STATE V. CALVILLO

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
PEDRO CALVILLO,
Defendant-Appellant.

NO. A-1-CA-33937

COURT OF APPEALS OF NEW MEXICO

December 6, 2017

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

COUNSEL

Hector H. Balderas, Attorney General, Santa Fe, NM, Jacqueline R. Medina, Assistant Attorney General, Albuquerque, NM, for Appellee

Bennett J. Baur, Chief Public Defender, B. Douglas Wood III, Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

TIMOTHY L. GARCIA, Judge. WE CONCUR: JONATHAN B. SUTIN, Judge, STEPHEN G. FRENCH, Judge

AUTHOR: TIMOTHY L. GARCIA

MEMORANDUM OPINION

GARCIA, Judge.

{1} Pedro Calvillo (Defendant) was convicted of one count of criminal sexual penetration of a minor (CSPM) (child under thirteen), contrary to NMSA 1978, Section

30-9-11(C) (2007, amended 2009). On appeal, Defendant continues to argue that his warrantless arrest was conducted without the requisite exigency required by Article II, Section 10 of the New Mexico Constitution and therefore, his admission of guilt in an interview conducted after his arrest was the fruit of the poisonous tree and was improperly admitted by the district court. We agree that Defendant's warrantless arrest was conducted without the requisite exigency required by Article II, Section 10 of the New Mexico Constitution. As such, we need not address Defendant's related argument that his admission made during a post-arrest interview with a detective was improperly admitted. Finally, Defendant argues that the forty-seven months of delay between his arrest and trial violated his right to a speedy trial. Concluding that Defendant suffered no undue prejudice and that the reasons for the delay were largely caused or stipulated to by Defendant, we hold that there was no violation of Defendant's right to a speedy trial. Because other sufficient evidence was presented to support a conviction for CSPM, we reverse Defendant's conviction and remand this matter to the district court for further proceedings and retrial.

BACKGROUND

{2} On July 15, 2008, Officer Mark Elrick of the Albuquerque Police Department responded to a call in reference to a CSPM. Upon arrival, Joanna Lucero (Victim's mother), told Officer Elrick that she had received a call from her son (Victim's brother) reporting that he had seen Defendant doing something to his sister (Victim). Officer Elrick spoke with Victim's brother who told him that he had gone for a bike ride to look for Victim and entered his grandmother's house next door when he saw Victim's bike outside the house. At the time of the incident, Defendant was grandmother's boyfriend. Defendant had also been living next door with grandmother since the time he moved in with her—either in 2002 or 2003. Victim's brother reported to Officer Elrick that when he entered his grandmother's house, he saw Defendant licking Victim's vagina. Antoinette Lucero (Victim's grandmother), arrived at Victim's mother's home and told Officer Elrick that she believed Defendant was "still home" because his truck was still in front of the house. Officer Elrick then went next door and placed Defendant under arrest. Detective Dee Sanchez interviewed Defendant at the police station following the arrest. Detective Sanchez informed Defendant of his *Miranda* rights and Defendant agreed to speak with Detective Sanchez. In the course of the interview, Defendant admitted to licking the Victim.

{3} Defendant was indicted on three counts of CSPM. Section 30-9-11(C). At the first jury trial held in June 2012, Defendant was acquitted by the jury of CSPM as to count two and the district court directed a verdict of acquittal on count three, finding that counts two and three merged into one count. The district court granted a mistrial as to count one ruling that "the [j]ury is in disagreement creating manifest necessity to declare a mistrial as to [c]ount [one]." A different judge presided over Defendant's re-trial in March 2014, and prior to trial, the court ruled that all prior pre-trial rulings would remain in place. At the second trial, the jury found Defendant guilty of CSPM as charged in count one. Defendant now appeals. We shall provide additional facts as they become necessary to address Defendant's arguments.

DISCUSSION

{4} Defendant makes three arguments on appeal. First, Defendant argues that, under Article II, Section 10 of the New Mexico Constitution, Defendant's arrest was an unconstitutional warrantless arrest that was not supported by probable cause or exigent circumstances, and as such, his statements made to Detective Sanchez should have been suppressed. Second, Defendant argues that the forty-seven-month delay between his arrest and his first trial violated his constitutional right to a speedy trial. Third, Defendant argues that his post-arrest statement to Detective Sanchez was involuntary and should not have been admitted. We hold that Defendant's warrantless arrest violated Article II, Section 10 of the New Mexico Constitution and, as a result, his statement to officers following the arrest should have been suppressed by the district court. As a result of this first ruling, we need not address Defendant's third argument regarding whether his post-arrest statement to Detective Sanchez was voluntary. Finally, we disagree with Defendant's second argument and conclude that Defendant's right to a speedy trial was not violated.

I. Motion to Suppress

{5} Defendant argues that the district court erred when it failed to suppress the statements he made to law enforcement "under Article II, Section 10 of the New Mexico Constitution" because he was arrested without a warrant and exigent circumstances did not exist to support a warrantless arrest. Defendant conceded that probable cause was established prior to his arrest and, on appeal, does not argue that his warrantless arrest violated the Fourth Amendment of the United States Constitution. *See State v. Rowell*, 2008-NMSC-041, ¶ 12, 144 N.M. 371, 188 P.3d 95 (recognizing that where an appellant conceded his constitutional argument in the district court and does not argue the constitutional issue on appeal, this Court will not address it). "Warrantless seizures are presumed to be unreasonable and the [s]tate bears the burden of proving reasonableness." *Id.* ¶ 10 (internal quotation marks and citation omitted). "Appellate review of a district court's decision regarding a motion to suppress evidence involves mixed questions of fact and law." *State v. Urioste*, 2002-NMSC-023, ¶ 6, 132 N.M. 592, 52 P.3d 964. "[The appellate courts] view the facts in the manner most favorable to the prevailing party and defer to the district court's findings of fact if substantial evidence exists to support those findings." *Id.* "Determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal." *Id.* "In making a determination about reasonable suspicion, a reviewing court must look at the totality of the circumstances." *Id.*

1. Article II, Section 10 Protection from a Warrantless Arrest

{6} We now proceed to address Defendant's only argument on appeal, that his arrest violated Article II, Section 10 of the New Mexico Constitution. "Where a state constitutional *provision* has previously been interpreted more expansively than its federal counterpart, trial counsel must develop the necessary factual base and raise the applicable constitutional *provision* in trial court." *State v. Leyva*, 2011-NMSC-009, ¶ 49,

149 N.M. 435, 250 P.3d 861; *see also* Rule 12-216(A) NMRA (1993, recompiled and amended as Rule 12-321 NMRA effective Dec. 31, 2016) ("To preserve a question for review, it must appear that a ruling or decision by the trial court was fairly invoked."). "Assertion of the legal principle and development of the facts are generally the only requirement[s] to assert a claim on appeal." *State v. Gomez*, 1997-NMSC-006, ¶ 22, 122 N.M. 777, 932 P.2d 1. Defendant moved to "suppress [his] . . . initial . . . detention" and "subsequent fruits" thereof on May 31, 2012, pursuant to "his state and federal constitutional . . . seizure rights[.]" Defendant renewed his motion to suppress at trial, after a more thorough evidentiary foundation was presented. On appeal, the State does not argue that Defendant failed to preserve the issue of whether his arrest violated Article II, Section 10 of the New Mexico Constitution. In addition, the State recognizes that, in the circumstance of a warrantless arrest, Article II, Section 10 of the New Mexico Constitution has previously been construed to provide broader protections than the Fourth Amendment of the United States Constitution. *See State v. Saiz*, 2008-NMSC-048, ¶ 13, 144 N.M. 663, 191 P.3d 521 (recognizing that "[a]ll warrantless arrests must comply with Article II, Section 10 of the New Mexico Constitution . . . [requiring the state] must show that the [arresting] officer had probable cause to believe that the person arrested had committed or was about to commit a felony and some exigency existed that precluded the officer from securing a warrant" (internal quotation marks and citation omitted)) *abrogated on other grounds by State v. Belanger*, 2009-NMSC-025, ¶ 36 n.1, 146 N.M. 357, 210 P.3d 783; *see also Gomez*, 1997-NMSC-006, ¶¶ 39, 44 (rejecting the federal bright-line automobile exception to the warrant requirement and providing greater protections under Article II, Section 10 of the New Mexico Constitution). *But see Payton v. New York*, 445 U.S. 573, 590 (1980) (recognizing broader Fourth Amendment protections against a warrantless arrest when the arrest occurs inside a home). Trial counsel asserted that the initial arrest of Defendant was without a warrant and therefore, the State had the burden to prove there was an exception to the warrant requirement. *See Rowell*, 2008-NMSC-041, ¶ 10 ("Warrantless seizures are presumed to be unreasonable and the [s]tate bears the burden of proving reasonableness." (internal quotation marks and citation omitted)).

{7} The New Mexico Constitution "strongly favor[s] the warrant requirement" and warrantless arrests are only permitted where "the officer had probable cause to believe that the person arrested had committed or was about to commit a felony and some exigency existed that precluded the officer from securing [an arrest] warrant."*Campos v. State*, 1994-NMSC-012, ¶ 14, 117 N.M. 155, 870 P.2d 117. We examine probable cause and exigent circumstances under a de novo standard of review, viewing the facts in the light most favorable to the prevailing party, indulging all reasonable inferences in support of the ruling and disregarding all evidence and inferences to the contrary. *See State v. Hernandez*, 1997-NMCA-006, ¶ 18, 122 N.M. 809, 932 P.2d 499 ("[W]e review mixed questions of law and fact de novo, particularly when they involve constitutional rights."). We must now determine whether Officer Elrick had probable cause to arrest Defendant.

{8} On the day of Defendant's arrest, Officer Elrick responded to a call at Victim's residence. Officer Elrick spoke with Victim's mother who told him that Victim's brother

had called her and reported that he had seen Defendant licking Victim's vagina. Officer Elrick then spoke with Victim's brother who confirmed that story. Victim's grandmother told Officer Elrick that she believed Defendant was "still home[,]" at the residence located next door. These statements provided Officer Elrick with probable cause to believe that Defendant had recently committed the crime of criminal sexual penetration of Victim and was still next door, at his home, where the crime had occurred. *See State v. Garcia*, 1983-NMCA-069, ¶¶ 2, 27, 100 N.M. 120, 666 P.2d 1267 (stating that police officers had probable cause to arrest the defendant where verbal statements made by the mother and other witnesses attested that the defendant was seen with the victim, who was later found crying and bleeding from her vagina); *see also State v. Granillo-Macias*, 2008-NMCA-021, ¶ 9, 143 N.M. 455, 176 P.3d 1187 (stating that probable cause exists "when the facts and circumstances within the officer's knowledge are sufficient to warrant the officer to believe that [a criminal] offense has been or is being committed"). We agree with the district court that probable cause was established.

{9} Having determined that Officer Elrick had probable cause to believe that Defendant had recently committed a crime, the next question is whether there were exigent circumstances supporting Defendant's warrantless arrest. *See Saiz*, 2008-NMSC-048, ¶ 13 (recognizing that both "probable cause . . . and some exigency [must have] existed that precluded the officer from securing a warrant" (internal quotation marks and citation omitted)). Our Supreme Court defined an exigent circumstance as "an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence." *Campos*, 1994-NMSC-012, ¶ 11 (internal quotation marks and citation omitted). More recently, our Supreme Court clarified that this definition of an "exigent circumstance" is "not an exclusive list." *State v. Paananen*, 2015-NMSC-031, ¶ 26, 357 P.3d 958. Instead, there are other circumstances short of imminent danger, imminent escape of a suspect, or destruction of evidence under which an exigency may "render reasonable a warrantless public arrest supported by probable cause under the totality of the circumstances." *Id.*

{10} In *Paananen*, our Supreme Court identified a factual scenario in which an "on-the-scene arrest supported by probable cause will usually supply the requisite exigency." *Id.* ¶ 26. Under the facts of the case, surveillance cameras at a sports warehouse store caught the defendant stealing two flashlights. *Id.* ¶ 2. Store employees apprehended the defendant outside the store, returned him inside, and held him in a back room until police arrived. *Id.* Upon arriving at the scene and while awaiting surveillance video, officers placed the defendant in handcuffs and searched his possessions, finding hypodermic needles and heroin. *Id.*¶¶ 3-4. On appeal, our Supreme Court held that the district court erred in suppressing the evidence obtained as a result of the officers' search and that an exigency had been established for the arrest of the defendant without a warrant. *Id.* ¶ 28. Our Supreme Court concluded that it was not reasonably practicable for the officers to obtain an arrest warrant prior to arriving at the scene. *Id.* ¶ 25. As a result, the officers had three alternatives after arriving on the scene and gathering probable cause: (1) the officers could have arrested the defendant on the scene; (2) the officers could have continued to detain the defendant, which would

have taken a significant amount of time and likely resulted in a de facto arrest; or (3) the officers could have released the defendant while awaiting a warrant and hoped to relocate him later. *Id.* Our Supreme Court determined these final two alternatives would be "an expenditure of resources seemingly disproportionate to the crime" and "a risk our Legislature has declared unacceptable" under the statute authorizing a warrantless arrest for shoplifting. *Id.* After considering these three options, our Supreme Court held that the defendant's on-the-scene arrest for the crime of misdemeanor shoplifting had supplied the requisite exigency to the warrant requirement. *Id.* ¶¶ 26, 28.

{11} The facts in the present case do not identify any necessity for an "on-the-scene arrest" or any of the other established examples of exigency. Here, Officer Elrick conceded that at the time he went next door to Defendant's residence, he had neither safety concerns for any person inside the house nor any concerns for Defendant's possible escape. According to Officer Elrick's testimony, the only reason he went next door and immediately placed Defendant under arrest was because "[he] had a statement from a direct witness of the crime[, he] had probable cause." He further stated that although he did not have any concern related to the destruction of evidence, it was "possible" that Defendant could have been destroying evidence. However, Officer Elrick did not testify about the need for, desire to, or any actual search for any evidence at Defendant's home, either before, during, or after Defendant's arrest. This Court has recognized that speculation about mere possibilities not supported by specific evidence in the record are insufficient to establish the need for immediate, warrantless action by an officer. *See State v. Cordova*, 2016-NMCA-019, ¶ 14, 366 P.3d 270 (recognizing that an officer's general concern, lacking any other specific information, "is the type of speculation and conjecture that we have previously rejected as supporting an officer's warrantless entry [to provide] emergency assistance").

{12} The district court determined that an exigency was established when "[t]he grandmother told [Officer Elrick] that [Defendant's] truck was still there and that [Defendant] was still there. The fact that the grandmother used the word 'still,' would indicate that there was a likelihood that he would be leaving there[.]" When the motion was renewed at trial, the district court agreed with its previous ruling and stated that "I'm going to deny the request[,] . . . Defendant left the protection of the home when he crossed the [threshold] and went out on the exposed porch." However, we see no support in the record for the district court's conclusions regarding exigency. Defendant resided next door and the officer gave no explanation for failing to simply obtain a warrant based upon the probable cause statements already obtained from Victim's family members. On appeal, the State does not pursue its previous argument that Defendant's act of stepping out onto the front porch to be placed in handcuffs would either establish exigency or eliminate the need to establish exigency. *See State v. Lujan*, 2003-NMCA-087, ¶ 27, 134 N.M. 24, 71 P.3d 1286 (recognizing that previous arguments made in the lower court but not briefed or argued on appeal are considered abandoned). Officer Elrick also testified that he was not concerned about Defendant attempting to escape or flee the scene, and there is no evidence in the record that Defendant was apprehended while attempting to flee. In fact, Defendant personally opened the door to his residence and fully cooperated with Officer Elrick.

Grandmother's use of the words "still home" as the basis to legally establish an "emergency" or any "uncertainty" about the officer's ability to locate Defendant at his established residence in the future are unwarranted, illogical, and could only have resulted from speculation or conjecture that was in direct contradiction to Officer Elrick's testimony. *See State v. Slade*, 2014-NMCA-088, ¶ 14, 331 P.3d 930 (emphasizing that "[a]n inference is . . . a logical deduction from facts which are proven, and guess work is not a substitute therefor[e]" (internal quotation marks and citation omitted)); *State v. Sizemore*, 1993-NMCA-079, ¶ 6, 115 N.M. 753, 858 P.2d 420 (determining that it is illogical to extrapolate an inferential conclusion without some factual basis for the initial inference).

{13} Having determined that none of the specific exigent circumstances previously articulated by our appellate courts were established by the State, we conclude that any extension of *Paananen*'s holding—the establishment of exigent circumstances based upon a review of the totality of the circumstances—would be inappropriate based upon the facts of the present case. *See* 2015-NMSC-031, ¶ 26 (recognizing that other circumstances short of imminent danger, imminent escape of a suspect, or destruction of evidence may "render reasonable a warrantless public arrest supported by probable cause under the totality of the circumstances"). Here, Officer Elrick was not "on-the-scene" of a crime in progress but only arrived at Victim's mother's home to investigate a call regarding a crime that previously occurred next door where Defendant lived with Victim's grandmother. Officer Elrick began an initial investigation but did not describe any urgency or other imminent circumstance requiring immediate action. This case is also distinguished by the more serious nature of the crime Defendant was accused of committing. The expenditure of resources necessarily required to investigate CSPM has never been recognized as "disproportionate to the crime" or justifying a warrantless public arrest. *Id.* ¶ 25. Finally, Defendant was living next door with Victim's grandmother and locating him later was never identified as "an emergency situation requiring swift action[.]" *Id.* ¶ 26 (internal quotation marks and citation omitted). Looking at the totality of the circumstances, the facts do not support a finding of exigent circumstances justifying an immediate warrantless arrest of Defendant. To rule otherwise would arguably eviscerate the exigency requirement to a warrantless arrest whenever a serious crime has been committed and law enforcement simply locates the alleged perpetrator at home when they go to investigate and speak with them. *See State v. Neal*, 2007-NMSC-043, ¶ 31, 142 N.M. 176, 164 P.3d 57 (denouncing an officer's improper speculation and conjecture for establishing reasonable suspicion to detain a defendant in violation of his rights "would eviscerate the very protection of individual rights and liberties the Fourth Amendment was designed to create and [our appellate courts have] taken an oath to uphold").

{14} Concluding that the district court erred in finding that the warrantless arrest of Defendant was reasonable under the circumstances, we hold that the arrest of Defendant violated Article II, Section 10 of the New Mexico Constitution. Accordingly, the district court erred in denying Defendant's motion to suppress his statements to officers while in custody and following his arrest and allowing those statements to be admitted into evidence at Defendant's trial. *See State v. Cardenas-Alvarez*, 2001-

NMSC-017, ¶ 17, 130 N.M. 386, 25 P.3d 225 (recognizing that "[t]he exclusionary rule requires suppression of the fruits of searches and seizures conducted in violation of the New Mexico Constitution").

2. Sufficiency of the Evidence to Justify Retrial

{15} Having reversed Defendant's conviction for CSPM, we must now consider whether the State put forth sufficient evidence to convict Defendant of the charges and justify a second trial. *See State v. Consaul*, 2014-NMSC-030, ¶ 41, 332 P.3d 850 (noting well-established precedent that "[t]o 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"). In reviewing the sufficiency of the evidence, this 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.

{16} Defendant does not argue that the State failed to submit sufficient evidence in order to prove beyond a reasonable doubt that Defendant committed CSPM. We agree, sufficient evidence was presented by the State. As this Court must view the evidence in the light most favorable to the State, disregarding contrary evidence and inferences, we conclude that there was sufficient other evidence to support Defendant's convictions. *See id*.

{17} The testimony provided by Victim and Victim's brother was sufficient to satisfy the State's evidentiary requirements. *See State v. Duran*, 2015-NMCA-015, ¶ 27, 343 P.3d 207 (recognizing that "[b]ecause [the v]ictim's testimony provided sufficient other evidence to support a conviction" remand for a new trial was proper); *State v. Gallegos*, 2005-NMCA-142, ¶ 38, 138 N.M. 673, 125 P.3d 652 (recognizing that the testimony of an eyewitness "is sufficient evidence to support [a d]efendant's conviction") *aff'd in part, rev'd in part on other grounds* 2007-NMSC-007, 141 N.M. 185, 152 P.3d 828. Victim testified about the oral sex that Defendant performed on her. Victim's brother testified about how he observed Defendant performing oral sex on Victim. Because "the jury was free to reject [D]efendant's version of the facts," the evidence and reasonable inferences from the evidence provided a sufficient factual basis for the jury to determine, beyond a reasonable doubt, that Defendant performed oral sex on Victim and was guilty of CSPM. *See State v. Astorga*, 2015-NMSC-007, ¶ 57, 343 P.3d 1245 (noting that "we ask whether a rational jury *could* have found beyond a reasonable doubt the essential facts required for a conviction" (internal quotation marks and citation omitted)).

II. SPEEDY TRIAL

{18} The right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and Article II, Section 14 of the New Mexico Constitution. This right recognizes that "there is a societal interest in bringing an accused to trial" and "[t]he heart of the right . . . is preventing prejudice to the accused." *State v. Garza*, 2009-NMSC-038, ¶ 12, 146 N.M. 499, 212 P.3d 387. When a defendant's speedy trial rights

have been violated, the charges must be dismissed. *See State v. Taylor*, 2015-NMCA-012, ¶ 1, 343 P.3d 199 (affirming a dismissal with prejudice when a defendant's constitutional right to a speedy trial has been violated). Because neither federal nor state law provides for an exact temporal measurement of when the right to a speedy trial has been violated, an analysis of a defendant's right to a speedy trial requires "an analysis of the peculiar facts and circumstances of each case." *Garza*, 2009-NMSC-038 ¶ 11.

{19} Our Supreme Court adopted the United States Supreme Court's balancing test articulated in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). *See Garza*, 2009-NMSC-038, ¶ 13. The United States Supreme Court identified four factors to be weighed by the court in analyzing a defendant's claim: (1) the length of delay in bringing the case to trial, (2) the reasons for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) the actual prejudice to the defendant caused by the delay. *Id.* "Each of these factors is weighed either in favor of or against the [s]tate or the defendant, and then balanced to determine if a defendant's right to a speedy trial was violated." *State v. Spearman*, 2012-NMSC-023, ¶ 17, 283 P.3d 272. "[T]he factors have no talismanic qualities, and none of them are a necessary or sufficient condition to the finding of a violation of the right [to a] speedy trial." *Id.* ¶ 18 (alteration, internal quotation marks, and citation omitted). Instead, each factor is related and must be considered together in the context of the circumstances. *Id.* In our review of a speedy trial ruling, this Court must "give deference to the district court's factual findings, but we review the weighing and the balancing of the *Barker* factors de novo." *Spearman*, 2012-NMSC-023, ¶ 19 (alterations, internal quotation marks, and citation omitted).

{20} While none of the *Barker* factors are dispositive, when a defendant fails to demonstrate particularized prejudice, we will not determine that a violation has occurred unless the other factors weigh heavily in favor of the defendant. *See State v. Parrish*, 2011-NMCA-033, ¶ 32, 149 N.M. 506, 252 P.3d 730 ("If [the d]efendant fails to make a particularized showing of prejudice, the other three factors must weigh heavily in [the d]efendant's favor.").

A. Length of the Delay

{21} Under the speedy trial analysis, the length of delay serves not only as one of the four *Barker* factors to be weighed and balanced, but also acts as a "triggering mechanism, requiring further inquiry into the *Barker* factors" once the delay has reached a specified minimum threshold, depending on the difficulty of the case. *Garza*, 2009-NMSC-038, ¶¶ 21, 23. "Whether or not the length of delay is presumptively prejudicial, triggering an inquiry into the *Barker* factors, depends on the complexity of the case[,]" simple, intermediate, or complex. *Spearman*, 2012-NMSC-023, ¶ 21. A delay of trial of a year in simple cases, fifteen months in intermediate cases, and eighteen months in complex cases is presumptively prejudicial and necessitates further inquiry. *Id.* In this case, Defendant's trial and appellate counsel, as well as the State, describe this case as one of intermediate complexity. Therefore, the delay in this case of forty-seven

months between Defendant's arrest in July 2008 and the first trial in June 2012 is presumptively prejudicial and triggers further inquiry into the *Barker* factors.

{22} Evaluation of the length of delay factor is independent of the remaining three *Barker* factors and may be found in favor of the defendant regardless of the fault of the parties when addressing the reasons for delay. *See State v. Serros*, 2016-NMSC-008, ¶ 26, 366 P.3d 1121. "A delay that crosses the threshold for presumptive prejudice necessarily weighs in favor of the accused; the only question is, how heavily?" *Id.* As the delay increases, so does the weight of this first factor in favor of the defendant and against the state—extraordinary delay weighs heavily in favor of the defendant. *See id*. The delay in this case exceeds the minimum fifteen month threshold by thirty-two months and as such, this factor weighs heavily against the State. *See id.* ¶ 24 (holding that a fifty-one-month delay in a case that was either complex or of intermediate complexity was "extraordinary, and therefore it weigh[ed] heavily in [the d]efendant's favor"); *see also Taylor*, 2015-NMCA-012, ¶¶ 7, 9 (holding that a twenty-four-month delay in a simple case weighed heavily against the state); *State v. Vigil-Giron*, 2014-NMCA-069, ¶¶ 19-20, 65, 327 P.3d 1129 (agreeing with the district court's analysis and determination that an additional eighteen-month delay beyond the presumptively prejudicial threshold in a complex case weighed heavily against the state); *State v. Fierro*, 2012-NMCA-054, ¶ 36, 278 P.3d 541 (holding that a fifty-five-month delay in a case of intermediate complexity weighed heavily in the defendant's favor).

B. Reason for the Delay

{23} Closely related to the length of the delay, the second *Barker* factor analyzes the reason for the delay by assigning "different weights . . . to different reasons for the delay." *Garza*, 2009-NMSC-038, ¶ 25 (internal quotation marks and citation omitted). Our courts have recognized several types of delay. On one side of the spectrum, which is not argued in this case by either party, is "intentional delay" by the prosecution in order to hamper the defense. *Id.* ¶ 26. This type of delay weighs heavily against the state. *Id.* "Negligent or administrative delay" weighs more lightly against the state, but "it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun." *Id.* (internal quotation marks and citation omitted). Additionally, this type of delay begins to weigh more heavily against the state as the length of the delay increases. *Id.* There are also various types of appropriate delay that are recognized to be inherent to the process. *Id.* ¶ 27. These types of delay would be justified for "valid reason[s]" which are neutral and do not weigh against either party. *Id.* Other pre-trial circumstances, such as recusal by the presiding judge, also require that resulting delay be weighed neutrally. *See State v. Benavidez*, 1999-NMCA-053, ¶ 35, 127 N.M. 189, 979 P.2d 234, *vacated on other grounds by* 1999-NMSC-041, 128 N.M. 261, 992 P.2d 274. The final type of delay is delay caused by the defense and this type of delay weighs against the defendant. *See Serros*, 2016-NMSC-008, ¶ 29. Defendant concedes that this *Barker* factor should be weighed neutrally by this Court. We agree.

{24} From July 31, 2008 through November 26, 2008, this case proceeded with neither party causing delay. The State admits that such administrative delay during the four-month period weighs slightly against the State. *See Garza,* 2009-NMSC-038, ¶ 26; *see also Taylor*, 2015-NMCA-012, ¶ 11 (weighing neutrally a period of delay when the case "was progressing in a normal fashion").

{25} From November 27, 2008 through April 14, 2009, investigation and proceedings in the case were delayed by Defendant's refusal to provide a DNA sample which necessitated the filing of a motion to obtain a buccal swab, defense counsel's unavailability, and a stipulated order to continue by the parties. On November 26, 2009, the prosecutor filed a motion for an order granting the seizure of DNA and the district court held a hearing on the motion on December 30, 2008. On January 27, 2009, the State filed a stipulated Rule 5-604 NMRA petition for an extension of time, asserting that plea negotiations were ongoing, interviews needed to be conducted, and that if a plea did not resolve the case, additional time was needed to complete discovery and to process Defendant's DNA if the State's motion was granted. The district court granted the extension up to August 11, 2009. The district court granted the State's motion for DNA standards at a hearing on March 23, 2009, filing the order on April 14, 2009. The State argues that this period of delay should weigh against Defendant. We agree even though Defendant's delay regarding the DNA sample was also interwoven with a stipulated extension of time. *See State v. Wilson*, 2010-NMCA-018, ¶ 38, 147 N.M. 706, 228 P.3d 490 (recognizing that this Court generally does not weigh stipulated extensions against the state).

{26} From April 15, 2009 through November 12, 2009, the parties stipulated to a second Rule 5-604 extension of time in order to negotiate a plea and to wait for the results of the DNA analysis. Our Supreme Court granted the extension up to and including January 25, 2010. The State agrees with Defendant that this seven-month period should be weighed neutrally as a stipulated delay. *See Wilson*, 2010-NMCA-018, ¶ 38 (refusing to weigh a period of three months delay against the state when the delay was stipulated to by the parties).

{27} From November 13, 2009 through August 18, 2010, a determination of Defendant's competency to stand trial delayed the proceedings. On November 13, 2009, the district court filed a stipulated order to stay proceedings pending a determination of Defendant's competency. The district court held a hearing on the motion on June 30, 2010, at which time defense counsel informed the district court that a competency evaluation had not yet been completed. The district court ordered that Defendant be evaluated within the next forty-five days. On August 17, 2010, defense counsel filed a motion to withdraw the issues of Defendant's competency. We agree with the district court that this period to determine competency does not weigh against either party. *See State v. Stock*, 2006-NMCA-140, ¶ 19, 140 N.M. 676, 147 P.3d 885(stating that "delays caused by competency evaluations should generally not count against the state for speedy trial purposes because the state cannot try an incompetent defendant").

{28} From August 18, 2010 through October 15, 2010, the State awaited a response from Defendant on its plea offer. Delay from plea negotiations is to be "weighed against the [s]tate when there exist measurable periods of negotiation." *Wilson*, 2010-NMCA-018, ¶ 33. "How heavily the delay is to be weighed depends on the length of that delay and the amount of delay caused by a defendant in failing to timely respond to a plea offer." *Id.* In this case, the State made a timely plea offer and it was within Defendant's power to accept or reject the plea during this two-month time period. We therefore weigh this period of delay only slightly against the State.

{29} From November 5, 2010 through November 2011, the case was delayed by defense counsel's trial schedule and Defendant's need for additional time to consider the plea offer. On November 5, 2010, the State filed a motion for a trial setting. The district court scheduled trial for January 10, 2011, and then rescheduled trial for March 14, 2011, pursuant to a stipulated request. At a hearing on the motion on March 11, 2011, defense counsel informed the district court that Defendant needed more time to consider the plea offer, he was not prepared to go to trial, and he had two other trials scheduled in April and June. At a hearing on July 19, 2011, Defendant advised the State of his rejection of the plea offer. This period does not weigh against the State as the delay was both stipulated to and in Defendant's favor. *See id.* ¶ 38 (refusing to weigh a stipulated three month delay against the State); *see also State v. Maddox*, 2008-NMSC-062, ¶ 24, 145 N.M. 242, 195 P.3d 1254 ("Generally, there is no rule attributing delay resulting from attempted plea negotiations to a specific party and absent some act of bad faith or some prejudice to the defendant[.]"), *abrogated on other grounds by Garza*, 2009-NMSC-038, ¶¶ 47-48; *Stock*, 2006-NMCA-140, ¶ 19 (acknowledging that generally, "to the extent delays are for a defendant's benefit, it would not be fair to hold them against the state").

{30} From November 2011 through January 3, 2012, the case remained untried and is best described as administrative delay, weighing only slightly against the State. *See Garza*, 2009-NMSC-038, ¶ 26.

{31} On January 3, 2012, the district court offered several possible trial dates. After addressing conflicts in their schedule, both parties agreed to a June 18, 2012 setting. This five-month period of delay, coordinated with Defendant to select a trial date, should weigh neutrally. *See Taylor*, 2015-NMCA-012, ¶ 11 (weighing neutrally a period of delay when the case "was progressing in a normal fashion").

{32} In total, very little of the delay in bringing this case to trial should be weighed against the State, and all other times weigh neutrally or against Defendant. Although it is the State's duty to ensure that "[Defendant is] brought to trial in a timely manner[,]" we agree with the district court's findings that there was not a single continuance in this case that was not agreed to by Defendant. *Stock*, 2006-NMCA-140, ¶ 25. As such, we agree with Defendant and weigh this factor neutrally in our speedy trial analysis.

C. Assertion of the Right

{33} The third *Barker* factor requires us to analyze Defendant's assertion of his right to a speedy trial. We must "assess the timing of the defendant's assertion and the manner in which the right was asserted." *Garza*, 2009-NMSC-038, ¶ 32.

{34} The facts here are similar to those analyzed by this Court in *State v. Valencia*, 2010-NMCA-005, 147 N.M. 432, 224 P.3d 659. In *Valencia,* the defendant entered a demand when he first appeared in magistrate court and then waited nineteen months before reasserting the right. *Id.* ¶ 27. On those facts, this Court held that the assertions weighed slightly in the defendant's favor. *Id.* Defendant asserted a speedy trial right upon the entry of appearance by his counsel on September 30, 2008. As discussed in *Valencia*, we generally afford little weight to early assertions of the right. *Id.* Defendant did not thereafter request a speedy trial until two weeks prior to his trial—nearly three years and ten months later. We therefore weigh the third *Barker* factor only slightly in Defendant's favor. *See Valencia*, 2010-NMCA-005, ¶ 27; *see also State v. Laney*, 2003-NMCA-144, ¶ 24, 134 N.M. 648, 81 P.3d 591 (emphasizing that "[b]ecause [the d]efendant waited until the eleventh hour to specifically and meaningfully invoke a ruling on the speedy trial issue, we find this factor weighs only slightly in his favor").

D. Prejudice to Defendant

{35} The right to a speedy trial protects three interests of a defendant: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *State v. Coffin*, 1999-NMSC-038, ¶ 68, 128 N.M. 192, 991 P.2d 477 (internal quotation marks and citation omitted). With regards to the first two types of prejudice,"some degree of oppression and anxiety is inherent for every defendant who is jailed while awaiting trial" and we therefore weigh this factor only in the defendant's favor if the anxiety suffered is "undue."*Garza*, 2009-NMSC-038, ¶ 35 (alterations, internal quotation marks, and citation omitted.) "The oppressive nature of the pretrial incarceration depends on the length of incarceration, whether the defendant obtained release prior to trial, and what prejudicial effects the defendant has shown as a result of the incarceration." *Id.* We will not speculate as to the degree of anxiety suffered by Defendant and instead, Defendant must make "a particularized showing of prejudice[.]" *Id.* The third type of prejudice—the impairment to the defendant's defense—is the most serious and protects the defendant's ability to assert an adequate defense from the prejudicial effects of time, such as loss of memory, or the death or disappearance of a witness. *Id.* ¶ 36. Defendant "must state with particularity what exculpatory testimony would have been offered" and "must also present evidence that the delay caused the witness's unavailability." *Id.* (alteration, internal quotation marks, and citation omitted).

{36} Defendant argues that although his trial defense was not impaired by the delay in the trial proceedings, he suffered anxiety after his release from jail and thereby, suffered prejudice. Defendant was incarcerated for a period of four months prior to trial. Defendant testified that he lost his job while incarcerated, was restricted from leaving the state to visit family, had financial hardships, and was unable to afford medication because he had no health insurance. He further testified that the delay was "pretty hard"

and that he was "worried all the time[.]" We acknowledge that the anxiety suffered by Defendant was for a longer period of time, however without a more particularized showing of prejudice, we agree that the prejudice suffered by Defendant was primarily inherent in the nature of the charges that lead to an initial four month period of incarceration, and the resulting types of anxiety were not "undue." *See id.* ¶ 35 (recognizing that the appellate courts "weigh this factor in the defendant's favor only where the pretrial incarceration or the anxiety suffered is undue"); *see also State v. Gallegos*, 2016-NMCA-076, ¶ 5, 387 P.3d 296 ("We apply a deferential standard of review to the factual findings of the district court[.]"). Furthermore, there was no actual prejudice to Defendant's ability to mount an adequate defense. Defendant, suffering no oppressive pretrial incarceration, no undue anxiety, and no particularized showing of prejudice to his defense, failed to make a showing of prejudice that is cognizable under the fourth *Barker* factor. *See Coffin*, 1999-NMSC-038, ¶ 68; *see also Gallegos*, 2016-NMCA-076, ¶ 31(stating that "although [the d]efendant's failure to show particularized prejudice is not dispositive to his claim of a speedy trial right violation, the prejudice factor of the speedy trial analysis does not weigh in [the d]efendant's favor"). As a result, we agree with the district court that the prejudice factor in this case was not "undue" and should not be weighed in Defendant's favor.

E. Weight and Balancing of the Speedy Trial Factors

{37} "[I]n the absence of a showing of particularized prejudice, the state violates a defendant's constitutional right to a speedy trial when the defendant demonstrates that the length of delay and the reasons for the delay weigh heavily in the defendant's favor and the defendant has asserted his right and not acquiesced to the delay." *Gallegos*, 2016-NMCA-076, ¶ 32 (alterations, internal quotation marks, and citation omitted). In this case, the length of the delay weighs heavily in Defendant's favor and Defendant asserted his right to a speedy trial. However, the reasons for the delay weigh neutrally and do not weigh heavily in Defendant's favor. The majority of this delay was acquiesced to or attributed to Defendant for various reasons that we have described. As a result, we conclude that Defendant's right to a speedy trial was not violated in this case.

CONCLUSION

{38} For the foregoing reasons, we reverse Defendant's CSPM conviction and remand this case to the district court for further proceedings and retrial.

{39} IT IS SO ORDERED.

TIMOTHY L. GARCIA, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

STEPHEN G. FRENCH, Judge