

1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 Opinion Number : _____

3 Filing Date: November 16, 2017

4 **NO. A-1-CA-35307**

5 **STATE OF NEW MEXICO,**

6 Plaintiff-Appellant,

7 v.

8 **DAMON LEWIS,**

9 Defendant-Appellee.

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

11 **Christina P. Argyres, District Judge**

12 Hector H. Balderas, Attorney General

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20 for Appellee

1 **OPINION**

2 **VARGAS, Judge.**

3 {1} Having denied Appellant’s motion for rehearing, we withdraw the opinion filed
4 on August 31, 2017, and substitute the following in its place. The State asks us to
5 reverse the district court’s sanction of dismissal with prejudice of Defendant’s
6 shoplifting charges resulting from the State’s failure to timely turn over recordings
7 of witness identification interviews. Because the district court failed to explain the
8 manner in which it considered culpability, prejudice, and lesser sanctions, as required
9 by *State v. Harper*, 2011-NMSC-044, 150 N.M. 745, 266 P.3d 25, and clarified in
10 *State v. Le Mier*, 2017-NMSC-017, 394 P.3d 959, we reverse the decision of the
11 district court and remand the case for further consideration of the propriety of the
12 sanction in light of these factors.

13 **I. BACKGROUND**

14 {2} Defendant Damon Lewis, was indicted for shoplifting and conspiracy to
15 commit shoplifting on June 25, 2014. The district court issued a scheduling order
16 requiring that the parties complete all witness interviews by July 17, 2015, and file
17 all pre-trial motions, excluding motions in limine, by July 28, 2015. The district court
18 set the docket call for October 26, 2015, and trial on a trailing docket beginning
19 November 2, 2015.

1 {3} Three months after the deadline to file pre-trial motions, Defendant filed a
2 motion to dismiss the case or suppress the photo array identifications. In his motion,
3 Defendant asserted that the police failed to record the photo array identifications
4 contrary to the police department’s standard operating procedures, reasoning that
5 because the State had not produced any recording during discovery as required by
6 Rule 5-501 NMRA, it must have failed to collect and preserve that evidence.

7 {4} On the first day of trial, the district court addressed Defendant’s motion to
8 dismiss, noting it was untimely. Defense counsel advised the court that, since filing
9 his motion, the State had provided the recordings he presumed were lost, destroyed,
10 or nonexistent. In response, the State pointed to a speed letter issued to Defendant,
11 explaining that the recordings had been checked into evidence for as long as the case
12 had been pending and were therefore available to Defendant. The State conceded that
13 it had “definitely violated” the rule requiring it to provide copies of audio, video, and
14 audio-video recordings made by law enforcement officers, *see* LR2-400.1(D) NMRA,
15 but argued that the court had discretion under *Harper* to impose a lesser sanction than
16 dismissal or suppression. *See* 2011-NMSC-044. Noting its obligation to impose
17 sanctions, and after rejecting monetary sanctions as a remedy, the district court
18 dismissed the case with prejudice, citing the State’s continuing duty to disclose and
19 its “blatant violation of the discovery rules.” The State appealed.

1 **II. DISCUSSION**

2 {5} We review the district court’s imposition of sanctions for an abuse of
3 discretion. *Le Mier*, 2017-NMSC-017, ¶ 22. To dismiss Defendant’s case, the district
4 court relied on LR2-400.1. The rule applies to cases filed in the Second Judicial
5 District Court on or before June 30, 2014. The rules of criminal procedure and
6 existing case law apply to these cases “only to the extent they do not conflict” with
7 the special calendar rule. LR2-400.1(A), (B). The rule requires the parties to disclose
8 “all discovery described in Rule 5-501(A)(1)-(6) NMRA” as well as the “phone
9 numbers and e-mail addresses of all witnesses if available, copies of documentary
10 evidence and audio, video, and audio-video recordings made by law enforcement
11 officers[,]” and to provide “a ‘speed letter’ authorizing the defendant to examine
12 physical evidence in the possession of the [s]tate.” LR2-400.1(D). These disclosures
13 must be made within ten days of the effective date of the rule, or no later than
14 February 12, 2015, if not already disclosed. LR2-400.1(D). The parties are also
15 subject to “a continuing duty to disclose additional information within five (5) days
16 of receipt of such information.” LR2-400.1(D)(2). Should either party fail to comply
17 with the discovery requirements set forth in the rule, the district court “shall impose
18 sanctions, which may include dismissal of the case with or without prejudice,
19 prohibiting the party from calling a witness or introducing evidence, monetary

1 sanctions . . . , or any other sanction deemed appropriate by the court.” LR2-
2 400.1(D)(4). Further, where a party “fails to comply with any provision of the
3 scheduling order, the court shall impose sanctions as the court determines is
4 appropriate in the circumstances[.]” LR2-400.1(J)(4).

5 {6} In *Harper*, our Supreme Court held that “exclusion of witnesses requires an
6 intentional violation of a court order, prejudice to the opposing party, and
7 consideration of less severe sanctions[.]” 2011-NMSC-044, ¶ 2. The *Harper* court
8 pointed out that dismissal and witness exclusion are extreme sanctions, to be used
9 only in exceptional cases. *Id.* ¶¶ 16, 21. Our Supreme Court later sought to “clarify
10 the circumstances under which a court may permissibly exclude a witness as a
11 discovery sanction.” *Le Mier*, 2017-NMSC-017, ¶ 1. According to *Le Mier*, “*Harper*
12 did not establish a rigid and mechanical analytic framework . . . so rigorous that
13 courts may impose witness exclusion only in response to discovery violations that are
14 egregious, blatant, and an affront to their authority.” *Le Mier*, 2017-NMSC-017, ¶ 16.
15 The Court further explained that a district court “must evaluate the considerations
16 identified in *Harper*—culpability, prejudice, and lesser sanctions—when deciding
17 whether to exclude a witness and must explain their decision to exclude or not
18 exclude a witness within the framework articulated in *Harper*[.]” *Le Mier*, 2017-
19 NMSC-017, ¶ 20. Despite this obligation, the district court continues to possess the

1 “broad discretionary authority to decide what sanction to impose when a discovery
2 order is violated.” *Id.* ¶ 22. Thus, according to *Le Mier*, “it is not the case that witness
3 exclusion is justified only if all of the *Harper* considerations weigh in favor of
4 exclusion.” *Le Mier*, 2017-NMSC-017, ¶ 20. Instead, the district court may use
5 suppression as a sanction for failure to comply with a discovery order “to maintain
6 the integrity and schedule of the court even though the defendant may not be
7 prejudiced.” *Id.* (internal quotation marks and citation omitted).

8 {7} Using this framework to guide its assessment of the district court’s discretion
9 in imposing sanctions, the *Le Mier* court then assessed the *Harper* factors. *Le Mier*,
10 2017-NMSC-017, ¶¶ 24-29. Looking first to the culpability factor, the Court noted
11 that the facts of that case were particularly compelling, with the state flagrantly
12 disregarding multiple extensions and warnings from the district court. Concluding
13 that the state’s conduct was sufficiently culpable to justify exclusion, the Court also
14 noted that “a single violation of a discovery order may suffice to support a finding of
15 culpability.” *Id.* ¶ 24. The Court similarly found no abuse of discretion in the district
16 court’s prejudice determination, reasoning that “[w]hen a court orders a party to
17 provide discovery within a given time frame, failure to comply with that order causes
18 prejudice both to the opposing party and to the court.” *Id.* ¶ 25. The prejudice to the
19 defendant, according to the Court, was that his “day in court” had been needlessly

1 delayed and that he had been subjected to “the possibility of trial by surprise[.]” *Id.*
2 The Court explained that the district court had been prejudiced by wasting its time
3 and disrupting its docket to the detriment of other parties and the entire justice
4 system. *Id.* ¶ 26. Finally, the Court concluded that the sanction imposed by the district
5 court had been the least severe sanction available, noting that the district court “was
6 not obligated to consider every conceivable lesser sanction before imposing witness
7 exclusion.” *Id.* ¶ 27. Instead, the district court satisfied its burden by “fashion[ing] the
8 least severe sanction that best fit the situation and which accomplished the desired
9 result.” *Id.* The Court reasoned that the progressive sanctions imposed by the district
10 court were evidence that the district court imposed the least severe sanction
11 appropriate to the circumstances. *Id.* ¶ 28. The Court further condoned witness
12 exclusion as a sanction in that case because it “ensured that the court’s authority to
13 efficiently administer the law and ensure compliance with its orders was vindicated.”
14 *Id.* ¶ 29.

15 {8} Because the rules of criminal procedure and existing case law apply to this case
16 “only to the extent they do not conflict” with the special calendar rule, LR2-
17 400.1(A),(B), we must determine whether a conflict exists. While the language of the
18 rule makes sanctions mandatory for violations of discovery obligations and
19 scheduling order deadlines, it leaves the decision of the type of sanction to impose to

1 the discretion of the district court. The rule provides no guidance as to the
2 considerations to be made when assessing sanctions. Our Supreme Court, however,
3 has set out guidelines for assessing sanctions in *Harper* and *Le Mier*. *Le Mier*'s
4 requirements that a court must both evaluate the considerations identified in *Harper*
5 and explain its decision within the *Harper* framework in determining what type of
6 sanction to impose, merely supplement the rule without conflicting with it. As no
7 conflict exists between the rule and established precedent, we continue to rely on
8 *Harper*'s use of culpability, prejudice, and lesser sanctions as appropriate tools for
9 evaluating the type of sanction that the district court may impose. Further, though
10 *Harper* and *Le Mier* address a district court's exclusion of a witness as a sanction,
11 rather than the dismissal with prejudice employed in this case, both dismissal and
12 witness exclusion constitute "extreme" sanctions. *See Harper*, 2011-NMSC-044,
13 ¶¶ 16, 21. The considerations relevant to both sanctions are similar, and we conclude
14 it is appropriate to apply the *Harper* and *Le Mier* considerations here.

15 {9} The State concedes that it violated its initial disclosure obligations under LR2-
16 400.1. The rule requires that "copies of documentary evidence and audio, video, and
17 audio-video recordings" be provided within ten days of February 2, 2015, if not
18 already disclosed. LR2-400.1(D). The State also had a "continuing duty to disclose
19 additional information to [the defendant] within five (5) days of receipt of such

1 information.” LR2-400.1(D)(2). Here, the recordings were not provided to Defendant
2 until November 16 or 17, 2015, just a day or so before trial was to begin and well
3 outside of any disclosure period provided for by the rule.

4 {10} We disagree with the State’s argument that providing the speed letter satisfied
5 the requirements of LR2-400.1(D). The rule requires the parties to provide “copies
6 of documentary evidence and audio, video, and audio-video recordings made by law
7 enforcement officers or others, *and*, where necessary, a ‘speed letter’ authorizing the
8 defendant to examine physical evidence in the possession of the State.” LR2-
9 400.1(D) (emphasis added). The requirements of LR2-400.1(D) were not satisfied by
10 the provision of a speed letter because the language of the rule requires production
11 of physical copies of documentary and audio-visual evidence in addition to a speed
12 letter. *See id.* The State’s failure to provide the recordings was a clear violation of the
13 rule, regardless of whether Defendant was given a speed letter. The plain language
14 of the rule indicates that a speed letter is not intended to serve as an alternative to the
15 State’s obligation to produce actual copies of the documentary and audio-visual
16 evidence as required by the rule.

17 {11} The State having violated its discovery obligations set forth in LR2-400.1(D),
18 the district court was required to impose sanctions. Those sanctions are subject to the
19 considerations enunciated in *Harper* and *Le Mier*. *Le Mier* makes it clear that, even

1 when the special calendar rule requires imposition of sanctions, the district court
2 “must evaluate . . . culpability, prejudice, and lesser sanctions[,]” as enunciated in
3 *Harper. Le Mier*, 2017-NMSC-017, ¶ 20. Upon weighing those factors, the district
4 court then has discretion to decide which sanction to impose, but has an obligation
5 to explain the reasons for its decision. *Id.*

6 {12} In this instance, the district court’s assessment of the *Harper* factors is virtually
7 nonexistent. *Le Mier* requires the district court to not only weigh the degree of
8 culpability and extent of prejudice, but also explain its decision regarding
9 applicability of lesser sanctions on the record. In this case, we do not have the benefit
10 of looking at the sanction imposed through the lens of a thorough record that
11 indicates a careful consideration of the *Harper* factors. Instead, we are left to
12 determine whether the district court abused its discretion by arriving at the most
13 extreme sanction available in response to an apparently unremarkable fact pattern.
14 Though the district court was unquestionably aware of its obligation to consider the
15 *Harper* factors, nothing in the record reveals the district court’s reasons for imposing
16 a sanction of dismissal with prejudice or the facts on which the district court based
17 its decision. The limited record in this case is inadequate to determine whether the
18 district court exercised due care in making its decision to impose a severe sanction
19 contrary to *Le Mier*’s specific requirement that a district court “*must explain* [its]

1 decision[.] 2017-NMSC-017, ¶ 20 (emphasis added). As such, the district court’s
2 imposition of its sanction—dismissal with prejudice—cannot presently be evaluated
3 or justified by this Court, and we must reverse and remand the matter to the district
4 court for further proceedings.

5 {13} To illustrate the inadequacy of the record made in this case, we discuss the
6 *Harper* factors—as modified by *Le Mier*—and the district court’s assessment of each,
7 beginning with culpability. *Le Mier* moves courts away from the *Harper* requirement
8 that bad faith or intransigence exist prior to assessing sanctions against a party.
9 *Harper*, 2011-NMSC-044, ¶ 17. In *Le Mier*, our Supreme Court emphasized the
10 mandatory nature of a court’s orders, stating that “[p]arties must obey discovery
11 orders” and explaining that “[o]ur system of justice would be neither orderly nor
12 efficient” if parties were not held to comply with those orders. 2017-NMSC-017,
13 ¶ 24. Though *Le Mier* dealt with multiple violations, it acknowledged that “a single
14 violation of a discovery order may suffice to support a finding of culpability[,]”
15 acknowledging a rebuttable presumption of culpability when a discovery order is
16 violated. *Id.* The degree of culpability, however, is a fact-specific inquiry for the
17 district court to consider in assessing sanctions against a party. It is through this
18 consideration of degree that bad faith or intransigence now factors into a district

1 court’s calculation of appropriate sanctions. *See id.* ¶ 17. However, the district court
2 made no such assessment here.

3 {14} As to prejudice, *Le Mier* explains that “[w]hen a court orders a party to provide
4 discovery within a given time frame, failure to comply with that order causes
5 prejudice both to the opposing party and to the court.” *Id.* ¶ 25. Thus, under *Le Mier*,
6 every discovery order violation gives rise to some degree of prejudice. Unlike the
7 circumstances in *Le Mier*, this case involved no additional extensions and hearings
8 regarding discovery issues requiring the district court to resolve the issue or effect
9 compliance with the discovery order. Instead, after the deadline for discovery and
10 pre-trial motions had expired, Defendant filed a motion to dismiss the case or
11 suppress the photo array identification when he realized, a few weeks before trial, that
12 the State had not produced a video of the identification. Nowhere in the record,
13 however, did the district court address prejudice.

14 {15} Finally, we look at whether the district court considered lesser sanctions prior
15 to dismissing the case with prejudice. *Le Mier* reminds us that “the district court was
16 not obligated to consider every conceivable lesser sanction” before imposing
17 dismissal with prejudice. *Id.* ¶ 27. It was only required to fashion the least severe
18 sanction that it felt fit the situation and achieved the desired result. *Id.* The district
19 court’s consideration of lesser sanctions in this case was cursory at best. The district

1 court began by reciting the sanctions listed in the rule, “which may include dismissal
2 of the case with or without prejudice, prohibiting the party from calling witnesses or
3 introducing evidence, [and] monetary sanctions[.]” LR2-400.1(D)(4). The court noted
4 that “monetary sanctions aren’t doing anything” and, after reciting language from the
5 rule regarding both parties’ duty to disclose, dismissed the case with prejudice. There
6 was no discussion of witness or evidence exclusion, which had been requested by
7 Defendant in the alternative, nor was there any discussion of dismissal without
8 prejudice. The district court made no other statements on the record explaining its
9 reasons for choosing the extreme sanction imposed—dismissal with prejudice—over
10 any other lesser sanction.

11 {16} Despite the broad discretion *Le Mier* provides district courts when imposing
12 sanctions, we remind our district courts that any decision to impose severe sanctions
13 requires an adequately developed record that an appellate court can substantively
14 review. While we may have expressed some concern with the severity of the sanction
15 imposed in the present case—circumstances that appear much less egregious than the
16 circumstances addressed in *Le Mier*—this does not preclude the possibility that the
17 district court could have developed an adequate record finding the State culpable,
18 perceiving sufficient prejudice to Defendant or the court, and determining that the
19 discovery violation was sufficiently egregious to warrant a dismissal with prejudice

1 rather than the lesser sanction requested by Defendant. We are also fully aware of our
2 duty to view the evidence and all inferences in the light most favorable to the district
3 court’s decision, *see Le Mier*, 2017-NMSC-017, ¶ 22, but without an adequate record
4 explaining the district court’s ruling and reasoning, we cannot properly perform our
5 role as an appellate court. In this case, the district court simply failed to satisfy the
6 requirement that it develop an adequate record and explain its reasons for imposing
7 such a severe sanction over other available alternatives. We make no determination
8 regarding whether dismissal with prejudice was the proper sanction in this case. We
9 therefore reverse the district court’s sanction of dismissal with prejudice and remand
10 for further consideration in light of this opinion.

11 {17} Finally, the State also argues on appeal that the district court erred in
12 considering and ruling on Defendant’s untimely motion to dismiss. Because the State
13 admitted it “definitely violated” its discovery obligation, and it waited until the day
14 before trial to actually produce the discovery, we conclude the district court did not
15 abuse its discretion in considering and ruling on Defendant’s untimely motion to
16 dismiss. *See* LR2-400.1(J)(3) (stating that “for good cause shown” the scheduling
17 order deadlines may be extended, provided the extension does not result in an
18 extension of the trial date). In making this argument, the State seeks a ruling that the
19 district court cannot impose a sanction of dismissal for discovery violations once the

1 motions deadline has passed. A district court is not prevented from imposing a
2 sanction of dismissal for discovery violations once the motions deadline has passed.
3 Nothing in the language of LR2-400.1 supports such an outcome. To read LR2-400.1
4 otherwise would lead to an illogical result, allowing the State to disregard the
5 discovery requirements of LR2-400.1, turn things over outside the discovery
6 deadline, argue a defendant cannot move for dismissal as a sanction because the
7 motions deadline has run, and thereby avoid any repercussions for its discovery
8 violations. *See State v. House*, 2001-NMCA-011, ¶ 18, 130 N.M. 418, 25 P.3d 257
9 (recognizing that when arguments appear illogical to this Court they can be rejected
10 on that basis). We do not read the rule to limit the district court in such a manner,
11 particularly where the local rule contains no language to suggest such an illogical
12 application and result would be appropriate.

13 **III. CONCLUSION**

14 {18} We reverse and remand based on the lack of stated support for the dismissal.

15 {19} **IT IS SO ORDERED.**

16
17

JULIE J. VARGAS, Judge

1 **WE CONCUR:**

2

3 **MICHAEL E. VIGIL, Judge**

4

5 **TIMOTHY L. GARCIA, Judge**