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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. 34,147

5 **JONATHON MARTINEZ,**

6 Defendant-Appellant.

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

8 **Fred Van Soelen, District Judge**

9 Hector H. Balderas, Attorney General

10 Santa Fe, NM

11 Jacqueline R. Medina, Assistant Attorney General

12 Albuquerque, NM

13 for Appellee

14 Jorge A. Alvarado, Chief Public Defender

15 Sergio J. Viscoli, Assistant Appellate Defender

16 David Henderson, Assistant Appellate Defender

17 Santa Fe, NM

18 for Appellant

19 **MEMORANDUM OPINION**

20 **GARCIA, Judge.**

1 {1} Defendant appeals from an order revoking his probation. We previously issued
2 a notice of proposed summary disposition in which we proposed to affirm in part and
3 reverse in part. Both Defendant and the State have filed responsive memoranda. After
4 due consideration, we adhere to our initial assessment of the merits. We therefore
5 affirm in part, reverse in part, and remand for further proceedings.

6 {2} Defendant asserts that the district court erred in denying his motion to dismiss
7 the State’s motion to revoke his probation because the adjudicatory hearing was held
8 more than one hundred days after he was arrested and the delay prejudiced him. [DS
9 3-4, 8; Defendant’s Memo 2-5] *See* Rule 5-805 NMRA (governing probation
10 violations, including time limits from the date of the probationer’s arrest to the date
11 of his adjudicatory hearing).

12 {3} As we stated in our calendar notice, the district court “may dismiss the motion
13 to revoke probation for violating any of the time limits in [Rule 5-805].” [CN 6
14 (quoting Rule 5-805(L))] We noted that the use of the term “may” implies that the
15 district court has discretion to dismiss the motion to revoke probation for failure to
16 comply with the time limits, and we proposed to hold that Defendant had not
17 demonstrated an abuse of discretion. [CN 6] We also proposed to hold that, to the
18 extent Defendant was arguing that the district court applied an incorrect

1 standard—one requiring a showing of prejudice—Defendant did not cite any authority
2 to support this assertion. [CN 6]

3 {4} In response to our proposed disposition, Defendant continues to argue that the
4 district court should have dismissed the State’s motion to revoke his probation
5 because his adjudicatory hearing was held one hundred and thirty-five days after his
6 arrest—which exceeds the one hundred-day limit for adjudication, as set forth in Rule
7 5-805—and the delay prejudiced him. [Defendant’s Memo 2-5] In support of
8 Defendant’s claim of prejudice, he asserts that he spent ninety-one days in jail from
9 the day that he was arrested until he was released pending his adjudicatory hearing,
10 and upon his release, the district court imposed burdensome conditions, including
11 requiring him to remain in Clovis, which required him to spend over \$1,000 at a hotel
12 and required him to stay at a homeless shelter. [Id.]

13 {5} The record reflects that the district court determined that Defendant suffered no
14 prejudice by the delay in holding his adjudicatory hearing in this case because
15 Defendant had been incarcerated in Quay County on separate charges, he did not post
16 bond, and after he was sentenced in Quay County, he was transferred to Curry County
17 for the alleged probation violations in this case. [RP 162; DS 3-4] On June 4, 2014,
18 the State filed its motion to revoke Defendant’s probation in this case [RP 128, 129],

1 and on June 9, 2014, Defendant appeared for his arraignment and was released on his
2 own recognizance with conditions of release. [DS 3; RP 138] As part of his conditions
3 of release in this case, Defendant was not allowed “to leave the 9th Judicial District
4 (Curry and Roosevelt County) without prior permission of the [c]ourt[.]” [RP 139; *see*
5 *also* RP 137-38]

6 {6} In his memorandum in opposition, Defendant asserts, without demonstrating,
7 that his incarceration and conditions of release prejudiced him. [Defendant’s Memo
8 2-5] We are not persuaded. *See In re Ernesto M., Jr.*, 1996-NMCA-039, ¶ 10, 121
9 N.M. 562, 915 P.2d 318 (“An assertion of prejudice is not a showing of prejudice.”).
10 Likewise, to the extent that Defendant asserts that his conditions of release were akin
11 to “reverse banishment,” we are not persuaded. [Defendant’s Memo 3-4] Defendant
12 has made no showing that he asked the district court for, and was denied, permission
13 to leave the 9th Judicial District.

14 {7} Defendant argues that the district court violated his due process rights under the
15 New Mexico Constitution by permitting hearsay testimony regarding his change of
16 address. [DS 4-5, 8-9] In our notice of proposed disposition, we noted that “hearsay
17 evidence may be used in probation revocation hearings if it has probative value” and
18 “in order to establish a violation of due process, a defendant must show prejudice.”

1 [CN 7 (quoting *State v. Neal*, 2007-NMCA-086, ¶ 42, 142 N.M. 487, 167 P.3d 935)]

2 We proposed to hold that the evidence in this case had probative value and was
3 admissible. [CN 7] Nevertheless, we stated that, even if we determined that the district
4 court erred in permitting hearsay testimony regarding Defendant’s change of address,
5 Defendant did not show that this error prejudiced him, particularly in light of the fact
6 that the district court found four separate violations. [CN 7]

7 {8} In response to our proposed disposition, Defendant contends that the hearsay
8 testimony regarding his change of address was contested and admission of this
9 evidence prejudiced him because “[t]here is nothing in the record that reflects the trial
10 court would have reached the same result had it not found this probation violation
11 occurred, and thus reliance on the uncorroborated and unreliable hearsay attributed to
12 Ms. Salas should be seen as prejudicial to [Defendant’s] right to due process.”
13 [Defendant’s Memo 10; *see also id.* 5-10]

14 {9} For clarification purposes, we note that the district court found Defendant guilty
15 of four probation violations—two of which were for failure to report. [RP 111, 121,
16 129, 171] The State offered the hearsay testimony at issue to support its allegation that
17 Defendant failed to report to his probation officer on January 3, 2014. [RP 111, 129,
18 171] The record reflects that during the adjudication hearing, Defendant’s probation

1 officer testified that Defendant was required to report to him on January 3, 2014;
2 Defendant did not report to him on that date; and the probation officer attempted to
3 locate Defendant and made contact with Ms. Salas who reportedly stated that
4 Defendant no longer lived at the residence and had moved to Tucumcari. [RP 111,
5 163; Defendant’s Memo 5] Admission of Defendant’s change of address was not
6 necessary to find that Defendant failed to report on January 3, 2014. Therefore, we are
7 not persuaded that admission of this hearsay testimony prejudiced Defendant.

8 {10} Additionally, we disagree with Defendant’s assertion that his change of address
9 was a “contested” issue. [Defendant’s Memo 8-10] As discussed in our calendar
10 notice, “[e]vidence is contested if contrary evidence has been introduced or the
11 probationer persuades the court that a particular assertion may not be reliable,
12 accurate, or true.” [CN 7-8 (quoting *State v. Guthrie*, 2011-NMSC-014, ¶ 35, 150
13 N.M. 84, 257 P.3d 904)] Defendant has not demonstrated that he introduced contrary
14 evidence or that the evidence pertaining to the change of address was not reliable,
15 accurate, or true. *See Guthrie*, 2011-NMSC-014, ¶¶ 45-46 (concluding that the
16 defendant’s due process right to confrontation was not violated when the district court
17 permitted hearsay testimony regarding the defendant’s non-compliance with a
18 residential treatment program because the defendant did not contest the allegation and

1 the fact of non-compliance was “an objective, negative, and rather routine fact”); *State*
2 *v. Ellis*, 2008-NMSC-032, ¶ 2, 144 N.M. 253, 186 P.3d 245 (characterizing “contested
3 facts as alleged by [the d]efendant[,]” as “contradictory testimony”).

4 {11} In his docketing statement, Defendant argued that upon the revocation of his
5 probation, the district court imposed an illegal sentence, and we proposed to agree.
6 [DS 5-9; CN 1-4] Both Defendant and the State agree with this Court’s proposed
7 disposition. [Defendant’s Memo 1; State’s Response 1-2] As discussed in our notice
8 of proposed disposition, we conclude that on January 9, 2012, the district court
9 sentenced Defendant to 1092 days; Defendant was entitled to 131 days of pre-sentence
10 confinement leaving him with a balance of 961 days; and as of July 30, 2014—the
11 date of Defendant’s sentencing hearing for violating his probation—Defendant only
12 had a balance of 28 days of his original sentence left to serve on probation.
13 Accordingly, we reverse the district court’s order on the probation violation and
14 remand to correct Defendant’s sentence and the balance that remained to be served.

15 {12} In his docketing statement, Defendant alleged that the district court violated his
16 due process rights by acting as both the judge and the prosecutor. [DS 8-9] We
17 proposed to conclude that this issue is not properly before this Court. [CN 8] In
18 response, Defendant affirmatively abandons this issue on appeal [Defendant’s Memo

1 2, n.1], and the State agrees with this Court’s proposed disposition [State’s Response
2 1].

3 {13} For the reasons stated above, we affirm as to Issues 1, 2, and 4; we reverse as
4 to Issue 3; and we remand for proceedings consistent herewith.

5 {14} **IT IS SO ORDERED.**

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TIMOTHY L. GARCIA, Judge

8 **WE CONCUR:**

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JONATHAN B. SUTIN, Judge

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RODERICK T. KENNEDY, Judge