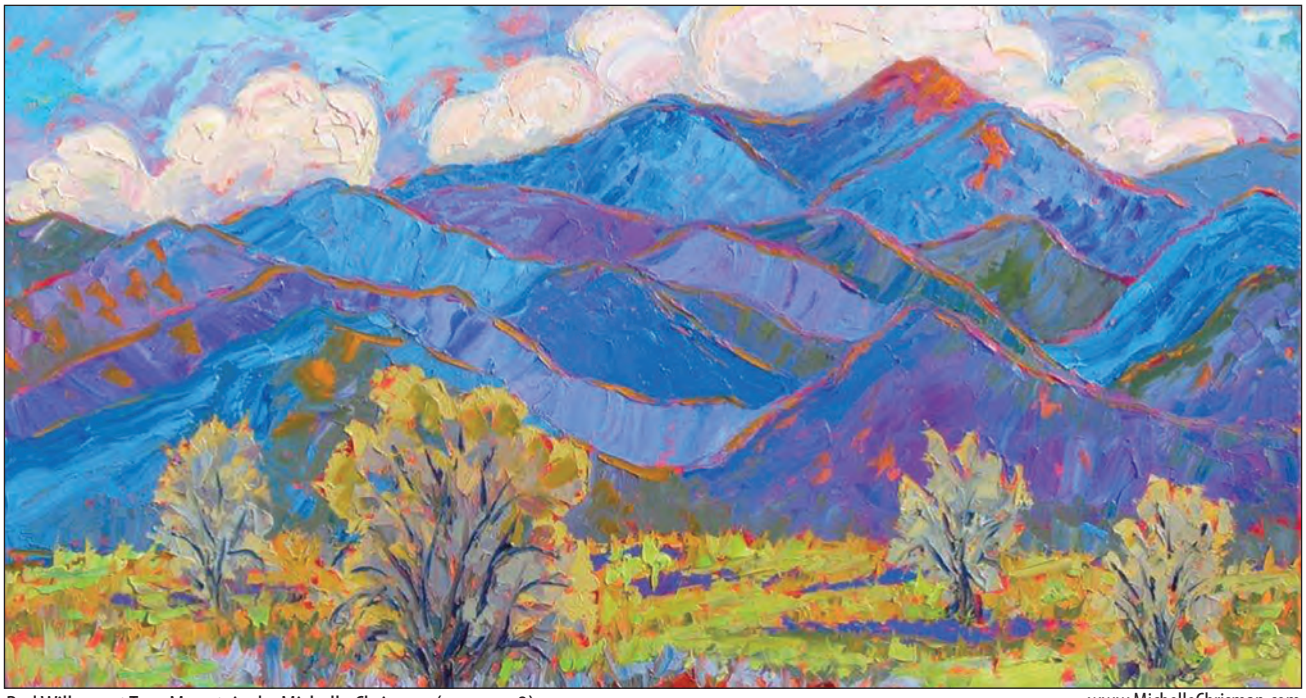
Official Publication of the State Bar of New Mexico

Bar Bulletin

April 8, 2020 • Volume 59, No. 7



Red Willows at Taos Mountain, by Michelle Chrisman (see page 3) www.MichelleChrisman.com

Updates, Information, and Event Cancellations Due to the Coronavirus Situation: The State Bar of New Mexico is committed to helping New Mexico lawyers respond optimally to the developing COVID-19 coronavirus situation. To view updates and information about the rapidly developing situation, visit www.nmbar.org/covid-19. For a list of events that have changed or been cancelled due to the coronavirus situation, visit www.nmbar.org/eventchanges or contact the event organizer.

Inside This Issue

CLE Planner

Upcoming programming from the

Center for Legal Education

Staying Healthy and Calm During Stressful Times

Learning how to remain calm in times of stress will not only have immediate soothing effects; it can also, over time, help you lead a healthier, happier life.

FOCUS ON WHAT IS IN YOUR CONTROL. Follow **everyday preventive actions** to keep you and your family healthy. Keep informed, but avoid excessive exposure to mass media and social media.

MAINTAIN CONSISTENCY AMIDST CHANGE. If you are working an adjusted schedule or teleworking, continue to maintain a regular sleep cycle. Adapt your exercise routine at home if you're not attending your regular fitness class or going to the gym.

REMAIN IN THE PRESENT. If you find yourself worrying about something that hasn't happened – and may never happen – tune into the sights, sounds, tastes and other sensory experiences in your immediate moment. Log into **MyStressTools**, your free online resilience-building resource, which includes Relaxation Music, Guided Meditations and mindfulness tools.

STAY CONNECTED. Talk to family and trusted friends about what you are feeling. While heeding social distancing warnings, be careful not to completely isolate.

GET SUPPORT. If you or any family member is feeling particularly anxious or could benefit from an objective ear, reach out to your EAP for added professional assistance.

Call anytime 24/7 at 866-254-3555 to schedule an appointment or video visit.

If you've been seeing an EAP counselor and are restricting your travel and social interactions, consider transitioning to video or telephonic sessions.

Call your affiliate provider directly or call 866-254-3555.

For more information, visit *www.solutionsbiz.com*

The Solutions Group

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

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14
Appellate Practice Section Board
Noon, teleconference

14
Bankruptcy Law Section Board
Noon, teleconference

16
Public Law Section Board
Noon, teleconference

17
Family Law Section Board
9 a.m., teleconference

Workshops and Legal Clinics

April

8
Common Legal Issues for Senior Citizens
Canceled
1-800-876-6657

9
Common Legal Issues for Senior Citizens
Canceled
1-800-876-6657

22
Consumer Debt/Bankruptcy Workshop
Canceled
505-797-6094

May

6
Divorce Options Workshop
Canceled
505-797-6022

27
Consumer Debt/Bankruptcy Workshop
Canceled
505-797-6094

About Cover Image and Artist: Michelle Chrisman's landscapes are painted "en plain air." She considers herself a contemporary colorist and modernist, but most of all a visual poet. She is drawn to the visual beauty of New Mexico and the West, the desert, and the variety of three cultures. She paints alla prima in direct response to the landscape. Chrisman teaches annual painting workshops for Ghost Ranch in Abiquiu and for the New Mexico Art League and Harwood Art Center in Albuquerque. She can be reached via email at MichelleChrisman78@gmail.com and her website is www.MichelleChrisman.com.

Notices

Court News

New Mexico Supreme Court

Rule-Making Activity

To view recent Supreme Court rule-making activity, visit the Court's website at https://supremecourt.nmcourts.gov/. To view all New Mexico Rules Annotated, visit New Mexico OneSource at https://nmonesource.com/nmos/en/nav.do.

Supreme Court Law Library

The Supreme Court Law Library is open to the legal community and public at large. The Library has an extensive legal research collection of print and online resources. The Law Library is located in the Supreme Court Building at 237 Don Gaspar in Santa Fe. Building hours: Monday-Friday 8 a.m.-5 p.m. Reference and circulation hours: Monday-Friday 8 a.m.-4:45 p.m. For more information call: 505-827-4850, email: libref@nmcourts.gov or visit https://lawlibrary.nmcourts.gov.

First Judicial District Court

Announcement of Vacancy

A vacancy on the First Judicial District Court will exist in Santa Fe as of May 20 due to the creation of an additional judgeship by the Legislature. Inquiries regarding additional details or assignment of this judicial vacancy should be directed to the chief judge or the administrator of the court. Sergio Pareja, chair of the Judicial Nominating Commission, solicits applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14 of the New Mexico Constitution. Applications may be obtained from the Judicial Selection website: http://lawschool.unm.edu/judsel/application.php, or emailed/faxed/mailed to you by calling Beverly Akin at 505-277-4700. The deadline for applications has been set for April 28 at 5 p.m. Applications received after that date will not be considered. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. The Judicial Nominating Committee will meet beginning at 9 a.m. on May 12 at the Santa Fe County Courthouse, 225 Montezuma Ave., Santa Fe, to evaluate the applicants for this position. The Committee meeting is open to the public.

Professionalism Tip

With respect to opposing parties and their counsel:

I will clearly identify, for other counsel or parties, all changes that I have made in all documents.

Notice of Possible Event Cancellations or Changes:
Due to the rapidly changing coronavirus situation, some events listed in this issue of the *Bar Bulletin* may have changed or been cancelled after the issue went to press. Please contact event providers or visit www.nmbar.org/eventchanges for updates.

Second Judicial District Court

Destruction Of Exhibits:

Pursuant to 1.21.2.6.17 FRRDS (Records Retention and Disposition Schedules-Exhibits), the Second Judicial District Court will destroy exhibits filed with the court, the Domestic (DM/DV) for the years of 2009 to 2013 including but not limited to cases which have been consolidated. Cases on appeal are excluded. Parties are advised that exhibits may be retrieved beginning April 8-22. Should you have cases with exhibits, please verify exhibit information with the Special Services Division, at 841-6717, from 8 a.m. to 4 p.m., Monday through Friday. Plaintiff's exhibits will be released to counsel for the plaintiff(s) or plaintiffs themselves and defendant's exhibits will be released to counsel of record for defendants(s) or defendants themselves by order of the court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by order of the court.

Eleventh Judicial District Court

Announcement of Applicants

Two applications were received in the Judicial Selection Office for the Judicial Vacancy in the Eleventh Judicial District Court - Gallup due to the retirement of the Honorable Lyndy D. Bennett, effective Feb. 29. The Judicial Nominating Commission met at 9 a.m., on March 30 at the Gallup District Courthouse, located at 207 W. Hill Ave, Gallup, to evaluate the applicants for this position. The Commission meeting is open to the public and members of the public who wish to be heard about the candidate will have an opportunity to be heard. The names of the applicants: **Linda Gasparich Padilla** and **R. David Pederson**.

Thirteenth Judicial District Court

Notice of Mass Case Reassignment

Gov. Michelle Lujan Grisham appointed James A. Noel to fill the vacancy of Division V and Christopher G. Perez to fill the vacancy of Division VII in the Thirteenth Judicial District Court. Effective March 11 a mass reassignment of cases occurred to the new judges. All cases in the Thirteenth Judicial District Court previously assigned to Judge Louis P. McDonald or to Division V, are reassigned to Judge Christopher G. Perez, Division VII. All cases in the Thirteenth Judicial District Court previously assigned to Judge John F. Davis or to Div. VII, are reassigned to Judge James A. Noel, Div. V. Parties who have not previ¬ously exercised their right to challenge or excuse will have ten days from April 22 to challenge or excuse Judge Noel or Judge Perez pursuant to NMRA 1-088.1.

New Mexico Employee Labor Relations Board

Audiotape Destruction

Notice is hereby given that New Mexico Public Employee Labor Relations Board will be destroying audiotape recordings of hearings, conferences and board meetings before the New Mexico Public Employee Labor Relations Board between 2004 and 2008. The contents of the audiotapes have been transferred to a digital format and will continue to be maintained in the PELRB's electronic records. If you have any questions regarding the destruction of these audiotapes, please contact the PELRB Executive Director at: Tom.Griego@state.nm.us 505-831-5422.

State Bar News

Coronavirus Updates

The State Bar of New Mexico is committed to helping New Mexico lawyers respond optimally to the developing CO-

VID-19 coronavirus situation. Visit www.nmbar.org/covid-19 for a compilation of resources from national and local health agencies, canceled events and frequently asked questions. This page will be updated regularly during this rapidly evolving situation. Please check back often for the latest information from the State Bar of New Mexico. If you have additional questions or suggestions about the State Bar's response to the coronavirus situation, please email Executive Director Richard Spinello at rspinello@nmbar.org.

Access to Justice

Fund Grant Commission

The Access to Justice Fund Grant Commission seeks grant applications from nonprofit organizations that provide civil legal services to low income New Mexicans within the scope of the State Plan. The 2020-21 RFP is available at nmbar.org/ATJFundGrant. The application due date is noon, April 17 and the grant period will be July 1, 2020 – June 30, 2021 (12 months). Approximately $900,000 will be awarded. Contact Vannessa Sanchez at vsanchez@nmbar.org with any questions.

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 2022 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 wishing to serve on the board must be a current ABA member in good standing and should send a letter of interest and brief resume by May 15 to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

Vacancy in Fifth Bar Commissioner District (Curry, DeBaca, Quay and Roosevelt counties)

A vacancy exists in the Fifth Bar Commissioner District (Curry, DeBaca, Quay and Roosevelt counties). The appointment will be made by the Board of Bar Commissioners to fill the vacancy until the next regular election of Commissioners, and the term will run through Dec. 31. Active status members with a principal place of practice located in the Fifth Bar Commissioner District are eligible to apply. The remainder of the 2020 Board meetings are scheduled for June 18 (Eldorado Hotel, Santa Fe, in conjunction with the State Bar of New Mexico Annual Meeting), Sept. 25 in Albuquerque, and Dec. 9 (Supreme Court, Santa Fe). Members interested in serving on the Board should submit a letter of interest and resume to Kris Becker, at kbecker@nmbar.org or fax to 505-828-3765, by April 10.

Client Protection Fund Commission

The Board of Bar Commissioners will make one appointment to the Client Protection Fund Commission for the remainder of an unexpired term through Dec. 31, 2021. Active status attorneys in New Mexico who would like to serve on the Commission should send a letter of interest and brief resume by April 15 to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

Commissioner Vacancy New Mexico Legal Aid

The Board of Bar Commissioners will make one appointment to the New Mexico Legal Aid Board for the remainder of a three-year term through Dec. 31; this vacancy is to be filled by a member of the Indian Law Section. Members wishing to serve on the NMLA Board should send a letter of interest and brief resume by April 5 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 time commitment for service on this Commission is substantial and the workload is voluminous. Receiving, reviewing, and analyzing substantial quantities of electronic documents are necessary to prepare for Commission matters. Strict adherence to constitutional, statutory, and regulatory authority governing the Commission is mandatory, expressly including but not limited to confidentiality. Commissioners meet at least six times per year for approximately three hours per meeting. A substantial amount of reading and preparation is required for every meeting. In addition to regular meetings, the Commission schedules at least three weeklong trailing dockets of trials. Additional trials, hearings, or other events may be scheduled on special settings. Additionally, mandatory in-house training sessions may periodically take place. Unless properly recused or excused from a matter, all Commissioners are required to faithfully attend all meetings and participate in all trials and hearings. Appointees should come to the Commission with limited conflicts of interest and must continually avoid, limit, or eliminate conflicts of interest with the Commission's cases, Commission members, Commission staff, and with all others involved in Commission matters. Members wishing to serve on the Commission should send a letter of interest and brief resume by May 15 to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

Legal Services and Programs Committee

Seeking Sponsors for Breaking Good High School Video Contest

The Legal Services and Programs Committee will host the sixth annual Breaking Good Video Contest for 2020. The Video

Contest aims to provide an opportunity for New Mexico high school students to show their creative and artistic talents while learning about civil legal services available to their communities. The LSAP Committee would like to invite a member or firm of the legal community to sponsor monetary prizes awarded to first, second, and third place student teams and the first place teacher sponsor. The Video Contest sponsors will be recognized during the presentation of the awards, to take place at the Legal Services & Programs Annual Conference, and on all promotional material for the Video Contest. For more information regarding details about the prize and scale and the Video Contest in general, or additional sponsorship information, visit nmbar.org/BreakingGood.

New Mexico Judges and Lawyers Assistance Program

We're now on Facebook! Search "New Mexico Judges and Lawyers Assistance Program" to see the latest research, stories, events and trainings on legal well-being!

Recovery Possibilities

- Canceled Until Further Notice

This support group explores non-traditional recovery approaches and has a focus on meditation and other creative tools in support of the recovery process from addiction of any kind. It meets at the District Courthouse, 225 Montezuma Ave, Room 270, Santa Fe. For more information, contact Victoria at 505-620-7056.

People with Wisdom

- Canceled Until Further Notice

The purpose of this group is to address the negative impact anxiety and depression can have in people's lives and to develop the skills on how to regulate these symptoms through learning and developing several different strategies and techniques that can be applied to their life. The process will help the individual to understand and manage cognitive, behavior, and physiological components of anxiety and depression. You are not required to sign up in advance, so feel free to just show up! The group meets at 320 Osuna Rd, NE, #A, Albuquerque and is led by Janice Gjertson, LPCC.Contact Tenessa Eakins at 505-797-6093 or teakins@nmbar.org for questions.

Monday Night Support Group

- April 13
- April 20
- April 27

As of March 30, this group will be meeting every Monday night via Zoom and phone conference call. The intention of this support group is the sharing of anything you are feeling, trying to manage or struggling with. It is intended as a way to connect with colleagues, to know you are not in this alone and feel a sense of belonging. We laugh, we cry, we BE together. Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#. The Zoom link will be on the NMJLAP website or email Pam at pmoore@nmbar.org and she will email it to you.

For more information, contact Latisha Frederick at 505-948-5023 or 505-453-9030, Bill Stratvert at 505-242-6845, or Pam Moore at 505-228-1948."

Employee Assistance Program

Managing Stress Tool for Members

A negative working environment may lead to physical and mental health problems, harmful use of substances or alcohol, absenteeism and lost productivity. Workplaces that promote mental health and support people with mental disorders are more likely to reduce absenteeism, increase productivity and benefit from associated economic gains. Whether in a professional or personal setting, most of us will experience the effects of mental health conditions either directly or indirectly at some point in our lives. The NM Judges and Lawyers Assistance Program is available to assist in addition to our contracted Employee Assistance Program (EAP). No matter what you, a colleague, or family member is going through, The Solutions Group, the State Bar's FREE EAP, can help. Call 866-254-3555 to receive FOUR FREE counseling sessions per issue, per year! Every call is completely confidential and free For more information, https://www.nmbar.org/jlap or https://www.solutionsbiz.com/Pages/default.aspx.

Real Property, Trust and Estate Section

Second Annual Ghost Ranch Retreat and CLE

The Real Property, Trust and Estate Section will be hosting their second annual Ghost Ranch Trip and CLE Presentation on April 30 through May 1. Join your fellow RPTE members for a social bonfire, practice related discussions, and a 3-hour CLE presentation that covers both areas of practice. The RPTE Board has secured 10 hotel rooms to be raffled off to the first 10 members who sign up for the CLE. To learn more about the trip, CLE presentations, and raffle entry, please visit the section website at nmbar.org/rpte.

Public Law Section

Now Accepting Nominations for Lawyer of the Year Award

Since 1996, the Public Law Section has presented the annual Public Lawyer Award to lawyers who have had distinguished careers in public service and who are not likely to be recognized for their contributions. The Public Law Section is now accepting nominations for the Public Lawyer of the Year Award, which will be presented at the state capitol at 4 p.m. on May 15. Visit nmbar.org/publiclaw to view previous recipients and award criteria. Nominations are due no later than 5 p.m. on April 20. Send nominations to Andréa Salazar at asalazar@santafenm.gov. The selection committee will consider all nominated candidates.

UNM School of Law

Law Library Hours Spring 2020

Through May 16

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	Closed.
Reference	
Monday–Friday	9 a.m.–6 p.m.

Other Bars

Christian Legal Aid

Fellowship Luncheons and Breakfasts

Christian Legal Aid invites members of the legal community to fellowship luncheons/breakfasts which are an opportunity for current attorney volunteers, and those interested in volunteering, to meet to learn about recent issues NMCLA attorneys have experienced in providing legal counseling services to the poor and homeless through the NMCLA weekly interview sessions. They are also opportunities to share ideas on how NMCLA volunteer attorneys may become more effective in providing legal services to the poor and homeless. Upcoming dates are: June 4 at noon at Japanese Kitchen; and Aug. 12 at 7 a.m. at Stripes at Wyoming

and Academy. For more information, visit nmchristianlegalaid.org or email christianlegalaid@hotmail.com

Albuquerque Bar Association's

2020 Membership Luncheons

- June 9: Damon Ely, Bill Slease, and Jerry Dixon presenting on malpractice an insurance issues (1.0 EP)
- July 7: Judge Shannon Bacon (1.0 G)
- Sept. 15: Douglas Brown presenting on a small/family business update (1.0 G)

Please join us for the Albuquerque Bar Association's 2020 membership luncheons. Lunches will be held at the Embassy Suites, 1000 Woodward Place NE, Albuquerque from 11:30 a.m.-1 p.m. The costs for the lunches are $30 for members and $40 for non-members. There will be a $5 walk-up fee if registration is not received by 5 p.m. on the Friday prior to the Tuesday lunch. To register, please contact the Albuquerque Bar Association's interim executive director, Deborah Chavez at dchavez@vancechavez.com or 505-842-6626. Checks may be mailed to PO Box 40, Albuquerque, N.M. 87103.

The Board Governing the Recording of Judicial Proceedings
A Board of the Supreme Court of New Mexico

Expired Court Reporter Certifications

The following list includes the names and certification numbers of those court reporters whose New Mexico certifications expired as of Dec. 31, 2018.

Name	CCR CCM No.	City, State
Coffelt Shepherd, Kristie L.	523	Santa Rosa, Ca.
Dockstader, Brynn E.	525	Tucson, Az.
Jasper, Robin L.	526	Peoria, Az.
Lusk Hufstetler, Martha	525	Marietta, Ga.
O'Bryan, Carol	186	Gillette, Wy.
Ottmar, Julie	527	Phoenix, Az.
Sing, Ningay N.	510	Auburn, Ca.
Slone, Stephanie	505	Santa Fe, NM
Sperry, Susan	514	Santa Fe, NM
Wolfe-Power, Shelby	126	El Paso, Tx.

National Conference of Bar Examiners

Testing Task Force Phases 1 and 2 Reports are Available

The National Conference of Bar Examiners' (NCBE's) Testing Task Force (TTF) is undertaking a comprehensive, future-focused study to ensure that the bar examination continues to test the knowledge, skills, and abilities required for competent entry-level legal practice in a changing legal profession. The collaborative study involves input from stakeholders at multiple phases and considers the content, format, timing, and delivery method for NCBE's current tests, which make up all or part of the bar examination in most U.S. jurisdictions: the Multistate Bar Examination (MBE), the Multistate Essay Examination (MEE), and the Multistate Performance Test (MPT). The study also includes the Multistate Professional Responsibility Examination (MPRE), which is administered by NCBE and required for admission in most U.S. jurisdictions. The reports are available at https://testingtaskforce.org/research/.

Legal Education

April

8 **Drafting LLC Operating Agreements, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Drafting LLC Operating Agreements, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

14 **Spring AODA Conference**
13.5 G, 2.0 EP
Live Seminar
Administrative Office Of The District Attorneys
www.nmdas.com

15 **2020 Uniform Commercial Code Update**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

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

24 **Basics of Trust Accounting: How to Comply with Disciplinary Rule 17-204**
1.0 EP
Live Webcast
Center for Legal Education of NMSBF
www.nmbar.org

27 **Bernalillo County Attorney Retreat**
3.0 G, 1.0 EP
Live Seminar
Office Of The Bernalillo County Attorney
505-314-0180

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

29 **Foreign Investment Crackdown**
1.5 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

May

1 **Lawyer Ethics When Clients Won't Pay Fees**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

14 **Annual Estate Planning Update**
5.0 G, 1.0 EP
Live Seminar
WILCOX & Myers, P.C.
www.wilcoxlawnm.com

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

21 **Drafting Waivers of Conflicts of Interest**
1.0 EP
Teleseminar
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

Notice of Possible Event Cancellations or Changes:
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Listings in the *Bar Bulletin* Legal Education Calendar are derived from course provider submissions and from New Mexico Minimum Continuing Legal Education. All MCLE approved continuing legal education courses can be listed free of charge. Send submissions to notices@nmbar.org. Include course title, credits, location/course type, course provider and registration instructions.

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 13, 2020

PUBLISHED OPINIONS

A-1-CA-37331	State v. N Hertzog	Affirm	03/11/2020

UNPUBLISHED OPINIONS

A-1-CA-36704	R Carrillo v. Copper Solutions	Affirm/Reverse/Remand	03/10/2020
A-1-CA-36831	State v. J Luttrell	Affirm	03/10/2020
A-1-CA-37034	State v. R Foster	Affirm/Reverse/Remand	03/10/2020
A-1-CA-37166	State v. R Foster	Affirm/Reverse/Remand	03/10/2020
A-1-CA-36495	C Nelson v. Bernalillo County	Affirm	03/11/2020
A-1-CA-36496	C Nelson v. Bernalillo County	Affirm	03/11/2020
A-1-CA-36660	City of Las Cruces v. O Flores	Reverse	03/11/2020
A-1-CA-36435	Board of Directors v. Casita de las Flores	Affirm	03/12/2020

Effective March 20, 2020

UNPUBLISHED OPINIONS

A-1-CA-36916	N Smith v. BNSF Railway Co	Reverse/Remand	03/16/2020
A-1-CA-37170	State v. D Clopton	Affirm	03/16/2020
A-1-CA-37741	Golden Equipment Co v. A Martinez	Reverse/Remand	03/16/2020
A-1-CA-37317	State v. E Bibeau	Affirm	03/17/2020
A-1-CA-36935	M Telles v. E Telles	Affirm	03/18/2020

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

Clerk's Certificates

From 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

CLERK'S CERTIFICATE OF CHANGE TO INACTIVE STATUS

Effective January 15, 2020:
Elena Alicia Esparza
12233 Roberta Lynne
El Paso, TX 79936

Effective January 20, 2020:
William H. Brosha
850 Carolier Lane
North Brunswick, NJ 08902

Effective January 24, 2020:
Cale Kennamer
3527 Hofstead Court
Colorado Springs, CO 80907

Effective January 30, 2020:
Maria Herrera Mellado
55 SW Ninth Street,
Suite 4009
Miami, FL 33130

Effective January 31, 2020:
Donald Whitney Johnson
315 Edith Blvd., NE
Albuquerque, NM 87102

Rebecca Anne Parish
804 Calle Romolo
Santa Fe, NM 87505

Effective January 31, 2020:
Oliver G. Davis
2753 Briggs Avenue
Bronx, NY 10458

Kathryn L. Leonard
PO Box 566
Waddell, AZ 85355

Carl William Lisberger
2049 Century Park E.,
Suite 1700
Los Angeles, CA 90067

Effective February 1, 2020:
Sarah J. Becker
PO Box 44
Hulls Cove, ME 04644

Jason Haubenreiser
600 Lafayette Street
Denver, CO 80218

Robert N. Hilgendorf
310 McKenzie Street
Santa Fe, NM 87501

Karl Fredrick Kumli III
2060 Broadway, Suite 400
Boulder, CO 80302

Gary Stephen Lee
12104 El Dorado Place, NE
Albuquerque, NM 87111

Effective February 1, 2020:
Alysha M. Craig
2908 Tierra Dorado Drive, SW
Albuquerque, NM 87121

Robert C. Knight
19 Villa Circle
Endwell, NY 13760

Effective February 29, 2020:
Duane J. Lind
10400 Academy Road, NE,
Suite 140
Albuquerque, NM 87111

Effective March 1, 2020:
Elaine Rich Dailey
8500 Menaul Blvd., NE,
Suite A-225
Albuquerque, NM 87112

CLERK'S CERTIFICATE OF AMENDED LIMITED ADMISSION

Effective February 24, 2020:
Imad S. Awad
Office of the Second Judicial District Attorney
520 Lomas Blvd., NW
Albuquerque, NM 87102
505-222-1099
imad.awad@da2nd.state.nm.us

CLERK'S CERTIFICATE OF LIMITED ADMISSION

On **March 4, 2020**:
Lewis G. Creekmore
New Mexico Legal Aid, Inc.
PO Box 25486
Albuquerque, NM 87125
505-243-7871
lewisc@nmlegalaid.org

CLERK'S OF CERTIFICATE OF NAME CHANGE

As of February 27, 2020:
L. Bernice Feathers
f/k/a L. Bernice Galloway
Galloway Legal Group
PO Box 327
Osprey, FL 34229
505-506-6265
berniceg@gallowaylegalgroup.com

CLERK'S CERTIFICATE OF LIMITED ADMISSION

On **March 9, 2020**:
Allysa Gambarella
Office of the Second Judicial District Attorney
520 Lomas Blvd., NW
Albuquerque, NM 87102
505-222-1099
allysa.gambarella@da2nd.state.nm.us

CLERK'S CERTIFICATE OF NAME CHANGE

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From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-055

No. A-1-CA-36014 (filed December 28, 2018)

LSF9 MASTER PARTICIPATION TRUST,
Plaintiff-Appellant,
v.
JOANN SANCHEZ and FRANK F. SANCHEZ,
Defendants-Appellees,
and
WELLS FARGO BANK, N.A. BY MERGER WITH WELLS FARGO FINANCIAL BANK, and CANVASBACK FINANCIAL SERVICES, LLC,
Defendants.

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
MARY W. ROSNER, District Judge

Released for Publication October 29, 2019.

McCarthy & Holthus, LLP
JOSHUA T. CHAPPELL
KAREN WEAVER
Albuquerque, NM
for Appellant

Eric Ortiz & Associates
ERIC N. ORTIZ
Albuquerque, NM
for Appellees

Opinion

Michael E. Vigil, Judge.

{1} Wells Fargo (Bank) appealed from the district court's order dismissing its foreclosure action against Joann and Frank Sanchez (Homeowners) with prejudice. During the pendency of the appeal, and after briefing was completed, Bank filed a motion to substitute LSF9 Master Participation Trust (LSF9) as appellant in the case, which we granted. LSF9 raised no new claims after our order of substitution, and as such, we address the arguments raised by Bank. Bank made two arguments on appeal: (1) the district court erred in dismissing its entire foreclosure claim as barred by the applicable statute of limitations, NMSA 1978, § 37-1-3(A) (2015); and (2) the district court abused its discretion in denying Bank leave to amend its complaint to plead the tolling effect on the statute of limitations of Homeowners' three bankruptcy cases. We reverse.

BACKGROUND

{2} The material facts are not in dispute. On October 30, 2007, Homeowners executed a note and mortgage to secure a $203,669.41 loan. The mortgage was secured by real property located in Las Cruces, New Mexico. The note and mortgage provided for periodic payments in the amount of $1,712.55 to be paid on the fourth day of every month beginning on December 4, 2007. The note and mortgage also contained acceleration clauses, providing that in the event of default, Bank "may require [Homeowners] to pay immediately the full amount of [p]rincipal which has not been paid and all the interest that [Homeowners] owe on that amount."

{3} Homeowner defaulted on the loan on October 4, 2008. Bank filed a foreclosure action against Homeowners on October 7, 2009. In this action, Bank asserted that it was exercising its option under the note to accelerate and declare immediately payable and due the full amount of principal and all interest still owed under the note.

{4} On June 21, 2011, during the pendency of the first foreclosure action, Homeowners filed for Chapter 13 bankruptcy, which was dismissed without prejudice on August 18, 2011, for failure to file information. Homeowners filed a second bankruptcy under Chapter 13 on November 17, 2011, which was dismissed for failure to make plan payments on June 15, 2012. During the pendency of the second bankruptcy, Bank voluntarily dismissed the first foreclosure action on March 20, 2012. Homeowners thereafter filed a third bankruptcy under Chapter 7 on August 21, 2012, which resulted in a discharge order entered on January 23, 2013.

{5} On February 22, 2016, Bank filed its second, and the currently operative, foreclosure action against Homeowners stemming from Homeowners' October 4, 2008 default. Bank alleged in the complaint that its claim was for the accelerated unpaid balance and that it had sent Homeowners a notice of default and a demand letter on August 28, 2015, requesting Homeowners cure of the default. Although not specifically alleging Homeowners' three bankruptcy cases, Bank only sought in rem relief in the complaint. However, concurrent with the complaint, Bank filed a notice of bankruptcy discharge and disclaimer of deficiency that referenced Homeowners' successful Chapter 7 bankruptcy and included a copy of the order of discharge as an exhibit.

{6} Homeowners filed a motion to dismiss pursuant to Rule 1-012(B)(1), (6) NMRA. Homeowners argued that the statute of limitations for a written contract of six years pursuant to Section 37-1-3(A) applied, and because more than six years had elapsed between their default on October 4, 2008, and Bank's filing of the second foreclosure action on February 22, 2016, Bank's foreclosure claim was barred.

{7} Bank responded that pursuant to *Welty v. Western Bank of Las Cruces*, 1987-NMSC-066, 106 N.M. 126, 740 P.2d 120, new and separate breaches of the note and mortgage occurred between Homeowners' original default on October 4, 2008 and October 7, 2009, when Bank accelerated the loan—and each separate breach of the note and mortgage accrued a new six-year period of limitation for each missed payment. Bank therefore argued that while its claim for some of Homeowners' oldest missed payments may have been barred by Section 37-1-3, the majority of Homeowners' missed payments, including the accelerated balance as of October 7, 2009, fell within the statute of limitations in light of the tolling of the limitations

period because of Homeowners' three bankruptcy cases pursuant to 11 U.S.C. § 362 (2012) (stating the circumstances in which the filing of a bankruptcy petition triggers an automatic stay of other proceedings involving the property of a debtor or bankruptcy estate), and NMSA 1978, Section 37-1-12 (1880) (governing the effect of a stay on the computation of statutes of limitations).

{8} After a hearing, the district court dismissed Bank's foreclosure complaint with prejudice. The district court ruled that it would not consider the tolling effect of Homeowners' bankruptcy filings and denied Bank's request to amend its complaint to plead facts concerning Homeowners' bankruptcies and their tolling effect on the limitation period for Bank's foreclosure claim. The district court did not provide reasoning explaining why it would not grant Bank leave to amend its complaint, but apparently agreed with Homeowners' argument that "[t]here has been nothing that prevented [Bank] from filing a motion to amend" between the filing of the complaint and litigation of Homeowners' motion to dismiss, and that "if [Bank] wished to remedy the problem by amending the complaint, they had the opportunity to do that and they failed to do so."

{9} Bank appeals from the order of dismissal with prejudice.

DISCUSSION

I. Standard of Review

{10} "When facts relevant to a statute of limitations issue are not in dispute, the standard of review is whether the district court correctly applied the law to the undisputed facts." *Haas Enters. v. Davis*, 2003-NMCA-143, ¶ 9, 134 N.M. 675, 82 P.3d 42. "We review questions of law de novo." *Id.* Further, insofar as our analysis involves statutory interpretation, our review is de novo. *See Wolinsky v. N.M. Corr. Dep't*, 2018-NMCA-071, ¶ 3, 429 P.3d 991, *cert. denied*, 2018-NMCERT-___ (No. S-1-SC-37287, Oct. 26, 2018).

II. Dismissal of Bank's Foreclosure Claim Was Precluded by Section 37-1-3

{11} Bank argues that the district court erred in dismissing its entire foreclosure claim with prejudice as barred by the statute of limitations, Section 37-1-3(A) (providing that "[a]ctions founded upon any bond, promissory note, bill of exchange or other contract in writing shall be brought within six years"). Bank concedes that certain of Homeowners' missed payments due prior to Bank's October 7, 2009 acceleration of the balance remaining under the note may have been barred when Bank filed the second foreclosure action on February 22, 2016. However, Bank asserts that the limitation period had not run on the accelerated balance as of October 7, 2009, considering the import of *Welty* and the tolling of the limitation period due to Homeowners' three bankruptcy cases and Bank's 2015 demand letter. We agree.

A. Homeowners' Missed Payments Prior to Bank's October 7, 2009 Acceleration

{12} Generally, "[i]n a breach of contract action, the statute of limitations begins to run from the time of the breach." *Welty*, 1987-NMSC-066, ¶ 8. In the context of an installment contract, like the note in this case, *see Maffett v. Emmons*, 1948-NMSC-012, ¶¶ 1, 6, 52 N.M. 115, 192 P.2d 557 (construing a note promising periodic payments as an installment contract), our Supreme Court held in *Welty* that

> under contract obligations payable by installments, the statute [of limitations defined in Section 37-1-3(A)] would have begun to run only with respect to each installment when due. The statute would have begun to run with respect to the whole indebtedness only from the date of an exercise of the option to declare the whole indebtedness due.

Welty, 1987-NMSC-066, ¶ 9.

{13} Under the foregoing authority, we conclude that the payments due between October 4, 2008 and October 4, 2009, prior to Bank's October 7, 2009 acceleration of the balance due under the note, were barred by the statute of limitations at the time of Bank's filing of the second foreclosure action. Pursuant to the note, which provided that payments were due on the fourth day of every month, the last payment Homeowners failed to make prior to the October 7, 2009 acceleration was the payment scheduled for October 4, 2009. Applying *Welty*, the limitation period for this missed payment accrued on October 4, 2009, and ran six years later, on October 4, 2015—142 days before Bank filed the second foreclosure action on February 22, 2016. *See* 1987-NMSC-066, ¶ 9. It follows that the statute of limitations for each payment missed by Homeowners prior to the October 4, 2009 payment also ran prior to Bank's filing of the second foreclosure action. *Id.*

B. Homeowners' Obligation Under the Note After Bank's October 7, 2009 Acceleration

{14} The fundamental dispute in this case concerns the tolling effect of Homeowners' three bankruptcy filings and Bank's 2015 demand letter on the running statute of limitations for Bank's claim for the remaining amount due under the note after Bank's October 7, 2009 acceleration.

{15} Bank argues that mandatory stays on its foreclosure claim were triggered by Homeowners' bankruptcy filings, which tolled the statute of limitations for the periods of time during which those cases were pending pursuant to 11 U.S.C. § 362(a) and Section 37-1-12. *See* § 37-1-12 (providing that "[w]hen the commencement of any action shall be stayed or prevented by injunction order or other lawful proceeding, the time such injunction order or proceeding shall continue in force shall not be counted in computing the period of limitation"). Further, relying on our Supreme Court's statement in *Welty*, 1987-NMSC-066, ¶ 9, that where a contract prohibits commencement of a suit for default within thirty days of demand, the statute of limitations is tolled during that period, Bank asserts that under the terms of the note, following service of the demand letter to Homeowners on August 28, 2015, the limitation period was tolled for an additional thirty days. Based on these asserted periods of tolling of the limitation period for Bank's claim for the accelerated balance as of October 7, 2009, Bank contends that the second foreclosure action was timely filed within the six-year limitation period.

{16} Homeowners respond that although generally "the filing of a bankruptcy petition operates as a stay of the commencement or continuation of judicial actions such as the foreclosures at issue in this case[,]" here, § 362(c)(3) and 11 U.S.C. § 108(c) (2012) operate as an exception or limitation to the general rule stated in § 362(a). Specifically, under these sections of the Bankruptcy Code, Homeowners argue that Bank is not entitled to toll the time of Homeowners' bankruptcies. It follows, Homeowners assert, Bank's second foreclosure action was filed after the statute of limitations had run.

{17} The commencement of a case under the Bankruptcy Code "creates an estate. Such estate is comprised of . . . all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1) (2016). The filing of a petition under the bankruptcy code "operates as a stay, applicable to all entities, of . . . any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate[.]" § 362(a)(3).

{18} Pursuant to § 362(c)(3)(A), "if a single or joint case is filed by or against a *debtor* is filed by or against a *debtor* who is an individual in a case under Chapter 7, 11, or 13, and if a single or joint case of the *debtor* was pending within the preceding 1-year period but was dismissed . . . the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt . . . shall terminate with respect to the *debtor* on the 30th day after the filing of the later case." (Emphases added.) Similarly, pursuant to § 108(c):

> if applicable nonbankruptcy law . . . fixes a period for commencing or continuing a civil action in a

> court other than a bankruptcy court on a claim against the *debtor*, or against [a codebtor] . . . protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of--
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
> (2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

(Emphasis added.)

{19} While Homeowners are correct to note that § 362(c)(3) and § 108(c) can operate as exceptions or limitations to the mandatory stays described in § 362(a) in actions filed by or against the *debtor*, Homeowners fail to recognize the significance, as Bank argues in its reply brief, of the material distinction drawn in bankruptcy law between actions against the *debtor* and actions against the *estate*, as described in § 541, in the context of § 362(a). Bank argues that the precedent of "[a] majority of federal courts, including the Tenth Circuit's Bankruptcy Appellate Panel[,]" which would have applied to Homeowners' bankruptcy case that was brought in New Mexico, holds that termination of the automatic stay occurs, pursuant to § 362(c)(3)(A), only with regard to the *debtor*—not the *estate*. In support of this argument, Bank cites *In re Holcomb*, 380 B.R. 813 (B.A.P. 10th Cir. 2008).

{20} In *Holcomb*, the Tenth Circuit Bankruptcy Appellate Panel held that:

> a majority of courts have [concluded] . . . the automatic stay terminates under § 362(c)(3)(A) only with respect to the debtor and the debtor's property but not as to the property of the estate. These courts reason that if Congress meant to terminate the stay in its entirety, it would have done so in plain language[.] . . . On this basis, we conclude that the language of § 362(c)(3)(A) terminates the stay only as to the debtor and the debtor's property.

380 B.R. at 815-16 (citations omitted). Accordingly, following the Tenth Circuit precedent in *Holcomb*, we conclude that § 362(c)(3) and § 108(c), each of which apply only to actions brought by or against the *debtor*, do not apply to this case in which Bank sought only in rem relief against the property of Homeowners' bankruptcy estate. *See Fed. Nat'l Mortg. Ass'n v. Chiulli*, 2018-NMCA-054, ¶ 2, 425 P.3d 739 (recognizing that in the event of a default on a promissory note, the mortgagee has an independent remedy to sue on the note or in rem against the mortgaged property to satisfy the debt).

{21} Concluding § 362(c)(3) and 108(c) do not apply to this case, we turn to Bank's argument that, pursuant to Section 37-1-12, the statute of limitations for its claim for the accelerated balance as of October 7, 2009, was tolled during the periods in which Homeowners' three bankruptcies were pending in federal bankruptcy court as a result of § 362(a) automatic stays.

{22} Homeowners' respond, in pertinent part, that "[e]ven if this Court reads Section 37-1-12 as tolling the time in which the bankruptcy stay was in effect, . . . the Bank may not toll the 58 days of the first bankruptcy because the [f]irst [f]oreclosure [l]awsuit, which was filed prior to the first bankruptcy, was pending during the first bankruptcy." In support, Homeowners' cite *Butler v. Deutsche Morgan Grenfell, Inc.*, 2006-NMCA-084, ¶ 18, 140 N.M. 111, 140 P.3d 532 for the proposition that "Section 37-1-12 does not apply unless the 'commencement' of an action is stayed or prevented[.]' "

{23} We assume without deciding that Homeowners argument concerning the applicability of Section 37-1-12 to the automatic stay resulting from their first bankruptcy is correct. Furthermore, we also assume that this rationale also applies to the approximate four-month period in which both Homeowners' second bankruptcy (filed on November 17, 2011) and Bank's first foreclosure actions were concurrently pending in federal bankruptcy and New Mexico state district court prior to Bank's voluntary dismissal of the first foreclosure action on March 20, 2012. However, notwithstanding these assumptions, we conclude sufficient tolling of the limitation period as a result of the stays resulting from Homeowners' second bankruptcy (which remained pending after Bank's voluntary dismissal of the first foreclosure action) and third bankruptcy cases operated to bring Bank's filing of the second foreclosure action within the six-year limitation period as contemplated by Section 37-1-12.

{24} First, under the undisputed facts, 88 days passed between Bank's March 20, 2012 voluntary dismissal of the first foreclosure action and the dismissal of Homeowners' second bankruptcy case on June 15, 2012. Second, 156 days passed between Homeowners' filing of the third bankruptcy case on August 21, 2012 and the bankruptcy court's January 23, 2013 discharge order. It follows, consistent with Section 37-1-12, that the automatic stays pursuant to § 362(a), resulting from Homeowners' second and third bankruptcies, operated to toll the limitation period for Bank's claim for the accelerated balance as of October 7, 2009, for a total of 244 days. The six-year limitation period for the accelerated balance was originally scheduled to run on October 7, 2015; however, based on the 244-day tolling of the limitation period, we conclude that limitation period was pushed to run on May 27, 2016. Therefore, when Bank filed the second foreclosure action on February 22, 2016, 107 days remained under the statute of limitations for Bank to refile its action for the accelerated balance. Accordingly, we conclude that the district court erred in dismissing Bank's entire foreclosure claim as precluded by the statute of limitations.

{25} In so concluding, we briefly address the issue raised by Bank concerning the tolling effect of Bank's 2015 demand letter, which Bank argues should apply to toll the limitation period for an additional thirty days on grounds that Homeowners failed to respond to the argument, constituting a concession of the issue. *See, e.g.*, *State v. Templeton*, 2007-NMCA-108, ¶ 22, 142 N.M. 369, 165 P.3d 1145 (stating that the failure to respond to contentions made in an answer brief is "a concession on the matter"). Based on our conclusion above that Bank's claim for the accelerated balance as of October 7, 2009 was filed within the statute of limitations, determination of this issue is unnecessary. Similarly, based on our conclusion above, we do not address Bank's second argument—that the district court abused its discretion in denying Bank leave to amend the second foreclosure complaint to plead Homeowners' three bankruptcy cases.

CONCLUSION

{26} The district court's order of dismissal is reversed. We remand for further proceedings consistent with this opinion.

{27} IT IS SO ORDERED.
MICHAEL E. VIGIL, Judge
WE CONCUR:
M. MONICA ZAMORA, Judge
JULIE J. VARGAS, Judge

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-056

No. A-1-CA-35812 (filed May 23, 2019)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
SAMMY GARCIA,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SANDOVAL COUNTY
LOUIS P. MCDONALD, District Judge

Certiorari Denied, September 10, 2019, No. S-1-SC-37766.
Released for Publication October 29, 2019.

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Opinion

Julie J. Vargas, Judge.

{1} Defendant appeals his convictions for one count each of child abuse, kidnapping, contributing to the delinquency of a minor, and battery against a household member, as well as two counts of bribery of a witness and four counts of conspiracy. Defendant raises five claims of error: (1) that an expert witness's bolstering testimony amounted to plain error; (2) that there was insufficient evidence to support his convictions; (3) that his conspiracy convictions violate his right to be free from double jeopardy; (4) that he was denied his right to a speedy trial; and (5) that the delay in resolving his appeal violated his due process rights. We conclude that the expert witness's bolstering testimony constitutes plain error, that insufficient evidence exists to support one of Defendant's convictions for bribery of a witness, and that three of Defendant's conspiracy convictions violate double jeopardy. We otherwise find the evidence sufficient to support Defendant's remaining convictions. We conclude that Defendant failed to preserve his speedy trial argument for appellate review, and decline to review that claim for fundamental error. Finally, with respect to Defendant's due process argument, an issue of first impression in this state, we hold that New Mexico recognizes a due process right in the timely resolution of an appeal of right, but conclude, on the record before us, that Defendant failed to make the required showing of prejudice to warrant relief on due process grounds.

FACTUAL BACKGROUND

{2} Victim went to her grandparents' house on Thanksgiving Day in 2003, where many of her family members, including Defendant, Victim's uncle, were gathered. According to Victim's testimony, she was playing outside with a go-cart when a flat tire caused her to enter a shed on the property in search of an air pump. Once inside the shed she encountered Defendant, who grabbed her, threw her onto the floor, held her down, and sexually assaulted her. During the encounter, Defendant's son entered the shed and Defendant held Victim down while Defendant's son sexually assaulted her. Victim was eventually allowed to leave the shed, and subsequently reported the incident to authorities.

{3} Defendant was indicted on twelve counts: one count each of child abuse, kidnapping, contributing to the delinquency of a minor, and battery against a household member, two counts of bribery of a witness,[1] four counts of conspiracy, and two counts of criminal sexual penetration of a minor (CSPM). The jury could not reach a verdict on the CSPM charges, but convicted Defendant of the remaining counts; the district court declared a mistrial on the CSPM charges. The State apparently elected not to retry Defendant on the CSPM charges. Defendant received the basic sentence for each conviction, resulting in a total sentence of thirty-five and one-half years, with seventeen and one-half years suspended.

APPELLATE PROCEDURAL BACKGROUND

{4} Defendant's trial counsel timely filed a notice of appeal on October 26, 2005, and a docketing statement on December 27, 2005. The case was assigned to this Court's general calendar on February 9, 2006, but when no brief in chief was filed, this Court, on its own motion and in accordance with the rules of appellate procedure, issued an order on May 23, 2006, dismissing the appeal but giving counsel leave to file a motion for rehearing within fifteen days. No such rehearing motion was ever filed.

{5} Nearly eight years later, on March 11, 2014, Defendant, filed a habeas petition in the state district court, and through appointed counsel, asserted ineffective assistance of counsel on appeal. Defendant's habeas petition requested that he be granted the right to file a new notice of appeal, as well as the right to file the original docketing statement under a new appellate case number, and that the appellate division of the public defender be appointed to represent him on appeal. Defendant did not assert any due process claim in his habeas petition. On September 2, 2015, the habeas court found that Defendant had demonstrated

[1]While Defendant's indictment refers to Count VIII as a claim for "Bribery of a Witness (Threats-Testimony)," the verdict refers to Count VIII as "Intimidation or Threatening a Witness." We will therefore refer to Count VIII as a claim for intimidation and threatening a witness.

ineffective assistance of appellate counsel and granted Defendant's requested relief. The notice of appeal was filed on October 8, 2015, but apparently due to confusion arising from the habeas court's order, a docketing statement was not filed in this Court until August 16, 2016, along with a motion seeking clarification regarding reinstatement as provided by the habeas court's order. Defense counsel submitted the same docketing statement that was originally submitted with the first notice of appeal; this Court declined to "reinstate" the first appeal, but accepted the original docketing statement under the present case number. After seven extensions of time, Defendant's brief in chief was finally filed on July 21, 2017, and the case was submitted to a panel on May 1, 2018. In November 2018 we requested that our Supreme Court accept certification of this case, given the issue of first impression raised in this appeal. The Supreme Court denied our request in January 2019 and we held oral argument in February 2019.

{6} We reserve further discussion of the facts for our analysis below.

DISCUSSION

{7} Our analysis begins with Defendant's assertion that under the plain error doctrine, he is entitled to a new trial. Because we conclude Defendant is entitled to a new trial on this ground, we consider whether there is sufficient evidence to support Defendant's convictions to determine whether retrial would implicate double jeopardy protections. In the interest of brevity, we combine our analysis of double jeopardy and legal sufficiency with respect to Defendant's conspiracy convictions. Following our sufficiency analysis, we briefly turn to Defendant's speedy trial argument before considering whether appellate delay violates a criminal defendant's right to due process, the parameters of such a due process analysis, and whether Defendant's due process rights were violated in this case.

A. Improperly Admitted Expert Opinion Testimony Was Not Harmless Error

{8} Defendant argues that testimony presented at trial by Rosalia Vialpando, a registered nurse, improperly bolstered Victim's testimony and vouched for Victim's credibility, resulting in plain error that requires reversal. The State concedes that portions of the nurse's testimony were inadmissible, but argues that the admission of those portions does not constitute plain error. The parties also disagree as to whether Defendant preserved this issue, allowing for a reversible error analysis, or failed to preserve it, requiring a plain error analysis. Because we determine that the admission of Vialpando's testimony rose to the level of plain error requiring reversal, we need not address whether the issue was properly preserved.

1. The Expert's Testimony

{9} At trial, Vialpando testified on behalf of the State as an "expert family nurse practitioner with a specialty in child sexual abuse." Defense counsel did not object to the qualification of Vialpando as an expert witness. Vialpando testified about Victim's account of sexual assault at length, repeating many of Victim's statements, and further testified that Victim had identified Defendant and Defendant's son as the individuals who committed the assault. Based on Victim's account of events, Vialpando concluded that "the things that [Victim] said had happened to her had, in fact, happened to her" and that Victim's physical examination, which revealed no physical injuries to Victim's genital area, was consistent with her description of the incident. Defense counsel made no objection to Vialpando's testimony. On cross-examination, defense counsel asked Vialpando questions about what Victim told her and raised issues attempting to draw into question Vialpando's conclusion that Victim had been raped. During redirect, Vialpando was asked to explain what aspects of Victim's account were most "compelling." Defense counsel objected to this line of inquiry, arguing it was beyond the scope of cross-examination; counsel's objection was overruled. Vialpando then went on to provide a lengthy explanation of those statements she found most compelling. For instance, Vialpando testified that she found the amount of detail Victim used in describing the assault to be compelling:

> She told me . . . first of all, that it's on Thanksgiving. . . . The detail—that they needed the hose for the compressor—why would she come up with something like that? She went to the garage, she walked in, she saw [Defendant]. . . . He grabbed the hose, she tried to run out, . . . he grabbed [her] hard by the arm. She doesn't just say he grabbed me or he threw me. [She said,] "He grabbed me hard by my arm and threw me on the floor." He told [her], "Let's make babies." She heard this. This person didn't say, "I'm going to rape you" or "just lie there," he said, "let's make babies." [S]he says he was holding her down and tried to take his pants off too. You can almost see what this child is talking about. . . . I can almost see that whole thing where the child is being held down with one hand and the pants are being taken off with the other hand. . . . That's very detailed. . . . She knows what was happening with each of the hands. It's very detailed. Unless you've experienced it, you would not know.

2. Plain Error Review

{10} We review for plain error in cases raising evidentiary matters in which the asserted error "affected substantial rights," though they were not brought to the attention of the trial judge. *See State v. Lucero*, 1993-NMSC-064, ¶ 13, 116 N.M. 450, 863 P.2d 1071 (noting that "the very point of the rule is to permit review of grave errors in the admission of evidence which have *not* been the subject of a ruling by the trial court because no objection was made at trial" (internal quotation marks and citation omitted)). The plain error rule is to be used sparingly as an exception to a preservation rule designed to encourage efficiency and fairness. *State v. Paiz*, 1999-NMCA-104, ¶ 28, 127 N.M. 776, 987 P.2d 1163. "To find plain error, [we] must be convinced that admission of the testimony constituted an injustice that created grave doubts concerning the validity of the verdict. Further, in determining whether there has been plain error, we must examine the alleged errors in the context of the testimony as a whole." *State v. Montoya*, 2015-NMSC-010, ¶ 46, 345 P.3d 1056 (alternation, omission, internal quotation marks, and citations omitted).

{11} Our Supreme Court has addressed the applicability of the plain error doctrine to the admission of expert testimony bearing directly on the credibility of an accuser in *Lucero*. The expert witness in *Lucero*, a clinical psychologist, recounted statements regarding sexual abuse the accuser made during the evaluation, testified that the accuser had been molested, stated that the defendant was the molester, and opined that the complainant's statements were truthful. 1993-NMSC-064, ¶¶ 5-6, 21. The *Lucero* Court concluded that the expert's testimony commenting directly upon the credibility of the accuser was "extremely prejudicial[,]" stating that while "testimony may be offered to show that the victim suffers from symptoms that are consistent with sexual abuse, it may not be offered to establish that the alleged victim is telling the truth[.]" *Id.* ¶ 15 (internal quotation marks and citation omitted). Concluding that the expert's testimony "naming the perpetrator was

tantamount to saying that the complainant was telling the truth[,]" the *Lucero* Court found the expert's testimony that the accuser's symptoms were caused by sexual abuse impermissible, as such testimony "vouches too much for the credibility of the victim and encroaches too far upon the province of the jury to determine the truthfulness of the witnesses." *Id.* ¶¶ 16-18 (internal quotation marks and citation omitted) (noting that "to allow an expert to testify that the complainant's symptoms were in fact caused by sex abuse is tantamount to allowing the expert to indirectly validate the complainant's credibility, and that is improper"). Turning its attention to the impact that the expert's testimony had on the trial itself, our Supreme Court concluded that the prejudicial effect outweighed any probative value that it might have: "Even though possibly admissible, . . . allowing the expert during direct examination to repeat to the jury the [accuser's] statements, made to the expert during her evaluation, is too prejudicial because it amounts to an indirect comment on the alleged victim's credibility." *Id.* ¶ 19. The admission of the expert's testimony therefore amounted to plain error. *See id.* ¶ 18 ("Determining the complainant's credibility or truthfulness is not a function for an expert in a trial setting, but rather is an issue reserved for the jury."). Finally, because the expert "repeated so many of the complainant's statements regarding the alleged sexual abuse by the defendant and because [the expert] commented directly and indirectly upon the complainant's truthfulness," the *Lucero* Court expressed "grave doubts concerning the validity of the verdict and the fairness of the trial" and concluded that the admission of the expert testimony was not harmless error. *Id.* ¶ 22.

{12} Like the expert in *Lucero*, Vialpando repeatedly commented, both directly and indirectly, upon Victim's truthfulness, identified Defendant as Victim's molester numerous times based solely on Victim's statement of events, and repeated in detail Victim's statements regarding the sexual abuse. We conclude *Lucero* applies to this case, and the admission of the expert testimony was in error.

3. Acquiescence

{13} The State acknowledges the applicability of *Lucero* to this case, and concedes that the admission of Vialpando's now-challenged testimony on redirect was improper and resulted in error. Nonetheless, the State, relying on *State v. Hill*, 2008-NMCA-117, 144 N.M. 775, 192 P.3d 770, argues that the doctrine of plain error should not apply to this case because Defendant acquiesced in the admission of Vialpando's testimony by cross-examining the witness.

{14} In *Hill*, the defendant objected to a single statement made by a lay witness, who testified about nationwide reporting of sexually transmitted diseases. *Id.* ¶ 22. For the first time on appeal, the defendant argued that the witness "exceeded her personal knowledge of the subject matter and, because the [s]tate did not qualify her as an expert, [the testimony] was improperly admitted." *Id.* ¶ 20. Assuming without deciding that the statement was improperly admitted, this Court found that the doctrine of plain error did not apply because "[the d]efendant, instead of objecting to [the witness's] testimony on that ground, chose to cross-examine her on the topic." *Id.* ¶ 22. Under the facts of that case, the Court concluded such a choice constituted waiver of any review of the propriety of the statement on appeal. *Id.*

{15} The State asks us to extend *Hill*'s reach to the present case—where numerous, impermissible statements were elicited by the State during both direct examination and redirect examination—thereby barring plain error review because Defendant exercised his right to cross-examine Vialpando. We decline to do so. Initially, we note that *Hill*'s limitation of the plain error doctrine has never been cited in a published opinion in the eleven years since *Hill*, nor has it been extended beyond the facts of that case. Moreover, nothing in *Hill*'s limited rationale suggests that it should apply in cases such as this, where the State repeatedly elicited prejudicial testimony that amounts to plain error under *Lucero*. Indeed, as *Lucero* aptly observed: "The fact that trial counsel did not preserve these errors for appeal by lodging a proper objection does not avoid review of the issue as plain error." 1993-NMSC-064, ¶ 21. Furthermore, the State's reading of *Hill* would inexplicably pit a defendant's right to cross-examination against his ability to have harmful evidentiary matters reviewed under the plain error rule. *See generally State v. Lopez*, 1996-NMCA-101, ¶ 14, 122 N.M. 459, 926 P.2d 784 ("The right to cross-examination is viewed as the most important element of the right of confrontation. [It] . . . is the principal means for testing the truth and credibility of a witness and is considered critical to insure the integrity of the fact-finding process." (internal quotation marks and citations omitted)). For these reasons, we decline to extend the rationale of *Hill* to this case and instead exercise our discretion to review Vialpando's testimony for plain error. *See* Rule 12-321(B)(2) (b) NMRA (permitting the appellate court in its discretion to review issues involving plain error). Having already concluded that the admission of Vialpando's testimony was error, we examine whether the error was harmless.

4. Harmless Error

{16} Alternatively, the State contends that any error was not harmful to the defense, pointing to the fact that Defendant was not convicted of CSPM and arguing "it is [therefore] not likely that the jury was swayed by inadmissible testimony." (Emphasis omitted.) The State's argument is based on pure conjecture as to the meaning of the jury's verdicts. The only witnesses to the alleged events were Victim, Defendant, and Defendant's son and there was no physical evidence of sexual assault; and as such, witness credibility was a pivotal issue in this case. Given the importance of credibility in the trial, we have grave doubts concerning the fairness of the trial and conclude that the admission of Vialpando's testimony amounted to plain error that was not harmless. *See Lucero*, 1993-NMSC-064, ¶ 22; *see also Montoya*, 2015-NMSC-010, ¶ 46.

{17} Defendant is entitled to reversal of his convictions based on the plain error committed in his trial. Whether the proper remedy is dismissal of the charges or retrial upon remand, however, is dependent on the legal sufficiency of the State's evidence in support of Defendant's convictions at the first trial. *See State v. Consaul*, 2014-NMSC-030, ¶ 41, 332 P.3d 850 ("To avoid any double jeopardy concerns, we review the evidence presented at the first trial to determine whether it was sufficient to warrant a second trial."); *State v. Cabezuela*, 2011-NMSC-041, ¶ 40, 150 N.M. 654, 265 P.3d 705 ("If we find that sufficient evidence was presented at trial to support a conviction, then retrial is not barred." (internal quotation marks and citation omitted)). We therefore consider whether each of Defendant's convictions is supported by sufficient evidence.

B. Sufficiency of the Evidence and Double Jeopardy

{18} An appellate court evaluating whether there was sufficient evidence to support a conviction "must consider all the evidence admitted by the trial court." *State v. Post*, 1989-NMCA-090, ¶ 22, 109 N.M. 177, 783 P.2d 487 (adopting reasoning set forth in *Lockhart v. Nelson*, 488 U.S. 33 (1988)). "If all of the evidence, including the wrongfully admitted evidence, is sufficient, then retrial following appeal is not barred." *Post*, 1989-NMCA-090, ¶¶ 22-23. Appellate courts look to "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. Garcia*, 2011-NMSC-003, ¶ 5, 149 N.M. 185, 246 P.3d 1057 (internal quotation marks and citation omitted). "[S]ubstantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion[.]" *State v. Salgado*, 1999-NMSC-008, ¶ 25, 126 N.M. 691, 974 P.2d 661 (internal quotation marks and citation omitted). We conduct this evaluation using the instructions given to the jury at trial, *State v. Ramos*, 2013-NMSC-031, ¶ 30, 305 P.3d 921, and "view the evidence in the light most favorable to the [s]tate, resolving all conflicts and making all permissible inferences in favor of the jury's verdict." *Consaul*, 2014-NMSC-030, ¶ 42 (internal quotation marks and citation omitted). "It is our duty to determine whether any rational jury could have found the essential facts to establish each element of the crime beyond a reasonable doubt." *Id.* (internal quotation marks and citation omitted).

1. Kidnapping

{19} Defendant argues that the evidence of force underlying his conviction for kidnapping (Count IV) was merely incidental to that presented in support of his alleged CSPM, and that the evidence was therefore insufficient to support his conviction for kidnapping. "Kidnapping" is defined as "the unlawful taking, restraining, transporting or confining of a person, by force" with the intent to inflict a sexual offense on the victim. NMSA Section 1978, § 30-4-1(A)(4) (2003). In enacting our kidnapping statute, "the Legislature did not intend to punish as kidnapping restraints that are merely incidental to another crime." *State v. Trujillo*, 2012-NMCA-112, ¶ 39, 289 P.3d 238. Deciding whether the conduct giving rise to a kidnapping charge is incidental to the conduct leading to another charge requires we consider "whether the restraint or movement increases the culpability of the defendant over and above his culpability for the other crime." *Id.* ¶ 38. This inquiry includes consideration of whether the restraint was longer or greater than necessary to commit the other crime, whether the restraint decreased the defendant's risk of detection or the difficulty associated with committing the crime, and whether the restraint increased the risk of harm or the severity of the assault beyond that inherent to the underlying crime. *Id.* ¶¶ 34, 36, 37, 39; *see also State v. Tapia*, 2015-NMCA-048, ¶ 31, 347 P.3d 738.

{20} According to Victim, she encountered Defendant in an outdoor shed and, upon seeing him, tried to retreat through the shed's open door. Before she could do so, however, Defendant stopped her retreat by grabbing her by the arm, suggesting that they "make babies," and shutting the door to the shed before throwing her to the floor and sexually assaulting her. Based on this evidence, Victim's confinement in the shed was slightly longer than necessary to commit the sexual assault, as Defendant took time to close the shed door and utter a menacing statement to Victim. Defendant's act of closing the door served, among other purposes, to decrease his risk of detection. While it is less clear whether Defendant increased the severity of the assault when he grabbed Victim's arm or closed the door to the shed, the failure to satisfy this condition, alone, does not necessarily lead to a conclusion that Defendant's conduct was incidental to the sexual assault.

{21} Our analysis is intended to encompass the totality of circumstances. *Tapia*, 2015-NMCA-048, ¶ 29. In conducting this analysis, we find it particularly relevant that Victim was attempting to retreat from the shed when Defendant grabbed her and that, through his actions, Defendant prevented her escape. And although some degree of privacy is often sought in incidents of sexual assault, the shed's closed door served a dual purpose—preventing detection and preventing Victim's escape. Victim's association with Defendant was no longer voluntary when Defendant grabbed her. *See State v. Jacobs*, 2000-NMSC-026, ¶ 24, 129 N.M. 448, 10 P.3d 127 ("[T]he key to finding the restraint element in kidnapping, separate from that involved in criminal sexual penetration, is to determine the point at which the physical association between the defendant and the victim was no longer voluntary."). Though we are cognizant of the short time period between Defendant's initial acts and the sexual assault, as well as the confined space in which they occurred, Defendant's actions constituted a completed kidnapping upon preventing Victim's escape, regardless of the sexual assault that followed. *See id.* ¶ 25 (concluding kidnapping was complete before the act of attempted criminal sexual penetration began); *State v. McGuire*, 1990-NMSC-067, ¶ 10, 110 N.M. 304, 795 P.2d 996 ("Once [the] defendant restrained the victim with the requisite intent to hold her for service against her will, he had committed the crime of kidnapping, although the kidnapping continued through the course of [the] defendant's other crimes."); *but see Tapia*, 2015-NMCA-048, ¶ 34 ("[W]hen in the course of committing a crime, a defendant does no more than move the victim around inside the premises in which the victim is already found, the movement generally will not be determined to constitute kidnapping." (alteration, internal quotation marks, and citation omitted)).

{22} Defendant argues that his actions are, as a matter of law, incidental to the underlying sexual assault. As support, Defendant cites to both *Trujillo* and *Tapia*, in which we conducted case-specific analyses and concluded as a matter of law that the kidnapping statute was not intended to encompass the restraints and movements described by the testimony in those cases. *Tapia*, 2015-NMCA-048, ¶¶ 29, 30, 36; *Trujillo*, 2012-NMCA-112, ¶¶ 6, 42. In *Trujillo*, "a momentary grab in the middle of a fight" was insufficient as a matter of law to support a kidnapping conviction. 2012-NMCA-112, ¶ 6. In *Tapia*, a "lack of complexity in the movements and restraints described" caused this Court to conclude that the actions giving rise to the kidnapping conviction—lying on top of the victim during a sexual assault, getting on the bed to commit a sexual assault, making the victim remove clothing, and causing the victim to go to another room in the home—were incidental to the sexual assaults and, as a matter of law, could not support kidnapping convictions. 2015-NMCA-048, ¶¶ 30-32, 36.

{23} This case, unlike *Trujillo* and *Tapia*, presents a more nuanced set of facts in which Defendant not only restrained Victim during the sexual assault, but also thwarted her attempt to escape. *See Trujillo*, 2012-NMCA-112, ¶ 42 (noting that a "more complicated factual scenario" presents a fact-specific inquiry for the jury as to whether a restraint is incidental to another crime). The jury was instructed that the State had to prove that Defendant "restrained or confined [Victim] by force[,]" and that Defendant "intended to hold [Victim] against her will to commit a sexual offense" against her. Drawing upon and distinguishing our holding in *Trujillo*, we conclude that there is sufficient evidence of restraint and confinement, independent from the restraint used during the sexual assault, to support Defendant's kidnapping conviction.

2. Conspiracy

{24} The jury found Defendant guilty of four counts of conspiracy: conspiracy to commit CSPM (Count II), conspiracy to commit kidnapping (Count V), conspiracy to commit intimidation or threatening a witness (Count X), and conspiracy to commit bribery of a witness (Count XI). Defendant challenges the sufficiency of the evidence supporting the latter three conspiracy convictions, arguing that those

convictions also violate double jeopardy, and asks that we vacate all conspiracy convictions except the conviction for conspiracy to commit CSPM. The State argues that the evidence is sufficient to support each conspiracy conviction, but concedes that double jeopardy requires that we vacate Defendant's convictions for conspiracy to commit kidnapping and conspiracy to commit bribery of a witness. We begin by considering the State's concessions, then address Defendant's argument, and conclude with a sufficiency analysis of the sole remaining conspiracy conviction.

{25} Both parties point to *Gallegos*, 2011-NMSC-027, 149 N.M. 704, 254 P.3d 655, as the authority controlling Defendant's double jeopardy claims. In *Gallegos*, our Supreme Court sought to clarify the standard applied in cases containing multiple conspiracy convictions by acknowledging that such an analysis "inevitably presents a double jeopardy question" that, once answered, is then subject to the deferential review afforded in a substantial evidence review. *Id.* ¶¶ 28-29, 43, 50; *see State v. Rodriguez*, 2006-NMSC-018, ¶ 3, 139 N.M. 450, 134 P.3d 737 (recognizing that appellate courts review double jeopardy claims de novo). In beginning its double jeopardy analysis, the *Gallegos* Court relied on the language of the conspiracy statute to reject a definition of conspiracy "that focuses on the criminal objectives of the agreement, i.e., the individual crimes that each combination or agreement sets out to accomplish." 2011-NMSC-027, ¶¶ 51-52 (applying unit of prosecution principles). The Court concluded that by enacting the conspiracy statute, the Legislature created "a rebuttable presumption that multiple crimes are the object of only one, overarching, conspiratorial agreement subject to one, severe punishment." *Id.* ¶ 55. Designating this standard as a "presumption of singularity," the Court explained that the state could overcome this presumption only in "exceptional instances[,]" as "doing so requires the state to carry a heavy burden." *Id.* ¶¶ 55-56. To aid courts in assessing whether the state has met its burden in rebutting the presumption of singularity, *Gallegos* adopted a totality of the circumstances test, which includes consideration of the following factors: the location of the alleged conspiracies, the temporal overlap between the conspiracies, the overlap of personnel between the conspiracies, the overt acts charged, and the role played by the defendant. *See id.* ¶ 42 (taking note of related questions, including "whether there was a common goal among conspirators[,]" "whether the agreement contemplated bringing to pass a continuous result[,]" and "the extent to which the participants overlap in the various dealings" (internal quotation marks and citation omitted)).

{26} Defendant's conviction for conspiracy to commit intimidation or threatening of a witness (Count X) is based on testimony that, just before releasing Victim and in the presence of Defendant's son, Defendant threatened Victim not to tell anyone what had happened. The State then offered testimony that Defendant's son called her later that night and repeated the threat as the basis for the other conspiracy to commit bribery of a witness charge (Count XI). As the State concedes, the conduct that gave rise to the conspiracy to commit bribery of a witness (Count XI), which occurred later on the same day, was likely the result of the then-recent prior agreement. That Defendant's son decided to call Victim and reiterate Defendant's threats regarding secrecy was not tantamount to forming an additional agreement to ensure Victim's silence. *See id.* ¶ 63. The State therefore proffered no evidence to rebut the presumption that the two separate threats, uttered to the same victim on the same day, were the result of only one, overarching conspiratorial agreement. *Id.* ¶ 55. As such, we accept the State's concession that Defendant's conviction for conspiracy to commit bribery of a witness (Count XI) must be vacated.

{27} In order to prove conspiracy to commit CSPM and conspiracy to commit kidnapping, the State relied on testimony that Defendant continued restraining Victim after he sexually assaulted her so that Defendant's son could also sexually assault her. Both of these conspiracy convictions involved the same victim and the same perpetrators, and occurred in the same location during the same time period, without any intervening events. Furthermore, the role Defendant played during the encounter is virtually the same for each conspiracy count. Again, the State did not present any evidence to overcome the presumption of singularity, and we therefore agree that Defendant's conviction for conspiring to commit kidnapping must be vacated.

{28} Applying *Gallegos* to the remaining conspiracy convictions—conspiracy to commit CSPM and conspiracy to commit bribery of a witness—we again consider whether the State provided sufficient proof to rebut the presumption that Defendant entered into only one agreement, thereby taking part in only one conspiracy. *See id.* ¶ 55. We conclude that it has not. The State seeks to distinguish between the purposes of conspiracy to commit CSPM and conspiracy to commit bribery of a witness by arguing that the latter conspiracy in no way furthered the sexual attack that gave rise to the former conspiracy. This distinction is contrary to the reasoning set forth in *Gallegos*: "That the same agreement evolved over time to embrace a . . . new objective . . . did not create a new crime but simply added a new objective to the same criminal combination." *Id.* ¶ 62; *see* NMSA 1978, § 30-28-2(A) (1979) ("Conspiracy consists of knowingly combining with another for the purpose of committing a felony."). The actions of Defendant and Defendant's son were aimed at furthering a single goal or purpose—facilitating the commission of CSPM upon Victim. Agreeing to silence the victim of their previously agreed-upon crime does not create a new agreement, but rather is one aspect of "a larger continuous combination." *Gallegos*, 2011-NMSC-027, ¶ 62. In addition, we find it noteworthy that the State repeatedly defined conspiracy in terms of actions rather than agreements in its closing arguments to the jury. *Gallegos* explicitly rejected such an approach. *See id.* ¶ 52.

{29} Under the facts of this case, Defendant's convictions for multiple conspiracies violate his double jeopardy rights. Based on *Gallegos* and the reasoning set forth above, we accept the State's concession that Defendant's convictions for conspiracy to commit kidnapping and conspiracy to threaten or intimidate a witness must be vacated. We also vacate Defendant's other conviction for conspiracy to commit bribery of a witness. *See State v. Montoya*, 2013-NMSC-020, ¶ 55, 306 P.3d 426 (stating rule requiring, "where one of two otherwise valid convictions must be vacated to avoid violation of double jeopardy protections, we must vacate the conviction carrying the shorter sentence"); *see also* § 30-28-2 (making conspiracy to commit a first-degree felony a second-degree felony, and making a conspiracy to commit a third-degree felony a fourth-degree felony); *compare* NMSA 1978, § 30-24-3(C) (1997) (defining bribery or intimidation of a witness as a third-degree felony), *with* NMSA 1978, § 30-9-11 (2003, amended 2009) (making first-degree criminal sexual penetration, which includes criminal sexual penetration of a minor under 13 years of age, a first-degree felony).

{30} Regarding the sole remaining conspiracy conviction, the jury was instructed that the State was required to prove beyond a reasonable doubt that Defendant "and another person by words or

acts agreed together to commit [CSPM]" and that they intended to commit CSPM. The jury could reasonably conclude that a tacit agreement existed between Defendant and Defendant's son based on testimony that Defendant and Defendant's son acted in concert to sexually assault Victim. *See Gallegos*, 2011-NMSC-027, ¶¶ 42, 45 (acknowledging rule that jury may "infer the existence of an agreement based on the defendant's conduct and surrounding circumstances"). Furthermore, the jury could reasonably conclude that Defendant intended to conspire to commit CSPM based on Victim's testimony that Defendant restrained Victim by pinning her to the floor, with her arms above her head and her legs under his so that Defendant's son could sexually assault her. *See generally State v. Silva*, 2008-NMSC-051, ¶ 18, 144 N.M. 815, 192 P.3d 1192 (acknowledging that specific intent, such as that required for tampering, "is subjective and is almost always inferred from other facts in the case" or "inferred from an overt act of the defendant" (internal quotation marks and citations omitted)). We therefore conclude that the evidence is sufficient to support Defendant's conviction for conspiracy to commit CSPM.

3. Intimidation or Threatening of a Witness (Count VIII)

{31} Defendant argues that the State presented insufficient evidence to support his conviction for intimidation or threatening of a witness (Count VIII). The State did not respond to Defendant's argument. In support of this count, the State relied on testimony elicited from Victim that Defendant's son called her on the telephone after the incident in the shed and threatened her, stating, "[r]emember, if you say anything, I'll get you at school myself." The jury was instructed that in order to find Defendant guilty, it must find that the State proved beyond a reasonable doubt that Victim was "a person likely to become a witness in a judicial proceeding" and that Defendant "knowingly intimidated or threatened [Victim] for the purpose of preventing [her] from testifying to any fact in a judicial proceeding." UJI 14-2402; *see* § 30-24-3. The jury was also instructed that it could find Defendant guilty "even though he himself did not do the acts constituting the crime" if the State proved beyond a reasonable doubt that he "helped, encouraged or caused the crime to be committed." *See State v. Carrasco*, 1997-NMSC-047, ¶ 6, 124 N.M. 64, 946 P.2d 1075 ("A person who aids or abets in the commission of a crime is equally culpable as the principal. Aiding and abetting is not a distinct offense and it carries the same punishment as a principal." (citations omitted)).

{32} The State did not present any evidence that Defendant helped or encouraged Defendant's son to intimidate or threaten Victim, nor did it establish that Defendant requested that Defendant's son place the call to Victim or was even aware that Defendant's son had called Victim. In fact, nothing in the record suggests Defendant had any involvement in placing the call. Based on this evidence, the jury could not have reasonably concluded that Defendant acted in any way to help or encourage Defendant's son to place the phone call to Victim. We therefore conclude that, even viewing the evidence in the light most favorable to the State, the evidence is not sufficient to support Defendant's conviction for intimidation or threatening of a witness (Count VIII).

4. Bribery of a Witness (Count IX)

{33} The jury was instructed that, in order to find Defendant guilty of bribery of a witness (Count IX), the State had to prove beyond a reasonable doubt that Defendant "knowingly intimidated or threatened [Victim]," that Defendant "intended to keep [Victim] from truthfully reporting to a law enforcement officer or any agency of government . . . information relating to the commission of the felony of criminal sexual penetration[.]" UJI 14-2403; *see* § 30-24-3. Victim testified that after the assault, Defendant threw her pants at her, instructed her to put them on, and stated, "remember, if you say anything, I'll get you again." This evidence, viewed in the light most favorable to the State, is sufficient to support Defendant's conviction for bribery of a witness (Count IX).

5. Contributing to the Delinquency of a Minor

{34} The jury was instructed that, in order to find Defendant guilty of contributing to the delinquency of a minor (Count VI), the State had to prove beyond a reasonable doubt that Defendant "caused or encouraged [Defendant's son] to engage in fellatio with [Victim]," that doing so "caused or encouraged the delinquency of [Defendant's son]," and that Defendant's son was under the age of eighteen at the time. UJI 14-601; *see* NMSA 1978 § 30-6-3 (1990). Victim testified that Defendant pinned her to the floor, with her arms above her head and her legs under his, while Defendant's son sat on her chest and sexually assaulted her by putting his penis in her mouth. Victim also testified that at the time of trial, Defendant's son was approximately fourteen years old. This evidence, taken in the light most favorable to the verdict, is sufficient to support Defendant's conviction for contributing to the delinquency of a minor.

6. Battery Against a Household Member

{35} The jury was instructed that, in order to find Defendant guilty of battery against a household member (Count VII), the State had to prove beyond a reasonable doubt that Defendant "intentionally touched or applied force" to Victim in a "rude, insolent or angry manner" and that Victim was a household member. UJI 14-390; *see* NMSA 1978, 30-3-15(A) (2001, amended 2008). Victim testified that Defendant kicked and pushed her. Victim also testified that Defendant is her uncle, and Victim's father testified that Defendant is his brother. Taken in the light most favorable to the State, this evidence is sufficient to support Defendant's conviction for battery against a household member.

7. Child Abuse

{36} The jury was instructed that to convict Defendant of child abuse (Count XII), the State had to prove beyond a reasonable doubt that: (1) "[Defendant] intentionally and without justification caused [Victim] to be placed in a situation which endangered the life or health of [Victim,]" and (2) "[Defendant] acted intentionally or with reckless disregard and without justification." UJI 14-615; *see* NMSA 1978, § 30-6-1(D) (2001, amended 2009). The jury was instructed that in order to find reckless disregard, it had to find that "[Defendant] knew or should have known [that his] conduct created a substantial and foreseeable risk, . . . disregarded that risk[,] and . . . was wholly indifferent to the consequences of the conduct and to the welfare and safety of [Victim.]" UJI 14-615; *see* § 30-6-1(A)(3). The jury was also instructed that the State had to prove that Victim was under the age of eighteen when these events occurred.

{37} According to Victim's testimony, Defendant grabbed her forcefully by the arm, threw her onto the ground, and pushed and kicked her when she stood up. When she testified at trial in 2005, Victim was fourteen years old, and she testified that these events occurred in Algodones, New Mexico on Thanksgiving Day in 2003. Victim's testimony, taken in the light most favorable to the State, is sufficient to support Defendant's conviction for child abuse.

C. Speedy Trial

{38} Turning to Defendant's speedy trial claim based on the delay in bringing his case to trial, we agree with the State's contention that Defendant failed to preserve the issue for appeal. "It is well-settled law that in order to preserve a speedy trial argument for appellate review, the defendant must properly raise it in the lower court and invoke a ruling."

State v. Olivas, 2011-NMCA-030, ¶ 22, 149 N.M. 498, 252 P.3d 722 (alterations, internal quotation marks, and citation omitted). Though Defendant asserted his speedy trial right when his case began in 2003, he never filed a motion to dismiss for violation of his speedy trial rights, and he never sought to invoke a ruling from the district court on that issue. We therefore conclude that the issue of whether the State violated his right to a speedy trial was not preserved. *See Olivas*, 2011-NMCA-030, ¶ 22; *see also State v. Rojo*, 1999-NMSC-001, ¶¶ 49-53, 126 N.M. 438, 971 P.2d 829 (concluding that constitutional speedy trial issue was not preserved where the defendant did not specifically invoke a ruling on the issue and the district court had no occasion to weigh any of the four factors established in *Barker v. Wingo*, 407 U.S. 514, 530-32 (1972)). While unpreserved speedy trial claims can be reviewed for fundamental error at the appellate court's discretion, Defendant has not asked us to review for fundamental error, and we decline to exercise our discretion in this case. *See State v. Lucero*, 1999-NMCA-102, ¶ 45 127 N.M. 672, 986 P.2d 468 (declining to review a claim that the district court improperly commented on the evidence where the issue was not preserved and the defendant did not argue fundamental error on appeal); *see also State v. Siqueiros-Valenzuela*, 2017-NMCA-074, ¶ 8, 404 P.3d 782, (refusing to address arguments that were not made in the district court and no assertion of fundamental error was made on appeal), *cert. denied* ___-NMCERT-___ (No. S-1-SC-36486, July 6, 2017).

D. Due Process and Appellate Delay

{39} Defendant argues that the approximately ten-year period between this Court's dismissal of his appeal and the subsequent reinstatement of the appeal constituted a violation of his right to due process sufficient to warrant reversal of his convictions and dismissal of the indictment. Whether inordinate appellate delay violates a criminal defendant's right to due process is an issue of first impression for our appellate courts.

{40} In New Mexico, a defendant's right to appeal is established by Article VI, Section 2 of the New Mexico Constitution. The United States Supreme Court has made clear that where a state provides a right to appeal, "the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution."[2] *Evitts v. Lucey*, 469 U.S. 387, 393 (1985); *see State v. Ibarra*, 1993-NMCA-040, ¶ 7, 116 N.M. 486, 864 P.2d 302 (New Mexico courts have recognized that the Fourteenth Amendment compels the state to "provide a fair opportunity for criminal defendants to present their contentions within the context of those state procedures"). We now join the majority of jurisdictions in recognizing that due process protects a criminal defendant against inordinate delay in direct appeal proceedings.[3] *See, e.g.*, *United States v. Alston*, 412 A.2d 351, 359 (D.C. 1980) (holding that delay preventing a fair trial after reversal of a conviction implicates due process); *Lopez v. State*, 769 P.2d 1276, 1288-89 (Nev. 1989) (recognizing that "a defendant may be denied due process of law where there is an inordinate delay in the appeal process" resulting in prejudice to the defense); *State v. Hall*, 487 A.2d 166, 171 (Vt. 1984) (indicating that an excessive delay in the appellate process may violate due process upon a sufficient defense showing of prejudice); *see generally State v. Lopez*, 2018-NMCA-002, ¶ 12, 410 P.3d 226 (stating that due process serves "as a protection against exorbitant delays").

1. Approaches to Analyzing Due Process

{41} Although an "undue delay in processing an appeal *may* rise to the level of a due process violation," *State v. Hammonds*, 541 S.E.2d 166, 175 (N.C. Ct. App. 2000) (internal quotation marks and citation omitted), "not every delay in the appeal of a case, even an inordinate one, violates due process[,]" *State v. Crabtree*, 625 S.W.2d 670, 674 (Mo. Ct. App. 1981) (internal quotation marks and citation omitted). *See also United States v. DeLeon*, 444 F.3d 41, 56-57 (1st Cir. 2006) (noting that while "[e]xtreme delay. . . may amount to a due process violation, . . . mere delay, in and of itself" is insufficient to establish a violation (internal quotation marks and citations omitted)). In evaluating whether appellate delay rises to the level of a due process violation, courts have generally taken one of two approaches.

{42} First, although the right at issue is grounded in the due process clause, many courts considering this issue have adopted a modified version of the United States Supreme Court's framework for analyzing alleged violations of a defendant's Sixth Amendment speedy trial rights as set out in *Barker*, 407 U.S. at 530 .[4] *See, e.g.*, *State v. Burton*, 269 P.3d 337, 343 (Wash. Ct. App. 2012) (stating that "[t]he *Barker* factors are relevant to the due process inquiry . . . , bearing in mind that we are analyzing [the defendant's] right to due process, not a right to a speedy appeal"). The stated rationale underpinning this approach is that the *Barker* speedy trial factors "are useful in conducting [the] due process analysis" required, as they provide a "familiar, thorough and practical means of assessing both the fairness and prejudice issues implicated by appellate delay." *Hoang*, 2014 CO 27 ¶ 48 (internal quotation

[2]Defendant makes no argument based on the Equal Protection Clause, and our opinion today does not address whether the Equal Protection Clause offers any protections beyond those encompassed in the Due Process Clause.

[3]Because neither party disputes that there was at least a nine-year and four-month delay, with Defendant arguing that he suffered "a decade of delay," between dismissal of the direct appeal and entry of the second notice of direct appeal, we assume without deciding that this is the relevant time period and that it constitutes an "appellate delay" for purposes of our due process analysis. For reasons discussed below, we need not determine whether the State is responsible for any portion of this delay.

[4]Among the cases applying the *Barker* framework are *Isom v. State*, 497 So. 2d 208, 213 (Ala. Crim. App. 1986) (delay caused by preparation of trial transcript); *In re Christopher S.*, 13 Cal.Rptr.2d 215, 217 (Ct. App. 1992) (delay caused by neglect of state official); *Hoang v. People*, 2014 CO 27, ¶ 48, 323 P.3d 780 (delay in completion of the record on appeal); *Gaines v. Manson*, 481 A.2d 1084, 1095 (Conn. 1984) ("institutionally engendered appellate delays"); *Chatman v. Mancill*, 626 S.E.2d 102, 107-08 (Ga. 2006) (delay attributed to ineffective assistance of appellate counsel); *People v. Sistrunk*, 630 N.E.2d 1213, 1218, 1223 (Ill. App. Ct. 1994) (delay caused by failure to file either a record or briefs in appellate court and subsequent miscommunication between court system and the defendant); *State v. Bussart-Savaloja*, 198 P.3d 163, 167 (Kan. Ct. App. 2008) (delay caused by reasons not evident in appellate record); *State v. Connors*, 679 A.2d 1072, 1075 (Me. 1996) (delay caused by preparation of trial transcript); *Lanier*, 684 So. 2d at 94, 98 (delay resulting from three successive retrials and appeals); *Crabtree*, 625 S.W.2d at 674 (Mo. Ct. App. 1981) (delay caused by the preparation of trial transcripts); *State v. LeFurge*, 535 A.2d 1015, 1018-19 (N.J. Super. Ct. App. Div. 1988) (delay caused by defendant's dilatory filing practices); *State v. Lennon*, 976 P.2d 121, 124 (Wash. Ct. App. 1999) (delay caused by preparation of trial transcript); *Daniel v. State*, 78 P.3d 205, ¶¶ 9, 44 (Wyo. 2003) (delay caused by preparation of trial transcript).

marks and citation omitted); *see also Harris v. Champion*, 15 F.3d 1538, 1559 (10th Cir. 1994) (stating that the *Barker* balancing test "provides an appropriate framework for evaluating whether a defendant's due process right to a timely direct criminal appeal has been violated").

{43} Other courts have declined to apply the *Barker* speedy trial factors and rejected any analogy between the Sixth Amendment speedy trial right and the Fifth Amendment due process right to a timely appeal, instead focusing on due process principles of fundamental fairness and prejudice.[5] The underlying reason these courts reject the *Barker* factors is that the considerations and consequences relevant to speedy trial by and large do not apply to appeals. This point was aptly explained in *Alston*:

> [A defendant's] conviction . . . can be said, in fairness, to rebut the presumption of innocence which underlies the right to bail, and, implicitly, underlies the right to a speedy trial. Thus, in a fundamental sense absent pretrial delay the conviction and sentencing have satisfied the interests of the defendant, as well as the public, in a speedy trial, and the burden of persuasion on appeal has shifted from the state to the defendant. The variety of concerns of a defendant who has been accused but never brought to trial has been dispelled in the case of a defendant who has had the opportunity to stand trial. Thus, judicial consideration of the appeal period does not require the kind of emphasis on delay as such that the Sixth Amendment imposes on the period between arrest and trial. It follows that, once again, there is one, predominant concern when a defendant faces appellate delay: prejudice to the ability to defend against the charge in the event of a second trial.

412 A.2d at 358-59; *see id.* at 357 (noting that Supreme Court has drawn a distinction between a "speedy" and a "fair" trial) (citing *United States v. Lovasco*, 431 U.S. 783 (1977)); *see also State v. Chapple*, 660 P.2d 1208, 1225-26 (Ariz. 1983) (in banc) (adopting approach in *Alston*); *State v. Black*, 798 P.2d 530, 535 (Mont. 1990) (looking to the line of cases originating with *Alston* in adopting approach to due process claims in appellate delay context). Those courts rejecting the application of the *Barker* framework instead look to due process principles of prejudice and fundamental fairness to determine whether a criminal defendant's due process rights have been violated by appellate delay, with the predominant concern being prejudice.[6] *See Hall*, 487 A.2d at 171 ("We agree with those courts which have established a showing of substantial prejudice by the defendant as the underlying criterion or standard.").

{44} Defendant urges us to follow the first approach and analyze his due process rights using the *Barker* factors. We decline to do so and, instead, join those jurisdictions that evaluate a defendant's due process rights in the context of a delayed appeal based on considerations of fairness and prejudice. We find the reasoning of *Alston* and other similar cases persuasive and conclude that the Fifth Amendment right to due process and the Sixth Amendment right to a speedy trial are not sufficiently analogous to warrant application of the *Barker* framework to due process claims arising from appellate delay. Moreover, our approach here today is consistent with prior New Mexico case law addressing delay that falls outside the protections of the Sixth Amendment but within the Due Process Clause. *See, e.g., Lopez*, 2018-NMCA-002, ¶ 14 (adopting the *Lovasco*, 431 U.S. 783, due process framework in evaluating sentencing delay, looking to the reasons for the delay and the prejudice the defendant has suffered as a result of the delay); *see also Gonzales v. State*, 1991-NMSC-015, ¶¶ 3, 6, 111 N.M. 363, 805 P.2d 630 (adopting a two-prong test requiring a defendant to prove prejudice and intentional delay by the state in cases involving preaccusation delay and citing with approval this Court's approach in distinguishing between due process and speedy trial analyses); *State v. Grissom*, 1987-NMCA-123, ¶¶ 53-55, 106 N.M. 555, 746 P.2d 661 (applying distinct analyses to the defendant's speedy trial and due process claims and requiring showing of "actual prejudice" under due process analysis); *see also Salandre v. State*, 1991-NMSC-016, ¶ 12 n.1, 111 N.M. 422, 806 P.2d 562 ("The due process guarantees examined in *Gonzales* are to be distinguished from the [S]ixth [A]mendment speedy trial rights discussed in this opinion."). Our due process cases, similar to the *Alston* line of cases, emphasize the importance of a showing of prejudice in establishing a due process violation. *Compare Alston*, 412 A.2d at 359 (noting that prejudice is the "predominant concern when a defendant faces appellate delay"), *with Lopez*, 2018-NMCA-002, ¶ 14 (stating that "proof of prejudice is generally a necessary but not a sufficient element of a due process claim" (alteration, internal quotation marks, and citations omitted)). We see no reason to deviate from our well-established approach in the due process realm.

{45} Finally, in adopting the appropriate due process standard in cases involving appellate delay, we are mindful of the need to provide courts with flexibility to fashion a remedy for violations of

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[5] *See, e.g., Alston*, 412 A.2d at 356-57 (concluding that "Sixth Amendment does not apply to post-conviction appellate delay"); *DeLeon*, 444 F.3d at 58 (rejecting any "direct analogy made to tests involving the Sixth Amendment speedy trial right"); *Lopez*, 769 P.2d at 1289 (reasoning that "[t]he purposes of the Sixth Amendment . . . do not apply in the context of an appellate proceeding where the accused has already been convicted of an offense" (internal quotation marks and citation omitted)); *State v. Walker*, 667 A.2d 1242, 1246 (R.I. 1995) (declining to apply *Barker* test and expand the applicability of a speedy trial right to delay appellate proceedings); *State v. Lagerquist*, 176 S.E.2d at 141-42 (S.C. 1970) (concluding "the right to a speedy and public trial . . . does not include an [a]ppeal"); *cf. State v. Adkins*, 725 S.W.2d 660, 664 (Tenn. 1987) (concluding speedy trial is inapplicable where accused has already been convicted, but declining to weigh in on whether delay can give rise to a due process claim).

[6] *See, e.g., Alston*, 412 A.2d at 356-57 (stating that "from a due process perspective, the one, indispensable concern during an appeal period is prejudice, since the focus shifts from a 'speedy' to a 'fair' trial"); *see also Chapple*, 660 P.2d at 1225 (applying reasoning set forth in Alston); *see also DeLeon*, 444 F.3d at 57-58 (rejecting any "direct analogy made to tests involving the Sixth Amendment speedy trial right" in favor of a "threshold requirement" that the defendant make a showing that prejudice "render[s] the proceedings fundamentally unfair" (internal quotation marks and citation omitted)); *Black*, 798 P.2d at 535 (rejecting *Barker* factors and stating, "[p]rejudice to the defendant is the sole determining factor in assessing whether a defendant was given a fair and meaningful appeal"); *Lopez*, 769 P.2d at 1289 (reasoning that "[t]he purposes of the Sixth Amendment . . . do not apply in the context of an appellate proceeding where the accused has already been convicted of an offense" and looking instead to "due process questions of fairness and prejudice"); *Hall*, 487 A.2d at 171 (declining to adopt *Barker* test, instead requiring "a showing of substantial prejudice").

what has been recognized as a flexible right. *See State ex rel. Torrez v. Whitaker*, 2018-NMSC-005, ¶¶ 87, 91, 410 P.3d 201 (recognizing that due process is necessarily a "malleable principle which must be molded to the particular situation" and characterizing it as a right that "calls for such procedural protections as the particular situation demands" (internal quotation marks and citation omitted)). Adherence to the *Alston* line of cases promotes that goal, while allowing courts to best determine "whether the action complained of violates those fundamental conceptions of justice which lie at the base of civil and political institutions, and which define the community's sense of fair play and decency." *Lopez*, 2018-NMCA-002, ¶ 13 (internal quotation marks and citation omitted). "Because each case revolves around a unique set of facts, consideration of the facts and circumstances of each case must be evaluated to determine whether that particular defendant has been afforded a fair and meaningful appeal." *Black*, 798 P.2d at 535 (internal quotation marks and citation omitted); *see generally State v. Gonzales*, 1990-NMCA-040, ¶ 25, 110 N.M. 218, 794 P.2d 361 ("To accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case.") (internal quotation marks and citation omitted). Having articulated the governing due process standard, our next step is to examine the facts and circumstances of this case to determine whether the appellate delay resulted in a violation of Defendant's due process rights.

2. Defendant's Due Process Claim

{46} Utilizing the due process framework set out in the *Alston* line of cases, we consider whether Defendant's due process rights were violated when his appeal was delayed as a result of his counsel's failure to file a brief in chief, resulting in the dismissal and eventual reinstatement of his appeal. In order to determine whether a given appellate delay violates due process, an appellate court "must (1) evaluate the impact of the appeal period on the appellant. If the impact has been prejudicial, the court shall (2) decide whether the relationship between (a) the nature and severity of the prejudice and (b) the government's alleged responsibility for it by delaying the appeal, warrants dismissal of the information or indictment under the Fifth Amendment." *Alston*, 412 A.2d at 359 (footnote omitted) (citing *Lovasco*, 431 U.S. at 789-90, among other authorities). Thus, we begin by addressing prejudice, the predominant concern of our due process analysis. There are two potential forms of prejudice that courts evaluating appellate delay commonly consider: (1) prejudice to a defendant's ability to assert his or her arguments on appeal, and (2) prejudice to a defendant's right to defend him or herself in the event of retrial or resentencing. *See Alston,* 412 A.2d at 359; *see also Chapple*, 660 P.2d at 1226; *Lagerquist*, 176 S.E.2d at 143.

{47} Defendant makes no claim that his ability to assert arguments on appeal has in any way been prejudiced, and, to the contrary, he has successfully advanced meritorious arguments in this appeal. *See Lagerquist*, 176 S.E.2d at 143 ("Although delayed, there is no showing that the appeal upon the merits cannot be just as effectively prosecuted now as earlier."). Further, Defendant has made no argument pertaining to his ability to defend himself on retrial. Instead, Defendant argues through counsel that he has experienced undue anxiety and oppressive incarceration. Assuming, without deciding, that these are appropriate considerations in our due process analysis, Defendant's argument is insufficient to establish prejudice. *See DeLeon*, 444 F.3d at 59 ("A defendant who has been convicted of a crime no longer enjoys a presumption of innocence, and so his incarceration pending appeal cannot itself be said to be 'oppressive.' " (internal quotation marks and citations omitted)); *Lopez*, 769 P.2d at 1289 ("[A] defendant's anxiety during post-conviction incarceration does not violate due process." (citing *Chapple*, 660 P.2d at 1226; *Alston*, 412 A.2d at 359)). "[T]he showing of prejudice must be based on concrete, practical considerations, rather than vague speculation unsupported by the facts." *Hall*, 487 A.2d at 171. "Mere anxiety concerning the outcome of the appeal, without more, is not sufficient." *Id.* Likewise, "an appellant must distinguish himself or herself from any other prisoner victorious on appeal in order to demonstrate that the extension of his or her incarceration through delay was so oppressive as to warrant the setting aside of an indictment." *United States v. Mohawk*, 20 F.3d 1480, 1486 (9th Cir. 1994). Assuming further that Defendant's claim of oppressive incarceration is strengthened by the fact that he has meritorious claims on appeal, that claim must nonetheless fail in the absence of any showing that "his incarceration [was] any more oppressive than that of any other prisoner who has succeeded on appeal." *Id.* (concluding that ten years of incarceration was not determinative of prejudice issue).

{48} Based on the record before us, we are unable to conclude that Defendant suffered prejudice from the delay of his appeal.[7] *See In re Ernesto M., Jr.*, 1996-NMCA-039, ¶ 10, 121 N.M. 562, 915 P.2d 318 (considering prejudice in the context of a habeas proceeding and noting "[a]n assertion of prejudice is not a showing of prejudice"); *People v. Cousart*, 444 N.E.2d 971, 975 (N.Y. 1982) ("This court cannot assume, without the benefit of a record compiled at . . . a hearing or at the retrial, that any prejudice did result."); *Mohawk*, 20 F.3d at 1486 (concluding that mere speculation as to prejudice carries no weight). We therefore need not undertake the remainder of the due process analysis to determine that Defendant is not entitled to dismissal of the entire indictment on due process grounds.

4. State Due Process

{49} Defendant argues that, should we conclude that the Federal Constitution does not provide for dismissal of the charges against him, then we should dismiss the charges against him "under Article II, [Sections] 13 and 18 of the New Mexico Constitution[.]" Our law is well-settled that any divergence under state Constitutional law from Federal Constitutional precedent must be for one of three reasons: the federal analysis is flawed, there are structural differences between state and federal government, or there are distinctive state characteristics. *State v. Gomez*, 1997-NMSC-006, ¶ 19, 122 N.M. 777, 932 P.2d 1.

{50} Defendant contends Article II, Sections 13 and 18 are structurally different from their federal counterparts because they express "a stronger interest

[7]We note that Defendant received the remedy he was entitled to under the Sixth Amendment's right to effective assistance of counsel for appellate counsel's failure to perfect his original appeal. *See State v. Lope*, 2015-NMCA-011, ¶ 9, 343 P.3d 186 (extending the conclusive presumption of ineffective assistance of counsel found in *State v. Duran*, 1986-NMCA-125, ¶¶ 4-6, 105 N.M. 231, 731 P.2d 374, to case where appeal was dismissed due to attorney's inaction and permitting appeal be reinstated); *State v. Robles*, No. 30,118, 2010 WL 4550921, at *1 (N.M. Ct. App. July 19, 2010) ("[B]ased on *Duran*, the remedy for ineffective assistance of counsel in perfecting an appeal is not reversal of the defendant's convictions, but allowing the appeal to go forward."). Whether Defendant is entitled to additional relief under the Due Process Clause for appellate delay when that delay was occasioned by ineffective assistance of appellate counsel is a question we need not resolve today as Defendant has failed to establish a due process violation.

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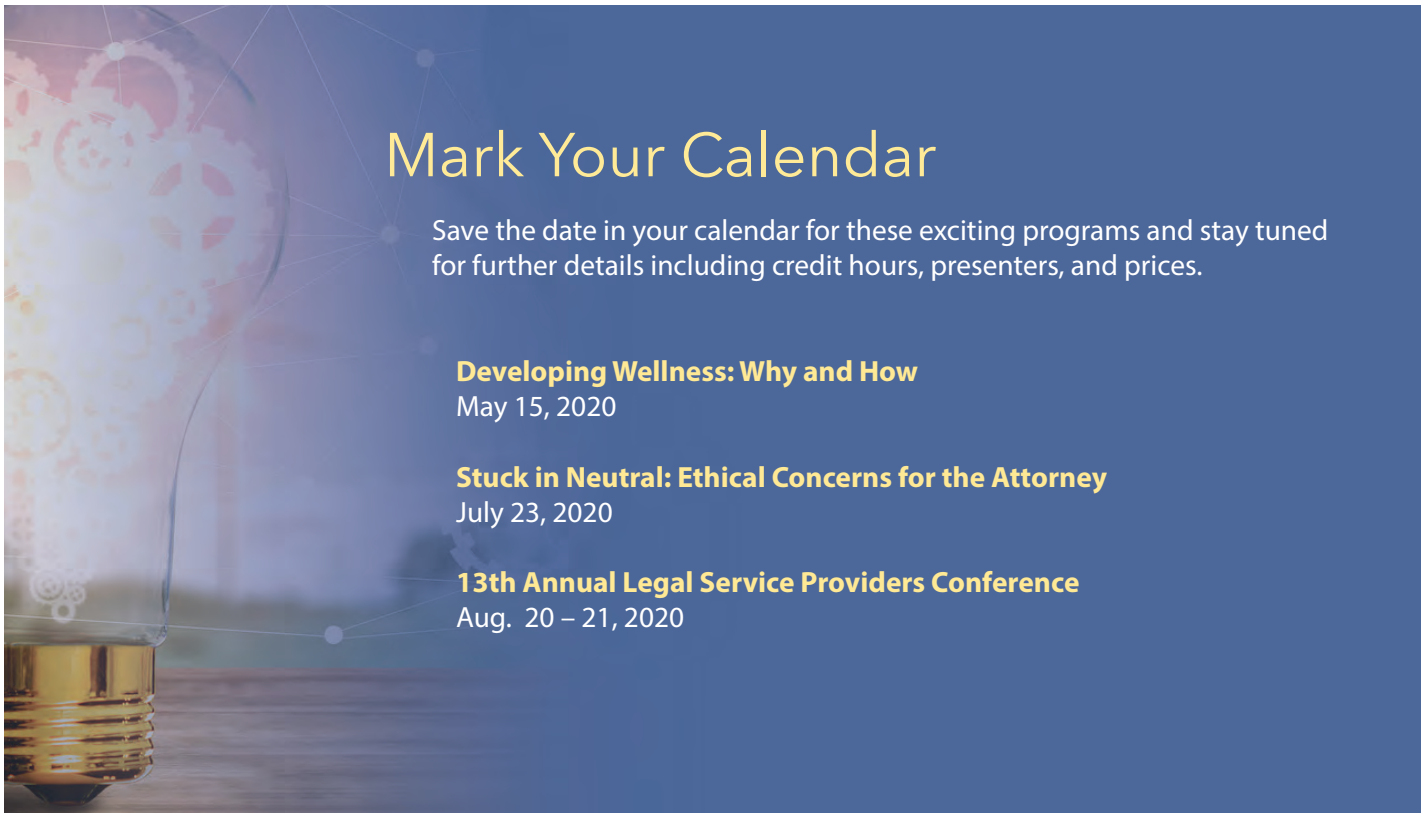

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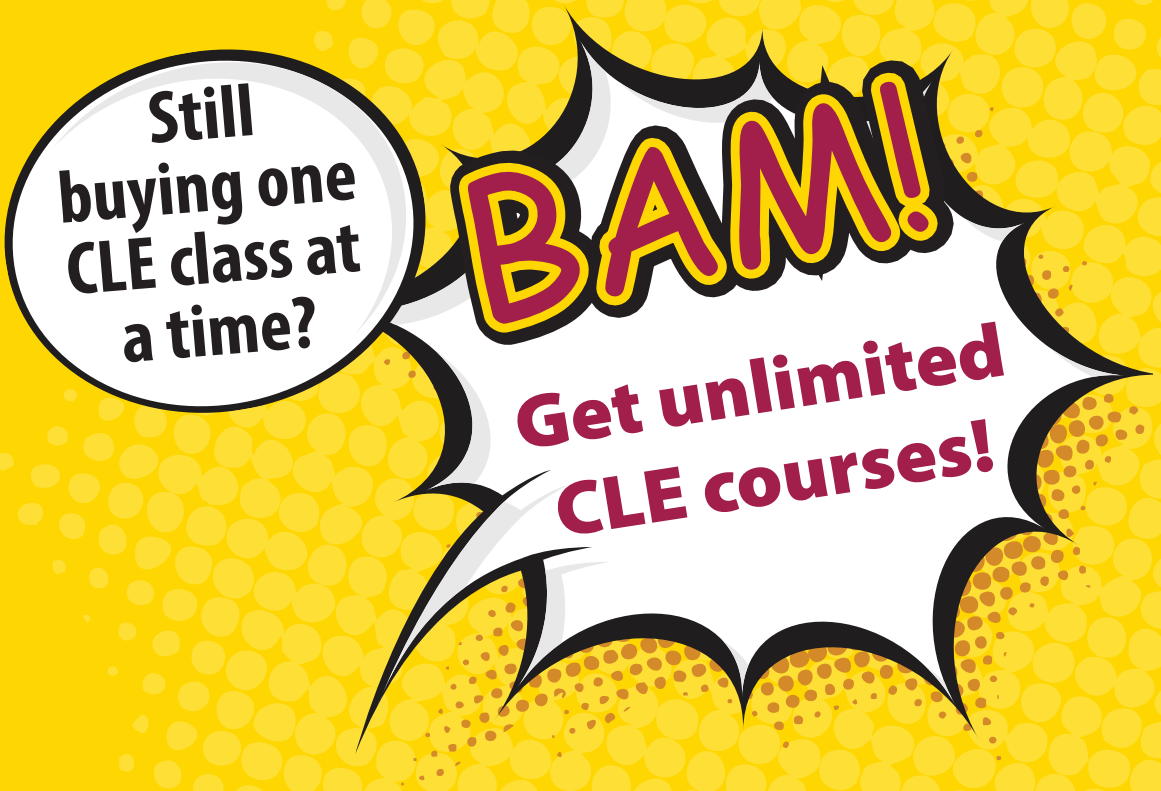

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in preventing oppressive incarceration pending appeal," citing to *Montoya v. Ulibarri*, 2007-NMSC-035, 142 N.M. 89, 163 P.3d 476. Defendant, however, overstates our Supreme Court's holding in *Montoya*. While *Montoya* acknowledged that the cruel and unusual punishment prohibition of Article II, Section 13 and the due process provisions of Article II, Section 18 of our State Constitution have been interpreted to provide some additional protection as compared to their federal counterparts, 2007-NMSC-035, ¶¶ 22-23, it did so in the limited context of a habeas petitioner's right to assert a claim of actual innocence. *See id.* ¶ 23("We conclude that the conviction, incarceration, or execution of an innocent person violates all notions of fundamental fairness implicit within the due process provision of our state Constitution. . . . [A] habeas petitioner must be permitted to assert a claim of actual innocence in his habeas petition"). Nothing in *Montoya* supports Defendant's assertion that structural differences between our State Constitution and the Federal Constitution reflect a heightened state interest in "preventing oppressive incarceration pending appeal" than that expressed under federal law. Nor does Defendant cite to any authority supporting the notion that a showing of prejudice, as articulated above and required under the federal analysis, is unnecessary under a state constitutional analysis. We therefore need not further address whether the New Mexico Constitution provides greater protections than its federal counterpart. *See State v. Vigil-Giron*, 2014-NMCA-069, ¶ 60, 327 P.3d 1129 ("[A]ppellate courts will not consider an issue if no authority is cited in support of the issue and that, given no cited authority, we assume no such authority exists."); *see also State v. Guerra*, 2012-NMSC-014, ¶ 21, 278 P.3d 1031 (explaining that appellate courts are under no obligation to review unclear or undeveloped arguments).

{51} Defendant additionally argues that federal law is flawed because it finds no distinction between one who prevails on appeal "despite unconstitutional delay" and one who prevails on appeal without such a delay. Defendant, however, has failed to develop this argument, and we will not do so on his behalf. *See Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 70, 309 P.3d 53 ("We will not review unclear arguments, or guess at what a party's arguments might be." (alteration, internal quotation marks, and citation omitted)). We find no basis for the dismissal of the charges against Defendant under our State Constitution.

5. Request for Remand

{52} As a final matter, we decline Defendant's request to remand this case to the district court for the purpose of allowing him to develop facts relevant to the issue of prejudice. We do not believe remand to be a prudent course in the circumstances of this case, particularly in view of the delay that has already occurred and Defendant's success in obtaining a retrial. We are not, however, indifferent to Defendant's unique position and the procedural peculiarities of this case that may have impacted his ability to develop a factual record as to prejudice. As such, our decision today should not be read to foreclose the possibility that Defendant—upon discovery, for example, of facts or circumstances impairing his ability to prepare a defense upon retrial—may advance a due process argument before the district court on remand.[8] *See, e.g.*, *United States v. Marion*, 404 U.S. 307, 326 (1971) (reversing dismissal of indictment based on preaccusation delay because actual prejudice had not been established, but recognizing that such prejudice may be demonstrated at trial); *Lanier v. State*, 684 So. 2d 93, 100 (Miss. 1996) ("On remand, since [the c]ourt has found other reversible error, [the defendant] shall be allowed to raise the issue that his ability to defend himself has been prejudiced."). At this juncture, however, Defendant is entitled only to the relief warranted by those arguments we have found persuasive—namely, reversal and dismissal with respect to the convictions we have identified and retrial on the remaining convictions. *See State ex rel. Mastrian v. Tahash*, 152 N.W.2d 786, 312-13 (Minn. 1967) ("[T]he remedy is in correction of the error. . . . What [the defendant] rightly seeks is adequate and effective appellate review upon the merits of his original conviction, and that he will now have.").

CONCLUSION

{53} We remand this matter to the district court with instructions to vacate Defendant's convictions for conspiracy to commit kidnapping (Count V), intimidation or threatening a witness (Count VIII), conspiracy to commit intimidation or threatening a witness (Count X), and conspiracy to commit bribery of a witness (Count XI), and to conduct further proceedings consistent with this opinion.

{54} IT IS SO ORDERED.
JULIE J. VARGAS, Judge

WE CONCUR:
M. MONICA ZAMORA, Chief Judge
JENNIFER L. ATTREP, Judge

[8]We emphasize that nothing in this opinion is intended to suggest or prescribe any potential remedy or remedies in the event a due process violation resulting in prejudice to Defendant is shown upon remand.

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-057
No. A-1-CA-35470 (filed June 13, 2019)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
MANUEL FRANCO,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY
LISA B. RILEY, District Judge

Certiorari Denied, August 8, 2019, No. S-1-SC-37817.
Released for Publication October 29, 2019.

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Opinion

Kristina Bogardus, Judge.

{1} Defendant appeals his conviction, following a bench trial, of eight counts of sexual exploitation of children (distribution), contrary to NMSA 1978, Section 30-6A-3(B) (2007, amended 2016),[1] a crime commonly referred to as distribution of child pornography. On appeal, Defendant advances two arguments: (1) there was insufficient evidence to support his convictions for distribution; and (2) his convictions of multiple counts of distribution violate double jeopardy. Agreeing with Defendant's double jeopardy argument, we remand to the district court to vacate seven of the eight counts of distribution. We otherwise affirm.

BACKGROUND

{2} Defendant's charges stem from his use of Ares, a peer-to-peer, file-sharing network, to access child pornography. The evidence at trial established the following. Peer-to-peer, file-sharing networks allow people to share files with others on the same network. Most of these networks, including Ares, operate on the same protocols and principles. As one of the State's witnesses testified, "To get, you have to give." While anything can be shared on these networks, they are also used to access child pornography because the networks, historically, have been subject to little oversight. More recently, law enforcement has developed software to monitor the networks.

{3} Qualified as an expert in peer-to-peer investigations, Special Agent Owen Peña with the New Mexico Internet Crimes Against Children Task Force testified that he uses Roundup, a software program, in the course of his investigations. Within the Roundup program, there are different tools that monitor different networks. The program identifies Internet Protocol (IP) addresses that have files of interest, which are suspected to contain child pornography, saved in their shared folders. The files of interest are identified by hash values,[2] which are equivalent to digital fingerprints in the sense that no two files can have the same hash value. Once an IP address with a shared folder containing a file of interest is identified, the Roundup program automatically attempts to connect to the IP address. Once it connects, the program browses and downloads all files contained in the shared folder. Unlike a typical peer-to-peer program that downloads a file from multiple sources at the same time, the Roundup program used by Agent Peña only downloads from a single source—the identified IP address.

{4} On August 10, 2013, Agent Peña's program identified an IP address that had files of interest in its shared folder, and the program downloaded eight files from the identified IP address. Upon review, Agent Peña confirmed the downloaded files contained child pornography. Agent Peña created a disk containing the downloaded files and all files generated by his program. Agent Peña determined that the physical address associated with the IP address was located in Loving, New Mexico, and that the internet service at that IP address was being paid for by a "Manuel Franco."

{5} Agent Peña contacted Detective Sergeant Blaine Rennie with the Carlsbad Police Department to advise him of the physical address associated with the IP address. Agent Peña also sent Sergeant Rennie the disk he created. Sergeant Rennie confirmed that the identified physical address was within his jurisdiction and that the images appearing on the disk contained child pornography. Sergeant Rennie then obtained a search warrant for the physical address.

{6} When law enforcement officers executed the search warrant at the residence associated with the IP address, Defendant and his mother were present. Law enforcement seized multiple items, including a desktop computer, laptop computer, and hard drive, which were sent to the Regional Computer Forensics Lab for analysis.

{7} Forensic analysis revealed that more than one of the seized items contained files that matched the hash values provided by Agent Peña. Between 250 and 300 other files that matched hash

[1]Defendant was also convicted of one count of sexual exploitation of children (possession), contrary to Section 30-6A-3(A). Defendant did not appeal this conviction, and we do not discuss it further.

[2]Witnesses and trial counsel used the terms "SHA-1 value," "SHA value," and "hash value" interchangeably throughout trial. For clarity and consistency, we use "hash value" for purposes of this opinion.

values for known child pornography were identified on the items taken from the residence. The forensic analysis also identified a folder containing Ares, the peer-to-peer, file-sharing network that Agent Peña's program connected through, as well as a number of other peer-to-peer, file-sharing networks. After the forensic analysis found thousands of images consistent with child pornography, Sergeant Rennie advised that it was not necessary to identify any more images. On several of the seized items, the registered owner was identified as "Manny" and the Windows Registry for one of the items showed "Manny Franco." The defense stipulated that the identified files were child pornography and that the files came from Defendant's computers.

{8} During the search pursuant to the warrant, Defendant indicated he believed the search warrant was "for pictures[,]" and agreed to go to the police station to discuss the matter further. At the police station, Defendant expressed familiarity with peer-to-peer networks and reported he had been searching for child pornography for over five years. Defendant admitted to possessing child pornography in his shared file, but denied distributing child pornography. Defendant stated, "But, when I'm on there, when I'm connected, it's not for days or whatever. It's more like an hour or two or whatever. Then I turn it off." Defendant explained, "I'm not trying to distribute, but I'm sharing."

{9} Defendant did not testify at trial, but the defense did present a witness qualified as an expert in computer forensics, Thomas Blog. Mr. Blog testified that, in preparing for this matter, he focused on the operation of the Ares program from the user's perspective. Mr. Blog reported that there are two settings that are especially relevant: (1) a default setting to start Ares when Windows starts; and (2) a default setting to not exit Ares when the program's close button is clicked. Mr. Blog explained that although an Ares user can turn off sharing, it does no good because the program automatically defaults back to sharing when it restarts.

{10} Defendant argued that the passive act of not changing settings to turn off sharing was insufficient for the fact-finder to conclude, beyond a reasonable doubt, that he "intentionally distributed" child pornography as required by Section 30-6A-3(B).[3] Unpersuaded, the district court found Defendant guilty of all charged counts.

DISCUSSION

I. Substantial Evidence Supported Defendant's Convictions for Intentional Distribution of Child Pornography

{11} Defendant contends that the evidence presented at trial was insufficient to support his convictions for distribution of child pornography. To the extent that Defendant's argument requires us to interpret the distribution of child pornography statute, "that presents a question of law which is reviewed de novo on appeal." *State v. Chavez*, 2009-NMSC-035, ¶ 10, 146 N.M. 434, 211 P.3d 891. "In interpreting a statute, our primary objective is to give effect to the Legislature's intent." *State v. Trujillo*, 2009-NMSC-012, ¶ 11, 146 N.M. 14, 206 P.3d 125. "In discerning legislative intent, we look first to the language used and the plain meaning of that language." *Id.* "[W]hen a statute contains clear and unambiguous language, we will heed that language and refrain from further statutory interpretation." *Id.* "After reviewing the statutory standard, we apply a substantial evidence standard to review the sufficiency of the evidence at trial." *Chavez*, 2009-NMSC-035, ¶ 11.

{12} In relevant part, the distribution of child pornography statute provides that

> [i]t is unlawful for a person to intentionally distribute 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.

Section 30-6A-3(B). In reaching its decision, the district court determined that general criminal intent, *see* UJI 14-141 NMRA, was sufficient to establish that Defendant "intentionally distributed" child pornography under Section 30-6A-3(B).

{13} Our appellate courts have not addressed the intent necessary to sustain a conviction for intentional distribution of child pornography under Section 30-6A-3(B). Defendant urges this Court to adopt the analysis found in *State v. Granillo*, 2016-NMCA-094, 384 P.3d 1121, and determine that general criminal intent is insufficient to convict under the statute. The State responds that general criminal intent suffices and that the evidence at trial proved beyond a reasonable doubt that Defendant acted with the requisite intent. For the following reasons, we conclude the analysis in *Granillo* is not applicable to the statute at issue in this case and that general criminal intent is sufficient to convict under Section 30-6A-3(B).

{14} In *Granillo*, 2016-NMCA-094, ¶ 1, this Court construed the mens rea for the crime of intentional child abuse by endangerment, as prohibited by NMSA 1978, Section 30-6-1(D)(1) (2009). Under that statute, "[t]he Legislature established three specific mental states by which a person may commit child abuse by endangerment: intentionally, knowingly, and recklessly." *Granillo*, 2016-NMCA-094, ¶ 13. "[The d]efendant was charged only with intentional child abuse by endangerment." *Id.* Noting that the statute did not define "intentionally," this Court described the confusion that has arisen from the common-law classification of crimes as requiring either "specific intent" or "general intent." *Id.* ¶¶ 14-15. We then looked to the Model Penal Code, which provided an alternative to the common-law dichotomy by defining "four specific culpable states of mind: purposely, knowingly, recklessly, and negligently." *Id.* ¶ 15.

{15} This Court reasoned that the tiered mens rea structure of Section 30-6-1(D)(1) "leans away from the common law approach, and instead, is more consistent with the approach of the Model Penal Code." *Granillo*, 2016-NMCA-094, ¶ 15. Under the Model Penal Code, "[a] person acts purposely (intentionally) . . . if it is the person's conscious object to engage in conduct of that nature or to cause such a result." *Id.* ¶ 16 (internal quotation marks and citation omitted). Based on that definition, this Court looked to the social harm targeted by the statute and concluded that the proscribed social harm was not conduct but a result—the endangering of a child. *Id.* ¶ 17. Therefore,

> because the Legislature has provided heightened mens reas in a tiered structure, the definitions of an intentional mental state from the Model Penal Code and other jurisdictions require a conscious objective to cause the proscribed social harm, and the social harm proscribed by the Legislature is the result of endangering a child, we [held] that the mens rea for intentional child abuse by endangerment requires a conscious objective to endanger a child.

Id. ¶ 21.

{16} Unlike the child abuse by endangerment statute, the Legislature has not provided a tiered mens rea in Section

[3]All references to Section 30-6A-3 in this opinion are to the 2007 version of the statute unless otherwise noted.

30-6A-3(B). Therefore, we cannot say that the structure of Section 30-6A-3(B) "leans away from the common law approach." *Granillo*, 2016-NMCA-094, ¶ 15. For that reason, we do not believe *Granillo*'s analysis is controlling here. Rather, under the common law,

> [w]hen the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a further consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be general criminal intent. When the definition refers to [the] defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent.

State v. Bender, 1978-NMSC-044, ¶ 7, 91 N.M. 670, 579 P.2d 796 (internal quotation marks and citation omitted). Here, the statute defining the crime of distribution of child pornography only describes a particular act and does not include an intent to do a further act or achieve a further consequence. Therefore, we hold that Section 30-6A-3(B) requires only general criminal intent—"purposely do[ing] an act which the law declares to be a crime." UJI 14-141.

{17} Our conclusion is consistent with our analyses of other statutes that also use "intentionally." For example, in *State v. Wilson*, 2010-NMCA-018, ¶¶ 6-13, 147 N.M. 706, 228 P.3d 490, we analyzed the sufficiency of the evidence supporting a conviction under NMSA 1978, Section 30-31-20(B) (2006), which makes it a crime to "intentionally traffic" a controlled substance. We stated, " 'Intentional' refers to general criminal intent, the requirement that a defendant generally intend to commit the act." *Wilson*, 2010-NMCA-018, ¶ 11 (citing UJI 14-141).

{18} Similarly, in *State v. Haar*, 1990-NMCA-076, ¶¶ 12-14, 110 N.M. 517, 797 P.2d 306, we analyzed the sufficiency of the evidence supporting a conviction under NMSA 1978, Section 30-15-1 (1963), which defines criminal damage to property as "intentionally damaging any real or personal property of another without the consent of the owner of the property." We concluded that because "the subject statute describes a particular act, without regard to intent to do anything further, all that is required is a general intent to do the proscribed act." *Haar*, 1990-NMCA-076, ¶ 12.

{19} We reached the same conclusion in *State v. Romero*, 1985-NMCA-096, ¶¶ 5-20, 103 N.M. 532, 710 P.2d 99, wherein we analyzed NMSA 1978, Section 30-9-14 (1975, amended 1996), which defined indecent exposure as "a person knowingly and intentionally exposing his primary genital area to public view." We noted that "it is not necessary that the exposure be made with the intent that some particular person see it, but only that the exposure be made where it is subject to being viewed by a person or persons which the law seeks to protect from exposure to such lewd conduct." *Romero*, 1985-NMCA-096, ¶ 16.

{20} Although Defendant's sole sufficiency argument is premised on the notion that general criminal intent is legally insufficient to support a conviction under Section 30-6A-3(B), which we have rejected, we nevertheless address the sufficiency of the evidence of Defendant's intent. "The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Montoya*, 2015-NMSC-010, ¶ 52, 345 P.3d 1056 (internal quotation marks and citation omitted). "[S]ubstantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion[.]" *State v. Salgado*, 1999-NMSC-008, ¶ 25, 126 N.M. 691, 974 P.2d 661 (internal quotation marks and citation omitted). "In reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176.

{21} "The element of general criminal intent is satisfied if the [s]tate can demonstrate beyond a reasonable doubt that the accused purposely performed the act in question." *State v. Gonzalez*, 2005-NMCA-031, ¶ 23, 137 N.M. 107, 107 P.3d 547 (alterations, internal quotation marks, and citation omitted); *see* UJI 14-141. Here, the evidence established that Defendant downloaded a peer-to-peer, file-sharing network and acknowledged he was familiar with file-sharing networks. For over five years, Defendant used such networks to access child pornography. Defendant used a network that required sharing in order to continue accessing files. Defendant kept files containing child pornography in his shared folder, which were accessible to others on the network. Defendant confirmed that he was sharing, but denied that he was distributing. We believe this is a distinction without a difference because Defendant's "sharing" allowed other users of the Ares peer-to-peer, file-sharing network unfettered access to the images contained in his shared folder while he was connected to the network. *See Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/share (last visited Jun. 11, 2019) (defining "share," in relevant part, as "to distribute on the Internet"). Based on the evidence presented at trial, we conclude that the State presented substantial evidence that Defendant acted with the requisite intent.

II. Defendant's Multiple Convictions for Distribution Violate Double Jeopardy

{22} The district court convicted Defendant of eight counts of distribution of child pornography, in violation of Section 30-6A-3(B). Defendant argues, and the State concedes, that *State v. Sena*, 2016-NMCA-062, 376 P.3d 887, requires us to vacate all but one count. While we are not bound by the State's concession, *State v. Tapia*, 2015-NMCA-048, ¶ 31, 347 P.3d 738, we accept that concession as supported by controlling precedent.

{23} We review Defendant's double jeopardy claim de novo. *See State v. Bernal*, 2006-NMSC-050, ¶ 6, 140 N.M. 644, 146 P.3d 289 ("A double jeopardy claim is a question of law that we review de novo."). "The constitution protects against both successive prosecutions and multiple punishments for the same offense." *State v. Sena*, 2018-NMCA-037, ¶ 35, 419 P.3d 1240; *see* U.S. Const. amend. V; N.M. Const. art. II, § 15. Defendant raises a unit-of-prosecution claim, "in which an individual is convicted of multiple violations of the same criminal statute." *Bernal*, 2006-NMSC-050, ¶ 7. "For unit-of-prosecution challenges, the only basis for dismissal is proof that a suspect is charged with more counts of the same statutory crime than is statutorily authorized." *Id.* ¶ 13.

{24} In *Sena*, the defendant obtained child pornography images through peer-to-peer software and stored those images on his computer in a shared file that allowed other users of the software to download the images contained therein. 2016-NMCA-062, ¶ 3. Using peer-to-peer software, an officer monitoring child pornography on the internet located and downloaded three separate child pornography images from the defendant's shared folder. *Id.* Almost two weeks later, the officer again used the detection software to download another seven separate child pornography images from the defendant's shared folder. *Id.* The defendant entered a conditional guilty plea to ten counts of distribution of child pornography that allowed him to appeal the issue of whether double jeopardy principles prohibited multiple

convictions for distribution of child pornography. *Id.* ¶ 4. We concluded that the defendant could only be convicted of one count of distribution of child pornography.[4] *Id.* ¶¶ 13-19.

{25} The Legislature has yet to amend the distribution of child pornography statute to address the ambiguity in the unit of prosecution we identified in *Sena*. ¶¶ 16-17. Therefore, under the facts and circumstances of this case, we hold that Defendant's eight convictions violate double jeopardy and must be reduced to a single conviction. *See id.* ¶ 19.

CONCLUSION

{26} We hold that general criminal intent is the mens rea for distribution of child pornography under Section 30-6A-3(B). We remand to the district court with instructions to vacate seven of Defendant's eight convictions for distribution of child pornography.

{27} IT IS SO ORDERED.
KRISTINA BOGARDUS, Judge

WE CONCUR:
M. MONICA ZAMORA, Chief Judge
ZACHARY A. IVES, Judge

[4]This Court noted that it was "specifically reserving the question of[] whether multiple actions undertaken by some other defendant to affirmatively share images of child pornography with a third party may constitute separate acts of sufficient distinctiveness to warrant multiple units of prosecution for the distribution of child pornography[.]" *Id.* ¶ 20. This case does not present such a situation.

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-058

No. A-1-CA-36455 (filed June 17, 2019)

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
TERRELL WILLYARD,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY
WILLIAM G. W. SHOOBRIDGE, District Judge

Certiorari Denied, September 10, 2019, No. S-1-SC-37818.
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Opinion

Kristina Bogardus, Judge.

{1} The State appeals from the district court's order that (1) set aside the jury verdict finding Defendant guilty of driving while under the influence of intoxicating liquor (DWI); (2) granted its own motion for a new trial; and (3) dismissed the case after concluding that retrial was not supported by the evidence. We reverse and remand.

BACKGROUND

{2} Defendant Terrell Willyard was charged with DWI, contrary to NMSA 1978, Section 66-8-102(A) (2016), following a single-vehicle collision in which Defendant's vehicle collided with a telephone pole. A witness heard Defendant's truck approaching, saw the collision, and then saw Defendant drive his truck from the scene and park it in the shadows behind a business. The witness called 911 and described the collision and Defendant. The witness lost sight of Defendant when Defendant walked away from the scene.

{3} A responding officer spotted Defendant a few blocks away. That officer and two assisting officers believed that Defendant displayed signs of intoxication. When he refused to submit to field sobriety tests and chemical testing, Defendant was placed under arrest and brought back to the scene for identification. Based on the witness's testimony, no more than twenty-one minutes passed from the time he lost sight of Defendant until the officers brought Defendant back to the scene.

{4} Defendant moved for a directed verdict at trial, both at the close of the State's evidence and after the defense rested, arguing the State presented no evidence that Defendant was intoxicated at the time he was driving. The district court denied both motions, and the jury found Defendant guilty of DWI.

{5} Following trial, and for the reasons cited in our discussion that follows, the district court, sua sponte, ruled that there was no evidence that Defendant's driving and impairment overlapped and granted Defendant a new trial. The district court then dismissed the case, concluding that Defendant could not be retried because there was insufficient evidence to sustain the jury's verdict. The State appeals.

DISCUSSION

I. The State Has a Right to Appeal the District Court's Ruling

{6} We first address the question of whether the State has the right to appeal in this case. "The right to appeal is . . . a matter of substantive law created by constitutional or statutory provision." *State v. Armijo*, 2016-NMSC-021, ¶ 19, 375 P.3d 415. "We review issues of statutory and constitutional interpretation de novo." *Id.* (internal quotation marks and citation omitted).

A. The State Is an Aggrieved Party Under the New Mexico Constitution

{7} The State argues that it has a "strong interest in enforcing a lawful jury verdict" and, therefore, as an aggrieved party, has a constitutional right to an appeal. *State v. Chavez*, 1982-NMSC-108, ¶ 6, 98 N.M. 682, 652 P.2d 232 (holding "that when the jury reaches a verdict after a trial which is fair and free from error, and such a verdict is set aside, the [s]tate is aggrieved within the meaning of the New Mexico Constitution"); *see State v. Heinsen*, 2005-NMSC-035, ¶ 9, 138 N.M. 441, 121 P.3d 1040 ("Article VI, Section 2 of the New Mexico Constitution provides 'that an aggrieved party shall have an absolute right to one appeal.' This provision gives the [s]tate an absolute, constitutional right to appeal a ruling that is contrary to law."). Although Defendant notes that under *Chavez*, the State's right to appeal from a verdict that has been set aside exists only when the verdict is reached after a trial that is "fair and free from error," 1982-NMSC-108, ¶ 6, he fails to identify any trial errors that affected the jury's verdict or rendered the trial unfair. We are not obligated to review Defendant's undeveloped argument, *State v. Guerra*, 2012-NMSC-014, ¶ 21, 278 P.3d 1031, nor are we obligated to "search the record for facts, arguments, and rulings" to find support for Defendant's claim of error. *Muse v. Muse*, 2009-NMCA-003, ¶ 72, 145 N.M. 451, 200 P.3d 104. We will not scour the record in search of trial error or unfairness, and thus conclude that the State, as the aggrieved party in the instant case, has a right to appeal under *Chavez*.

B. The District Court's Ruling Did Not Constitute an Acquittal

{8} Defendant relies on *State v. Lizzol*, 2007-NMSC-024, 141 N.M. 705, 160 P.3d 886, to argue that the State has no "right to appeal an acquittal based on the insufficiency of the evidence[.]" The State argues *Lizzol* is distinguishable because the acquittal in that case was entered before the case was submitted to the jury. The State also argues double jeopardy does not bar this appeal because reversal would only lead to reinstatement of the jury's verdict. We agree with the State

that *Lizzol* is not applicable here because the district court dismissed this case after the jury rendered its verdict.

{9} In *Lizzol*, the defendant was charged with driving under the influence of intoxicating liquor. *Id.* ¶ 2. When the state attempted to lay the foundation for the breath alcohol test (BAT) card through the testimony of the arresting officer, the metropolitan court found the officer lacked knowledge to lay the proper foundation. *Id.* ¶¶ 3-4. The state then rested its case, and the metropolitan court entered a written order suppressing the card and dismissing the case, concluding there was insufficient evidence to proceed. *Id.* ¶ 4. The state ultimately appealed to the New Mexico Supreme Court, which explained that "an acquittal results when, after making an erroneous evidentiary ruling, the trial court concludes the evidence is insufficient to proceed[.]" *Id.* ¶ 15. The Court held, therefore, that double jeopardy barred the state's appeal because the defendant was acquitted when the trial court excluded the BAT card and concluded there was insufficient evidence to proceed. *Id.* ¶ 29.

{10} Here, by contrast, the district court made no evidentiary ruling during trial that resulted in a determination that the evidence was insufficient to proceed, which is the specific and limited scenario addressed in *Lizzol*. Unlike the trial in *Lizzol*, the trial in this case was presented in its entirety, after which the district court determined that the evidence was sufficient to send the case to the jury, which then returned a guilty verdict. In this case, the district court addressed an evidentiary scenario applicable only to the granting of a new trial, and not a mid-trial evidentiary determination that mandated acquittal. Therefore, we conclude that the district court's ruling after the verdict was rendered did not operate as an acquittal under *Lizzol*. *See id.* ¶ 15. Furthermore, because Defendant was not acquitted and reversal would not require a second trial, but rather reinstatement of the original verdict, we conclude that double jeopardy does not bar this appeal. *Cf. State v. Griffin*, 1994-NMSC-061, ¶ 12, 117 N.M. 745, 877 P.2d 551 ("Allowing an appeal after the second trial would not offend the prohibition against double jeopardy because reversal on appeal would not lead to another trial but to reinstatement of the original jury verdict.").

II. The District Court Erred in Granting a New Trial

{11} Defendant contends that the district court's grant of a new trial, pursuant to Rule 5-614 NMRA, could be based on the legal insufficiency of the evidence. The State responds that the district court exceeded its authority by granting the motion based on what the court concluded was insufficient evidence. We agree with the State for the following reasons.

{12} Rule 5-614(A) provides, in relevant part, "When the defendant has been found guilty, the court on . . . its own motion, may grant a new trial if required in the interest of justice." This rule provides the district court with a limited opportunity to consider the verdict and, if warranted, grant a new trial before judgment is entered. Therefore, if such a motion is properly granted by the district court, there is no procedural violation when a judgment consistent with the verdict is not entered.

{13} In deciding a motion for a new trial, the district court "may weigh the evidence and consider the credibility of witnesses." *Griffin*, 1994-NMSC-061, ¶ 6 (internal quotation marks and citation omitted). A new trial can be granted and the verdict set aside only if the district court concludes that "the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted." *Id.* (internal quotation marks and citation omitted). "When the [district] court reaches this conclusion, it is stating not just that it disagrees, but that the evidence so heavily preponderates against the verdict that there evidently has been a miscarriage of justice." *Id.* ¶ 7. If the district court reaches that conclusion, "the verdict may be set aside and a new trial granted." *Id.* ¶ 6 (internal quotation marks and citation omitted).

{14} Such an inquiry is different than a sufficiency of the evidence determination. When a defendant challenges the sufficiency of the evidence at trial in a motion for directed verdict, the district court must "assume the truth of the evidence offered by the prosecution." *Id.* (emphasis, internal quotation marks, and citation omitted). When a motion for directed verdict is granted, it results in an acquittal barring even appellate review. *See Lizzol*, 2007-NMSC-024, ¶ 15. Based on these differences, we conclude that it would be inherently inconsistent to allow a motion for new trial to be granted based on insufficiency of the evidence when that insufficiency bars retrial. Therefore, when the district court granted the motion for new trial based on insufficiency of the evidence in this case, it did so in error.

{15} Our conclusion is supported by this Court's decision in *State v. Davis*, 1982-NMCA-057, 97 N.M. 745, 643 P.2d 614. In *Davis*, after the jury returned a guilty verdict, "[the d]efendant moved for a judgment of acquittal notwithstanding the verdict." *Id.* ¶ 1. The district court set aside the jury's verdict and entered a judgment of not guilty, and the state appealed. *Id.* Concluding that the district court erred, this Court highlighted the mandatory language of NMSA 1978, Section 31-1-3 (1972), that criminal prosecutions "shall be commenced, conducted[,] and terminated in accordance with [r]ules of [c]riminal [p]rocedure. All pleadings, practice[,] and procedure shall be governed by such rules." *Davis*, 1982-NMCA-057, ¶ 10 (internal quotation marks and citation omitted). This Court stated that the term "shall" as used in that statute is mandatory, so "shall" in the rules of criminal procedure is also mandatory. *Id.* ¶ 11. This Court held that "[w]here . . . the [district] court failed to comply, after the verdict was received, with a mandatory rule of criminal procedure, the [s]tate has a right to appeal." *Id.* ¶ 3.

{16} In reaching that holding, the *Davis* Court reasoned that Rule 5-607 NMRA[1] requires "a determination of the sufficiency of the evidence before the case is submitted to the jury." *Davis*, 1982-NMCA-057, ¶ 14. After the verdict is returned by the jury, Rule 5-701(A) NMRA[2] "requires the [district] court to enter judgment in accordance with the verdict." *Davis*, 1982-NMCA-057, ¶ 14. This Court concluded the district court violated both Rule 5-607, by failing to rule on the sufficiency of the evidence before the case was submitted to the jury, and Rule 5-701, by entering a judgment of not guilty. *Davis*, 1982-NMCA-057, ¶¶ 12, 15. The Court "remanded with instructions to enter a judgment and sentence in compliance with" Rule 5-701. *Davis*, 1982-NMCA-057, ¶ 23.

{17} As we emphasized in *Davis*, a district court has two opportunities to rule on the sufficiency of the evidence during a trial. Both arise before the case is submitted to the jury: the first opportunity is after the state has submitted its evidence, Rule 5-607(E), and the second, after the defense presents its evidence or rests, Rule 5-607(K). No provision in our rules of criminal procedure allows a district court to consider the sufficiency of the evidence after the jury has returned its verdict and enter a judg-

[1]The *Davis* Court referred to this rule as "Rule of Criminal Procedure 40." *Davis*, 1982-NMCA-057, ¶ 14. For clarity and consistency, this opinion refers to the rule as it is now codified.

[2]The *Davis* Court referred to this rule as "Rule of Criminal Procedure 46." *Davis*, 1982-NMCA-057, ¶ 14. For clarity and consistency, this opinion refers to the rule as it is now codified.

ment contrary to the jury's verdict.[3] *See Davis*, 1982-NMCA-057, ¶ 6 ("We note that a judgment notwithstanding a verdict is recognized by . . . the [r]ules of [c]ivil [p]rocedure but is not mentioned in the [r]ules of [c]riminal [p]rocedure."). In the instant case, the district court impermissibly revisited its rulings on the sufficiency of the evidence after the jury returned its verdict.

{18} It did so in the following manner. The day after the jury found Defendant guilty of DWI, the district court, sua sponte, moved for a new trial, pursuant to Rule 5-614. In its motion, the district court noted that: (1) no evidence was presented that Defendant's driving and impairment overlapped; (2) pursuant to *State v. Cotton*, 2011-NMCA-096, 150 N.M. 583, 263 P.3d 925, any connections between the driving and impairment had to result from impermissible speculation; and (3) there was insufficient evidence to sustain the jury's verdict.

{19} At the hearing on its motion, the district court explained that it was confused when it denied Defendant's motions for directed verdict because it mistakenly believed that testimony describing Defendant walking away from the collision "in a 'drunk-like' manner" had been introduced. Upon review, however, the district court determined that no such testimony was elicited at trial. The district court indicated it moved, pursuant to Rule 5-614, to remedy its prior confusion. After argument from the parties, the district court set aside the jury's verdict and, despite granting a new trial under the rule, concluded that retrial was precluded due to insufficient evidence, which effectively granted judgment to Defendant.

{20} It appears that the district court, having reconsidered the evidence and its previous rulings on Defendant's motions for directed verdict, intended its motion for a new trial to provide an opportunity to correct its previous rulings on the sufficiency of the evidence. However, as we held above, insufficiency of the evidence does not support a motion for a new trial. Additionally, we are unaware of, and Defendant has failed to cite, any authority indicating a district court can revisit its rulings on directed verdict motions after the jury has rendered its verdict. *See State v. Vigil-Giron*, 2014-NMCA-069, ¶ 60, 327 P.3d 1129 ("[A]ppellate courts will not consider an issue if no authority is cited in support of the issue and that, given no cited authority, we assume no such authority exists[.]"). To the contrary, the controlling authority—our rules of criminal procedure—required the district court to render a judgment in accordance with the jury's verdict. Rule 5-701(A). Had that judgment been rendered, Defendant would then have had the opportunity to challenge the sufficiency of the evidence on appeal. *See Davis*, 1982-NMCA-057, ¶ 16.

III. Substantial Evidence Supported Defendant's Conviction for DWI

{21} The district court ruled that the State's evidence was insufficient to sustain Defendant's DWI conviction. Therefore, another appeal is likely to follow if we remand without addressing this issue. In the interest of conserving judicial resources, and because the parties have fully briefed the sufficiency issue, we now turn to whether the evidence introduced at trial is sufficient to sustain the conviction. *See id.* ¶ 17 (addressing the sufficiency of the evidence question to conserve judicial resources).

{22} "Whether there is sufficient evidence to support a conviction is a question of law which we review de novo." *State v. Neal*, 2008-NMCA-008, ¶ 20, 143 N.M. 341, 176 P.3d 330. "The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Montoya*, 2015-NMSC-010, ¶ 52, 345 P.3d 1056 (internal quotation marks and citation omitted). The reviewing court "view[s] the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. "Evidence of a direct or circumstantial nature is sufficient if a reasonable mind might accept the evidence as adequate to support a conclusion." *Neal*, 2008-NMCA-008, ¶ 20 (alteration, internal quotation marks, and citation omitted). We disregard all evidence and inferences that support a different result. *See State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829.

{23} The State contends there is sufficient evidence to support all elements of DWI and, thus, the jury's guilty verdict. Defendant, relying on *Cotton*, argues there is insufficient evidence to support his conviction because the State failed to prove that his driving and impairment overlapped. For the following reasons, we are unpersuaded that *Cotton* is controlling here.

{24} In *Cotton*, we reversed an aggravated DWI conviction because the state failed to provide evidence that the defendant actually drove while impaired. 2011-NMCA-096, ¶ 1. When the responding officer approached, the defendant was sitting in the driver's seat of a van parked on the side of the road. *Id.* ¶¶ 4-5. "The van was not running, and the keys were not in the ignition." *Id.* ¶ 5. The defendant failed field sobriety tests and admitted to drinking an hour before the officer arrived. *Id.* ¶ 6. At trial, "there was no evidence presented to prove that the driving and impairment overlapped. No one testified about seeing [the d]efendant driving while impaired." *Id.* ¶ 14. Additionally, because there was no evidence as to when the defendant had parked the van, we noted that the defendant could have parked the van and then consumed the beer. *Id.* We concluded the state "failed to establish that [the d]efendant drove *after* he had consumed alcohol and after alcohol had impaired his ability to drive to the slightest degree." *Id.*

{25} *Cotton*, however, does not control this case because the following evidence leads us to conclude that there was sufficient circumstantial evidence introduced at trial to establish that Defendant's impairment and driving overlapped. *See, e.g.*, *Town of Taos v. Wisdom*, 2017-NMCA-066, ¶ 38, 403 P.3d 713 (distinguishing *Cotton* when there were witnesses to the defendant's driving and sufficient circumstantial evidence "allow[ed] for an inference that [the d]efendant drove while intoxicated").

{26} First, a witness testified he heard Defendant's truck as it approached and saw it collide with a telephone pole. This witness estimated that Defendant was traveling at forty-five to fifty miles per hour prior to the collision. Under these facts and circumstances, a reasonable juror could infer that the collision itself was evidence of Defendant's impairment at the time he operated the vehicle.[4] This evidence of Defendant's driving alone significantly distinguishes this case from the circumstances in *Cotton*.

{27} Second, responding officers testified that Defendant smelled of alcohol; had bloodshot, watery eyes; and was swaying back and forth when they encountered him less than twenty-one minutes after the collision. This evidence supports an inference that Defendant had consumed alcohol and further bolsters the inference that Defendant was impaired when he operated and crashed the vehicle less than half an hour previously. Although defense counsel suggested that Defendant could have become intoxicated between the time he was driving and his encounter with the officers, no evidence was offered to support the suggested inference. Nevertheless, the jury was free to reject

[3]Such a scenario is different than what occurs when a court exercises its discretion under Rule 5-614. Under that rule, the court does not enter its own judgment in the matter; instead, it sets aside the verdict and orders a new trial.

[4]Defendant contends that an inference of intoxication based on the collision is impermissible speculation, but cites no authority in support. *See Vigil-Giron*, 2014-NMCA-069, ¶ 60.

Defendant's version of events. *See State v. Salazar*, 1997-NMSC-044, ¶ 46, 123 N.M. 778, 945 P.2d 996.

{28} Third, the State presented the following evidence from which a reasonable juror could infer Defendant's consciousness of guilt. Following the collision, Defendant moved his truck into the shadows behind a business and left the scene without reporting the collision. Defendant also futilely attempted to hide behind a pole as an officer approached. Defendant then refused to submit to field sobriety and chemical testing. *See State v. Wright*, 1993-NMCA-153, ¶ 15, 116 N.M. 832, 867 P.2d 1214 (reasoning that a jury could infer consciousness of guilt from a defendant's refusal to take a field sobriety test); *see also McKay v. Davis*, 1982-NMSC-122, ¶ 16, 99 N.M. 29, 653 P.2d 860 (holding that "a defendant's refusal to take a chemical test is relevant to show his consciousness of guilt and fear of the test results").

{29} Viewing the evidence in the light most favorable to the verdict and indulging all reasonable inferences, we conclude that substantial evidence supported Defendant's conviction for DWI. *See Wisdom*, 2017-NMCA-066, ¶ 35 ("Circumstantial evidence alone may be sufficient to allow a fact-finder to infer that the accused drove while intoxicated.").

CONCLUSION

{30} We reverse the district court's order setting aside the jury's verdict and remand with instructions to enter a judgment and sentence in accordance with the jury's verdict.

{31} IT IS SO ORDERED.
KRISTINA BOGARDUS, Judge

WE CONCUR:
J. MILES HANISEE, Judge
MEGAN P. DUFFY, Judge

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-059

No. A-1-CA-35234 (filed June 25, 2019)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
PAUL A. CAIN,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY
ANGIE K. SCHNEIDER, District Judge

Certiorari Denied, September 10, 2019, No. S-1-SC-37826.
Released for Publication October 29, 2019.

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Opinion

Megan P. Duffy, Judge.

{1} Defendant was found guilty of two counts of failure to register as a sex offender under New Mexico's Sexual Offender Registration and Notification Act (SORNA), NMSA 1978, Section 29-11A-4) (2005, amended 2013). We hold that the two convictions violated Defendant's right to be free from double jeopardy and remand to the district court to vacate one of Defendant's convictions. We reject the remainder of Defendant's arguments on appeal.

BACKGROUND

{2} Defendant was convicted of third degree criminal sexual penetration on September 5, 2008. Thereafter, he was required to register as a sex offender pursuant to SORNA, which required that he register every ninety days and also within ten days of changing his address. *See* Section 29-11A-4 (F), (L)[1]; *see also* UJI 14-990 NMRA (sex offender registration and notification chart). In 2012, Defendant failed to comply with both requirements. Defendant had last registered on March 7, 2012, and his next ninety-day deadline to re-register was June 7, 2012. Section 29-11A-4(L)(1). In that period, Defendant was evicted and required to move out of his home by June 17, 2012, thus triggering a separate requirement that he register his new address within ten days of his move. Section 29-11A-4(F) (2005). Defendant missed both deadlines and did not register again until July 11, 2012. Defendant was arrested and elected to proceed, pro se, with a bench trial. The district court convicted Defendant on November 10, 2015, of two counts of failing to register as a sex offender and sentenced him to three years' incarceration.

DISCUSSION

{3} Defendant, representing himself pro se at trial and on appeal, raises numerous claims of error. This Court, in its notice of assignment to the general calendar, requested that the parties discuss any double jeopardy implications arising from Defendant's convictions. Along with double jeopardy, Defendant raises sixteen additional claims of error. We address the double jeopardy issue and other claims properly raised on appeal, but decline to review the remaining unpreserved and undeveloped claims. In *Lukens v. Franco*, our Supreme Court stated,

> We remind counsel that we are not required to do their research, and that this Court will not review issues raised in appellate briefs that are unsupported by cited authority. When a criminal conviction is being challenged, counsel should properly present this court with the issues, arguments, and proper authority. Mere reference in a conclusory statement will not suffice and is in violation of our rules of appellate procedure.

2019-NMSC-002, ¶ 5, 433 P.3d 288 (quoting *State v. Clifford*, 1994-NMSC-048, ¶ 19, 117 N.M. 508, 873 P.2d 254)); *Newsome v. Farer*, 1985-NMSC-096, ¶ 18, 103 N.M. 415, 708 P.2d 327 ("Although pro se pleadings are viewed with tolerance, a pro se litigant, having chosen to represent himself, is held to the same standard of conduct and compliance with court rules, procedures, and orders as are members of the bar." (emphasis and citation omitted)).

I. Double Jeopardy

{4} Defendant was convicted of two counts of violating Section 29-11A-4, and argues on appeal that his convictions violate his right to be free from double jeopardy. "The defense of double jeopardy may not be waived and may be raised by the accused at any stage of a criminal prosecution, either before or after judgment." NMSA 1978, § 30-1-10 (1963). "A double jeopardy claim is a question of law that we review de novo." *State v. Bernal*, 2006-NMSC-050, ¶ 6, 140 N.M. 644, 146 P.3d 289.

{5} "The Fifth Amendment . . . . functions in part to protect a criminal defendant against multiple punishments for the same offense." *State v. Swick*, 2012-NMSC-018, ¶ 10, 279 P.3d 747 (internal quotation marks and citations omitted). "This prohibition relates to two general categories of cases: cases in which a defendant has been charged with multiple violations of a single statute based on a single course of conduct, known as 'unit of prosecution' cases; and cases in which a defendant is charged with violations of multiple statutes for the same conduct, known as 'double-description' cases." *State v. DeGraff*, 2006-NMSC-011, ¶ 25, 139 N.M. 211, 131 P.3d 61. Because Defendant

[1]The SORNA was amended in 2013, after Defendant was charged but before he went to trial. The 2013 amendment to Subsection (F) reduced the time to file a change of address notification from ten days to five days. Section 29-11A-4. Subsection (L) was not modified.

is charged with two violations of the same statute, this is a unit-of-prosecution case. *See Swick*, 2012-NMSC-018, ¶ 33 (applying unit of prosecution analysis to two convictions based on different subsections of the same statute); *State v. Bello*, 2017-NMCA-049, ¶ 9, 399 P.3d 380 (noting that "double jeopardy claims based on multiple violations of different subsections under one statute" are analyzed "using the unit of prosecution standard analysis").

> To determine the Legislature's intent with respect to the unit of prosecution for a criminal offense, we apply a two-step test. First, we review the statutory language for guidance on the unit of prosecution. The plain language of the statute is the primary indicator of legislative intent. 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. If the acts are not sufficiently distinct, then the rule of lenity mandates an interpretation that the legislature did not intend multiple punishments, and a defendant cannot be punished for multiple crimes.

State v. Ramirez, 2018-NMSC-003, ¶ 47, 409 P.3d 902 (internal quotation marks and citations omitted). Accordingly, in discerning the Legislature's intent, we first look to the statutory language for guidance on the unit of prosecution.

{6} The Legislature set forth the unit of prosecution within SORNA by stating that "[t]he willful failure to comply with any registration or verification requirement set forth in this section shall be deemed *part of a continuing transaction or occurrence*." Section 29-11A-4(P) (emphasis added).[2] The Legislature's use of "any" indicates that it contemplated that more than one violation may occur within a given period of non-compliance before the offender next registers, and expressly states that those violations are treated as part of a single, ongoing transaction or occurrence. *Cf. Ramirez*, 2018-NMSC-003, ¶ 53 ("Significantly, our Legislature chose not to employ the phrase 'any child' or the word 'children' in place of 'a child.' Had it done so, Section 30-6-1(D)(1) would have expressly contemplated that more than one child may be affected by a single course of abuse by endangerment[.]"). Thus, when a sex offender fails to register after changing his address in violation of Section 29-11A-4(F) and also fails to register within the ninety-day time period in violation of Section 29-11A-4(L)(1), the Legislature defines those failures as "part of a continuing transaction or occurrence" such that Defendant may only be charged with one offense. Section 29-11A-4(P).

{7} While the State argues that *State v. Valencia*, 416 P.3d 1275, 1280 (Wash. Ct. App. 2018), supports a contrary outcome, we note that Washington's version of the SORNA expressly provides that defendants may be charged separately for multiple violations in some circumstances. Wash. Rev. Code Ann. § 9A.44.130(4)(c) (West 2010) (providing that failure to register following arrest or service of criminal complaint for failure to register "constitutes grounds for filing another charge of failing to register"). Because the statute contains a unit of prosecution contrary to our own, *Valencia* is not persuasive in interpreting our SORNA. We hold that Defendant's two convictions under Section 29-11A-4 violate double jeopardy, and thus remand with instructions to vacate one of Defendant's convictions and for resentencing as may be necessary.

II. Remaining Issues

A. Subject Matter Jurisdiction

{8} Defendant argues that the district court did not have jurisdiction to impose criminal penalties because SORNA is a civil statute. Defendant filed two motions to dismiss below, both asserting that the district court lacked jurisdiction to punish Defendant criminally. The Legislature, however, has specifically provided for criminal penalties as part of SORNA. *See* § 29-11A-4(P), (Q) (making violations of the registration or verification requirements of SORNA a fourth degree felony). Moreover, we have previously addressed the district court's subject matter jurisdiction, stating that SORNA "confers criminal jurisdiction on the district court to hear cases brought by the State when a sex offender has either willfully failed to register or has provided false information when registering." *State v. Brothers*, 2002-NMCA-110, ¶ 19, 133 N.M. 36, 59 P.3d 1268. Defendant fails to address our holding in *Brothers* and offers no argument or authority requiring us to reach a different result here. We hold that the district court had subject matter jurisdiction to impose criminal penalties for Defendant's failures to register.

B. Illegal Warrant

{9} Defendant argues that his arrest was illegal because it was based on an "illegal warrant." Defendant preserved this issue by filing a motion to dismiss in the district court. We understand Defendant to argue that he was illegally arrested in Texas on a warrant authorizing his arrest only in New Mexico. As an initial matter, the State points out that two separate warrants were issued in this case. The first warrant issued on July 10, 2012, and resulted from Defendant's failure to register under SORNA. It stated, "[e]xtradite New Mexico only." The second warrant issued on August 3, 2012, as a result of Defendant's parole violation, and contained no similar limitation on extradition. Defendant was arrested in Texas on the second warrant and, pursuant to NMSA 1978, Section 31-21-14(A) (1963), we see no violation in Defendant's arrest. *See id.* (authorizing the issuance of an arrest warrant for a released prisoner for violation of conditions of release, and providing that "[i]f the prisoner is out of the state, the warrant shall authorize the superintendent to return him to the state").

{10} With respect to Defendant's complaint that proper extradition procedures were not followed, we note that Defendant signed a waiver of extradition, agreeing to be transported to New Mexico to answer the charges against him, and he therefore waived his right to challenge any alleged failure to comply on appeal. We further point out, as the State did below, that even if Defendant's arrest was illegal or otherwise not authorized, our case law does not support dismissal of the charges against him. *See State v. Nolan*, 1979-NMCA-116, ¶¶ 8-9, 93 N.M. 472, 601 P.2d 442 (holding that dismissal of charges against the defendant was not warranted even assuming his arrest was illegal); *see also State v. Nysus*, 2001-NMCA-023, ¶ 5, 130 N.M. 431, 25 P.3d 270 (stating that "the jurisdiction to try a person is not divested because the person's arrest was illegal").

C. Right to Be Represented by Counsel and Right to Proceed Pro Se

{11} Although Defendant expressly waived his right to an attorney before trial, he argues that he was denied his right to counsel and levies two claims of error: (1) that he was entitled to be represented by counsel at the earliest possible time and the public defender failed to do so; and (2) that the district court erred in allowing him to represent himself.

{12} The district court did not officially appoint a public defender for Defendant until the hearing on the State's motion to determine counsel, which occurred about five months after Defendant's arraignment. Defendant argues that counsel should have been appointed for him earlier. We are not persuaded. A public defender was present and represented Defendant at his arraignment on September 10, 2012. Although he was given a packet to apply for a public defender, he failed to complete the paperwork. Nevertheless, a public defender was present and appeared for Defendant at the hearing on the State's motion to determine counsel on February 28, 2013. When asked

[2]The 2005 version of SORNA contained identical language in Section 29-11A-4(N).

by the trial court, Defendant stated that he was reluctant to have a court-appointed attorney and that he had refused to fill out the paperwork. Despite Defendant's reluctance, the district court issued an order assigning the Law Office of the Public Defender to represent Defendant. In the period between Defendant's arraignment and the hearing on the State's motion to determine counsel, the only actions appearing in the record were the district court's scheduling order and an order setting plea deadlines—nothing that would have required a court appearance or Defendant's participation. Thus, the record reflects that Defendant had representation at all proceedings prior to the official appointment of counsel, and any delay in acquiring representation resulted from Defendant's intentional failure to submit a required application. We find no error in Defendant's first argument.

{13} Defendant also claims that the district court erred in allowing him to dismiss his public defender and proceed pro se, arguing that he did not want to dismiss his attorney for the remainder of his trial, but rather only wanted to appear pro se to "assist in his defense" by presenting one issue regarding jurisdiction to the district court. "[A] defendant should be accorded the right of self-representation when he or she is able to make a knowing and intelligent waiver of counsel." *State v. Chapman*, 1986-NMSC-037, ¶ 9, 104 N.M. 324, 721 P.2d 392 (citing *Faretta v. California*, 422 U.S. 806, 835 (1975)).

{14} To determine whether a defendant is making a voluntary, knowing, and intelligent waiver, "the court must inform itself regarding a defendant's competency, understanding, background, education, training, experience, conduct and ability to observe the court's procedures and protocol." *Chapman*, 1986-NMSC-037, ¶ 10. In *State v. Castillo*, 1990-NMCA-043, ¶ 9, 110 N.M. 54, 791 P.2d 808, we stated that

> the trial court must insure that [a] defendant has been informed of the nature of the charges, the statutory offenses included within them, the range of allowable punishments, possible defenses or mitigating factors that might be available to the defendant, and it must also admonish him that he will be expected to follow the rules of evidence and courtroom procedure.

The record reveals that the district court followed *Castillo.* The district court specifically advised Defendant about the charges against him and the possible sentences in the event of a guilty verdict, and Defendant asserted that he understood. The district court further advised Defendant that if he proceeded pro se, he would be representing himself through the entire proceeding, not just on the jurisdictional motion. The district court went on to explain to Defendant that he had a right to counsel, he could hire a different attorney if he wished, and that he would be held to the same standard as an attorney. The district court asked about Defendant's education, special learning needs, if any, or other mental health issues that would affect his ability to comprehend the proceedings. The district court told Defendant that there was a risk that he would not identify an issue for appeal that Defendant's attorney might have caught if Defendant had been represented, and Defendant said he was willing to assume that risk. The district court said Defendant's attorney would stay on as standby counsel but that the attorney would not make any arguments to the court, and Defendant said he understood. Later, the district court said, "[M]y concern is that you're doing this so that you can—solely for the purpose of making your jurisdiction argument, your jurisdictional argument, and that's a small sliver of what can take place today . . . the consequences of the outcome of today go well beyond that . . . I want to be clear—there's a lot more that can happen today than just that one argument that you feel so strongly about making. Do you understand that?" Defendant replied, "Yes, ma'am, I understand that, I was prepared to go pro se before [my public defender] was appointed." The court asked if anyone was "forcing you" to do this, and Defendant responded, "[N]o." Defendant signed a waiver of counsel.

{15} Defendant was adequately advised of the hazards of self-representation and we conclude in accordance with our case law that Defendant voluntarily, knowingly, and intelligently waived his right to counsel. *See State v. Reyes*, 2005-NMCA-080, ¶¶ 9-10, 137 N.M. 727, 114 P.3d 407. Accordingly, we perceive no error in permitting Defendant to proceed pro se pursuant to his request.

D. Ineffective Assistance of Counsel

{16} Defendant also claims ineffective assistance of counsel on appeal, arguing that his attorney "failed to research the jurisdiction issue and failed to submit subpoenas for [Defendant's] witnesses." "Although we are reluctant to consider an ineffective assistance of counsel claim on appeal without an evidentiary hearing, we generally do not demand preservation of the issue because effective assistance of counsel is a fundamental right[.]" *Garcia v. State*, 2010-NMSC-023, ¶ 28, 148 N.M. 414, 237 P.3d 716. "We review the legal issues involved with claims of ineffective assistance of counsel de novo." *State v. Crocco*, 2014-NMSC-016, ¶ 11, 327 P.3d 1068.

> When an ineffective assistance claim is first raised on direct appeal, [appellate courts] evaluate the facts that are part of the record. If facts necessary to a full determination are not part of the record, an ineffective assistance claim is more properly brought through a habeas corpus petition, although an appellate court may remand a case for an evidentiary hearing if the defendant makes a prima facie case of ineffective assistance.

Id. ¶ 14 (internal quotation marks and citation omitted). "In order to be entitled to relief on the basis of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense." *State v. Trammell*, 2016-NMSC-030, ¶ 16, 387 P.3d 220 (internal quotation marks and citation omitted).

{17} First, Defendant faults both his attorney and the district court for failing to submit subpoenas for Defendant's witnesses at trial. Defendant signed a waiver of counsel on August 18, 2015, and thereafter proceeded pro se until his trial on November 10, 2015. Defendant filed his own witness list on August 24, 2015, but failed to issue any subpoenas to compel his witnesses to appear at trial pursuant to Rule 5-511(A)(3) NMRA, which states that "The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service." At trial, Defendant notified the district court that "his witnesses were not at the court. [The district court] told [Defendant] that it is his responsibility as a pro se defendant to subpoena and contact his own witnesses to appear at trial." Defendant, "having chosen to represent himself, is held to the same standard of conduct and compliance with court rules, procedures, and orders as are members of the bar." *Newsome*, 1985-NMSC-096, ¶ 18. We find no error by Defendant's attorney or the district court in connection with Defendant's failure to subpoena his witnesses.

{18} With respect to Defendant's second claim of error—that his attorney failed to research the jurisdictional issue—Defendant fails to establish prejudice. As we discussed above, Defendant's jurisdictional question fails as a matter of law. Because Defendant has not demonstrated that his defense was prejudiced by his counsel's alleged errors, we conclude that Defendant has failed to establish a prima facie case of ineffective assistance of counsel.

E. Discovery

{19} Defendant argued below and on appeal that his parole officer, Aida Ramos, took "field notes," which he alleged would prove that Ms. Ramos had told Defendant that he did not need to register until July 5. He alleges Ms. Ramos failed to disclose these notes, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

{20} Defendant's attorney filed a motion to compel the State to produce the notes. At the hearing on the motion, Defendant's standby

counsel said that Defendant still did not have the notes. The prosecutor responded that all of the notes in the State's possession had already been tendered, including the field notes. Defendant took no further action after the hearing regarding the field notes and did not indicate at any time before his closing argument that he believed that the discovery was still incomplete.

{21} At trial, the district court asked if Defendant was ready to proceed, and he responded affirmatively. The State called Ms. Ramos as a witness, and although Defendant had an opportunity to cross-examine Ms. Ramos about her notes, he elected to not cross-examine her at all. Instead, Defendant brought up the notes in his closing statement, saying he still did not have them. The district court responded, "that's a part of the record, we've already addressed that issue." Defendant has not shown that the State violated its disclosure obligations or failed to produce the field notes, and consequently, we perceive no error in the district court's resolution of Defendant's discovery claims.

F. Issues Not Adequately Developed for Appellate Review

{22} We summarily address several issues that are undeveloped for appellate review. *See Clayton v. Trotter*, 1990-NMCA-078, ¶¶ 16-17, 110 N.M. 369, 796 P.2d 262 (stating that the appellate court will review the arguments of self-represented litigants to the best of its ability, but cannot respond to unintelligible arguments).

{23} First, Defendant's brief includes vague references to the constitutionality of SORNA and his due process rights, but includes no explanation of those arguments. *See Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 70, 309 P.3d 53 ("This Court requires that the parties adequately brief all appellate issues to include an argument, the standard of review, and citations to authorities for each issue presented. . . . We will not review unclear arguments, or guess at what a party's arguments might be." (alteration, internal quotation marks, and citations omitted)); Moreover, we have already reviewed and affirmed the constitutionality of SORNA, and we decline to depart from that decision here. *See also State v. Druktenis*, 2004-NMCA-032, ¶ 2, 135 N.M. 223, 86 P.3d 1050 (affirming the constitutionality of SORNA).

{24} Second, Defendant raised "sufficiency of evidence" in his brief-in-chief; thus, we presume he sought to raise a sufficiency of the evidence challenge on appeal. However, this section of his brief consists only of two citations to federal cases and no argument, no citation to the record, and does not identify any deficiency in the evidence or articulate a basis for reversal. *State v. Fuentes*, 2010-NMCA-027, ¶ 29, 147 N.M. 761, 228 P.3d 1181 (explaining that this Court does not review unclear or undeveloped arguments on appeal that would require this Court to guess at what a party's arguments might be).

{25} Third, Defendant argues that he had a right to an interlocutory appeal concerning the jurisdictional issue, and that the district court erred in failing to inform him of a statute applicable to interlocutory appeals in criminal trials—NMSA 1978, Section 39-3-3(A)(3) (1972). Defendant raised the jurisdictional issue in a motion to dismiss while representing himself pro se, and after the district court denied his motion, he failed to file an application for interlocutory appeal in this Court. Defendant cites no authority for the proposition that a district court is required to advise and educate a pro se litigant on appellate procedure, nor are we aware of any. Indeed, we have often stated that "a pro se litigant is not entitled to special privileges because of his pro se status." *Bruce v. Lester*, 1999-NMCA-051, ¶ 4, 127 N.M. 301, 980 P.2d 84. "Defendant, who has chosen to represent himself, must comply with the rules and orders of the court, and will not be entitled to greater rights than those litigants who employ counsel." *Id.*

{26} Fourth, Defendant captioned a section of his brief, "collateral order doctrine" and states that "[i]t is within the [appellate] court's discretion to consider the error preserved below and presented in appellant's brief after having been omitted from the docketing statement." In this opinion, however, we have considered each of Defendant's arguments, we have addressed all of the arguments that were properly preserved and developed for appeal, and have declined to address only those arguments that Defendant failed to adequately develop for appellate review. *State v. Gonzales*, 2011-NMCA-007, ¶ 19, 149 N.M. 226, 247 P.3d 1111 (stating that "this Court has no duty to review an argument that is not adequately developed").

{27} Finally, Defendant raises various claims of error, including "fair trial," "fundamental rights," and "plain error." In each of these sections, Defendant quotes portions of state and federal cases, but provides no argument, no citation to the record, and fails to identify any specific claim of error with respect to his trial. *See State v. Ortiz*, 2009-NMCA-092, ¶ 32, 146 N.M. 873, 215 P.3d 811 (noting that it is the party's responsibility to connect legal theories to the pertinent elements and the factual support for those elements and that this Court may decline to review undeveloped arguments on appeal). Because these arguments are not sufficiently developed, we do not address them.

G. Issues Not Preserved

{28} Lastly, we address several issues for which Defendant failed to include any citation to the record to indicate that they were preserved below. These include whether Defendant was subject to entrapment**,** whether there was an unconstitutional deprivation of Defendant's "good time," and whether the New Mexico Corrections Department has regulations that are unconstitutional. "We generally do not consider issues on appeal that are not preserved below." *State v. Leon*, 2013-NMCA-011, ¶ 33, 292 P.3d 493 (internal quotation marks and citation omitted). "To preserve an issue for review it must appear that a ruling or decision by the trial court was fairly invoked." Rule 12-321(A) NMRA. "In order to preserve an issue for appeal, a defendant must make a timely objection that specifically apprises the trial court of the nature of the claimed error and invokes an intelligent ruling thereon." *State v. Montoya*, 2015-NMSC-010, ¶ 45, 345 P.3d 1056 (internal quotation marks and citation omitted). In his briefing, Defendant must point the appellate court to where in the record the issues raised on appeal were preserved below. Rule 12-318(A)(4) NMRA ("The brief in chief of the appellant . . . shall contain . . . a statement explaining how the issue was preserved in the court below, with citations to authorities, record proper, transcript of proceedings, or exhibits relied on."). This Court will not search the record to find whether an issue was preserved where defendant did not refer to appropriate transcript references. *See State v. Rojo*, 1999-NMSC-001, ¶ 44, 126 N.M. 438, 971 P.2d 829. As Defendant has failed to indicate how these issues were preserved for appellate review or that a preservation exception is applicable, we do not address these arguments on appeal. *See State v. Lucero*, 1999-NMCA-102, ¶ 43, 127 N.M. 672, 986 P.2d 468 (declining to address argument on appeal because the defendant failed to indicate how the issue was preserved for review).

CONCLUSION

{29} For the foregoing reasons, we reverse one of Defendant's convictions under Section 29-11A-4 and remand to the district court with instructions to vacate one of Defendant's convictions and resentence Defendant as may be necessary.

{30} IT IS SO ORDERED.
MEGAN P. DUFFY, Judge

WE CONCUR:
KRISTINA BOGARDUS, Judge
CYNTHIA A. FRY, Judge Pro Tempore

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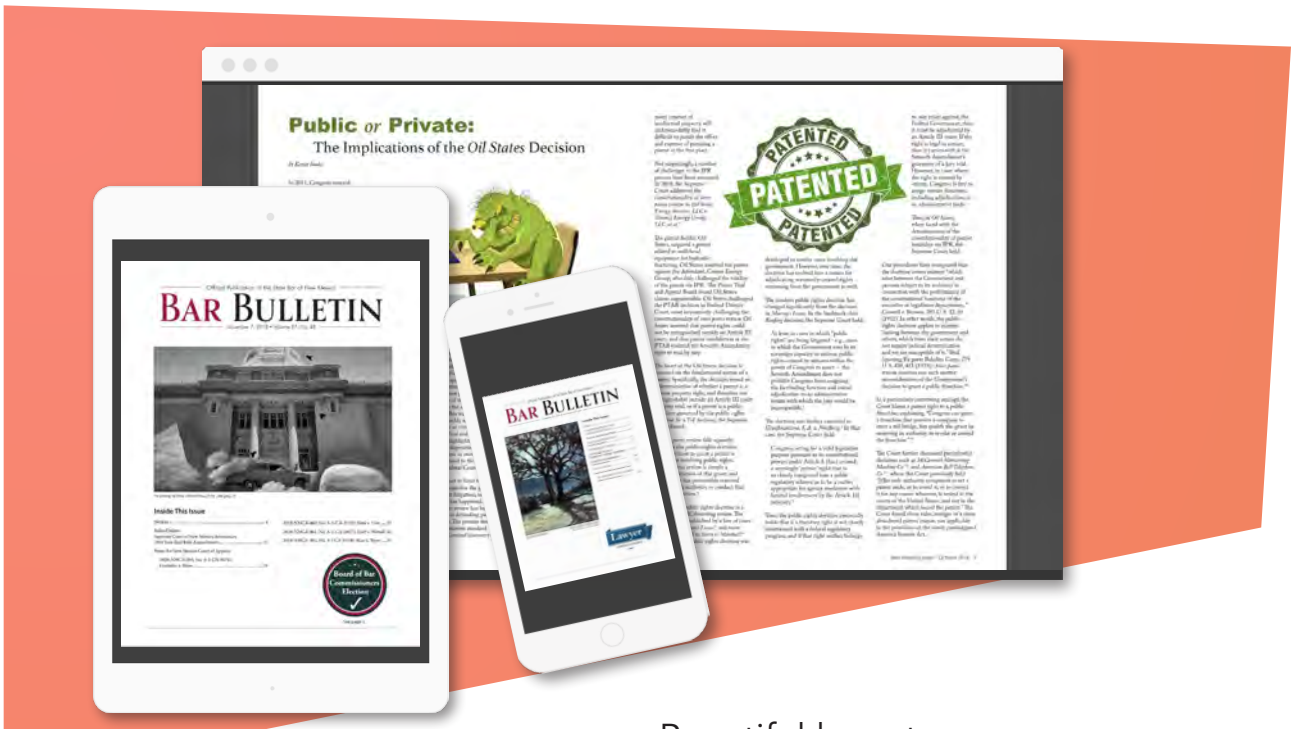

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