

STATE V. A. N-C

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**STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
A. N-C,
Defendant-Appellee.**

No. A-1-CA-34667

COURT OF APPEALS OF NEW MEXICO

December 26, 2018

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY

COUNSEL

Jacqueline D. Flores, District Judge, Hector H. Balderas, Attorney General, Santa Fe, NM, John Kloss, Assistant Attorney General, Albuquerque, NM, for Appellant

Zach Ives Law, Zachary A. Ives, Albuquerque, NM, Urias & Ward PA, Molly Schmidt-Nowara, Albuquerque, NM, for Appellee

JUDGES

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

AUTHOR: LINDA M. VANZI

MEMORANDUM OPINION

VANZI, Chief Judge.

{1} This case comes to us by order of remand from our Supreme Court for further consideration in light of *State v. Le Mier*, 2017-NMSC-017, 394 P.3d 959. See Order at 1, *State v. A. N-C*, No. S-1-SC-36307 (May 22, 2017). Plaintiff appeals the district

court's April 2, 2015 order, granting Defendant's motion to exclude, claiming that exclusion of its 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 March 20, 2014, on charges of criminal sexual penetration in the first degree and criminal sexual contact of a minor in the third degree. The district court held a status conference on December 8, 2014. At the status conference, Defendant claimed that he had been trying to arrange pretrial witness interviews with the State to no avail and requested that the district court provide a hard deadline for interviews so he could move to suppress if the witnesses were unable to be interviewed by that time. While the court did not enter a formal scheduling order, the court and the parties set the deadline for pretrial interviews for February 13, 2015, and the trial for May 11, 2015. At the status conference, the court stated, "The State must produce the witnesses. They must have been set and produced, clear?" and the State responded, "Clear." On February 2, 2015, the case 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 failing to comply with its scheduling order. See LR2-400.1(J)(4).

{3} On February 24, 2015, eleven days past the pretrial witness interview deadline, the State filed an unopposed motion to extend the deadline until March 13, 2015. The State asserted that it had good cause in seeking additional time because it could not get the alleged minor victim's therapist's name without a court order, which the court had yet to sign. Additionally, the State cited difficulties scheduling witness interviews. However, the district court denied the State's motion, concluding that there was no good cause to extend the district court's previously scheduled deadline.

{4} On March 5, 2015, Defendant filed a motion to exclude the witnesses that the State failed to make available before the pretrial interview deadline. While it is unclear what other witnesses Defendant had not been able to interview by the deadline, it appears that Defendant was not able to interview at least three witnesses: the alleged victim, an investigating officer, and the victim's therapist. According to Defendant, the State was primarily responsible for missing the deadline because it accepted responsibility for setting up the interviews and failed to respond to many of Defendant's interview requests in the past several months. Defendant acknowledged that the State tried to set up an interview with the alleged victim at one point, but the parties canceled the interview when the victim's family said they were running late. While Defendant was able to interview the victim's sister and parents at another time, the State never made the victim available for an interview before the pretrial interview deadline. As a result, Defendant claimed that he "[would] be prejudiced if he is forced to go to trial without having interviewed the [alleged victim]."

{5} In response, the State admitted that it might have been "too accommodating with the victim's family," but claimed that it had engaged with Defendant in trying to set

times. The State also admitted that it inadvertently failed to schedule the alleged victim's interview on the day of her parents' make-up interview, but claimed that it attempted to work with Defendant by setting a make-up interview for the victim in late February or early March. The State also asserted that defense counsel failed to appear for the interview with the investigating officer the day before the pretrial interview deadline because defense counsel improperly calendared the interview. Additionally, the State claimed that it could not set up an interview with the alleged victim's therapist because the district court failed to sign an order to disclose protected health information before the pretrial interview deadline.

{6} The court held a hearing on the motion on March 19, 2015. After hearing Defendant's reasons for making the motion to exclude and the State's response, which largely mirrored the arguments in their motions, the court stated that "[t]he request is granted" and adjourned. The court issued a short order memorializing its decision to exclude the State's witnesses not interviewed by the pretrial witness interview deadline. The court did not explain its decision to exclude the witnesses or mention any consideration of the factors identified in *State v. Harper*, 2011-NMSC-044, 150 N.M. 745, 266 P.3d 25, i.e., the culpability of the State, prejudice to Defendant or the court, or the availability of lesser sanctions. This appeal followed.

{7} On January 24, 2017, we issued an opinion reversing and remanding for the district court to consider lesser sanctions. See *State v. A. N-C*, 2017-NMCA-034, 392 P.3d 236. Our Supreme Court granted Defendant's petition for writ of certiorari on March 16, 2017. See Order at 1, *State v. A. N-C*, No. S-1-SC-36307 (March 16, 2017). The Court subsequently quashed the writ of certiorari and remanded this case to this Court for further consideration in light of its recent decision, *Le Mier*, 2017-NMSC-017. See Order at 1, *State v. A. N-C*, No. S-1-SC-36307 (May 22, 2017).

{8} Given *Le Mier's* holding 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, and given that the Supreme Court decided *Le Mier* 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*."

{9} In response to our order for limited remand, the district court entered an order with specific findings regarding the circumstances surrounding its decision to exclude the State's witnesses, which generally included the factual background described above. In its order, the district court explained that it was operating under the strict timelines and requirements of LR2-400.1, which required it to impose sanctions for failure to comply with discovery deadlines. The district court found that "[t]he State violated this Court's order and [LR2-400.1] when, despite having ample time and being the only party with the ability to contact the alleged victim, the State repeatedly failed to arrange pretrial interviews with the alleged victim before the deadline." The court also

found that “[t]he failure of the State to timely arrange the pretrial interviews resulted, at the very least, in Defendant’s inability to interview a key witness.” Given these facts, the district court concluded that “exclusion of the witnesses [was] the most appropriate sanction.”

DISCUSSION

{10} As this case was filed before June 30, 2014, it was subject to the District Court’s special calendar rule. See LR2-400.1(A)-(B). The rule requires the district court to hold a scheduling conference and issue a scheduling order. See LR2-400.1(I)-(J). “If 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, such as suppression, exclusion, dismissal, monetary sanctions . . . or any other sanction deemed appropriate by the Court.” LR2-400.1(J)(4). However, for good cause the parties may seek to have the scheduling order deadlines extended up to twenty days if the extension does not result in an extension of the trial date. LR2-400.1(J)(3).

{11} 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. See 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.* ¶ 22. To determine whether the imposition of severe sanctions, such as the exclusion of a witness, is proper, our Supreme Court has instructed courts to consider: “(1) the culpability of the offending party, (2) the prejudice to the adversely affected party, and (3) the availability of lesser sanctions.” *Id.* ¶ 15 (internal quotation marks and citation omitted). 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.

{12} As an initial matter, we note that the State does not appear to dispute that the district court was required to impose some sort of sanction under LR2-400.1(J)(4) because the State failed to comply with the pretrial interview deadline. Rather, the State argues that the district court abused its discretion by imposing the sanction of exclusion without adequately considering the *Harper* factors. Specifically, the State argues that the district court did not adequately evaluate the *Harper* factors because it did not make any findings or conclusions pertinent to *Harper* in its original order. While it is true that the district court did not include any findings or conclusions with its original order granting Defendant’s motion to exclude, it issued a detailed order upon limited remand that included specific findings regarding the State’s violations of its scheduling order.

We conclude that this order provides us with an adequately developed record for us to substantively review for consideration of the *Harper* factors, which we do so now.

{13} 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 district court did not issue a formal scheduling order, it held a status conference where it clearly told the parties that the deadline for pretrial interviews was February 13, 2015. At the hearing, the court explicitly told the State that “[it] must produce the witnesses. They must be set and produced, clear?” and the State replied, “Clear.” By setting this deadline, the district court was properly exercising its authority to ensure the timely adjudication of the case and was proactively managing its docket. *See Le Mier*, 2017-NMSC-017, ¶ 29. However, despite this clear and unambiguous deadline, the State did not produce all of its witnesses, including the alleged victim, on time. While there was evidence that the State tried to work with Defendant to schedule interviews and that some of the events that occurred may have been out of the State’s control, we “view[] the evidence . . . and all inferences . . . in the light most favorable to the district court’s decision.” *Id.* ¶ 22. It is undisputed that the State accepted responsibility for scheduling its witnesses’ interviews, and it had more than two months to produce its witnesses for an interview. Yet Defendant was never able to interview the witnesses by the deadline despite his many requests to do so.

{14} The State had the option to request an extension, see LR2-400.1(J)(3), but did not file its motion to extend the pretrial witness interview deadline until February 24, eleven days after the deadline. Upon limited remand, the district court found that “[t]he State violated this Court’s order and [LR2-400.1] when, despite having ample time and being the only party with the ability to contact the alleged victim, the State repeatedly failed to arrange pretrial interviews with the alleged victim before the deadline.” Given these facts, we conclude that the district court did not abuse its discretion in finding the State culpable for failing to make their witnesses available for pretrial interviews before the court’s clear and unambiguous deadline. *See 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. Moreover, . . . the violation of clear and unambiguous orders is only further proof of culpable conduct.”).

{15} With respect to the second *Harper* factor, “the prejudice to the adversely affected party,” *Le Mier* explains that any discovery violation necessarily involves some amount of prejudice to the defendant and the court. *See id.* ¶ 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.”). Upon limited remand, the court found that “[t]he failure of the State to timely arrange the pretrial interviews resulted . . . in Defendant’s inability to interview a key witness.” While it may have remained possible for Defendant to interview the alleged victim at some later point before trial, the State’s actions prevented him, at the very least, from interviewing the key witness for months. Moreover, failure to abide by the court’s deadlines prejudiced the court by requiring it to dedicate its time and resources to the needless and wasteful task of ensuring

compliance with basic deadlines. See *id.* ¶ 26 (“The State’s inability to provide . . . correct witness addresses required the court to dedicate its time and resources to a needless and wasteful cause: ensuring compliance with basic discovery rules and orders. . . . [T]he court’s time was wasted, and this is prejudicial.”). Therefore, the State’s actions resulted in at least some degree of prejudice to Defendant and the court.

{16} 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.” *Id.* ¶ 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. Upon limited remand, the court issued an order detailing the State’s actions and concluded, “The Court is operating under the strict timelines and requirements set by [LR2-400.1]. Continuances are allowable only for good cause and none were presented to the Court and, in this case, exclusion of the witnesses is the most appropriate sanction.” Given the State’s failure to comply with a clear and unambiguous deadline set by the court, despite numerous requests by Defendant over the course of several months, we cannot say that any lesser sanction would have accomplished the goal of ensuring future compliance on behalf of the State. 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’ determinations as to how their discretionary authority is best exercised.” *Le Mier*, 2017-NMSC-017, ¶ 17.

{17} In sum, given the district court’s updated order with specific findings and conclusions relating to the *Harper* factors, and given the court’s broad discretion to impose sanctions under *Le Mier*, we cannot say that the decision to exclude the State’s witnesses was “clearly against the logic and effect of the facts and circumstances of the case.” *Id.* ¶ 22 (internal quotation marks and citation omitted).

CONCLUSION

{18} For the foregoing reasons, we affirm the district court’s order granting Defendant’s motion to exclude and remand for further proceedings consistent with this opinion.

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

LINDA M. VANZI, Chief Judge

WE CONCUR:

J. MILES HANISEE, Judge

STEPHEN G. FRENCH, Judge Pro Tem