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

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellant,

4 v.

NO. 34,956

5 **AMY HERRERA,**

6 Defendant-Appellee.

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

8 **Jacqueline D. Flores, District Judge**

9 Hector H. Balderas, Attorney General

10 Santa Fe, NM

11 for Appellant

12 D. Eric Hannum

13 Albuquerque, NM

14 for Appellee

15 **MEMORANDUM OPINION**

16 **KENNEDY, Judge.**

1 {1} The State appeals from a district court order excluding evidence, which
2 effectively excluded a witness. We issued a calendar notice proposing to reverse.
3 Defendant has responded with a memorandum in opposition. We reverse.

4 {2} In this appeal, the State has challenged the district court's order effectively
5 excluding a State witnesses as a sanction for a discovery violation. "A court has the
6 discretion to impose sanctions for the violation of a discovery order that results in
7 prejudice to the opposing party." *State v. Harper*, 2011-NMSC-044, ¶ 16, 150 N.M.
8 745, 266 P.3d 25. But "the mere showing of violation of a discovery order, without
9 a showing of prejudice, is not grounds for sanctioning a party." *Id.* Once prejudice
10 is shown, any sanction should "affect the evidence at trial and the merits of the case
11 as little as possible." *Id.* "Our case law generally provides that the refusal to comply
12 with a district court's discovery order only rises to the level of exclusion or dismissal
13 where the State's conduct is especially culpable, such as where evidence is unilaterally
14 withheld by the State in bad faith, or all access to the evidence is precluded by State
15 intransigence." *Id.* ¶ 17.

16 {3} In this case, Defendant has been charged with second degree murder for
17 allegedly shooting her husband. [DS 4-5] A stipulated discovery order was entered
18 requiring the State to produce copies of computer hard drives that had been taken
19 from the residence. [RP 84] Defendant subsequently moved to dismiss based on the
20 State's failure to produce these copies. [RP 188] The district court did not grant

1 Defendant's request to dismiss the charges. The suppression of the late-disclosed
2 computer evidence did not provide the court with a sanction alternative, because this
3 evidence was going to be used by Defendant to show that the decedent was the type
4 of individual who could trigger a self-defense situation. Since the court did not want
5 to suppress the computer evidence, it chose to suppress a statement made by
6 Defendant to a friend when she found out from a credit card statement that her
7 husband had been a member of Ashley Madison: "I wish I could kill him again."
8 [MIO 1, 3; RP 301]

9 {4} We believe that the district court abused its discretion in this case. There was
10 no showing below that the State acted in bad faith, or was otherwise "especially
11 culpable," as contemplated by *Harper*. Also, there was nothing on the computer hard
12 drives that relates to the anticipated testimony of the excluded witness. The
13 suppressed "I wish I could kill him again" statement was made to a friend after
14 Defendant opened up a credit card statement and found out that her husband had been
15 a member of an online dating site. [MIO 3] Although Defendant argues [MIO 7] that
16 the court only suppressed the above-noted statement, and not the witness, the
17 suppression effectively excluded this witness because that statement was the only
18 reason to call him as a witness. There was also no showing that the late discovery
19 presented Defendant from reviewing the materials in preparation for trial. *See id.* ¶
20 16 ("Prejudice must be more than speculative; the party claiming prejudice must prove

1 prejudice—it is not enough to simply assert prejudice.”). With respect to Defendant’s
2 claim [MIO 5] that the excluded statement is not substantial proof of a fact material
3 to the proceeding, we disagree. Although the statement could be interpreted in a
4 manner that is consistent with Defendant’s innocence [MIO 10], it could also be
5 interpreted as probative of whether Defendant acted in self-defense, or whether her
6 anger at her husband caused her to shoot him without justification. Finally, with
7 respect to Defendant’s claim [MIO 11] that the statement could lead to a “mini-trial”
8 about the couple’s relationship, we emphasize that our decision is limited to the
9 exclusion of this witness as a sanction. We express no opinion as to whether exclusion
10 is proper on any other basis.

11 {5} For the reasons set forth above, we reverse.

12 {6} **IT IS SO ORDERED.**

13

14

RODERICK T. KENNEDY, Judge

15 **WE CONCUR:**

16

MICHAEL E. VIGIL, Chief Judge

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2 **LINDA M. VANZI, Judge**