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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. 31,054

5 **JUDY CASTILLO,**

6 Defendant-Appellant.

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

8 **Kenneth H. Martinez, District Judge**

9 Gary K. King, Attorney General

10 Santa Fe, NM

11 M. Victoria Wilson, Assistant Attorney General

12 Albuquerque, NM

13 for Appellee

14 Bennett J. Baur, Acting Chief Public Defender

15 J.K. Theodosia Johnson, Assistant Appellate Defender

16 Santa Fe, NM

17 for Appellant

1 **MEMORANDUM OPINION**

2 **BUSTAMANTE, Judge.**

3 {1} Defendant appeals from the district court’s order revoking her probation and
4 sentencing her to nine years in the Department of Corrections, 1825 days of which she
5 was required to serve in actual imprisonment. On appeal, Defendant argues that the
6 district court erred by ruling that she was competent to stand trial. We agree.
7 Accordingly, we reverse the district court and remand for proceedings consistent with
8 Rule 5-602(D) NMRA.

9 **BACKGROUND**

10 {2} In the district court, five of Defendant’s criminal cases were consolidated for
11 competency proceeding purposes after Defendant raised the issue by motion. An
12 expert was appointed to evaluate Defendant’s competence and submitted a report to
13 the court on July 28, 2010. The expert, Dr. Vickie Bulling, testified at the August 17,
14 2010, competency hearing that Defendant was not competent to stand trial at the time
15 of Defendant’s evaluation, which was nearly two months before the competency
16 hearing. Dr. Bulling had conducted over 1800 forensic evaluations, was under a New
17 Mexico Department of Health contract with the court, and was employed at the
18 Colorado State Mental Health Institute in Pueblo, Colorado. The district court found,
19 and the parties stipulated, that Dr. Bulling was a qualified expert in the field of

1 forensic psychological evaluations. Dr. Bulling interviewed Defendant and
2 administered numerous forensic psychological tests for three hours, which Dr. Bulling
3 testified were nationally recognized as the “best practices” instruments for
4 determining competency to proceed in criminal cases. Dr. Bulling testified that she
5 had a diagnostic impression of psychosis, thought disorder, post-traumatic stress
6 disorder, and dysphoria.

7 {3} Dr. Bulling offered a detailed explanation for her conclusions. Dr. Bulling
8 noted that Defendant was highly distractible, tended to perseverate, tended to ramble,
9 and required frequent redirection. Defendant reported hearing voices, and she had a
10 name for the entity that spoke to her. Dr. Bulling was unable to administer some tests.
11 Dr. Bulling stated that Defendant’s post-traumatic stress disorder stemmed from the
12 extreme violence to which Defendant was subjected as a child at the hands of her
13 father, who beat her mother to the point of brain damage, causing her to be a
14 quadriplegic. She left home at age nine, relying on her sister while living on the street
15 before her sister was murdered.

16 {4} Dr. Bulling testified that Defendant had poor insight into her mental illness,
17 denied having any mental illness, and exhibited no signs of malingering after
18 administering three tests designed to detect malingering. Dr. Bulling testified that
19 competency and mental illness are fluid and change over time, and therefore, it is not

1 uncommon for people who have been previously represented by counsel in criminal
2 proceedings to be found incompetent later in subsequent criminal proceedings. She
3 stated that it would be difficult for Defendant to communicate with her attorney while
4 experiencing psychosis.

5 {5} A second psychologist, Dr. James Harrington, also testified. He had conducted
6 a program suitability interview with Defendant in February 2010—six months before
7 the competency hearing—while working for the district court mental health court.
8 During the interview, Defendant appeared to be addressing an imaginary person, who
9 she said protects her and gives her commands. Dr. Harrington stated that his clinical
10 impression was that Defendant showed signs of a psychotic disorder, including
11 hallucinations. This doctor also detected no evidence of malingering. Dr. Harrington
12 also stated that Defendant did not bring attention to her mental illness on her own
13 accord at all. Dr. Harrington was not asked at the time of the interview to evaluate
14 Defendant's competency and therefore offered no opinion on that matter.

15 {6} The State offered the brief testimony of two of Defendant's former attorneys,
16 one who had represented Defendant in 2008, and another in August 2009, a year
17 before the competency hearing. Each testified that they entered pleas on Defendant's
18 behalf, and that it is their practice not to enter pleas if a defendant appears
19 incompetent. The State also relied on an undated letter purportedly written by

1 Defendant to the district court judge, asking for inpatient care. When confronted with
2 this letter, Dr. Bulling agreed that it was not consistent with her test results, which
3 showed a third grade reading level.

4 {7} The district court judge accepted Dr. Bulling as an expert and seemed to
5 acknowledge the reliability of the tests performed. In its findings and conclusions, the
6 district court emphasized that Dr. Bulling’s diagnosis and evaluation were relevant
7 only to Defendant’s state at the time of the evaluation, not the competency hearing
8 held two months later. The district court’s findings about Defendant’s competence,
9 however, focused on the fact that Defendant’s previous attorneys encouraged her to
10 enter plea agreements without raising the issue of competency. The district court
11 found it relevant and important that Defendant did not seem incompetent during a plea
12 agreement hearing in 2008 or in 2009. The district court also noted that defense
13 counsel did not raise competency at a hearing in January or March of 2010, six and
14 three months, respectively, before the psychiatric evaluation. The district court relied
15 on its own observations of the letter it had received from Defendant prior to probation
16 violation hearing in January 2010, seven months before the competency hearing, in
17 which Defendant used language the district court described as “collegiate” and which
18 the court found “indicate[d] . . . Defendant has a clear understanding of the potential
19 penalties she is facing and the role of the [district c]ourt.”

1 {8} The district court also questioned the expert’s diagnosis on grounds that the
2 tests require self-reporting and the expert “made little to no effort to substantiate any
3 of . . . Defendant’s representations.” The district court also stated that the lack of
4 support for Defendant’s incompetence at the time of the hearing was particularly
5 troubling because it was Dr. Bulling’s opinion that Defendant had gone undiagnosed
6 and untreated for many years. Accordingly, the district court ruled against Defendant
7 on the competency claim.

8 **STANDARD OF REVIEW**

9 {9} Defendant maintains that we should apply a de novo standard of review, or a
10 mixed standard of review that would be less deferential than abuse of discretion.
11 However, the standard is well-settled. The defendant has the burden of proving that
12 he or she is incompetent by a preponderance of the evidence. *See State v. Chavez*,
13 2008-NMSC-001, ¶ 11, 143 N.M. 205, 174 P.3d 988. “Preponderance of the evidence
14 simply means the greater weight of the evidence[.]” *Campbell v. Campbell*, 1957-
15 NMSC-001, ¶ 24, 62 N.M. 330, 310 P.2d 266. On appeal, we review a district court’s
16 competency determination for abuse of discretion. *See State v. Rael*,
17 2008-NMCA-067, ¶ 6, 144 N.M. 170, 184 P.3d 1064; *State v. Garcia*, 2000-NMCA-
18 014, ¶ 20, 128 N.M. 721, 998 P.2d 186. Of course, in considering the court’s exercise

1 of discretion, we view its ruling in the context of the statutory framework governing
2 competency and the evidence that resulted from mandated evaluation.

3 **DISCUSSION**

4 {10} The State’s primary argument is that the district court was free to reject Dr.
5 Bulling’s testimony. Although obviously the district court makes the ultimate
6 determination regarding competency and may reject an expert opinion, its rejection
7 must be based on a sound rationale. *See State v. Gonzales*, 2001-NMCA-025, ¶ 40,
8 130 N.M. 341, 24 P.3d 776, *overruled on other grounds by State v. Rudy B.*, 2009-
9 NMCA-104, 147 N.M. 45, 216 P.3d 810 (stating that a fact finder is free to reject
10 expert testimony); *Rael*, 2008-NMCA-067, ¶ 6 (stating that “[a] district court abuses
11 its discretion when its ruling [as to competency] is clearly against the logic and effect
12 of the facts and circumstances of the case” (internal quotation marks and citation
13 omitted)). We note that the New Mexico Mental Illness and Competency Code
14 (NMMIC) places great emphasis on the opinion of the expert. Under the NMMIC,
15 proceedings must be suspended when there is a valid question as to the defendant’s
16 competency. *See* NMSA 1978, § 31-9-1 (1993). The statute does not require a
17 showing of a pattern of behavior indicating incompetency for a question to arise.
18 When a question arises, the defendant must be professionally evaluated by an expert
19 whose report is submitted to the district court for a hearing on it. NMSA 1978, § 31-

1 9-1.1 (1993). The competency hearing must be held within a reasonable time, “but
2 in no event later than thirty days after notification to the court of completion of the
3 diagnostic evaluation.” *Id.* The statute does not indicate that the expert is an advocate
4 or a witness for the defense to be rebutted by a professional hired by the State.
5 Instead, it calls for a single expert to be an independent professional regarding the
6 defendant’s competency. Clearly, the NMMIC contemplates the primacy of the
7 expert’s opinion and makes that opinion time-sensitive for the district court to
8 determine competency.

9 {11} We conclude that the factors relied on by the district court were not sufficient
10 to undermine the expert evaluation that was conducted pursuant to the “best practices”
11 used by experts for determining competency. The district court rejected the expert’s
12 evaluation on grounds that question the nature of such psychiatric evaluations and
13 would apply to nearly any psychiatric evaluation. For instance, although the State
14 contends that the district court believed that Dr. Bulling relied too heavily on
15 information provided by Defendant without verifying the information, we note that
16 this challenges Dr. Bulling’s methodology, which she testified employed a “best
17 practices” approach to determining Defendant’s competency. In addition, although
18 the evaluations rely on self-reporting, they can be buttressed with testing to detect
19 malingering, as took place here. Also, nothing seems to underlie the district court’s

1 findings that contradict Dr. Bulling’s or Dr. Harrington’s observations that Defendant
2 was not malingering and had no insight into her mental illness, even to the point of
3 denying it. The district court’s misgivings about Dr. Bulling’s opinion that Defendant
4 has gone undiagnosed and untreated is a problem that will always result whenever a
5 mental illness concern arises and calls for a competency hearing and psychiatric
6 evaluation.

7 {12} The district court’s reasoning as to the timing of the evaluation is also suspect.
8 The district court replaced the expertise of both experts and particularly that of Dr.
9 Bulling with its own opinion of Defendant’s letter, which the court received at least
10 seven months before the competency hearing. Likewise, the events involving
11 Defendant’s previous attorneys occurred one and two years before the hearing,
12 respectively. *Cf. State v. Flores*, 2005-NMCA-135, ¶ 29, 138 N.M. 636, 124 P.3d
13 1175 (stating that “a court may consider defense counsel’s observations and opinions,
14 but that those observations and opinions alone cannot trigger reasonable doubt about
15 the defendant’s competency”). Given the district court’s acceptance that mental
16 illness is fluid, it seems illogical for the district court to reject Dr. Bulling’s evaluation
17 on grounds of timing by itself relying on events that occurred well before the
18 psychiatric evaluation. Finally, if the court was concerned that Dr. Bulling’s
19 evaluation had taken place two months prior to the hearing and therefore was stale

1 information, the better remedy to any timeliness problem would have been a new
2 evaluation instead of minimizing Dr. Bulling's conclusion.

3 {13} As the State observes, the New Mexico Supreme Court has affirmed a district
4 court's rejection of expert testimony regarding a defendant's competence, even where
5 it was compelling. *See State v. Jason F.*, 1998-NMSC-010, ¶ 29, 125 N.M. 111, 957
6 P.2d 1145. However, the Supreme Court so decided under very distinct
7 circumstances. In *Jason F.*, at issue was the defendant's competence to confess,
8 which was one moment in time, and there was a video-taped confession, which the
9 district court viewed for itself. *Id.* ¶¶ 22-29. The experts, who did not view the video-
10 taped confession, relied on the defendant's self-report that he was intoxicated at the
11 time of his confession to determine that the defendant was not competent to confess.
12 *Id.* ¶¶ 25-26. The experts stated that their opinion as to the defendant's competency
13 might have changed had they viewed the video-taped confession. *Id.* ¶ 6. Also, the
14 detective who questioned the defendant and took his confession testified that the
15 defendant did not appear to be intoxicated, he understood the nature of the accusations
16 against him, and was able to recall the alleged crimes and many details surrounding
17 the incidents. *Id.* ¶ 27. The district court's own observations about the video-taped
18 confession mirrored that of the detective. *Id.* ¶ 28. The Supreme Court held that "it
19 was within the children's court's discretion to reject the expert testimony in light of

1 [the detective's] testimony of his personal observations of [the defendant] at the time
2 of the confession, and in light of the taped confession itself.” *Id.* ¶ 29. *Jason F.* is
3 inapposite to the current case because here nothing suggests that the district court
4 rejected the expert opinion based on observations of Defendant at the time the
5 competency tests were administered.

6 {14} The State argues that the district court's rationale is supported by several other
7 considerations. We find these arguments unpersuasive. First, the State refers to prior
8 criminal proceedings where competency was not raised. We do not believe this is
9 relevant to the issue of whether Defendant was competent for this particular
10 proceeding. As noted, Dr. Bulling testified that mental illness is fluid and that
11 Defendant's prior criminal proceedings would not affect her conclusion that
12 Defendant was not competent. Second, Dr. Bulling's testimony specifically stated her
13 opinion that Defendant's condition had been undiagnosed for a long time. Third, the
14 State questions Defendant's motive for pursuing the competency evaluation, noting
15 that she did not request it until she had been denied the option of special mental health
16 treatment. This consideration seems too speculative to form a rational basis for
17 rejecting the expert malingering tests employed by Dr. Bulling.

18 {15} Finally, the State claims the district court judge could make his own
19 determination based on his observation of Defendant and consideration of a letter that

1 Defendant allegedly wrote some seven months earlier. With respect to the former, we
2 do not believe that the expert evaluation can be nullified by the generalized in-court
3 observations discussed above. Otherwise, a district court might never be overruled
4 on a competency issue because it would be free to substitute its observations over the
5 statutorily-mandated expert evaluation. The latter claim is also highly suspect. The
6 district court relied on the letter to find that “Defendant was malingering during the
7 evaluation period.” But, given that the letter was written at least seven months earlier,
8 this finding is inconsistent with the district court’s disparagement of the expert’s June
9 22, 2010 evaluation because it did not demonstrate incompetence on the day of the
10 hearing two months later.

11 **CONCLUSION**

12 {16} We conclude that the district court’s ruling that Defendant was competent was
13 not supported by substantial evidence and was clearly against the logic and effect of
14 the facts and circumstances before it. We therefore reverse the district court and
15 remand for proceedings consistent with Rule 5-602(D).

1 {18} **IT IS SO ORDERED.**

2

3

MICHAEL D. BUSTAMANTE, Judge

4 **WE CONCUR:**

5

6 **RODERICK T. KENNEDY, Chief Judge**

7

8 **CYNTHIA A. FRY, Judge**