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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. 32,902

5 **ROBERT BOYNTON,**

6 Defendant-Appellant.

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

8 **William G. Shoobridge, District Judge**

9 Gary K. King, Attorney General

10 Santa Fe, NM

11 for Appellee

12 The Sawyers Law Group

13 James W. Klipstine, Jr.

14 Hobbs, NM

15 for Appellant

16 **MEMORANDUM OPINION**

17 **BUSTAMANTE, Judge.**

1 {1} Defendant appeals his conviction for fourth degree felony larceny over \$500.00,
2 which was enhanced due to his habitual offender status. [RP 167] Our notice proposed
3 to affirm and Defendant filed a memorandum in opposition. We remain unpersuaded
4 by Defendant's arguments and therefore affirm.

5 {2} Defendant continues to argue that the district court erred in allowing the State
6 to use evidence it had not disclosed prior to trial. [DS 4; MIO 1-2] *See generally State*
7 *v. Desnoyers*, 2002-NMSC-031, ¶ 25, 132 N.M. 756, 55 P.3d 968 (providing that we
8 review the admission of evidence involving alleged discovery violations for abuse of
9 discretion), *abrogated on other grounds by State v. Forbes*, 2005-NMSC-027, 138
10 N.M. 264, 119 P.3d 144. As provided in our notice, even if the evidence was not
11 disclosed by the State in this case, Defendant nonetheless did have notice that the
12 photos would be used well before trial given the State's disclosure of the evidence in
13 another case that was eventually dismissed. [DS 3; MIO 2] *See generally In re Ernesto*
14 *M.*, 1996-NMCA-39, ¶ 10, 121 N.M. 562, 915 P.2d 318 ("An assertion of prejudice
15 is not a showing of prejudice."). Given the lack of prejudice of any non-disclosure, we
16 conclude that the district court did not abuse its discretion.

17 {3} For the reasons set forth herein and in our notice, we affirm.

18 {4} **IT IS SO ORDERED.**

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MICHAEL D. BUSTAMANTE, Judge

3 **WE CONCUR:**

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5 **TIMOTHY L. GARCIA, Judge**

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7 **M. MONICA ZAMORA, Judge**