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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. 35,825

5 **JESSE J. TORRES,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY**

8 **Marci E. Beyer, District Judge**

9 Hector H. Balderas, Attorney General

10 Santa Fe, NM

11 for Appellee

12 Bennett J. Baur, Chief Public Defender

13 Will O’Connell, Assistant Appellate Defender

14 Santa Fe, NM

15 for Appellant

16 **MEMORANDUM OPINION**

17 **GARCIA, Judge.**

18 {1} Pursuant to a conditional plea agreement, Defendant appeals from his DWI

19 conviction. We previously issued a second notice of proposed summary disposition

1 in which we proposed to affirm. Defendant has filed a second memorandum in
2 opposition. After due consideration, we remain unpersuaded. We therefore affirm.

3 {2} The pertinent background information was set forth in our first notice of
4 proposed summary disposition. We will avoid undue repetition here, and focus instead
5 on the content of the second memorandum in opposition.

6 {3} Defendant continues to argue that the district court erred in denying his motion
7 to dismiss premised on a violation of the six-month rule. [SMIO 1] In his first
8 memorandum in opposition, Defendant asserted that trial counsel orally argued below
9 that the magistrate court could have (1) held jury selection as scheduled on September
10 1, 2015, (2) scheduled the trial for a later date that month “days or even weeks after
11 jury selection”, and (3) heard Defendant’s motions in between, thereby giving the
12 State sufficient time to prepare a response. [MIO 3-5] In our second calendar notice,
13 we erroneously construed Defendant’s memorandum as raising an argument not
14 preserved below. [CN 2] We agree with Defendant that we must accept assertions as
15 to what arguments were preserved as true at this stage. [SMIO 2] *See Udall v.*
16 *Townsend*, 1998-NMCA-162, ¶ 3, 126 N.M. 251, 968 P.2d 341 (stating that the
17 appellate court’s will not accept the factual assertions in the docketing statement if the
18 record on appeal shows otherwise). We nevertheless affirm.

19 {4} It is well established that, under double jeopardy principles, “the [s]tate is

1 barred from appealing when a defendant is acquitted by the trial court no matter how
2 egregiously erroneous the trial court's ruling[.]” *State v. Lizzol*, 2007-NMSC-024,
3 ¶ 15, 141 N.M. 705, 160 P.3d 886. Further, “whether a defendant [is] acquitted
4 depends on whether the trial court’s ruling, however labeled, correctly or incorrectly
5 resolve[s] some or all of the factual elements of the crime.” *Id.* ¶ 7. Here, Defendant’s
6 motion to exclude sought the suppression of all of the evidence gathered as a result
7 of his traffic stop; [RP 37-40] thus, an erroneous ruling thereon by the district court
8 in Defendant’s favor would have necessarily resolved all factual elements of his DWI
9 charge and denied the State the right to appeal. *See Lizzol*, 2007-NMSC-024, ¶¶ 7, 15.
10 Therefore, we hold that the district court did not err in refusing Defendant’s invitation
11 to deny the State its right to appeal the court’s rulings on Defendant’s motions. As we
12 explained in our first calendar notice, the need for an extension was caused by
13 Defendant, and so the State could not have protected against the loss of its right to
14 appeal through “ordinary experience or prudence.” *See* Rule 6-506 (NMRA)
15 (committee commentary); *see also State v. Nunez*, 2000-NMSC-013, ¶ 28, 129 N.M.
16 63, 2 P.3d 264. (“In a jury trial, jeopardy attaches at the point when a jury is
17 impaneled and sworn to try the case.”).

18 {5} As to the remaining issues on appeal, the second memorandum in opposition
19 presents no new arguments. [SMIO 4]

1 {6} Accordingly, for the reasons stated above and in our notices of proposed
2 summary disposition, we affirm.

3 {7} **IT IS SO ORDERED.**

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TIMOTHY L. GARCIA, Judge

6 **WE CONCUR:**

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LINDA M. VANZI, Chief Judge

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M. MONICA ZAMORA, Judge