



1 {1} Defendant appeals his convictions on two counts of first degree criminal sexual  
2 penetration (child under 13) and four counts of criminal sexual contact of a minor  
3 (child under 13). We issued a calendar notice proposing to affirm. Defendant has  
4 responded with a memorandum in opposition. We affirm.

5 {2} Defendant continues to argue that the district court should have excluded a chart  
6 that was used by the State to impeach Defendant's polygraph expert, because the chart  
7 had not been disclosed to Defendant. We review a district court's decision with regard  
8 to discovery for abuse of discretion. *See State v. McDaniel*, 2004-NMCA-022, ¶ 6,  
9 135 N.M. 84, 84 P.3d 701. In determining whether late disclosure of evidence requires  
10 reversal, we consider the following factors: "(1) whether the [s]tate breached some  
11 duty or intentionally deprived the defendant of evidence; (2) whether the improperly  
12 non-disclosed evidence was material; (3) whether non-disclosure of the evidence  
13 prejudiced the defendant; and (4) whether the [district] court cured the failure to  
14 timely disclose the evidence." *Id.* ¶ 8 (internal quotation marks and citation omitted).

15 {3} Defendant presented the testimony of a defense polygraph expert, who  
16 concluded that Defendant was not being deceptive when he denied engaging in sexual  
17 conduct with the victim. [MIO 3] On cross-examination, the State attempted to  
18 impeach the expert with a chart that the expert had made in an unrelated case. [MIO

1 3-4] The district court allowed the State to use the chart over the objection of  
2 Defendant, who argued that it was not disclosed to him. [MIO 4]

3 {4} We agree with Defendant that the fact that the chart was used for impeachment  
4 purposes does not exclude it from the duty to disclose; the test is whether the State  
5 intended to use the chart. *See State v. Allison*, 2000-NMSC-027, ¶ 12, 129 N.M. 566,  
6 11 P.3d 141 (requiring disclosure of document that the State intended to use for  
7 impeachment purposes); Rule 5-501(A)(3) NMRA (requiring disclosure of documents  
8 and related tangible items intended to be used at trial). Defendant argues that this case  
9 is similar to the non-disclosure that occurred in *Allison*, in that the use of the chart  
10 from the other case undermined his trial strategy. [MIO 6-8] In *Allison*, the State  
11 failed to disclose a prior arrest that it intended to use for impeachment purposes; our  
12 Supreme Court determined that the failure prejudiced the defendant because “defense  
13 counsel was attempting to portray [the d]efendant as an individual without any  
14 criminal record, and had counsel been aware of Defendant's arrest, he may have  
15 altered his strategy.” *Id.* ¶ 18.

16 {5} In the present case, Defendant’s expert testified that he employed generally  
17 accepted measurements in conducting the polygraph test of Defendant. [MIO 3] One  
18 of these indicators measured physiological movement, and the expert testified that  
19 Defendant’s test did not record movement, which could have been due to the fact that

1 Defendant remained still during the test. [MIO 3-4] The undisclosed chart presented  
2 by the State was from one of the expert's other cases and recorded movement by that  
3 defendant. [MIO 4] Unlike *Allison*, which directly undermined the defense trial  
4 strategy, the fact that the State used someone else's results, which indicated  
5 untruthfulness, was just as likely to be construed by the jury as an indication that  
6 Defendant was telling the truth in this case. As such, we conclude that any prejudice  
7 in this case was too speculative to require reversal under our standard of review. *See*  
8 *State v. Rojo*, 1999-NMSC-001, ¶ 61, 126 N.M. 438, 971 P.2d 829 (refusing to hold  
9 that the prosecution's delay in disclosing evidence required reversal in the absence of  
10 a showing of prejudice from the non-disclosure); *see also State v. McDaniel*, 2004-  
11 NMCA-022, ¶ 6, 135 N.M. 84, 84 P.3d 701 ("The prejudice must be more than  
12 speculative.").

13 {6} For the foregoing reasons, we affirm.

14 {7} **IT IS SO ORDERED.**

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**JAMES J. WECHSLER, Judge**

17 **WE CONCUR:**

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19 **LINDA M. VANZI, Chief Judge**

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2 **J. MILES HANISEE, Judge**