

**STATE V. CHAVEZ**

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**STATE OF NEW MEXICO,  
Plaintiff-Appellant,  
v.  
JOAQUIN CHAVEZ,  
Defendant-Appellee.**

No. A-1-CA-34670

COURT OF APPEALS OF NEW MEXICO

December 20, 2018

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Stan Whitaker,  
District Judge

**COUNSEL**

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**JUDGES**

LINDA M. VANZI, Chief Judge. **WE CONCUR:** J. MILES HANISEE, Judge, STEPHEN G. FRENCH, Judge Pro Tempore

**AUTHOR:** LINDA M. VANZI

**MEMORANDUM OPINION**

**VANZI, Chief Judge.**

{1} The State appeals the district court's November 23, 2015 order, granting Defendant Joaquin Chavez's motion to exclude the State's witnesses, claiming that

exclusion of the witnesses was an abuse of discretion under the circumstances. We hold that the district court did not abuse its discretion by excluding the witnesses.

## **BACKGROUND**

{2} Defendant was indicted on October 11, 2013, and arraigned on October 21, 2013. On August 6, 2014, the district court entered a scheduling order setting the discovery and pretrial witness interview deadline for December 31, 2014, and the trial for March 9, 2015. On December 30, 2014, the State filed a notice of compliance stating that it never received a response to its December 11, 2014 email asking if Defendant wanted to interview any of the State's witnesses. On January 30, 2015, the State filed an amended witness list, which gave the general Albuquerque Police Department (APD) court services contact information for the witnesses employed by APD. The State also filed a notice disavowing responsibility for scheduling pre-trial interviews and directing Defendant to serve a written notice of statement or subpoena on the State's witnesses if he wanted to interview them.

{3} On February 2, 2015, the case was reassigned to another judge and became subject to case management requirements of the Second Judicial District Court's special calendar rule, see LR2-400.1(A)-(B) NMRA (2015), which required the district court to sanction parties for discovery and scheduling order violations. See LR2-400.1(D)(4), (J)(4). On February 23, 2015, the court entered an updated scheduling order setting the pretrial witness interview deadline for November 21, 2015, and trial for some time between March 7 and March 25, 2016.

{4} On March 13, 2015, Defendant filed a motion to exclude three detectives and one officer named on the State's witness list based on violations of Rules 5-501, 5-503, and 5-505 NMRA, as well as LR2-400.1. Defendant asserted that he had subpoenaed the four witnesses for pretrial interviews and only one detective appeared. Defendant claimed that the one detective who appeared could not remember anything about the case even after having his memory refreshed. Defendant also claimed that defense counsel discovered that one detective no longer worked for APD, despite having the general APD court services contact information listed for him on the State's amended witness list. Additionally, Defendant claimed that someone from APD court services left a message at the time of the officer's scheduled interview stating that the officer was on duty and could not attend. It is unclear why the third detective failed to appear for his interview. Defense counsel claimed that, "[b]ecause of these witnesses' failure to appear for their interviews, [she could not] provide effective assistance of counsel, file appropriate motions or perform effective follow-up investigation."

{5} In response, the State cited *State v. Harper*, 2011-NMSC-044, 150 N.M. 745, 266 P.3d 25, claiming that exclusion was not the appropriate remedy when the State "is not generally obligated to make witnesses available for an interview." *Id.* ¶ 22. However, the State did not refute any of Defendant's claims or explain why the detectives and officer missed their interviews. Nor did the State explain why it did not provide current contact information for the detective who left APD. Although the State quoted our

Supreme Court's guidance in *Harper* that "the exclusion of witnesses should not be imposed except in extreme cases, and only after an adequate hearing to determine the reasons for the violation and the prejudicial effect on the opposing party," neither party actually requested a hearing. *Harper*, 2011-NMSC-044 ¶ 21.

{6} Without holding a hearing, the district court granted Defendant's motion to exclude. In its order granting Defendant's motion, the court stated, "The Defendant's Motion is well-taken and therefore granted. . . . The State shall provide in writing to the Court . . . whether it can proceed to trial in this matter given the Court's ruling." The court did not mention any consideration of the culpability of the State, prejudice to Defendant or the court, or the availability of lesser sanctions in its order. The State appealed the court's ruling before informing the court whether it could proceed without the witnesses.

{7} Subsequent to the district court's decision, our Supreme Court decided *State v. Le Mier*, 2017-NMSC-017, 394 P.3d 959, which clarified its holding in *Harper* and explained that "[c]ourts must evaluate the considerations identified in *Harper*—culpability, prejudice, and lesser sanctions—when deciding whether to exclude a witness and must explain their decision to exclude or not to exclude a witness within the framework articulated in *Harper*." *Le Mier*, 2017-NMSC-017, ¶ 20. As *Le Mier* was decided after the district court's decision, we remanded this case for the "limited purpose of allowing the [district] court to provide a written explanation of its decision to exclude the witnesses within the framework articulated in *Harper*, as clarified by *Le Mier*."

{8} In response to our order for limited remand, the district court held a hearing to inquire about the parties' recollection of the events and discuss the best way to address our order for limited remand. Although the court did not explain its decision to exclude the witnesses within the *Harper* framework at the hearing, the court acknowledged *Harper* and its responsibility to consider lesser sanctions, and sought input from the State and Defendant. After the hearing, the court entered an order with specific findings regarding the circumstances surrounding its decision to exclude the State's witnesses. In its order, the district court generally recited the factual background discussed above and concluded, "Based upon the State's lack of compliance with its obligation to keep its witness contact information accurately updated, and the seemingly uninterested and uncooperative law enforcement personnel regarding compliance with lawful subpoenas, the Court determined that the sanction of exclusion of these witnesses was warranted in this case."

## DISCUSSION

{9} As this case was filed before June 30, 2014, it was subject to the Second Judicial District Court's special calendar rule. See LR2-400.1(A)-(B). The rule requires parties to "disclose or make available all discovery described in Rule 5-501(A)(1)-(6) . . ." no later than February 12, 2015, if not already disclosed. LR2-400.1(A), (D). Rule 5-501(A)(5) provides that the State shall disclose or make available to the defendant "a written list of

the names and addresses of all witnesses which the prosecutor intends to call at the trial[.]” The parties also have “a continuing duty to disclose additional information within five (5) days of receipt of such information.” LR2-400.1(D)(2). Should either party fail to comply with these discovery requirements, the district court “shall impose sanctions, which may include dismissal of the case with or without prejudice, prohibiting the party from calling a witness or introducing evidence, monetary sanctions . . . , or any other sanction deemed appropriate by the court.” LR2-400.1(D)(4). Additionally, where a party “fails to comply with any provision of the scheduling order, the court shall impose sanctions as the court determines is appropriate in the circumstances[.]” LR2-400.1(J)(4).

**{10}** While LR2-400.1 makes sanctions mandatory for violations of discovery obligations and scheduling order deadlines, it provides the district court with discretion regarding the type of sanction to impose. LR2-400.1(D)(4), (J)(4). We review the district court’s imposition of sanctions for an abuse of discretion. See *Le Mier*, 2017-NMSC-017, ¶ 22. “An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case.” *Id.* (internal quotation marks and citation omitted). “In reviewing the district court’s decision, [appellate courts] view[] the evidence . . . and all inferences . . . in the light most favorable to the district court’s decision.” *Id.* To determine whether the imposition of severe sanctions, such as exclusion of a witness, is proper, courts look at: “(1) the culpability of the offending party, (2) the prejudice to the adversely affected party, and (3) the availability of lesser sanctions.” *Id.* ¶ 15. However, “*Harper* did not establish a rigid and mechanical analytic framework. Nor did *Harper* embrace standards so rigorous that courts may impose witness exclusion only in response to discovery violations that are egregious, blatant, and an affront to their authority.” *Le Mier*, 2017-NMSC-017, ¶ 16. Thus “it is not the case that witness exclusion is justified only if all of the *Harper* considerations weigh in favor of exclusion.” *Le Mier*, 2017-NMSC-017, ¶ 20.

**{11}** The State argues that the district court abused its discretion in excluding the four witnesses because the deadline for completing pretrial witness interviews was still months away. While we express some concern with the severity of the sanction imposed in light of the deadline for pretrial witness interviews, given the district court’s broad discretion to impose sanctions and our imperfect understanding of the proceedings we review, we cannot say that this was “clearly against the logic and effect of the facts and circumstances of the case.” *Id.* ¶ 22 (internal quotation marks and citation omitted). As an initial matter, we note that while we agree that the district court was not required to impose sanctions under LR2-400.1(J)(4) because the witnesses’ failure to appear did not violate its scheduling order, it still had the inherent power to impose sanctions for the witnesses’ failures to obey the subpoenas. See *State v. Jackson*, 2004-NMCA-057, ¶ 17, 135 N.M. 689, 92 P.3d 1263 (“Although the trial court apparently believed that it had no power to sanction the County’s behavior directly, we note that Rule 5-511(E) NMRA . . . provides that a ‘failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued.’ ” (alteration omitted)); see also *Freeman v. Fairchild*, 2018-NMSC-023, ¶ 19, 416 P.3d 264 (“[I]f a party’s litigation

abuses fall outside the sanction authority expressly set forth in our procedural rules, ‘the court may rely on its inherent powers’ to impose sanctions.” (quoting *Gonzales v. Surgidev Corp.*, 1995-NMSC-047, ¶ 23, 120 N.M. 151, 899 P.2d 594)); *State v. Candelaria*, 2008-NMCA-120, ¶ 12, 144 N.M. 797, 192 P.3d 792 (“A metropolitan court is vested with the inherent authority to sanction parties in furtherance of controlling its docket and the proceedings that come before it.”). As the district court did not state whether it was excluding the witnesses because it believed it had to under LR2-400.1(J)(4), we presume that it was exercising its inherent authority to sanction the State for its non-civilian witnesses’ failure to obey their subpoenas. See *State v. Brown*, 1993-NMCA-120, ¶ 3, 116 N.M. 705, 866 P.2d 1172 (“[O]n a doubtful or deficient record, we presume regularity and correctness in the proceedings below.”).

**{12}** Moreover, the district court was required to impose a sanction for the State’s failure to provide an updated and correct address for the one detective who no longer worked for APD, in violation of its continuing duty to disclose additional information. See LR2-400.1(D)(2), (4); Rule 5-501(A)(5); *Le Mier*, 2017-NMSC-017, ¶ 23 (“[Rule 5-501(A)(5)] would have little or no practical value if it were not true that it requires the state to provide *correct* witness addresses.”). The State claims that what happened to the detective who left APD remains a factual question for the district court to resolve. We disagree. While the district court did not make any findings of fact in its initial order granting Defendant’s motion to exclude, on limited remand from this Court it found, “With regard to one witness, . . . the primary detective in the case and the State’s primary witness, no updated contact information was provided to the defense. [The d]etective . . . had apparently left APD sometime after the State filed its first [w]itness [l]ist in November, 2013 and prior to [D]efendant filing his motion in March, 2015.” However, even if the district court did not make this finding, the State did not dispute any of Defendant’s factual allegations in its response to the motion to exclude. Instead the State merely argued that it should not be sanctioned for their witnesses’ failures to appear for pretrial interviews. And contrary to its assertion on appeal, it did not explicitly request a hearing so it could dispute Defendant’s factual claims. Therefore, any underlying factual dispute as to what happened to the detective and whether the State violated LR2-400.1(D)(2) was unpreserved and we do not address this question on appeal. See Rule 12-321(A) NMRA (“To preserve an issue for review, it must appear that a ruling or decision by the trial court was fairly invoked.”).

**{13}** Having determined that the district court had the power, if not the obligation, to sanction the State, we now turn to whether the district court abused its discretion in excluding the witnesses. With respect to the first *Harper* factor, the culpability of the offending party, we note the following facts, which the district court considered upon limited remand in making its determination that witness exclusion was the appropriate sanction. While the State tried to email defense counsel to set up pretrial interviews in December 2014, it later disavowed itself of any further responsibility for setting up pretrial witness interviews for Defendant. This being so, the State was responsible for assuring that the contact information of its witnesses was correct and updated so that Defendant could subpoena them for a pretrial interview. Yet the State did not inform Defendant of its detective’s departure from APD until after Defendant already sent the

detective's subpoena to the APD court services address listed on the amended witness list. Additionally, two of the State's witnesses did not show up for their pretrial interviews, despite being subpoenaed by Defendant. Nor did the State or their witnesses give any advanced notice that the witnesses would not be able to attend the interviews. While one of the four subpoenaed witnesses did show up for the interview, he apparently could not remember anything about his involvement in the case, even after defense counsel attempted to refresh his memory. All of this prompted Defendant to file his motion to exclude, to which the State filed a "cursory" response that failed to refute any of Defendant's claims. Upon limited remand, the district court concluded that the State failed to uphold its discovery obligations and that its non-civilian witnesses were "seemingly uninterested and uncooperative." Given these facts, we conclude that the district court did not abuse its discretion in finding the State culpable for failing to update its witnesses' contact information or make sure their witnesses would attend the pretrial interviews. *Cf. Le Mier*, 2017-NMSC-017, ¶ 24 ("While here the violations were multiple, a single violation of a discovery order may suffice to support a finding of culpability.").

**{14}** With respect to the second *Harper* factor, prejudice to the adversely affected party, *Le Mier* explains that any discovery violation necessarily involves some amount of prejudice to the defendant. *See Le Mier*, 2017-NMSC-017, ¶ 25 ("When a court orders a party to provide discovery within a given time frame, failure to comply with that order causes prejudice both to the opposing party and to the court."). While the State may not have violated the district court's discovery order, as the deadline for pretrial witness interviews had not yet passed, it violated its continuing duty to keep its witness contact information up to date. *See* LR2-400.1(D)(2), (4); Rule 5-501(A)(5). The State's failure prevented Defendant from being able to subpoena the State's primary witness and ensure that he would attend his scheduled pretrial interview. This, combined with the other two witnesses' failure to appear for their scheduled interviews, at the very least caused defense counsel to waste valuable time setting up pretrial interviews only to find out that the witnesses either did not get their subpoena or chose to ignore them. The State's failures may not have delayed Defendant's day in court, but they undoubtedly delayed his counsel's ability to perform effective follow-up investigation and prepare a defense. Moreover, unnecessary wastes of time not only affects Defendant, but can affect defense counsel's other clients as well by preventing her from attending to her other cases. *Cf. Le Mier*, 2017-NMSC-017, ¶ 26 ("When a party accepts a setting only to later abandon it for no meritorious reason, other parties and the justice system as a whole suffers."). Therefore, the State's actions resulted in at least some degree of prejudice.

**{15}** Finally, with respect to the third *Harper* factor, the availability of lesser sanctions, we note *Le Mier's* guidance that district courts are "not obligated to consider every conceivable lesser sanction before imposing witness exclusion. . . . Rather, the court[s] are] only required to fashion the least severe sanction that best fit the situation *and* which accomplished the desired result." *Le Mier*, 2017-NMSC-017, ¶ 27. While the record in which we review does not show an explicit consideration of lesser sanctions, we specifically remanded this case back to the district court to re-examine its ruling in

light of *Harper* and *Le Mier*, and therefore, the court was undoubtedly aware of its duty to consider lesser sanctions. Indeed, in response to our order for limited remand, the district court held a hearing, where it acknowledged *Harper*'s requirement to consider lesser sanctions. The court also issued an order detailing the State's actions and concluded, "Based upon the State's lack of compliance with its obligation to keep its witness contact information accurately updated, and the seemingly uninterested and uncooperative law enforcement personnel regarding compliance with lawful subpoenas, the Court determined that the sanction of exclusion of these witnesses was warranted in this case." Given the State's failure to comply with discovery obligations, its "seemingly uninterested and uncooperative" witnesses, and the State's "cursory" response to the motion to exclude, we cannot say that any lesser sanction would have accomplished the goal of ensuring future compliance on behalf of the State and its non-civilian witnesses. The district court was in the best position to determine the least severe sanction that would accomplish its desired result, and it is not our job to "second-guess our courts' determination as to how their discretionary authority is best exercised." *Le Mier*, 2017-NMSC-017, ¶ 17.

{16} The State argues that the district court did not adequately evaluate the *Harper* factors because it did not hold a hearing or make any findings or conclusions pertinent to the *Harper* factors in its original order granting the motion to exclude. However, the State cannot fault the district court for failing to hold a hearing when the State failed to dispute any of the underlying facts or explicitly request a hearing. Even if the court did err by not holding a hearing before making its decision, we believe that the district court's actions upon limited remand, i.e. holding a hearing and issuing an order with specific findings of fact, were sufficient to show that it considered the *Harper* factors. As explained earlier, the district court was undoubtedly aware of its obligations under *Harper* and *Le Mier* when it issued its most recent order. In its order, the court detailed the State's discovery violations and its witnesses' failures to comply with lawful subpoenas, and it concluded that excluding the witnesses was warranted. Given the district court's actions upon limited remand, we conclude that the district court provided us with an adequately developed record for us to substantively review.

## **CONCLUSION**

{17} For the foregoing reasons, we affirm the district court's order granting Defendant's motion to exclude and remand for the State to determine whether it can proceed to trial without the excluded witnesses.

{18} **IT IS SO ORDERED.**

**LINDA M. VANZI, Chief Judge**

**WE CONCUR:**

**J. MILES HANISEE, Judge**

**STEPHEN G. FRENCH, Judge Pro Tempore**