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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,

4 v.

No. 34,707

5 **GWENDOLYN ETHERLY,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

8 **Charles W. Brown, District Judge**

9 City of Albuquerque

10 Jessica M. Hernandez, City Attorney

11 Nicholas H. Bullock, Assistant City Attorney

12 Albuquerque, NM

13 for Appellee

14 Jorge A. Alvarado, Chief Public Defender

15 Santa Fe, NM

16 Steven J. Forsberg, Assistant Appellate Defender

17 Albuquerque, NM

18 for Appellant

19 **MEMORANDUM OPINION**

20 **KENNEDY, Judge.**

1 {1} Defendant, Gwendolyn Etherly, received a conviction in metropolitan court,
2 appealed that conviction to the district court, and was granted trial de novo. She failed
3 to appear for that trial at the scheduled time. Pursuant to Rule 5-828(B) NMRA, the
4 district court held a show cause hearing so that Defendant could explain the reason for
5 her absence. After the hearing, the district court concluded that Defendant failed to
6 show good cause for her failure to appear for trial, and dismissed the appeal pursuant
7 to Rule 5-828(B). Defendant appeals that dismissal, but has provided no transcript for
8 our review and does not cite to anything in the record that supports the factual
9 assertions on which her argument depends. In light of the complete absence of
10 evidence to the contrary, we conclude that the district court did not abuse its discretion
11 in dismissing Defendant's appeal.

12 **I. BACKGROUND**

13 {2} Defendant was convicted in Bernalillo County Metropolitan Court for violating
14 the City of Albuquerque's animal ordinance. Defendant appealed that conviction to
15 the district court, seeking a de novo trial pursuant to NMSA 1978, Section 34-8A-
16 6(D) (1993). Defendant failed to appear at the specified time on the date that the trial
17 was scheduled to take place. Upon the State's motion, the district court dismissed the
18 case. Defendant filed a motion to reconsider dismissal, requesting that the court
19 schedule a show cause hearing. The State stipulated to Defendant's motion. The

1 district court held a hearing on the motion on March 10, 2015, after which it denied
2 Defendant's motion and issued an order dismissing Defendant's appeal. In its order,
3 the district court made the following findings of fact:

4 2. A de novo trial on the merits was set by this Court for January 31,
5 2015. All parties were present before this Court on December 9,
6 2014 for the scheduling of the trial.

7 3. Appellant failed to appear at the trial on January 31, 2015.

8 4. Pursuant to Rule 5-828(B), a hearing was held on March 10, 2015
9 for Appellant to demonstrate good cause for her failure to appear
10 at the January 31, 2015 trial.

11

12 7. Argument was heard and it was determined by this Court that
13 Appellant failed to show good cause for her non-appearance at the
14 hearing.¹

15 Defendant now appeals the district court's dismissal of the case.

16 **II. DISCUSSION**

17 {3} In her appellate brief, Defendant makes several factual assertions. None of those
18 assertions are supported by citation to the record. In fact, Defendant's brief is
19 completely devoid of any citations to support factual statements, save a single

20 ¹We note that, although the district court's findings stated that the trial was held
21 on January 31, 2015, the rest of the record proper clearly indicates that the trial was
22 scheduled for and held on January 30, 2015. The date in the court's findings appears
23 to be a typographical error.

1 reference to the docketing statement. Rule 12-213(A)(3) NMRA clearly states that a
2 summary of relevant facts must contain citations to the record proper, transcript of
3 proceedings, or exhibits to support each factual representation. Defendant, as the
4 appellant, therefore bears the burden of bringing a record that is sufficient to
5 demonstrate the validity of her contentions and cite to the pertinent portions of that
6 record in her brief. *See, e.g., Drake v. Trujillo*, 1996-NMCA-105, ¶ 18, 122 N.M. 374,
7 924 P.2d 1386. Defendant's failure to satisfy this burden and comply with Rule 12-
8 213(A)(3) is grounds for striking the brief in chief in its entirety or declining to
9 address contentions made therein. *See, e.g., State v. Kerby*, 2001-NMCA-019, ¶ 6, 130
10 N.M. 454, 25 P.3d 904 (stating that the failure to cite to the record proper or transcript
11 is grounds for striking brief in chief in its entirety); *State v. Goss*, 1991-NMCA-003,
12 ¶ 12, 111 N.M. 530, 807 P.2d 228 (stating that the failure to comply with Rule 12-213
13 may result in appellate court declining to address issues on appeal). Defense counsel
14 is cautioned to read and follow appellate rules, and avoid similar violations in the
15 future.

16 {4} The unsupported factual assertions made in Defendant's brief include an
17 assertion that she testified during the March 10, 2015 show cause hearing that she was
18 mistaken about the time of the trial and that she had arrived only minutes after the
19 district court dismissed the case. Defendant asserts that this factual basis was adequate

1 to show good cause to vacate the dismissal under Rule 5-828(B). Defendant also
2 suggests that *State v. Wilson*, 1993-NMCA-032, ¶ 24, 116 N.M. 802, 867 P.2d 1184,
3 requires a finding of “extreme willfulness” to justify dismissal. Thus, Defendant
4 suggests that because her testimony demonstrated that her failure to appear was
5 merely negligent, she did not act willfully, and her case should not have been
6 dismissed.

7 {5} While Defendant advocates for the use of the *Wilson* standard of “extreme
8 willfulness” on appeal, nothing in the record indicates Defendant proffered this theory
9 to the district court. In fact, Defendant concedes that this argument was not preserved
10 and asks that we review for fundamental error. Therefore, we first determine if error
11 occurred; if so, we then turn to a determination of whether that error was fundamental.
12 *Campos v. Bravo*, 2007-NMSC-021, ¶ 8, 141 N.M. 801, 161 P.3d 846. The district
13 court’s dismissal of Defendant’s appeal for trial de novo is error if it constitutes an
14 abuse of discretion. *Peralta v. State*, 1991-NMSC-034, ¶ 1, 111 N.M. 667, 808 P.2d
15 637. An abuse of discretion occurs when a ruling is “clearly against the logic and
16 effect of the facts and circumstances of the case.” (internal quotation marks and
17 citation omitted). *State v. Lasner*, 2000-NMSC-038, ¶ 16, 129 N.M. 806, 14 P.3d
18 1282.

19 {6} Rule 5-828(B), which governs the district court’s ability to dismiss appeals

1 from metropolitan court, allows dismissal if the defendant “fails to show good cause
2 for the failure to appear” for the de novo trial. If the defendant shows good cause, the
3 district court is required to reschedule the trial. *Id.* Though carrying many different
4 connotations, the term “good cause” in its most basic form is defined as a “legally
5 sufficient reason.” *Black’s Law Dictionary* 266 (10th ed. 2014). The record clearly
6 indicates that Defendant was present when the January 30, 2015 trial was scheduled,
7 and it is undisputed that Defendant failed to appear at the scheduled time of trial.
8 Defendant’s motion for reconsideration was premised on her desire for “an
9 opportunity for the court to hear her explanation for why she was not present at the
10 appointed hour.” There is no other evidence in the record on which to base our review
11 of the district court’s determination.

12 {7} An appellate court considers only facts that appear in the record. *See, e.g., Nix*
13 *v. Times Enters., Inc.*, 1972-NMCA-070, ¶ 15, 83 N.M. 796, 498 P.2d 683. “Upon a
14 doubtful or deficient record we indulge every presumption in support of the
15 correctness and regularity of the decision of the trial court. Every reasonable
16 intentment and presumption are resolved in favor of the proceedings and judgment
17 in that court.” *State ex rel. Alfred v. Anderson*, 1974-NMSC-101, ¶ 6, 87 N.M. 106,
18 529 P.2d 1227 (citations omitted); *see Jones v. Schoellkopf*, 2005-NMCA-124, ¶ 34,
19 138 N.M. 477, 122 P.3d 844 (“If the appellant does not designate the necessary

1 portions, the appellee may do so or may rely on the proposition that the appellant has
2 not brought a sufficient record to the appellate court[.]”).

3 {8} As there are no facts contrary to the district court’s conclusion, and based solely
4 on the limited record in this case and the facts contained therein, we cannot conclude
5 that the district court abused its discretion in dismissing the appeal pursuant to Rule
6 5-828(B). *See Reliance Ins. Co. v. Marchiondo*, 1977-NMSC-106, ¶¶ 6-11, 91 N.M.
7 276, 573 P.2d 210 (“Having neglected to provide a proper record on appeal, [the
8 appellant] cannot challenge here the correctness of the decision of the trial
9 court. . . . Here[, the appellant] has failed to provide a record from which such a
10 showing could be made.”). Because we conclude that no error occurred, we need not
11 continue with a fundamental error analysis. *See Campos*, 2007-NMSC-021, ¶ 8.

12 **III. CONCLUSION**

13 {9} Defendant’s woefully inadequate brief in this case accompanies a sparse record
14 proper and very few facts. Because none of the facts in the record stand opposed to
15 the district court’s dismissal of Defendant’s appeal, we affirm.

16 {10} **IT IS SO ORDERED.**

17
18

 RODERICK T. KENNEDY, Judge

19 **WE CONCUR:**

1 **JAMES J. WECHSLER, Judge**

2

3 **M. MONICA ZAMORA, Judge**