion for a speedy trial violation though the delay may be less than one year."); *see also State v. Smith*, 2016-NMSC-007, ¶ 59, 367 P.3d 420 (noting that "[the d]efendant must still show particularized prejudice cognizable under his constitutional right to a speedy trial and demonstrate that, on the whole, the *Barker* factors weigh in his favor").

{29} Defendant only asserts that he was prejudiced by being in custody while awaiting trial, but makes no argument as to how his case was prejudiced in any way due to his incarceration. *See State v. Coffin*, 1999-NMSC-038, ¶ 69, 128 N.M. 192, 991 P.2d 477 (recognizing that even when the delay slightly exceeds the presumptively prejudicial threshold, the typical hardship and anxiety resulting from criminal charges and pretrial incarceration only warrants enough prejudice to weigh lightly in the defendant's favor). As a result, we hold that Defendant has failed to present a viable argument that his right to a speedy trial was violated.

CONCLUSION

{30} For the foregoing reasons, we reverse and vacate Defendant's convictions for possession of drug paraphernalia that was based upon the small baggies in his possession and affirm the conviction for possession of drug paraphernalia based upon the red straw with a burnt end. We also uphold all of Defendant's remaining convictions. We remand this case to the district court for resentencing consistent with this opinion.

{31} IT IS SO ORDERED.
TIMOTHY L. GARCIA, Judge

WE CONCUR:
JONATHAN B. SUTIN, Judge
MICHAEL E. VIGIL, Judge

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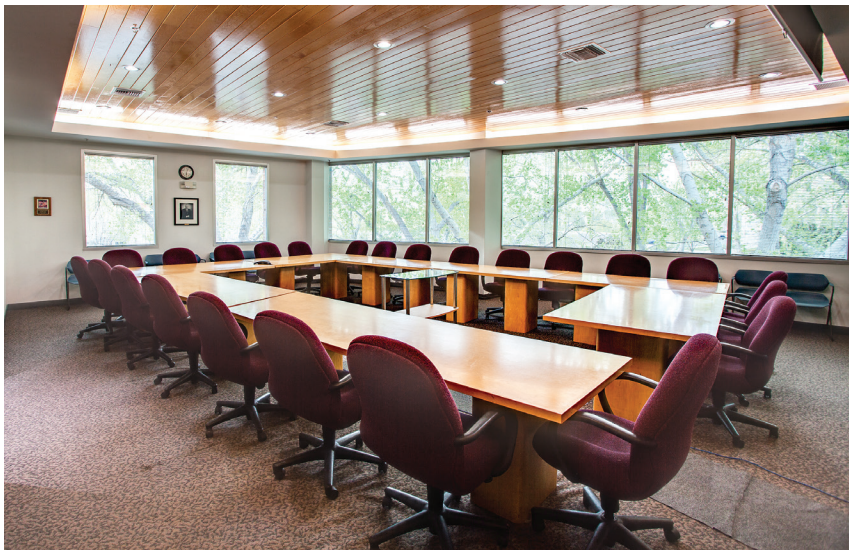

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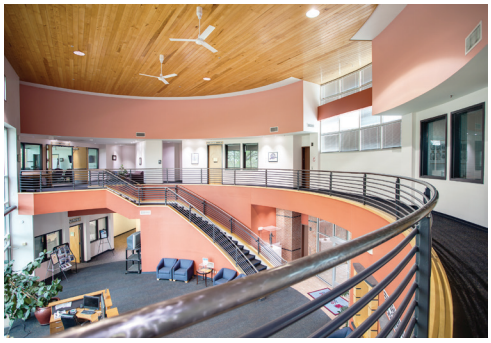

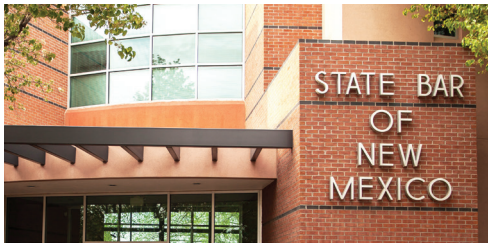

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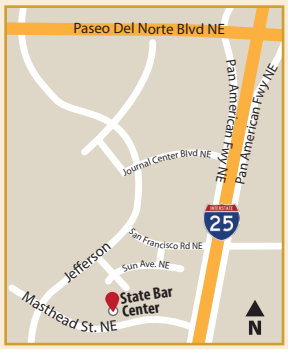

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